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LEGAL MEANING AS A SHARED ENTERPRISE: THE JUDICIARY-SCHOLARSHIP DYNAMIC THROUGH THE LENS OF THE SOCIAL DIVISION OF LINGUISTIC LABOUR

Abstract

Scholarly discussions on legal interpretation often centre on methodological approaches rather than the diverse actors who contribute to shaping legal meaning. This article refocuses attention from interpretive techniques to the agents involved in meaning-making, arguing that legal interpretation is a collaborative effort among multiple contributors. Building on Hilary Putnam's theory of the social division of linguistic labour, the paper offers a conceptual framework for understanding the distributed nature of legal interpretation. At the heart of this discussion is the interaction between legal academia and the judiciary, demonstrating how academic discourse often informs judicial decision-making, thereby reinforcing a collective enterprise in the making of legal meaning. While this study offers only an initial and illustrative account, it opens several promising avenues for future research. These include empirical inquiries into how academic arguments influence judicial reasoning, the interpretive role of legal practitioners in specialized and innovative domains, and the broader inclusion of corporate and non-institutional actors in the legal-linguistic community. Ultimately, the article argues that legal meaning should be understood not as the product of a single institutional voice, but as the outcome of a dynamic and socially distributed epistemic process.

KEYWORDS

legal interpretation, social division of linguistic labour; legal meaning, legal scholarship; judicial decision making, case law, faithful agent theory, collective meaning-making

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interpretacja prawna, społeczny podział pracy językowej, znaczenie prawne, nauka prawa, podejmowanie decyzji sądowych, orzecznictwo, teoria wiernego agenta, zbiorowe tworzenie znaczeń

I. INTRODUCTION

The interpretation of legal provisions is a central task performed by lawyers. While numerous comprehensive theories and practical guidelines exist on how legal interpretation should be performed, in this paper I focus on issues ranging from the interpretive process itself to those who engage in it. Specifically, I aim to highlight the plurality of actors involved in the construction of legal meaning. To this end, I draw on the concept of the 'social division of linguistic labour', which according to me offers a useful conceptual framework for understanding how legal interpretations function in practice. In my view, recognizing the role of the social division of labour within the legal-linguistic community is essential for grasping how legal meaning is collaboratively produced. I proceed with the assumption that case-law reflects the operative legal meanings within a jurisdiction. It follows that when conflicting interpretations occur – they may originate in such sources as legislative history or scholarly opinion – the court's understanding is decisive.

In this contribution, I aim to demonstrate the operation of the social division of linguistic labour within the legal domain by focusing on the influence of legal scholarship on the ascription of legal meanings to legal terms. I argue that privileging the role of the legislator results in an incomplete account of legal discourse, one that neglects the complex structure of interpretive voices. The motivation behind this inquiry lies in the observation that the legal interpretation literature often overlooks the cooperative dimension of interpretation. While the collectivity of processes in law has received scholarly attention, such analyses have primarily concentrated on how the multiplicity of actors involved in the formal legislative process affects the understanding of what the legislative body as a whole has

produced in that process.[1] Thus, their orientation remains primarily towards the bilateral relationship between the interpreter and the legislator, as opposed to embracing a collective perspective that incorporates all involved actors, which is a distinctive aspect of my approach.

The paper begins by showing how the salient role of the legislator is traditionally grounded, with particular attention to the faithful agent theory. I argue that neither this theory nor other notable attributes of the legislator, such as the power to craft legal definitions, necessarily compel deference to the legislator when interpreting legal terms. Next, I introduce Putnam's concept of the social division of linguistic labour and consider its manifestations within the legal domain. The influence of legal scholarship on judicial interpretation serves as an illustrative example of collaborative efforts to shape legal meaning. In adjudicating disputes, judges strive to ascertain the correct meaning of legal terms, often relying on scholarly analyses to inform their interpretations.[2] This interdependence suggests the existence of a legal form of the social division of linguistic labour. I conclude by summarising the main argument and suggesting areas for further exploration. Before proceeding, it should be noted that the discussion is confined to statutory

[1] See e.g., Richard Ekins, *The Nature of Legislative Intent* (OUP 2012); Zygmunt Tobor, *W poszukiwaniu intencji prawodawcy* (Wolters Kluwer Polska 2013); Marcin Matczak, 'Three Kinds of Intention in Lawmaking''(2017) 36 Law and Philosophy 651; Damiano Canale and Francesca Poggi, 'Pragmatic Aspects of Legislative Intent' (2019) 64(1) American Journal of Jurisprudence 125.

