LAW TRANSLATION: A SELF-DEFENCE CASE STUDY

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Translation is commonly used to facilitate comparative legal study. This paper explores some of the potential issues of legal translation through the translation of two Swiss Federal Supreme Court judgments into English from French and German using the skopos method. Analysis of examples from these cases shows what can be learned from Swiss judgments with respect to how a multilingual judiciary may function.

La traduction est couramment utilisée en droit comparé. Cet article s'intéresse à quelques unes des problématiques fréquemment rencontrées dans le processus de traduction juridique. Pour illustrer sa démonstration, l'auteure prend l'exemple des difficultés rencontrées en Suisse, pays de tradition civiliste mais aussi multilingue (français, allemand, italien). La traduction suivant les principes de la méthode 'skopos', de deux arrêts de la Cour Suprême suisse, respectivement rédigés dans leur version originale en français et en allemand, forme le fil conducteur de l'analyse.

A la lumière de ces deux exemples, l'auteure en tire quelques enseignements qui selon elle pourraient être transposés dans le fonctionnement d'autres systèmes judiciaires multilingues.

I INTRODUCTION

Translation can be essential to comparative law because not every legal system uses the same language let alone the same basic concepts. Legal translation has emerged as a specialist interdisciplinary field combining both translation theory and comparative methodology legal translation.[1] Susan Šarčević, a legal translation

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1 Martina Künnecke "Translation in the EU: Language and Law in the EU's Judicial Labyrinth" (2013) 20 Maastricht J Eur & Comp L 244.

scholar whose *New Approach to Legal Translation* is one of the materials most cited by legal translation theorists,[2] states:[3]

> legal translation is no longer regarded as a process of linguistic transcoding but as an act of communication in the mechanism of the law. As such, one must take account of the situational factors constituting the production and reception of the parallel texts of legal instruments.

In other words, translators must have a solid understanding of the source text's (ST) legal system, because they are creating not only a linguistic translation, but a translation of the ST's legal system and legal culture. Legal translators therefore must be knowledgeable about comparative law for translation purposes; their translations enable others who cannot understand the source language to engage in comparative law study.

Within the New Zealand context, courts often look to other Common Law jurisdictions as part of their decision-making process. With the rise in globalisation and a potential requirement to look further afield, New Zealand and other English-speaking Common Law jurisdictions need to develop an interest in Civil Law, which in turn would necessitate an increase in legal translation.

Switzerland is a Civil Law jurisdiction which is particularly interesting because it is multilingual (German, French, Italian) and could therefore offer some helpful insights for a more globalised New Zealand.[4]

This paper explores, by translating one French and one German Swiss language case into English, how legal translation of Swiss cases may be approached and the challenges a translator may face. Background information on Swiss law and the cases is provided in Part II, then comments on the methodology and theoretical framework used are provided in Part III. The translations are presented in Part IV, and analysis in Part V.

II SWISS LAW

The Swiss Confederation is divided into 26 areas called cantons. Each canton operates its own judiciary, legislature, and executive, however federal law takes

2 Künnecke, above n 1, at 244; Deborah Cao *Translating Law* (Multilingual Matters, Clevedon (UK), 2007) at 8.

3 Susan Šarčević *New Approach to Legal Translation* (Kluwer Law International, The Hague, 1997) at 55.

4 In addition, it is not inconceivable that New Zealand may in future move towards being truly bilingual in English and Te Reo Māori.

precedence over any conflicting cantonal law.[5] The federal government creates legislation in federal law, civil law, civil procedure, criminal law, and criminal procedure, which is administered primarily by cantonal courts.[6] Decisions of the cantonal courts can be appealed to the appropriate federal judicial authority; once the cantonal appeal process is exhausted, in a criminal case, an appellant can ask the Criminal Law Division of the Federal Supreme Court (the Tribunal) to review the decision.[7]

Switzerland has three national and official languages (French, German and Italian) and one national language that is official when communicating with a speaker of it (Romansh).[8] Each canton has an official language and this determines the language of its law cases.[9] If a case is appealed to the Tribunal, this must be decided in the same language; therefore Tribunal judges must be proficient in German, French, and Italian. The Federal Assembly considers judges' mother tongues when making appointments to ensure appropriate representation.[10]

Switzerland draws most of its law from Codes and other legislative instruments. Legislation is drafted in each official language and has equal legal status in those languages.[11] Cases, however, are published only by the courts in the language of the case.[12] Any translations are unofficial and non-binding, however they are still produced regularly and published by the *Journal des tribunaux* (from German and Italian into French) and in *Praxis des Bundesgerichts* (from French and Italian into German).

