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CHALLENGING TEXTUAL INTERPRETATION IN MULTILINGUAL LEGAL SYSTEMS

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By presenting the Swiss approach to statutory interpretation, ie the pragmatic pluralism of methodologies, this paper underlines that this is a good way for the judge to take into account a basic principle: different cultures, different languages produce different texts. Since the same idea cannot be expressed in the same way in different languages, one cannot stick to the wording in order to find the common meaning of all these various wordings. More visible in multilingual legal regimes, this principle applies, however, also to monolingual systems. It is not possible to stick to a "clear" wording without a proto-interpretation of such wording through which the judge weighs all the approaches in order to get to a solution that reflects the underlying normative values.

To start a Law Journal in English in France might be seen as bold, even foolhardy. 'French law expresses itself best in French', one might say. Does this mean that this Law Journal will have to address only international and comparative issues, since English might sound appropriate only for those issues? Well, certainly not. English is not necessarily the main language when it comes to official languages in Europe. With 24 official languages[1] and 27 legal systems, Europe has been often called a world of translations.[2] To this translation mechanism in Europe, one must add the transposition of concepts and whole directives from European into domestic law. Indeed, transposing directives into the domestic law of member States requires to look at the aim pursued by an EU provision to get a similar result,

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1. Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 55 para. 1: '1. This Treaty, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.'
2. F. Ost, *Traduire. Défense et illustration du multilinguisme* (Fayard, coll. 'Ouvertures' 2009) 401: '(…) la langue de l'Europe, c'est la traduction'. See also Nicolas Levrat, who goes further than translation in N. Levrat, 'Le droit européen: de la traduction assistée au métissage' in A. Vailleux and others (eds), *Traduction et droits européens: enjeux d'une rencontre, Hommage au Recteur Michel van de Kerchove* (Presses de l'Université Saint-Louis 2009) 492: '(…) La langue de l'Europe du droit n'est pas la traduction, mais le métissage'.

even while using a different wording. Given this legal background, one may wonder whether it is then sensible to consider that a judge may start any interpretation with the text. In other words, what does it really mean to use a literal or textual interpretation, when the goal of such interpretation process is to ensure that the aim of an EU Directive is achieved?

If each word is haunted by pre-existing meanings, as Derrida might have said,[3] is it really possible to purposefully begin any interpretation with a text (*interprétation grammaticale*), when the goal is to achieve a certain *result*, ie the alignment of domestic statutes with what is expected through an EU Directive? At the same time, though, legislators and judges express themselves through texts, which means that one has to start any hermeneutical process from such texts. In view of this, how should one proceed? As a Swiss lawyer, I will start with a presentation of how a Swiss judge deals with such Gordian knot, given that Swiss law has to deal with four official languages, though mainly three play a role (I.). I will try then to draw some benefits from this analysis for monolingual systems using English as a non-official language (II.).

I. The Swiss experience with the pragmatic pluralism of methods

1. From 'clear text' to pragmatic pluralism

Switzerland is a multilingual state. Pursuant to Article 70 para. 1 of the Federal Constitution, '*the official languages of the Confederation are German, French and Italian. Romansh is also an official language of the Confederation when communicating with persons who speak Romansh*'. Based on this constitutional provision, the Federal Parliament adopted in 2007 a federal 'Act on Languages and Understanding between Linguistic Communities'.[4] This statute deals with many aspects of the use of languages. Article 5 of the Act on Languages states that '*Official languages of the Confederation are German, French and Italian. Romansh is the official language for relations with persons of this language*'. This means that acts adopted on the federal level are published at least in German, French and Italian.[5] Pursuant to Article 14 of the Publications Act,[6] '*publication takes place simultaneously in the official languages German, French and Italian. In the case of enactments, the three versions are equally binding*'.[7] The principle that all three official versions have equal authority has been

3. J. Derrida, *Force de loi (*Galilée 1994) 68: '[L]e texte est hanté par (…) une quasi-logique du fantôme qu'il faudrait substituer, parce qu'elle est plus forte qu'elle, à une logique ontologique de la présence'.
4. This Act has not been translated into English, but the exact title in French reads as follows: '*Loi fédérale du 5 octobre 2007 sur les langues nationales et la compréhension entre les communautés linguistiques (Loi sur les langues, LLC)*' in force since 1st January 2010, Federal classified compilation N° 441.1, hereafter 'Languages Act'.
5. Some important Acts are also published in Romansh according to Art. 11 para. 2 Languages Act and Art. 14 para. 5 Publications Act (Federal classified compilation N° 170.512, but this version is not binding according to Art. 14 para. 1 Publications Act. See P.-H. Steinauer, Traité de droit privé suisse, vol II/1 – *Le Titre préliminaire du Code civil* (1st edn, Helbing Lichtenhahn Verlag 2009) para. 263.
6. Art. 14 para. 1 Publications Act: 'La publication a lieu simultanément dans les langues officielles que sont l'allemand, le français et l'italien. Dans le cas des actes, les trois versions font foi.'
7. Federal Act on the Compilations of Federal Legislation and the Federal Gazette (Publications Act, PublA) of 18th June 2004, Systematic Collection 170.512.