[2] Of course, here lies the widely recognised assumption that 'self- evidently, meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover'. Richard H Fallon, 'The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation' (2015) 82 University of Chicago Law Review 1235, 1237. For the sake of simplicity, I will mostly refer to the meanings of legal terms. However, in a concrete interpretive context, what is at issue may not be a single word, but rather a group of words, an entire sentence, or multiple sentences. Legal practice reflects the full spectrum of these possibilities, with interpretive doubts concerning isolated words being rare. See Riccardo Guastini, 'An Exercise in Legal Realism' (2020) 25 Iuris Dictio 37, 40-41. I also wish to underscore the interpretive impact of how normative material is selected. See Victoria Nourse, 'Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language' (2017) 69 Florida Law Review 1409. In addition, I do not claim in this article that 'ascribing legal meanings' is the only or even the primary activity of legal interpreters. The interpretive process clearly involves various operations, such as the inferential derivation of norms from other norms, and the 'construction of unexpressed rules'. See Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), Oxford Studies in Philosophy of Law: Volume 1 (Oxford, OUP 2011) 138; Riccardo Guastini, 'Juristenrecht: Inventing Rights, Obligations, and Powers' in Jordi Ferrer Beltrán and others (eds), *Neutrality and Theory of Law* (Springer 2013) 147, 153-157. However, due to the limitations of this article, I focus on the task of specifying meanings based on legal texts. Incidentally, it is noteworthy that classifying a particular interpretive decision as either a clarification of meaning or the construction of a norm may itself be controversial. Such an assessment largely depends, inter alia, on the concept of literal meaning held by the evaluator – whether minimalist or more expansive. I am grateful to the Anonymous Reviewers for pointing out the need to clarify these issues.

and constitutional interpretation. The core reasoning may hold for common law interpretation, although a detailed treatment of this area is reserved for future work due to space limitations.

II. LAW'S MEANING-MAKERS: A TRADITIONAL FRAMEWORK

Traditionally, when lawyers look for the meaning of legal terms, they firstly refer to the legislator. The validity of this approach is supported by two primary reasons. Legal practice is an activity centred on the interpretation of written sources.[3] For the functioning of the law in practice, the main point of reference are legal texts that bear the seal of approval of the legislator. They are either created or at least accepted as binding by the legislative authority. In addition, this privileged position is underlined by its exclusive authority to formulate legal definitions, which allows it to authoritatively refine or redirect the interpretation of legal terms.[4] Consequently, if the legislator disapproves of the interpretation of certain terms, it has a potent corrective tool at its disposal. The prominent position of the legislator is evident in the widespread acceptance of the faithful agent mode in the theory of legal interpretation.

This idea assumes that legal interpreters play a subordinate role to the legislator, consistent with the principal – agent model. Its roots lie in the command theory of law, according to which it was originally the monarch who exercised its sovereign power. Over time, sovereignty passed to the king-in-parliament, then to the parliament, and eventually to the people through their elected representatives. Despite this evolution, the central idea remains: interpreters are expected to follow and implement the directives of the lawmaking authority, reflecting the longstanding view that the legitimacy of the law lies in obedience to the sovereign's will.[5] It follows that any mode of operation that is not strongly deferential to the legislature, such as the use of 'more aggressive' substantive canons, creates a major problem of legitimacy.[6]

[3] For the sake of simplicity, I will further refer to institutional legal practice. Referring to non-institutional legal practice, e.g. applications of legal rules that will never find their way to courts or administrative bodies, would require more realist-oriented reflections, which I do not attempt to undertake here.