The two decisions considered in this paper are of the Criminal Division of the Tribunal and concern the self-defence provision of the Criminal Code (art 15).[13] Self-defence cases were chosen because self-defence in New Zealand includes concepts similar to Swiss law such as imminent danger, proportionality, and lack of alternative options. New Zealand's self-defence provision in s 48 of the Crimes Act 1961 is

5 Federal Constitution of the Swiss Confederation 1999, arts 3, 46.

6 Federal Constitution, art 46.

7 Martin Killias and Stefan Trechsel "Law of Criminal Procedure" in François Dessemontet and Tuğrul Ansay (eds) *Introduction to Swiss* Law (Kluwer Law International, the Hague, 2004) at 284.

8 Federal Constitution, arts 4, 70.

9 Swiss Criminal Procedure Code 2007, art 67.

10 Šarčević, above n 3, at 82.

11 Federal Constitution, art 4.

12 Joseph Voyame "Introduction" in François Dessemontet and Tuğrul Ansay (eds) *Introduction to Swiss Law* (Kluwer Law International, the Hague, 2004) at 8.

13 Criminal Code (Switzerland), art 15.

supplemented by Common Law principles, such as that detailed by the Law Commission in its 2016 report and in the case of *R v Wang*.[14] Familiarity with the corresponding New Zealand self-defence law assisted the translator in that it reduced the scope for hindrance by conceptual legal questions and thus permitted a clearer focus on translation and its challenges.

The Tribunal officially publishes only some of the cases it hears each year. In 2017, there were, according to the Tribunal's annual report, 8029 cases of which only 3004 judgments were published.[15] This provides a limited number of cases to choose from generally and few on self-defence in the criminal context. The French language case, *BGE 122 IV 1*,[16] was decided in 1995, and the German language case, *BGE 136 IV 49*,[17] in 2010. Over this period, the Code provision was changed only in respect of the number of the article from 33 to 15.[18] This is a federal provision, so there should not be any significant deviation in its application apart from any due to the particular facts of each case.

III METHODOLOGY AND THEORETICAL FRAMEWORK

This study is based on the premise that a New Zealand researcher might wish to explore Swiss cases but has limited understanding of other languages. This raises two questions.

First, what are the challenges in translating Swiss cases into New Zealand English? Legal translation scholarship, particularly in English, has begun to be recognised only over the past few decades.[19] Whilst there has been some important research, and Switzerland is often discussed by legal translation scholars due to its multilingual status,[20] the discussion to date has centred on the translation of legislation, not of cases.

Second, what are some of the difficulties faced by the Swiss Tribunals that could affect New Zealand if its judiciary became multilingual?

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14 Law Commission *Understanding Family Violence* (NZLC R139, 2016) at 71-92; *R v Wang* [1990] 2 NZLR 529 (CA).

15 Tribunal fédéral *Rapport de gestion du Tribunal fédéral 2017* (2018) at 17.

16 BGE 122 IV 1.

17 BGE 136 IV 49.

18 Killias and Trechsel, above n 7, at 253.

19 Künnecke, above n 1, at 244.

20 Šarčević, above n 3, at 36.

Regarding the first question, the two Swiss judgments were translated into English to expose any translational challenges and provide an example of some of the necessary considerations a native English-speaking New Zealand legal translator would need to take into account in order to provide accessible materials for a comparative law researcher. Further analysis of the cases answered the second question by concentrating particularly on the extent to which they included elements of multilingualism.

The source of most conflict in translation theory is perhaps the issue of fidelity. Essentially, all translators must ask what is more important: remaining as close to the ST as possible in the target language, producing a translation that is faithful but is so foreign in the target language that it is incomprehensible or unreadable for the readership (foreignisation), or creating a version that is easily read and understood by the target readership but in doing so sacrifices the style and any trace of foreignness or the voice, distorting the ST so much that it is unrecognisable (domestication).[21] Many translators see foreignisation and domestication as extremes on a spectrum and try to find a balance between the two.