confirmed by decisions of the highest Court of Switzerland, the 'Federal Tribunal'.[8] This, however, does not mean that an Italian-speaking judge in the Canton of Ticino will be allowed to refer only to the Italian version of a Federal Act, or that a German-speaking judge in Zurich will refer only to the German version. Indeed, equal authoritativeness of the various linguistic versions means that whatever the official language of the proceedings is, all three versions of a given Act have to be taken into account.[9] The Federal Tribunal has sometimes expressed this by saying that '*if the three versions do not agree, the meaning must be determined by means of interpretation, and only then can it be determined which version expresses it most clearly*'.[10] It is not infrequent for the Federal Tribunal to compare the three language versions and decide at the end that the German, the French or the Italian version (better) reflects the meaning of the specific provision.[11] It does so sometimes after an analysis of the purpose of a provision.[12]

Given, however, that each canton shall decide which language is its official language(s) in accordance with the principle of territoriality (see Article 70 para. 2 Fed. Cst.), procedures in most cantons run in only one language. Indeed, the choice of the cantonal official language is not arbitrary, but should guarantee the territorial stability of languages, the so-called principle of territoriality, which is particularly important where there is a need to

8. See DFT [Decision of the Federal Tribunal] 140/*2014* II 495 reason 2.3.1: 'Ausgangspunkt der Auslegung eines Gesetzes bildet der Wortlaut der Bestimmung (grammatikalisches Element). Bei Erlassen sind die Fassungen in den *Amtssprachen* Deutsch, Französisch und Italienisch in gleicher Weise verbindlich (Art. 14 Abs. 1 des Bundesgesetzes vom 18. Juni 2004 über die Sammlungen des Bundesrechts und das Bundesblatt [PublG; SR 170.512)]. Stimmen die drei Fassungen nicht überein, ist auf dem Wege der Auslegung der Sinn zu ermitteln, woraus sich erst ergibt, welche Version ihn am klarsten ausdrückt (BGE 135 IV 113 E. 2.4.2 S. 116; BGE 134 V 1 E. 6.1 S. 2; BGE 126 V 435 E. 3 S. 438)'; DFT 148/*2022* II 556, reason 3.4.1; Decision of the FT, 2C_876/2020 (13.09.2022), reason 3.2.2; Decision of the FT, 2C_469/2015 (22.02.2016), reason 3.2.1; DFT 127/*2001* V 160; DFT 126/*2000* V 206; DFT 125/*1999* III 57/58 reason 2b.
9. B. Schnyder, '*Dreisprachigkeit des ZGB: Last oder Hilfe?*' in *Mélanges en l'honneur de Henri-Robert Schüpbach* (Helbing & Lichtenhahn 2000) 37; cf Steinauer (n 5) para. 264.
10. DFT 140/*2014* II 495 reason 2.3.1: 'Stimmen die drei Fassungen nicht überein, ist auf dem Wege der Auslegung der Sinn zu ermitteln, woraus sich erst ergibt, welche Version ihn am klarsten ausdrückt'.
11. See for some examples, DFT 127/*2001* III 548, reason 3, 551: '(…) Selon la version allemande du premier alinéa de la norme en cause, *in initio*, la demeure du locataire en retard pour s'acquitter d'un terme ou de frais accessoires échus intervient "nach der Übernahme der Sache". La version française de l'art. 257d al. 1 CO parle de "réception de la chose", alors que la version italienne indique "dopo la consegna della cosa". *C'est la teneur italienne de la disposition qui doit être préférée, où il est question non pas de la réception (Übernahme), mais bien de la remise (consegna) de la chose*'; FT, Decision 4A_362/2017 (26 October 2017), reason 3.6: '3.6. Nach der Bestimmung von Art. 109 Abs. 2 lit. b ZPO kann das Gericht von der Kostenregelung der Parteien abweichen, wenn "die getroffene Regelung einseitig zulasten einer Partei geht, welcher die unentgeltliche Rechtspflege bewilligt worden ist" ("elle défavorise de manière unilatérale la partie au bénéfice de l'assistance judiciaire" bzw. "la ripartizione pattuita grava unilateralmente una parte cui è stato concesso il gratuito patrocinio"). Für die Abweichung von der Kostenvereinbarung der Parteien wird damit nach dem deutschen und italienischen Wortlaut zunächst vorausgesetzt, dass der durch die Kostenregelung benachteiligten Partei die unentgeltliche Rechtspflege bewilligt bzw. gewährt ("concesso") wurde. *Diese also – wie es in der französischen Fassung der Norm heisst – von der unentgeltlichen Rechtspflege profitiert ("partie au bénéfice").*'; FT, 6B_438/2013 (18 July 2013), reason 2.1: '(…) Contrairement à la version française, les versions allemande et italienne opèrent une distinction entre la partie plaignante ("Privatklägerschaft"; "accusatore privato") et le plaignant ("antragstellende Person"; "querelante"). Ainsi la condition d'avoir agi de manière téméraire ou par négligence grave et de la sorte entravé le bon déroulement de la procédure ou rendu celle-ci plus difficile ne s'applique qu'au plaignant. En revanche, cette condition ne s'applique pas à la partie plaignante à qui les frais peuvent être mis à charge sans autre condition.'
12. See esp. FT, Decision 4A_362/2017 (26.10.2017) in which reason 3.5, dealing with the language versions, follows reason 3.4, dealing with the purpose of the provision.