[4] See Yaniv Roznai, 'A Bird is Known by its Feathers: On the Importance and Complexities of Definitions in Legislation' (2014) 2 Theory and Practice of Legislation 145.

[5] Thomas W Merrill, 'Faithful Agent, Integrative, and Welfarist Interpretation' (2010) 14 Lewis and Clark Law Review 1565, 1567.

[6] Amy C Barrett, 'Substantive Canons and Faithful Agency' (2010) 90 Boston University Law Review 109.

The faithful agent theory is claimed to be a conventional one and so 'entrenched in our constitutional structure and practice that adopting a particular interpretation of a statute because it accords best with congressional will requires no special justification'.[7] This is also perceived as the most common assumption about the position of judges vis-à-vis lawmakers.[8] Interpreters who adhere to this theory are praised for contributing to stable and predictable legal systems.[9]

It should, therefore, come as no surprise that the emphasis on the central role of the legislature is reflected in the widely accepted theories of legal interpretation. All major theories of legal interpretation – intentionalism, purposivism, and textualism – all endorse the conception of the interpreter as a faithful agent of the legislator.[10] To remain faithful to their principal, legal interpreters are tasked with uncovering the meaning of the legislative command as accurately as possible. However, these theories differ in how they conceptualize and pursue this adequacy: intentionalists focus on identifying the legislator's intended meaning; textualists emphasize adherence to the law's textual expression; and purposivists prioritize advancing the legislative purpose attributed to the lawmaker.[11] Crucially, this variety illustrates that the prioritisation of 'speaker meaning' over 'word meaning',[12] as a means of upholding the authority of law,[13] represents merely one possible approach to maintaining fidelity to the lawmaker. In recent years, legal theorists have increasingly shifted their focus toward methods for discerning 'ordinary meaning',[14] which aligns more closely with 'word meaning' than with 'speaker meaning'.[15] The growing prominence of originalism in the U.S. constitutional interpretation most clearly reflects this trend.[16]

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[7] John David Ohlendorf, 'Against Coherence in Statutory Interpretation' (2014) 90 Notre Dame Law Review 735, 747.

[8] Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013), 21.

[9] Thomas W Merrill (n 5) 1577.

[10] Kevin Tobia, Brian G Slocum and Victoria Nourse, 'Progressive Textualism' (2022) 110 Georgetown Law Journal 1437, 1449.

[11] Andrei Marmor, *The Language of Law* (OUP 2014) 107-117.

[12] This distinction was introduced to philosophy of language by Paul Grice. See HP Grice, 'Utterer's Meaning, Sentence Meaning, and Word-Meaning' (1968) 4 Foundations of Language 225.

[13] Brian H Bix, 'Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?' (2003) 16 Ratio Juris 281, 287-288.

[14] Brian G Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (University of Chicago Press 2015), 4.

[15] On the inadequacy of the speaker meaning given the specificity of communication in law see Marcin Matczak, 'Does Legal Interpretation Need Paul Grice? Reflections on Lepore and Stone's Imagination and Convention' (2016) 10(1) Polish Journal of Philosophy 67; Francesca Poggi, 'Against the Conversational Model of Legal Interpretation: On the Difference Between Legislative Intent and Speaker's Intention' (2020) 40 Revus 9.

[16] Lawrence B Solum, 'We Are All Originalists Now' in Robert W Bennett and Lawrence B Solum (eds), Constitutional Originalism: A Debate (Cornell University Press 2011); Mark A

This development, I believe, reflects a more accurate account of the relationship between lawmakers and other participants in the legal domain. The traditional bias towards the lawmaker's role in the semantics of legal language distorts the actual mechanisms of legal meaning-making. It neglects, on the one hand, the structural limitations faced by lawmakers and, on the other, the interpretive significance of judicial and non-official legal practice.