An example of this debate, and the most significant instance in the Swiss context, is the translation of the original German text of the Swiss Civil Code into French and Italian in 1907. Professor Virgile Rossel, who created the French language rendering, insisted on producing not a literal translation but one that captured the style of the French language.[22] His translation was subject to criticism for altering the letter of the law, but Rossel defended his approach in the January 1911 issue of *Schweizerischen Juristen-Zeitung* on the basis of linguistic equality:[23]

> La Suisse romande avait le droit, selon moi, d'exiger que le texte français du Code civil suisse ne fût pas de l'allemand francisé avec une servile exactitude, ni même du français décalqué en quelque sorte sur l'allemand, mais du français suffisamment alerte et clair, pour qu'elle eût le sentiment de vivre sous l'empire d'une loi qui serait la sienne, et non pas d'une loi dans laquelle elle n'aurait retrouvé ni sa langue, ni son esprit.
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> [French-speaking Switzerland had the right, in my opinion, to insist that the French text of the Swiss Civil Code not be in German that had been Frenchified with servile precision, nor even in a French more or less transliterated from the German, but rather

21 Friedrich Schleiermacher "Über die verschiedenen Methoden des Übersetzens" in Lawrence Venuti (ed) *The Translation Studies Reader* (Routledge, London, 2012) (Susan Bernofsky (translator) "On the Different Methods of Translating") at 43.

22 Šarčević, above n 3, at 37.

23 Sourced from Šarčević, above n 3, at 37.

in a French sufficiently dynamic and clear to give it the feeling that it was living under the rule of a law that would be its own, and not a law which would have reflected neither its language nor its spirit.]

Rossel's view, decades before translation theorists began to consider purpose a necessary consideration when determining the appropriate translation approach, demonstrated a commitment to and an emphasis on the purpose of the translation. His aim was to create a truly French language version of the Code that captured both the meaning of the ST and the spirit of Swiss French for the French speakers, as the German speakers already had for themselves.[24]

According to Katharina Reiß's functionalist theory, developed in the 1970s and 1980s, it is the function and type of text that determines the method of translation, whether this is more of a foreignising or domesticating approach.[25] Reiß expanded on this with Hans J Vermeer in *Grundlegung einer allgemeinen Translationtheorie*.[26] In the first part of the book Vermeer sets out his *skopostheorie*, which is referred to by Šarčević as the modernisation of translation theory.[27] *Skopostheorie* states that any translational action is determined by its purpose or *skopos*, and the purposes of the ST and target text (TT) may differ. It is more important "that a particular translational purpose be achieved than that the translation process be carried out in a particular way."[28] Šarčević compliments Vermeer for "recognizing that all legal translation need not be literal," but critiques his disregard for "the fact the legal texts are subject to special rules governing their use in the mechanism of the law."[29] That said, Šarčević in *New Approach* advocates a middle ground between creativity (domesticating) and honouring the restrictions of the profession (foreignising), dependent on the particular circumstances.[30] Her study is focused on authenticated, authoritative translations of legal instruments, and she acknowledges that in the case of non-authentic translations (translations that have no legal force), such as court cases being translated for comparative analysis, it is "appropriate to ask whether the

24 Šarčević, above n 3, at 40.

25 Katharina Reiß and Hans Vermeer *Grundlegung einer allgemeinen Translationtheorie* (Niemeyer, Tübingen, 1984) (2nd translated ed: Christiane Nord and Marina Dudenhöfer (translators) Katharina Reiß and Hans Vermeer *Towards a General Theory of Translational Action: Skopos Theory Explained* (Routledge, London, 2014)) at 114.

26 Above n 25.

27 Šarčević, above n 3, at 18.

28 Reiß and Vermeer, above n 25, at 89.

29 Šarčević, above n 3, at 19.

30 At 272.

shift in function [from the ST] justifies a change in translation strategy, as suggested by the *skopos* theory."[31] She suggests that:[32]

> linguistic purity in the target language is necessary for the sake of comprehension. At the same time, translators should guard against using functional equivalents of the target legal system which could mislead target receivers into believing that such concepts or institutions exist in the source legal system.

A functional equivalent, used predominantly in domesticating a text, is a term in the target language that evokes a similar concept or function to that of the ST without being a literal translation. However the risk with functional equivalents is that in domesticating, equivalents may be sought for relatability when there is no equivalence between the two terms because of the different legal systems.