protect language minorities, especially in territories in which they are endangered.[13] Thus, in four cantons (Vaud, Neuchâtel, Geneva and Jura) French is the official language; all cantonal acts are adopted in French, the administration interacts with citizens in French and proceedings are also normally conducted in French. Seventeen cantons use German as their official language. For those cantons, the official language is the so-called 'High German' or 'written German'. The Swiss-German dialects are not official languages;[14] they are mainly oral dialects, which have no standardised written forms, so it would be difficult to use them as official languages. However, if all parties agree, Swiss-German is sometimes used in court, since less educated parties will feel more comfortable speaking in the Swiss German dialect rather than in 'High German'. In one canton, Ticino, Italian is the official language. Three cantons are bilingual German/French (Bern,[15] Fribourg,[16] and Valais[17]) and one is trilingual German, Italian and Romansh (Graubünden)[18]. In those cantons, statutes are adopted in two (or three for Graubünden) equally valid linguistic versions.

As a result, a court in Geneva will normally cite only the French version of a Federal Act, but might need to consider the German and/or the Italian version to reinforce the understanding of a specific provision. Thus, all three linguistic versions are supposed to play a role in the interpretation of a statute, but the judge will normally express the specific provision only in one language, the official language of the forum.

Despite the variety of official languages both on cantonal and federal levels, the Federal Tribunal has used the old principle that '*in claris cessat interpretatio*', ie, if the wording is clear there is no need for more interpretation, for decades, at least since the sixties.[19] The Federal Tribunal used to say that 'the clear, ie unequivocal and unambiguous wording may only be deviated from in exceptional cases, namely if there are good reasons to believe that the wording does not reflect the true meaning of the provision'.[20] A similar formula can be found in more recent cases: 'A statute is interpreted first and foremost according to its wording. According to case law, there is no reason to depart from the literal meaning of a clear

13. P. Mahon, 'Article 70' in Bernhard Ehrenzeller and others (eds), *Die schweizerisches Bundesverfassung – St. Galler Kommentar* (Dike Verlag (in cooperation with Schulthess) 2023) 9; E.M. Belser and B. Waldmann, 'Article 70' in B. Waldmann, E.M. Belser, A. Epiney (eds), *Basler Kommentar – Schweizerisches Bundesverassung (BV)* (Helbing Lichtenhahn 2015) 27 and 30.
14. For more detail on this issue, see E.M. Belser and B. Waldmann (n 13) 7 and 19; see also Message of the Federal Council on the Revision of Art. 116 Constitution, FF 1991 II 338 (German version).
15. See Art. 6 para. 2 Constitution of Bern of 6th June 1993, Federal classified compilation N° 131.212.
16. See Art. 6 para. 1 Constitution of Fribourg of 16th May 2004, Federal classified compilation N° 131.219.
17. See Art. 12 para. 1 Constitution of Valais of 8th March 1907, Federal classified compilation N° 131.232.
18. See Art. 3 para. 1 Constitution of Graubünden of 14th September 2003, Federal classified compilation N° 131.226.
19. On this long established principle, see C. Schott, '"Interpretatio cessat in claris" – Auslegungsfähigkeit und Auslegungsbedürftigkeit in der juristischen Hermeneutik' in J. Schröder (eds), *Theorie der Interpretation vom Humanismus bis zur Romantik – Rechtswissenschaft, Philosophie, Theologie* (Franz Steiner 2001); D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (6th edn, C.H. Beck 1998) C 116; for a modern account, see among others, P. Pichonnaz, 'Le centenaire du Code des obligations' (2011) 130, II, Revue de droit suisse, at 117ff, esp. at 206.
20. Free English translation from the original German version: DFT 127/*2001* V 1 reason 4a 'Vom klaren, d.h. eindeutigen und unmissverständlichen Wortlaut darf nur ausnahmsweise abgewichen werden, unter anderem dann nämlich, wenn triftige Gründe dafür vorliegen, dass der Wortlaut nicht den wahren Sinn der Bestimmung wiedergibt'.