Regarding the constraints placed on lawmakers in shaping the meanings of legal terms, it is important to recall that legal language is a register of natural language.[17] While it exhibits distinct semantic, syntactic, and pragmatic features, it ultimately draws upon the common language of the community to which it applies. Taking into account the functions of law, there is no alternative. Given the law's primary function of guiding human behaviour,[18] there is no viable alternative: legal subjects must be able to understand the rules they are expected to follow. Excessive idiosyncrasy in legal language undermines this objective. It is not surprising, therefore, that clarity – or intelligibility – is widely recognised as a core requirement for law to produce its intended normative effects.[19]

Moreover, the prominent position of the lawmaker does not render it omnipotent. If we look at the figure of the legislator and the law-making processes as they really are, it becomes evident that the institutions involved consist of individuals who are constrained by limited time, knowledge, and foresight regarding the situations to which their rules will apply.[20] It is inevitable, therefore, that they will make use of the expertise available in the community, both during the legislative process and later, when they rely on other participants in the legal discourse, the courts in particular, to determine the precise meanings of legal terms.[21] Since we are all familiar with the importance of the activity of the courts in modern legal

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Hannah and Francis J Mootz III, 'The Ethos of Originalism' in Brian N Larson and Elizabeth C Britt (eds), *Rhetorical Traditions & Contemporary Law* (Cambridge University Press, forthcoming 2025) 17, 17-18.

[17] Tomasz Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej* (Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z nauk politycznych, z 26, Państwowe Wydawnictwo Naukowe 1986), 93-102.

[18] It is taken to form part of the 'universal functions of legal systems'. See Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687, 1711.

[19] Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969), 63-65. This does not imply that all legal subjects are supposed to understand all legal provisions. Given the level of specialisation of contemporary legal systems, it is obvious that a group of addresses of certain provisions is limited. A more detailed analysis of this issue is beyond the scope of this paper.

[20] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994), 128-129.

[21] In some instances the lawmakers deliberately formulate provisions that are highly abstract, because members of the legislative body cannot agree what rules should exactly entail in particular cases. If it happens, it is for the courts to make these legislative expressions more precise and operative in details. In this context, Cass Sunstein is known for exploring the concept of incompletely theorised agreements in law. See e.g. on the application to constitution-making: Cass R Sunstein,

systems, I will not dwell on this aspect. Instead, I would like to draw attention to a less scrutinised form of assertion about law, that of non-officials – especially academics. Before doing so, however, I would like to introduce the concept of the social division of linguistic labour, which will provide a framework for further analysis.

III. JUDICIAL-SCHOLARLY INTERACTION AS A FORM OF LINGUISTIC DIVISION OF LABOUR

The concept traces its origins to the 1970s when Hillary Putnam proposed it for the general use of language. In particular, Putnam wanted to draw attention to the fact that:

> There are tools like a hammer or a screwdriver which can be used by one person; and there are tools like a steamship which require the cooperative activity of a number of persons to use. Words have been thought of too much on the model of the first sort of tool.[22]

The basic idea is that linguistic communities naturally evolve systems in which the meaning of certain terms is maintained by experts, while others participate in language use through a kind of social trust and cooperation. Expert activity allows the broader public to access linguistic and conceptual competence within specialised fields. At the same time, a beneficiary in one field may be an expert in another, thus contributing to the community as a whole. Naturally, this linguistic division of labour is founded on and reflects the existence of a corresponding division of non-linguistic labour. Consider the case of gold: it is not necessary for every buyer to distinguish gold from pyrite. What is essential is the presence of qualified experts and a dependable certification system that ensures the authenticity of the product.[23] A comparable dynamic operates within the legal domain. Specialists in labour law possess the most comprehensive understanding of labour institutions, just as experts in criminal procedure are most familiar with the workings of criminal proceedings. The knowledge held by these experts informs both legal professionals outside their field and laypersons. As in other areas of specialisation, the availability of legal experts enables others in the community to

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'Practical Reason and Incompletely Theorized Agreements' (1998) 51 Current Legal Problems 267, 273–176.

[22] Hilary Putnam, 'The Meaning of "Meaning"' in Hilary Putnam, *Philosophical Papers*, Vol 2: *Mind, Language and Reality* (CUP 1975) 215, 229.