As Emily Poon, Chair of the Hong Kong Institute of Legal Translation, states, "Although today it is more liberal in style, the first consideration in legal translation is still "fidelity to the original text"."[33] Traditionally the legal translator's role is to provide a translation that is as close to the ST as possible to avoid distortion of the legal meaning,[34] a principle which has resulted in a strict literalist approach that conservative theorists adhere to because "the language of the legal text is sacred."[35] This is still a school of thought prevalent in legal translation, which is natural considering that legal cases often focus on the meaning of a particular word or turn of phrase. Šarčević states that "even after legal translators won the right to produce texts in the spirit of the target language, the general guideline remained fidelity to the source text."[36]

In translating two Swiss decisions from a New Zealand Common Law background, *skopostheorie* is appealing. This is because the aim is not to create authoritative English versions, but versions that are comprehensible to a legally trained person from New Zealand for comparative purposes. The second vital consideration is that the translations are of cases from a Civil Law jurisdiction, so the translations must deliberately take into consideration a Common Law readership. Literal translations could hinder understanding of the legal concepts and processes.

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31 At 277.

32 At 277.

33 Emily Poon "The Cultural Transfer in Legal Translation" (2005) 18 IJSL 307 at 315.

34 Šarčević, above n 3, at 16.

35 Leon Wolff "Legal Translation" in Kirsten Malmkjær and Kevin Windle (eds) *The Oxford Handbook of Translation Studies* (Oxford, Oxford University Press, 2011) at *2*.

36 Šarčević, above n 3, at 16.

By allowing flexibility and the ability to draw on Common Law knowledge, gaps in understanding should be filled.

Fidelity to the text is still of great importance. These are legal texts and the words themselves can be essential to the law. The law on self-defence is similar in New Zealand and Switzerland, which should limit domestication to instances where the literal translation would be incomprehensible. Because these translations are for the purpose of enabling comparison, preserving the expression of the judgments is also important. For these reasons, a *skopos* approach is adopted here tempered with literalism, deferring to literalism where domestication would serve only to make the English versions more natural to read.

IV THE TRANSLATIONS

A Theoretical Application

The primary tool used when approaching the translations of the cases was *skopostheorie*. According to Vermeer and Reiß, there are three phases of decision-making in application of the theory.[37] How these were applied is detailed below, but it should be noted that the greater purpose of these translations is to provide an example of how legal translation may work and to investigate some of its challenges.

The first phase is to set the *skopos*, meaning that the target audience needs to be determined. Without this, a functionalist approach is inoperable because the overarching purpose of the translation determines each translation decision. The target readership here is someone familiar with New Zealand Common Law, who is interested in Swiss court cases, who may or may not understand the original case languages, and if they do understand the original case languages, would not understand the legal concepts as they are expressed in the source language; even where the concepts are similar to those in New Zealand, they may not have a direct equivalent.

The second step is to redefine "the relevance of certain aspects of the ST according to the *skopos* set."[38] This can be done before, during, or after the translational action. The aspects that needed redefining in these texts were the legal terms and concepts. However, while redefinition is important for easy analysis by a comparative lawyer, it is important to redefine only terms that have an appropriate equivalent, and to leave in the source language anything unique to Swiss or Civil

37 Reiß and Vermeer, above n 25, at 91-92.

38 Reiß and Vermeer, above n 25, at 91.

Law or anything ambiguous. This allows fidelity to the Swiss law and the ST and enables accurate comparative analysis.

Raw, literal translations could have been used in first drafts, however it was more natural to reconfigure terms and concepts as they occurred to achieve understanding of the substance. Attempting to find appropriate Common Law terms was part of the process. For example, Deborah Cao's *Translating Law*, 'la jurisprudence' would have initially been translated to 'jurisprudence' but afterwards this was changed to 'case law.' In New Zealand 'jurisprudence' refers to legal theory and case law, whereas the French term refers solely to case law.[39] This is a striking example of a false cognate, or 'faux ami'.[40]

The third phase is to accomplish the *skopos*.[41] This involves a functional transfer, taking into account the target readership; in other words, a translation must be tailored to the target readership's knowledge and culture if the purpose of the translation is to be achieved. A brief discussion of how the *skopos* approach worked in practice is included in Part VII the Conclusion.