text by way of interpretation unless there are objective reasons to believe that the text does not convey the true meaning of the provision in question'.[21]

Even though some 'new' cases still use a similar formula,[22] the Federal Tribunal modified its approach around mid-1990 by declaring it would be using a pragmatic pluralism of methods (*pragmatischer Methodenpluralismus*,[23] *pluralisme pragmatique de méthodes*). In a free English translation from the original German expression of such methodology, one could say that the Federal Tribunal affirms the following:[24]

> A statute must first and foremost be interpreted on its own merits, ie according to its wording, meaning and purpose and the underlying evaluations on the basis of a teleological method of understanding. The interpretation of the law must be guided by the idea that it is not the wording alone that constitutes the norm, but only the law understood and concretised through the facts. What is required is the factually correct decision in the normative structure, oriented towards a satisfactory result of the *ratio legis*. In doing so, the Federal Tribunal follows a pragmatic pluralism of methods and refuses to subject the individual elements of interpretation to a hierarchical order of priority.

Thus, even if it starts with the wording, the Federal Tribunal considers it necessary to examine all other elements of interpretation to be then able to find which interpretation might give the most appropriate result, including for the concrete case at hand. Thus, there is no preestablished hierarchy between the literal, the systematic, the historic or the teleological interpretation, as long as the pragmatic approach results in a solution that reflects a meaning that is satisfactory and equitable in general, but in particular also for the case at hand. As to what the standard of an 'equitable solution' is, the reader is left without any specific indications. No decision by the Federal Tribunal gives any guidance on it. Only a careful analysis of each case may identify some underlying principles of justice.[25]

This approach is in line with Article 1 para. 1 Swiss Civil Code (SCC), which provides for the application of the law and reads as follows, in a free English translation: 'The law applies according to its wording or interpretation to all legal questions as to which it contains a provision'. As one can see, the drafter of the Swiss Civil Code, Eugen Huber, did not write

21. Free English translation from the original French version: DFT 132/*2006* III 226 reason 3.3.5 'La loi s'interprète en premier lieu selon sa lettre. Selon la jurisprudence, il n'y a lieu de déroger au sens littéral d'un texte clair par voie d'interprétation que lorsque des raisons objectives permettent de penser que ce texte ne restitue pas le sens véritable de la disposition en cause'.
22. See also further cases DFT 135/*2009* III 640 reason 2.3.1; DFT 135/*2009* IV 113 reason 2.4.2; DFT 135/*2009* V 1 reason 7.2; on this see also E. A. Kramer, *Juristische Methodenlehre* (6th edn, C.H. Beck 2019) 95ff; F. Werro, 'Article 1' in P. Pichonnaz and B. Foëx (eds), *Commentaire romand – Code civil I* (1st edn Helbing Lichtenhahn 2010) para. 1 and 6ff.
23. DFT 136/*2010* III 283 reason 2.3.1; DFT 136/*2010* III 23 reason 6.6.2.1; DFT 136/*2010* II 187 reason 7.3.
24. DFT 131/*2005* III 33 reason 2: 'Das Gesetz muss in erster Linie aus sich selbst heraus, das heisst nach dem Wortlaut, Sinn und Zweck und den ihm zugrunde liegenden Wertungen auf der Basis einer teleologischen Verständnismethode ausgelegt werden. Die Gesetzesauslegung hat sich vom Gedanken leiten zu lassen, dass nicht schon der Wortlaut die Norm darstellt, sondern erst das an Sachverhalten verstandene und konkretisierte Gesetz. Gefordert ist die sachlich richtige Entscheidung im normativen Gefüge, ausgerichtet auf ein befriedigendes Ergebnis der ratio legis. Dabei befolgt das Bundesgericht einen pragmatischen Methodenpluralismus und lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen (BGE 128 I 34 E. 3b S. 40 f.)'.
25. For such an attempt to identify the grounds of equity in a tax law case, see eg H. Torrione, 'Justice distributive aristotélicienne en droit fiscal selon la jurisprudence du TF – Une étude de philosophie du droit sur la notion de "Sachgerechtigkeit"' (2010) 129, I, Revue de droit suisse 131-61.

'wording and interpretation' but 'wording *or* interpretation'. When one looks at the three linguistic versions, the difficulty of adhering to the wording becomes also more apparent:

> Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach *Wortlaut oder Auslegung* eine Bestimmung enthält.
> La loi régit toutes les matières auxquelles se rapportent *la lettre ou l'esprit* de l'une de ses dispositions.
> La legge si applica a tutte le questioni giuridiche alle quali può riferirsi *la lettera od il senso* di una sua disposizione.