[23] ibid 227–228.

navigate and structure their interactions in accordance with generally applicable legal norms. Analogously to the non-legal division of social labour, experts in some fields benefit from the work of their counterparts in other fields.

An example I wish to explore is the influence of academic scholarship on the work of public officials. Naturally, the forms and degrees of this influence differ across legal systems and historical periods. My aim here is not to trace the evolution of the *communis opinio doctorum* over time, but rather to focus on current manifestations of such influence. I will begin with the most immediately noticeable examples, namely judicial references to academic sources.

Germany serves as a prime example of a well-established tradition where legal scholarship directly influences judicial opinions. The legal culture there is nurtured as an 'expert culture', in which 'the academic spirit permeates the decisions of all courts'.[24] A well-known illustration was provided by Heinz Kötz, who in the course of his research found that an average citation of academic works on a decision in a given volume could easily exceed 10 items.[25] Judicial citation of academic sources is widespread in other jurisdictions such as Argentina,[26] Poland,[27] Sweden,[28] the UK,[29] and the US. To provide more concrete data concerning the last one, Petherbridge and Schwartz have shown that from 1949 to 2009 the US Supreme Court used legal scholarship in roughly one third of its judgments.[30] Moreover, the trend of using the legal scholarship has been accelerating. In some instances, the scholarly contribution is the main reference point of a question considered by a court. This happened, e.g., in the US Supreme Court's *Ortiz v United States*[31] where Justice Elena Kagan who wrote the majority opinion devoted more than half of its length to the consideration of Aditya Bamzai's

[24] Robert Alexy and Ralph Dreier, 'Statutory Interpretation in the Federal Republic of Germany' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 105.

[25] Hein Kötz, 'Scholarship and the Courts: A Comparative Survey' in David S Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot, 1990) 183, 193.

[26] Enrique Zuleta-Puceiro, 'Statutory Interpretation in Argentina' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 50.

[27] In particular, academic commentaries on the legislation at issue in a case are often cited.

[28] Aleksander Peczenik and Gunnar Bergholz, 'Statutory Interpretation in Sweden' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 356.

[29] Zenon Bankowski and D Neil MacCormick, 'Statutory Interpretation in the United Kingdom' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1st edn, Ashgate 1991, republished Routledge 2016) 404-405.

[30] Lee Petherbridge and David L Schwartz, 'An Empirical Assessment of the Supreme Court's Use of Legal Scholarship' (2015) 106 Northwestern University Law Review 995, 998-999.

[31] *Ortiz v United States* [2018] 585 U.S. ___ (SC).

amicus curiae. Expectedly, several other academic papers found a way to the opinion as well.[32] Moreover, this phenomenon also occurs in international courts. In this respect, it is noteworthy that it is beginning to be the subject of interest in empirical research.[33]

In some jurisdictions, the links between academia and the case-law are not that obvious. In France, legal literature is not directly cited in judicial decisions, although it may be referred to in 'conclusions'. This would be regarded as substituting an extra-legal source for the authority of the law, which is a particular point of emphasis in the standpoint on the separation of powers cultivated in France since the Revolution.[34] In Italy, Article 118 of the Supplementary Provisions annexed to the 1941 Code of Civil Procedure explicitly prohibits courts from citing legal authors in judicial opinions. Common law jurisdictions have long maintained a 'living author rule', which forbade the naming of authors in judgments, except for the deceased ones.[35] We need to also remember that citation patterns can also vary significantly between institutions in the same jurisdiction. For example, while the High Court of Australia regularly cites academic material, State Supreme Courts rarely do so.[36] Moreover, individual preferences may be decisive: not all judges are advocates of extensive citation, as it can obscure the clarity of the reasoning or even 'undermine a judgment'.[37]

Notwithstanding, the influence of legal scholarship on judicial decision-making appears undeniable. Chief Justice John G. Roberts, Jr., renowned for his frequent criticisms of academic legal writing as detached from the exigencies of judicial practice,[38] nevertheless cites scholarly authorities in approximately one-fourth of the opinions he authors.[39] Notably, this reliance becomes even more pro-

[32] Also, these contributions spanned many decades – from the 1940s to the 2020s.