B The Cases

The translation of the first case appears here in 1 BGE 122 IV 1; the second appears in 2 BGE 136 IV 49.

1 BGE 122 IV 1

Headnote

1. Extract of the judgment of the Court of Criminal Cassation of 8 December 1995 in the case *R v the Public Ministry of the Canton of Valais* (appeal on point of law)

Register

Article 33 al. 1 and 34 ch. 1 CP.[42] State of necessity as opposed to self-defence. Domestic abuser killed by his spouse.

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39 Cao, above n 2, at 59.

40 Jean Darbelnet and Jean-Paul Vinay *Stylistique comparée du français et de l'anglais* (Didier, Paris, 1958) (translated ed: Juan Sager and Marie-Josée Hamel (translators) *Comparative Stylistics of French and English: A Methodology for Translation* (John Bejamins Publishing Company, Amsterdam, 1977)) at 68.

41 Reiß and Vermeer, above n 25, at 92.

42 *CP* refers to Code pénal Suisse, the French language version of the Swiss Criminal Code.

The necessary act is lawful if the protected interest is of more value than the injured interest; it is unlawful but absolutely excused or exempt from punishment when the interests in conflict are of comparable value (at 2b).

Imminent danger (at 3a and b).

Danger impossible to otherwise divert (at 3).

State of necessity, as an absolute defence, may enter into consideration in the case of a person who kills to put an end to a true martyrdom that she suffers (at 4 and 5).

Facts from page 2

R, born in 1953, originally from Kosovo, married a compatriot, J, in 1974. 5 children were born of this union between 1974 and 1985.

In 1989 the family moved to Valais. Tension between the spouses increased. The wife lived in seclusion in the marital home. Disputes were frequent. The husband was brutal and abused his wife physically. In the month of October 1992, a doctor stated that the wife showed significant weight loss: she weighed only 42.5 kg and was suffering from anaemia.

From the start of 1993, the husband began to beat his wife weekly with the electric cord of the vacuum cleaner; he punched her and forbade her to go out when his blows left marks (traces). During the month of January, the husband told their eldest daughter that her mother would be dead within the year.

On 24 January 1993 the husband beat his wife quite severely once again. He tore up her passport, threatening to send her back to Kosovo where she would be killed. Witnessing the violence of this scene, the eldest daughter telephoned her aunt twice to report her father's abuses; he terrified her, and she dared not report to the police out of fear.

On 30 January 1993, the husband violently attacked his wife. He threw a butcher's knife at her, which wounded her in the thigh. She was hospitalised from 31 January to 8 February 1993 following the intervention of her brother who had alerted the police. The patient presented in a state of malnutrition and with multiple hematomas, of varying ages, all over her body.

After this hospitalisation, the wife was beaten at least twice more by her husband: she was insulted and threatened with death.

15 March 1993, the husband returned home from work in a bad mood, insulting towards his wife. At the end of the evening, he approached her armed with a revolver, explaining that he had bought it for her. When the couple went to bed, she noticed that the gun was placed under her husband's pillow. He had told her that if the

children had not screamed when he showed her the revolver, he would have already killed her. From this point on, she was convinced that he was going to carry out his threats. On reflection, she reached the conclusion that it was preferable for her children if he were the one to disappear, and that she no longer loved him at all.

Having noted that her husband had fallen asleep, his back turned to his wife, she reflected on her course of action again for some twenty minutes. At about one o'clock in the morning, she took hold of the weapon, got out of bed and, standing at the head of it, from a distance of about 40 to 50 cm, shot the weapon directly at her husband's head. He had not moved. She fired off all the ammunition contained in the revolver, being the six shots that caused the death of the victim. After explaining her actions to her eldest daughter, the wife surrendered herself to the police.

According to psychiatric evaluation, the accused is very intelligent. She is not suffering from a mental illness, mental incapacity, or serious alteration of consciousness; her responsibility is not diminished in the sense of art 11 CP. However, according to the appellate judges, the cultural impact and emotional context clearly played a determining role in the homicide.

10 June 1994 R was convicted of manslaughter (art 113 CP) by the Third District Court for the district of Monthey. She was sentenced to three years in prison, with a reduction of 192 days for time already served in pretrial detention.

Ruling 20 June 1995 on appeal by the defendant, the Second Criminal Court of the Cantonal Court of Valais dismissed the appeal.