It is obvious that 'Auslegung' should have been translated into French by 'interprétation' (interpretation) instead of 'l'esprit' (spirit), and the Italian 'senso' is closer to 'meaning' than 'interpretation'. However, the choice of words in each language is not innocent and refers to some preunderstandings. This is particularly clear with 'l'esprit', which is haunted by Montesquieu and his 'L'esprit des lois'.[26]

So, wording in a system in which three language versions are equally authoritative cannot be 'trusted' at its 'face value'. The interpreter, ie the judge, has to consider the wording as a gate to something more profound, a meaning that is both hidden in the choice of words, and transcends those words into a purpose that emanates from a whole set of factors. The interpretation transforms itself into a more dynamic process; the judge has to find the best solution in light of all the interpretative methodologies, ensuring an *equitable solution* in line mainly with the overall framework of the provision. This is a pragmatic approach, *par excellence*.

2. Between the expression of a method and its application

The Swiss Federal Tribunal has developed its methodology for almost three decades, but strangely there is no unitarian expression of it, maybe because of its pragmatic nature and the difficulty of applying a predefined roadmap.

One finds different expressions of such method, which are divided by language and by Chamber of the Federal Tribunal. The first use of the expression 'pragmatischer Methodenpluralismus' by the Federal Tribunal occurred in 1995[27] in a decision rendered in German.[28] After some explanations on the role of the judge and the separation of powers, the Federal Tribunal stated the following:

> Die Gesetzesauslegung hat sich vom Gedanken leiten zu lassen, dass nicht schon der Wortlaut die Rechtsnorm darstellt, sondern erst das an Sachverhalten verstandene und konkretisierte Gesetz. Gefordert ist die sachlich richtige Entscheidung im normativen Gefüge, ausgerichtet auf ein befriedigendes Ergebnis aus der *ratio legis*. Dabei befolgt das Bundesgericht einen pragmatischen Methodenpluralismus und

26. C. De Secondat de Montesquieu, *De l'esprit des Lois* (first published in 1758).
27. DFT 121/*1995* III 219 reason 1/d/aa.
28. Pursuant to Article 54 para. 1 Federal Tribunal Act (in an unofficial English translation), 'the proceedings are conducted in one of the official languages (German, French, Italian, Rumantsch Grischun), as a general rule in the language of the contested decision. (…)'.

> lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen.[29]

One had to wait another four years to see the expression appear in a French decision by the Federal Tribunal, though used by a different Chamber.[30] The wording was also quite different, as it still relied heavily on the former understanding of the central importance of the wording:[31]

> La loi s'interprète en premier lieu selon sa lettre. Toutefois, si le texte n'est pas absolument clair, si plusieurs interprétations de celui-ci sont possibles, il faut alors rechercher quelle est la véritable portée de la norme, en la dégageant de tous les éléments à considérer, soit notamment les travaux préparatoires, le but et l'esprit de la règle, les valeurs sur lesquelles elle repose, ainsi que sa relation avec d'autres dispositions légales (*citations omitted*). Pour rendre la décision répondant de manière optimale au système et au but de la loi, le Tribunal fédéral utilise, de manière pragmatique, une pluralité de méthodes, sans fixer entre elles un ordre de priorité.

The French version declares using the same pragmatic methodology, but still starts with the idea that such methodology would apply only if the text is not absolutely clear. This creates at least in appearance a direct contradiction. Indeed, while one can understand that in a system based on codes and statutes, one has to start any analysis with a textual approach, it is never possible to stop at this initial step, given that in the Federal Tribunal's methodology, the literal interpretation has no more weight than any of the other historical, systematic or teleological approaches. Furthermore, a text can only be considered as 'clear' if it appears that the literal interpretation is in line with the other approaches. Therefore, by referring to a text as being 'absolutely clear', the Federal Tribunal must have already admitted that the literal interpretation is in line with the other approaches (at least as a kind of proto-interpretation step). There is therefore a contradiction in claiming that no interpretation is needed when the text is absolutely clear, given that a proto-interpretation must necessarily have taken place. Nevertheless, the Federal Tribunal has continued to use expressions of the pragmatic pluralism of methods referring also to the 'clear text' of a statute.[32]

The ambit of this methodology is sometimes also restricted through references to the purpose as a means to enlarge or restrict the meaning of a specific wording:

29. An unofficial translation reads as follows: 'The interpretation of the law must be guided by the idea that it is not the wording alone that constitutes the legal norm, but only the law understood and concretised through the facts. What is required is the factually correct decision in the normative structure, oriented towards a satisfactory result of the *ratio legis*. In doing so, the Federal Tribunal follows a pragmatic pluralism of methods and specifically refuses to subject the individual elements of interpretation to a hierarchical order of priority'.
30. DFT 125/*1999* II 238 reason 5.
31. An unofficial translation reads as follows: 'First and foremost, the law must be interpreted according to its letter. However, if the text is not absolutely clear, if several interpretations are possible, then the true scope of the rule must be ascertained from all the elements to be considered, in particular the preparatory work, the purpose and spirit of the rule, the values on which it is based, as well as its relationship with other legal provisions ([*citations omitted*]). The Federal Tribunal pragmatically uses a variety of methods to arrive at a decision that best reflects the system and purpose of the law, without establishing an order of priority between them'.
32. For example, DFT 127/2001 V 1/5; DFT 132/*2006* III 226 reason 3.3.5; DFT 135/*2009* III 640 reason 2.3.1; DFT 135/*2009* IV 113 reason 2.4.2; DFT 135/*2009* V 1 reason 7.2; DFT 142/*2016* II 695; DFT 142/*2016* V 368 reason 5.1; and references by E.A. Kramer, supra note 22, at 95.

> Il peut résulter d'une interprétation dans les règles de l'art qu'un texte apparemment clair soit trop large et ne puisse être appliqué à la situation qu'il envisage (restriction téléologique).[33]
> Le postulat de la force obligatoire de la loi n'exclut pas en soi, par principe, la marge de décision des juges. Il limite cependant l'admissibilité de l'élaboration du droit *contra verba* mais *secundum rationem*.[34]

Finally, a closer look also shows some discrepancies between the various Chambers of the Federal Tribunal. The two public law Chambers seem to use the expression of the pragmatic pluralism of methods (in French and in German) less often than the two private law Chambers. The criminal law Chamber also applies the expression of the pragmatic pluralism of methods, without systematically referring to the clear text of a statute, but taking into account the principle of *nulla poena sine lege*, in a formulation that is often presented as follows:

> Strafbar ist nur, wer eine Tat begeht, die das Gesetz ausdrücklich mit Strafe bedroht (Art. 1 StGB). Der Gesetzestext ist Ausgangspunkt der Gesetzesanwendung. Selbst ein klarer Wortlaut bedarf aber der Auslegung, wenn er vernünftigerweise nicht der wirkliche Sinn des Gesetzes sein kann. Massgebend ist nicht der Buchstabe des Gesetzes, sondern dessen Sinn, der sich namentlich aus den dem Gesetz zu Grunde liegenden Wertungen ergibt, im Wortlaut jedoch unvollkommen ausgedrückt sein kann. Sinngemässe Auslegung kann auch zu Lasten des Beschuldigten vom Wortlaut abweichen. Im Rahmen solcher Gesetzesauslegung ist auch der Analogieschluss erlaubt. Dieser dient dann lediglich als Mittel sinngemässer Auslegung. Der Grundsatz 'keine Strafe ohne Gesetz' (Art. 1 StGB) verbietet bloss, über den dem Gesetz bei richtiger Auslegung zukommenden Sinn hinauszugehen, also neue Straftatbestände zu schaffen oder bestehende derart zu erweitern, dass die Auslegung durch den Sinn des Gesetzes nicht mehr gedeckt wird.[35]
> Only a person who commits an act that is expressly punishable by law is liable to prosecution (Art. 1 Criminal Code). The wording of the law is the starting point for the application of the law. However, even a clear wording requires interpretation if it cannot reasonably be the true meaning of the law. It is not the letter of the law that is decisive, but its meaning, which results in particular from the values underlying the law, which may, however, be imperfectly expressed in the wording. An interpretation according to the meaning can also deviate from the wording to the detriment of the accused. Within the framework of such an interpretation of the law, the conclusion by analogy is also permitted. In this case, the analogy merely serves as a means of interpretation. The principle of 'no punishment without statute' (Art. 1 Criminal Code) merely prohibits going beyond the meaning of the law as correctly interpreted, ie creating new offences or expanding existing ones in such a way that the interpretation is no longer covered by the meaning of the law.[36]

One can see how astute this analysis of the relation between the text and the meaning of a given provision is; the principle *nulla poena sine lege* does not mean that the text must prevail over the intent and the underlying values, if those are not (correctly) reflected in the

33. DFT 145/*2019* III 109 reason 5.1.
34. DFT 140/*2014* I 305 reason 6.2.
35. DFT 128/*2002* IV 272, reason 2.
36. Free translation of DFT 128/*2002* IV 272, reason 2.