[33] See Kanstantsin Dzehtsiarou and Niccolò Ridi, 'The Use of Scholarship by the European Court of Human Rights' (2024) 73 International and Comparative Law Quarterly 707 which is the first large-scale empirical study of the use of scholarship by the ECtHR.

[34] Michel Troper, Christophe Grzegorczyk and Jean-Louis Gardies, 'Statutory Interpretation in France' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Routledge 2016), 188–189. For the same reason, it is not common practice to cite judicial interpretations carried out by other courts.

[35] GVV Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28(4) Canadian Bar Review 422, 425–40.

[36] Rachel Klesch, Guzyal Hill and David Price, 'The Academy and the Courts: Citation Practices' (2023) 42(1) University of Queensland Law Journal 103.

[37] ibid 123.

[38] Diane P Wood, 'Legal Scholarship for Judges' (2015) 124 Yale Law Journal 2592, 2594. Of course, critical voices on the 'growing disjunction' between legal education and the practice of law are more common. See, e.g., Tamara R Piety, 'In Praise of Legal Scholarship' (2017) 25 William & Mary Bill of Rights Journal 801, 809-811.

[39] To be precise, in 23.08% of the opinions issued between 2005 and 2010. Lee Petherbridge and David L Schwartz (n 30).

nounced in cases of heightened controversy or complexity. As Petherbridge and Schwartz have documented, 'the Supreme Court (...) disproportionately uses legal scholarship when cases are either more important or more difficult to decide'.[40] Their research highlights that citations to academic work are more frequent in contentious decisions, such as those featuring minority votes, those overturning precedent, or those striking down legislation as unconstitutional. Furthermore, there is an increasing concentration of such references in opinions delivered in June – the final month of the Supreme Court's term, traditionally associated with the release of its most challenging decisions. These patterns suggest that, contrary to claims of irrelevance, academic scholarship plays a meaningful role in informing judicial reasoning, especially in cases that demand particularly careful consideration.[41]

Of course, the citation practices do not tell the whole story about the impact of academic works on the judiciary. The focus on this aspect may be misleading in two principal respects.[42] On the one hand, the presence of a citation may overstate the real impact of academic writing. A reference could be largely ornamental, added to lend authority to a conclusion that has already been reached independently. On the other hand, the absence of a citation does not necessarily imply a lack of scholarly influence. Firstly, we need to be aware of what is known as 'licensed plagiarism', i.e. relying on academic material without acknowledging it.[43] Occasionally, this phenomenon is beyond the control of the judges; as in Italy, for example, where a legal prohibition prevents them from granting academic credit when it is due, even if they desire to do so. Indeed, there is a plethora of scholarly contributions regarding definitions, rules, or conceptions that have been subsequently adopted by the Italian courts.[44] Furthermore, the aforementioned prohibition does not prevent courts from invoking prevailing views of legal scholarship in general, a practice which they voluntarily undertake. Nor does the rule of non-citation of living authors necessarily mean that their works have not been used in decision-making.[45] Also, judges may have absorbed ideas, arguments, or perspectives from academic sources without explicitly acknowledging them in their reasoning. The influence of intellectual ideas is often diffuse, shaping the background knowledge in ways that remain imperceptible even to the

[40] ibid 1016.

[41] ibid 1010–1015.

[42] Lord Rodger of Earlsferry, 'Judges and Academics in the United Kingdom' (2010) 29(1) University of Queensland Law Journal 29, 30–31.

[43] Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) Melbourne University Law Review 447, 452.

[44] Alexandra Braun, 'Professors and Judges in Italy: It Takes Two to Tango' (2006) 26 Oxford Journal of Legal Studies 665, 675–677.

[45] Zenon Bankowski and D Neil MacCormick (n 29) 379.

decision-maker. Consequently, a purely citation-based analysis is susceptible both to overestimation and underestimation of the true extent of academic impact on judicial decision-making.