In summary, the cantonal authority considered that the accused had acted under deep distress. Alone, without support, in a foreign country where she could not integrate because of a selfish and uneducated man, she was forced to act as she did to escape the cruelty of her husband, who seemed firmly resolved to kill her. She suffered from domestic violence and was not responsible for the state of distress in which she found herself. Contrary to the defendant's argument, self-defence was not accepted as a defence for lack of an imminent attack; after considerable reflection, the wife's decision was clearly to kill her torturer before he acted, not to ward off an attack.

R. is appealing to the Federal Supreme Court on a point of law. According to her, the cantonal authority contravened art 33 para 2 CP by refusing to admit putative[43] self-defence; in fact the presence of the weapon under the pillow, after the threats

43 Putative self-defence / necessity is a particular Swiss legal term, meaning that the self-defence or state of necessity occurred due to the defendant's mistaken belief of the facts. It is distinguished from self-defence / state of necessity that arises from the objective circumstances.

suffered during the evening, would have provoked a violent emotion, preventing her from deciding with objectivity that there were solutions other than killing.

Judgment

Considering in law:

1. (jurisdiction)

2. a) The cantonal authority, with good justification, held that the accused did not act in self-defence. In fact, at the moment when she fired, her spouse was sleeping. He was not attacking her. He was not threatening her any more with an imminent attack in the sense of art 33 para 1 CP. She reflected on her project for about 20 minutes, before shooting to kill. In this respect, she is unable to maintain that she believed an attack was imminent (putative self-defence). In this regard, it is impossible to see how the argument that there was violent emotion, rather than deep distress, could modify this conclusion. Furthermore, the grievances presented are inadmissible insofar as the Appellant diverges from the statement of facts by claiming that her action was due to the victim's – alleged – refusal to remove the weapon from the bed and remove the bullets. However, self-defence is not the only justification provided for in the law. State of necessity defined in art 34 CP is another.

2. b) According to art 34 ch. 1 para 1 CP, an act committed in a state of necessity is exempt from punishment [non è punible, straflos]. The current dominant idea in scholarly writing is that the legal nature of an act of necessity – lawful or otherwise excusable – varies according to the value of the conflicting interests. The act of necessity is lawful if the protected interest is more valuable than the damaged interest (rechtfertigender Notstand); it is unlawful but completely excused or exempt from punishment when the conflicting interests are of comparable value [Citation: entschuldigender Notstand; Ph Graven, L'infraction pénale punissable, 2e éd. Berne 1995 p. 137 let. B, with references to l'Avant-projet de la Commission d'experts concernant la Partie générale et le Troisième livre du Code pénal, 1993; Stratenwerth, Partie générale I, Berne 1982, p. 198 ss et p. 264 ss]. If the judge considers that the person has not committed any fault, he must not only exempt her from all punishment but also pronounce a complete discharge from criminal prosecution (see *ATF 120 IV 313*,[44] at 2).

In this case, given the comparable value of the injured interest and the protected interest (the life of the husband on one hand, and that of the wife on the other), only an absolute defence could be considered. It is also necessary that the act alleged

44 *ATF* refers to the *Recueil Officiel des Arrêts du Tribunal Fédéral Suisse*, the official French language collection of Tribunal judgments.

against the accused be considered as exempt from any culpability, because otherwise it would constitute premeditated self-justice. It could also be that the person acted in a putative state of necessity. In this case, if the mistake was avoidable, a fault subsists and leads to an unrestricted mitigation of the sentence (Stratenwerth, op cit, pp 269, no. 86 ss; Graven op cit, p 178 no 134). It may be recalled in this regard that, pursuant to art 19 CP, if the misrepresentation of the person includes a fact, a fact whose existence would result in the mitigation of the sentence or exemption from any penalty, the judge must rule as if this fact were a given (*ATF 117 IV 270* at 2b).

3. a) Self-defence is related to State of Necessity, the latter exists in a situation where something exposed to a current or imminent danger can only be saved by committing an offence (see Ph Graven, op.cit. p. 136 no 80).

One of the fundamental elements of state of necessity in Swiss law (art 34 ch. 1 para 1 CP) is that of imminent danger. Unlike art 33 CP, there is no question of an imminent attack – Angriff, aggressione – but of an imminent danger (Gefahr, pericolo). This difference, between the notion of attack and that of danger, suggests that the damage to the interest, which the person wants to protect, is closer in time in the case of attack than in the case of danger. In other words, the imminence of this damage is greater in a situation of hypothetical attack than that of a hypothetical danger. An attack is an aggression, a danger is a risk of aggression.