letter of a provision. In the same decision, the Federal Tribunal acknowledges, however, how difficult it might be to distinguish between a permissible interpretation of a criminal provision to the disadvantage of the accused and the impermissible creation of new criminal offences by analogy. The endeavour to actually punish a conduct worthy of punishment must not be confused or equated with the meaning and purpose of a penal provision. It underlines that it should not be overlooked that the question of whether a certain conduct falls under a criminal offence arises precisely when it appears to be punishable.[37]

In a more recent decision, the Federal Tribunal, Criminal Chamber, has gone beyond the letter of the juvenile criminal code after demonstrating that there was a gap to be filled in, based on the intent of the legislator to reproduce, in the juvenile criminal code, provisions of the 'ordinary' criminal code.[38] The Court used at this end a pragmatic pluralism of methods to better reflect the equitable solution that was being sought by the legislator.

In summary, not only does the Federal Tribunal have various versions of its central methodology of the pragmatic pluralism of methods, but the tension between this methodology and former ones based on the absolute centrality of the text creates tensions that are difficult to solve in a coherent way, especially in criminal law which applies the principle *nullum crimen sine lege*. Nevertheless, the Court has rightly considered that the pragmatic pluralism of methods does indeed has its full justification in criminal law just as in any other area, as any text requires interpretation. This is especially true when the text is expressed in various languages with ultimately several potential meanings driven from the various linguistic wordings. *The pragmatic pluralism of methods is therefore a necessary means in a pluralinguistic legal system*.

II. Facing challenges of expressing a monolingual system in English

This ambivalent perspective of any literal interpretation being both the necessary start of an interpretation and, at the same time, not predictive of the outcome, cannot only be true for a multilingual system, such as the Swiss legal regime. Monolingual systems may also need to realise that wording is haunted and that a clear text is only the result of a hermeneutical process.

However, in multilingual systems, the importance of a pragmatic pluralism of methods is more apparent, as the various language versions reveal more easily the feature that a wording cannot preempt the interpretation, as the mere literal interpretation in the various languages does often lead to different results. This cannot be different in essence when there is only one official language. Without a *tertium comparationis*, it is just more difficult to identify that feature.

This is all the truer when legal systems are expressed in non-official languages, such as in English. This will typically happen when Swiss law is the applicable law in arbitration

37. DFT 128/*2002* IV 272, reason 2: '(…) Die Abgrenzung zwischen zulässiger Auslegung einer Strafbestimmung zu Ungunsten des Beschuldigten und unzulässiger Schaffung neuer Straftatbestände durch Analogieschlüsse ist allerdings schwierig. Das Bestreben, ein strafwürdiges Verhalten tatsächlich auch zu bestrafen, darf nicht mit dem Sinn und Zweck einer Strafnorm vermengt bzw. gleichgesetzt werden. Andererseits ist nicht zu übersehen, dass sich die Frage, ob ein bestimmtes Verhalten unter einen Straftatbestand fällt, eben gerade dann stellt, wenn es als strafwürdig erscheint (BGE 127 IV 198 E. 3b S. 200)'.
38. DFT 143/*2017* IV 49, reasons 1.5-1.7.

proceedings held in English. The readers (and therefore potentially the arbitrators) will give a meaning to words according to their own cultural and legal educational background. By doing so, interpreters might misunderstand the meaning of a provision. For example, when reading the words '*essential mistake*' at Article 23 (Swiss) Code of Obligations, one must understand that the Swiss system is based on the theory of intent (*Willenstheory*) meaning that one should only be bound when the statement made reflects what was meant by the author of such statement. A *unilateral mistake* makes a statement inoperative, as long as it is considered as essential, ie as one of the triggering elements for a person to have made such statement. It does not need to go necessarily to the core of the motives, it may also be one essential element needed for the valid conclusion of a contract. This means that an 'essential mistake' pursuant to Article 23 Swiss Code of Obligations might not only be a unilateral mistake, but it can be indifferently a mistake of fact or of law, even if the statute does not say so.

An interesting example is given with the rules related to penalty clauses (Article 160 ff Swiss Code of Obligations). Article 161 Swiss Code of Obligations has been translated into English in the unofficial translation of the Federal Administration as follows: 'The penalty is payable even if the creditor has not suffered any damage'.[39] Concerned about the fact that a penalty clause is void under American law as soon as the contractual amount does not closely reflect the actual damage, and therefore anytime when it is not truly a liquidated damages clause, the Swiss-American Chamber translated Article 161 Swiss code of Obligations in an English version of 2011[40] as follows: 'Liquidated damages are due even in the event that the obligee has not suffered damage'. For a common-law reader, the latter may be more easily explainable, as penalty clauses are in this case void by definition, so it needs to be a liquidated damages clause. The provision would therefore aim at expanding the validity of liquidated damages clause to situations in which there is even no damage, ie to penalty clauses. This attempt to bring the translation close to the English reader has failed, as it superimposes two notions that are clearly distinct under Swiss law, and which are both valid, penalty clauses on the one hand and liquidated damages on the other. An interpretation of Article 161 Swiss Code of Obligations would necessarily mean understanding the underlying values of the regime, what is haunted in the provision. A mere translation cannot transmit this information easily.