There are two principal reasons why academic contributions may be valuable for judicial decision-making.[46] Firstly, judges operate in a time-constrained environment, which limits their capacity to conduct exhaustive research. Scholarly analyses that directly address the legal questions at issue can, therefore, provide essential support, offering judges nuanced perspectives and structured arguments that assist in resolving complex cases. It would be unrealistic to expect judges, within the confines of their substantial caseloads and procedural obligations, to conduct such examinations independently. Secondly, while judges possess extensive legal expertise, they are frequently required to adjudicate matters across a wide range of substantive areas, some of which may fall outside their primary fields of familiarity. In contrast, academic scholars develop highly specialised knowledge and employ methodological tools, including empirical research, comparative analysis and interdisciplinary approaches that may be beyond the practical reach of the judiciary. Hence, the depth and rigour of scholarly work represents a valuable resource for judges seeking to ensure that their rulings are well grounded. Of course, for this proposition to be actualised, judges must both be aware of the relevant scholarship and have the opportunity to engage with it in the midst of their busy schedules. Only then can we speak of a 'co-symbiotic existence'[47] between legal scholarship and the judiciary in which 'academics and judges create law together'.[48] The potential is the greatest in areas of law where developments are rapid and the need for support is especially strong.[49]

The observations presented here are broadly consistent with Putnam's theoretical framework. The different roles of judges and legal academics impose divergent limitations on their work. It is where these constraints are present that the strengths of the other group emerge. Judges, operating under significant time pressure and tasked with resolving concrete legal disputes, often lack the opportunity to engage in theoretical elaboration or to develop broader conceptual frameworks. Academics, freed from the exigencies of case resolution and doctrinal constraints, are better positioned to propose normative frameworks and advance *de lege ferenda* recommendations. At the same time, the authoritative role of the judiciary ensures that academic discourse remains tied to the judicial output.

There are also some complications to consider. While the analogy to Putnam's conception may serve as a point of departure, its application to law requires

[46] Susan Kiefel (n 43) 455–456.

[47] ibid 454.

[48] Alexandra Braun (n 44) 655.

[49] See e.g., Enrique Zuleta-Puceiro (n 26) 50.

adjustments. This is primarily due to the need to incorporate the normative dimension, including the institutional roles of legal actors. Putnam's account operates within a framework of decentralised linguistic practices, in which meaning emerges without recourse to any formally empowered authority. This stands in contrast to the legal field. Although any participant in legal discourse with expert knowledge can potentially provide an interpretation that gains broad acceptance, this acceptance is achieved through specific institutional channels. The decisions of authorities empowered to resolve legal disputes are central to this process. Most notably, the highest courts and tribunals exert the greatest influence on interpretive practice. Furthermore, the legislator must be accorded a special status. In instances of disagreement with prevailing interpretations in legal practice, it can issue authoritative decisions by amending legal provisions or introducing legal definitions that alter previously established meanings. Crucially, other participants in legal discourse are obliged to take such decisions into account. This is a key consideration that must not be overlooked when employing Putnam's theoretical framework. At the same time, this very argument underscores that adopting the theory of the social division of linguistic labour neither undermines the faithful agent theory nor transfers legal authority to interpreters. The legislator remains the central authority capable of shaping legal semantics through the revision or abrogation of legal provisions.

An additional point worth emphasising is that Putnam envisages a communicative dynamic between experts and laypeople, whereas judges are legal experts in their own right. In my view, however, expertise should be understood, first, as a matter of degree rather than a binary, all-or-nothing condition, and second, as a dynamic and context-sensitive attribute. On this account, legal education and judicial experience do not preclude the possibility that a particular judge may, in specific contexts, function as a 'layperson' in the sense relevant to Putnam's theory. Such a situational characterisation does not, of course, compromise the general standing of judges as preeminent legal experts. There is also an epistemic dimension to Putnam's account that warrants further exploration, related to his view on foundational semantics, which underpins content externalism.[50] Notably, a pertinent question arises regarding the kind of attitude a language user – parasitising on expert use – must adopt. Drawing from Putnam's framework with minimal modification, it might suffice for the decision-maker to know a 'stereotype'[51] and follow the referential use. However, this raises the question of the nature of legal (and, more broadly, linguistic) concepts and their application in

[50] Michael McKinsey, 'Skepticism and Content Externalism' (Winter 2024 Edition) *Stanford Encyclopedia of Philosophy* (Edward N Zalta and Uri Nodelman eds) <https://plato.stanford.edu/archives/win2024/entries/skepticism-content-externalism/> accessed 21 May 2025.