According to the case law, imminence within the meaning of art 34 CP is a danger that is neither past nor future, that is to say a present but also concrete danger (*ATF 109 IV 156* at 3, *ATF 108 IV 120* at 5, *ATF 75 IV 49* at 2; SJ 1995 p. 737; Hauser/Rehberg, Schweizerisches Strafgesetzbuch, Zurich 1992, art 34 p 52).

b) Given the lack of precedents from which criteria for imminence of danger can be derived, it is possible to illustrate the problem by examples drawn from German practice on this point. Admittedly the German Criminal Code does not define state of necessity in the same way as our code. It expressly distinguishes between lawful state of necessity and excusable state of necessity (rechtfertigender Notstand et entschuldigender Notstand). This distinction has no influence here, because the element of danger is the same in both cases. Articles 34 and 35 of the German Criminal Code both provide that the danger must be current or present (gegenwärtige Gefahr).

According to German scholarly writing, this danger is current when one is not yet truly confronted with immediate damage, but it would be impossible to defend oneself at a later point or only do so by taking far greater risks. In a so-called "preventive self-defence" (Präventiv-Notwehr) situation, similar to that of the Appellant's, it suffices that while the unlawful attack may not yet be happening, it must be about to happen, that its execution is close. This proximity to the damage

must be distinguished from that of an attack required for self-defence, where the potential aggressor must have essentially already reached the stage of the attempt (Roxin, *Strafrecht, Allgemeiner Teil* (2nd Edition, Munich 1994), vol I p 597 16 no 17).

Some German commentators also allow that current danger can be extended, perpetual, continuous or enduring (Dauergefahr). It exists when the peril may materialize at any time (Jederzeit akut werden kann; Jescheck, *Lehrbuch des Strafrechts* (4th Ed Berlin, 1988) p 434 ch. 2. It should be noted that as examples of perpetual danger, they cite the cases of domestic abusers and disturbers of the peace or bullies (Haustyran, Spanner). They allow that the danger they represent can lead to an excusable state of necessity (Hand Joachim Hirsch, *Leipziger Kommentar 1994* (13th livraison) p 32 no 37 and 86 no 9; Jescheck, loc cit). In summary, in the face of perpetual danger, the notion of proximity to damage (*gegenwärtig*) is interpreted more broadly and extends to situations where this damage clearly seems more remote in time than that which would pertain to an attack in the sense of self-defence (Roxin, op cit p 597 no 17 and p 804 no 17).

c) According to art 34 ch. 1 CP, the danger must be not only imminent but also impossible to otherwise avoid (*non altrimenti evitabile*, *nicht anders abwendbare Gefahr*). This impossibility has not given rise to case law or any particularly precise commentary on Swiss law. Here again, it is possible to draw on examples of German case law and scholarly writing, because both paras 34 and 35 of the German Criminal Code provide that – current – danger must not be otherwise avoidable (*Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr*…).

Thus, according to Roxin, one must not be too severe in this respect to anyone who attacked a domestic abuser; admittedly it is often possible to flee the house, but circumstances weigh against it, and such an escape would only aggravate the danger by exciting the wrath of the abuser (Roxin, op cit p 805 no 18; Hirsch, op cit p 89 no 37 and case law cited; Jescheck loc cit). The German Federal Court, for example, has accepted that it could not be required that the spouse of an alcoholic domestic abuser endure inhumane treatment while awaiting the eventual success of divorce proceedings or placement in alternative accommodation ("Neue juristische Wochenschrift", NJW, 1966 p. 1823, in particular 1825). This authority also overturned a judgment condemning a wife who killed her husband – a domestic abuser – during his sleep, on the grounds that the trial court had not examined all the mitigating factors, including the state of excusable necessity ("Neue Zeitschrift für Strafrecht-NStZ", 1984 p. 20 ch. 6). Hirsch further states that the more remote the damage to the protected interest seems to be, the more possible it seems to otherwise avoid the danger (op cit p 33 no 37).