This is why one has difficulties following a very affirmative statement made by Judge Posner in the *Bodum case*. The Statement reads as follows:[41]

> Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client (…) But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, all in English (if English is the foreign country's official language), to provide neutral illumination of issues of foreign law. I cannot fathom why in dealing with the meaning of laws of English-speaking countries that

39. The official versions read as follows: 'I Die Konventionalstrafe ist verfallen, auch wenn dem Gläubiger kein Schaden erwachsen ist'; 'I La peine est encourue même si le créancier n'a éprouvé aucun dommage.'; 'I La pena convenzionale è dovuta sebbene non sia derivato alcun danno al creditore.' and even in Rumansh 'I Il chasti convenziunal è scadì, er sch'i n'ha dà nagin donn per il creditur'.
40. Swiss-American Chamber of Commerce (ed.), Swiss Code of Obligations I, Contract Law (Articles 1-551), English Translation of the Official Text, 2011, Updated Edition, Zurich 2011.
41. *Bodum USA, Inc. v. La Cafetière, Inc.*, 96 U.S.P.Q.2d 1689, 621 F.3d 624 (2010), by R. Posner, at 633.

> share our legal origins judges should prefer paid affidavits and testimony to published materials.
> It is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if is a major country and has a modern legal system. Although most Americans are monolingual, including most judges, there are both official translations of French statutes into English, Legifrance, "Codes and Texts" (…). It does not justify our judges in relying on paid witnesses to spoon feed them foreign law that can be found well explained in English-language treatises and articles. I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. It is excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn. The French legal system is obviously not of that character.

Indeed, the French Civil Code or even French treatises may be translated into English, but for a foreigner not trained in such a system to 'truly' understand what those texts mean, one might need an interpreter that is able to make apparent what is hidden or what haunts the text. This is the role of a judge of such a legal system, but it might be the role of an expert for a foreign tribunal.

Since the wording does not necessarily reflect the true meaning of a statute, it is not sufficient to look at a translation of a text to understand what a provision 'truly' means. One needs therefore an interpreter that is sufficiently versed in a legal system to bring the other means of interpretation, especially the historical, systematic and teleological approaches in perspective, to determine what the proper interpretation that allows to have a just and fair solution in a given case shall be. What matters is the true meaning of a statute, which does not necessarily derive from a preset of interpretation methods.

Conclusion

This little journey into a multilingual legal system such as Swiss law has shown that the pragmatic pluralism of methodologies is a good way for the judge to take into account a basic principle: different cultures, different languages produce different texts. Since the same idea cannot be expressed in the same way in different languages, one cannot stick to the wording in order to find the common meaning of all these various wordings. There must, necessarily, be a multiplicity of approaches that should be combined. This is not new. Since the end of the time of the *École de l'exégèse*, and the fundamental works of François Gény, lawyers have understood that the wording of a statute is not its meaning. Eugen Huber, the main drafter of the Swiss Civil Code, was in epistolary contact with François Gény who once wrote to him saying that Article 1 of the Swiss Civil Code, and in particular para. 2, was a very good synthesis of his approach.[42]

42. On this see P. Pichonnaz supra note 19 in part. at 205 fn 48; on the letters between Gény and Huber, see O. Gauye, 'Lettre inédites d'Eugen Huber' (1962) 81, I, Revue de droit suisse 91ff; as well as O. Gauye, 'François Gény est-il le père de l'art. 1 al. 2 CCS' (1973) 92, I, Revue de droit suisse 271ff; see also F. Werro (n 22) 4.

What is probably new in the approach to the hermeneutical process by the Federal Tribunal is the pragmatic approach, which refuses to set a pre-defined hierarchy between elements of interpretation, as this would impair the core value of the law, which is to find an equitable solution for a specific case within a normative framework. The role of the text is no longer almighty, but it is a path full of possibilities for the interpreter. In order to determine the optimal solution, ie a solution that is just and equitable, the judge must weigh all the approaches in order to get to a solution that reflects the underlying normative values. Giving meaning to a wording may therefore sometimes mean ignoring its apparent meaning, to let the aim that can be derived from various components prevail. Rudolf von Jhering's 1877 '*Der Zweck im Recht*' already showed similar concerns. The pragmatism at the root of the Federal Tribunal's methodology may inspire some judges to rethink the relationship between the letter and the meaning, and, through it, the relationship between the legislator and the judge, in a more dynamic way.