[51] Putnam (n 22) 250–251.

legal interpretation, which is a highly contentious issue. Given the limited scope of this paper, I merely highlight this problem and direct the reader towards legal scholarship in which this issue has already been explored in the context of interpretive practices in law.[52]

IV. CONCLUSION

This article has sought to highlight an often-overlooked dimension of legal interpretive practice. While the phenomenon discussed is by no means novel, it frequently escapes attention within mainstream legal theory. I have argued that Putnam's concept of the social division of linguistic labour offers a promising theoretical lens through which to understand the broader dynamics of meaning-making in law. Although this discussion focused primarily on the influence of legal scholarship on judicial reasoning, this is merely one manifestation of a wider phenomenon. For instance, the practice of citing foreign judicial decisions – commonplace among the highest national courts – offers further evidence of the collaborative nature of legal interpretation. These citations are typically used for comparative analysis rather than as binding authority under EU or international law.[53]

The recognition of a form of the social division of linguistic labour highlights the fact that legal meaning is shaped collectively. Courts frequently rely on interpretations initially developed within legal scholarship, adopting and legitimising arguments that emerge from academic discourse. In such cases, the key ideas originate outside the courts, while they act not as primary authors of meaning but as arbiters among competing views. This process does not undermine the authority of law. As has long been recognised, the respect of authority 'need not entail an approach to legal interpretation that emphasizes "the speaker meaning"'[54] understood as the legislator's meaning. The whole mechanism reinforces the view that the interpretive process is inherently collaborative and based on the broader epistemic function of expert knowledge, including linguistic

[52] Michael S Moore, 'A Natural Law Theory of Interpretation' (1985) 58 Southern California Law Review 277; David O Brink, 'Legal Theory, Legal Interpretation, and Judicial Review' (1988) 17 Philosophy and Public Affairs 105; Nicos Stavropoulos, *Objectivity in Law* (Clarendon 1996); Marcin Matczak, 'The Semantics of Openness: Why References to Foreign Judicial Decisions Do Not Infringe the Sovereignty of National Legal Systems' in Anne Lise Kjaer and Joanna Lam (eds), *Language and Legal Interpretation in International Law* (OUP 2022) 64.

[53] Martin Gelter and Mathias M Siems, 'Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe' (2013) 21 Supreme Court Economic Review 215, 268.

[54] Brian H Bix (n 13) 288.

expertise. It also suggests that law is best understood not as a static repository of legislator-driven meanings, but as a dynamic, socially distributed process of conceptual development.

Of course, as already mentioned, this article offers only a preliminary and illustrative analysis. A more comprehensive inquiry, integrating detailed theoretical elaboration with empirical research, is required to substantiate the argument further. Several promising avenues for future study emerge. First, there is a need to deepen the inquiry on conditions under which judicial decisions rely on academic interpretations – whether through citation patterns, influence on doctrinal shifts, or the adoption of particular terminologies. Second, the role of legal practitioners as contributors to interpretive innovation warrants greater attention. In practice, especially in rapidly evolving or highly technical legal domains, it is often practitioners – rather than academics or courts – who first engage with novel concepts, whether in drafting innominate contracts, crafting new legal clauses, or applying existing legal categories to new technologies. These actors may be at the forefront of interpretive development, shaping the legal landscape in ways that only later receive academic or judicial elaboration. In this context, the social division of linguistic labour could be extended to include not only scholars and judges, but also corporate actors, legal technicians, and even lay participants in legal discourse, especially in emerging fields where formal legal structures are still in flux.

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