4. Here, the cantonal court has considered this particular and extreme case from the angle of self-defence, but not from that of the state of necessity of art 34 CP. In doing so, it contravened federal law because, according to the factual findings which bind this Court, it is not excluded that the accused in fact acted in a potentially putative state of necessity.

In terms of the imminent danger, it was actually noted that the dysfunction between the spouses had lasted for a long time, that it had gotten worse as soon as the accused arrived in Switzerland in 1989, that in October 1992 she was suffering from anaemia and weight loss and that she had endured abuse, that since the beginning in 1993, she was beaten weekly with the electric cord of the vacuum cleaner, that she showed traces of blows from being punched, that her husband had stated in January that she would die in the course of that year 1993, that 24 January 1993 he beat her and tore up her passport, that 30 January 1993 he wounded her with a butcher knife, for which she needed to be hospitalised, that afterwards she was beaten again, insulted, and threatened with death, that on the evening of the tragedy he had verbally abused her then showed her the revolver, explaining that he had bought it for her, that he had made it clear that if the children had not screamed previously when he showed her the weapon, he would have already killed her. According to these facts, a lasting and imminent danger (not an attack) becomes a consideration.

As to the possibility of avoiding this danger, to which the Appellant and her children were exposed, by other means, it was found that she was forced to act as she did. However, according to the cantonal authority, she was no longer directly threatened with death. She could also have used the revolver to defend herself in case of an attack, hidden it, or taken it to the police. Other solutions would have been feasible such as a request for intervention by a judge or social services, if necessary through a relative. However, these findings are contradictory. On one hand it seemed – and rightly so according to the cantonal authority's terms – impossible for the accused to do otherwise; on the other hand, reference is made to other solutions. The cantonal court did not examine whether these recommended measures might not have been more likely to increase the danger, which was ever-present and intensifying. It is however noted that the crisis had reached its peak and that there was no possible outcome other "than the aggressive act that was committed, all attempts of negotiation having failed". It must be concluded that the existence of a danger that is impossible to avoid is also to be taken into consideration.

5. Thus, the cantonal court did not see that according to the stated facts, a potentially putative state of necessity became relevant. In doing so, it violated federal law, which led to the annulment of the judgment under appeal, and referral back to

the cantonal authority for a new decision. It will have to consider the possibility of the existence of an excusable state of necessity (absolute defence).

However, it must remain clear that Swiss law does not permit homicide with the goal of putting quarrels between spouses to an end or to substitute for a divorce to go unpunished. Vigilantism is illegal, no one has the right to act as judge, jury and executioner. But the Criminal Code does allow, in applicable cases in the presence of an absolute defence, the exoneration of a person who kills to put an end to martyrdom.

6. (Following costs).

2 BGE 136 IV 49

Headnote

Excerpt from the judgment of the Criminal Law Division i.S. X. against the Chief Prosecutor of the Canton of Zurich and A. (appeal in criminal matters) 6B_1005/2009 from 18 February 2010.

Register

Article 15 StGB;[45] self-defence; reasonable defence with a knife.

The use of a knife in defence of an assault on bodily integrity requires special restraint. It is essentially the defence of last resort. However, in a particular case, considering factors such as the nature of attack, the numerical advantage of the attackers, and the risk of serious bodily injury during the altercation, it may be reasonable (See 3 and 4).

Judgment from page 50

From the judgment

1. According to the findings of the lower court, essentially based on the Appellant's statements, the events played out 26 January 2008 at approximately 5.43 a.m. on Langstrasse in Zürich, and are stated in fact as follows:

In the course of a verbal dispute, the Appellant was violently attacked by A. and another person. The reason for this was apparently a derogatory comment by the Appellant about Kurds. A., who himself is not of Kurdish origin, took the remark as cause to abruptly attack the Appellant. A. and another person kicked and punched the Appellant. A punch struck his face. The Appellant subsequently took out his pocketknife (blade length about 7 cm) and stabbed A. first against the hollow of the

45 *StGB* refers to the Schweizerisches Strafgesetzbuch, which is the German language version of the Swiss Criminal Code.

knee, which created a puncture wound approximately 4 cm deep. The Appellant, who was subjected to further punches and kicks, threatened the injured party that he would kill him if he continued. When the attack persisted, the Appellant stabbed A. in the flank (and in the shoulder). None of the injuries sustained by A. were life-threatening, however, the massive stab in the flank (8 cm deep wound) directed towards the spinal column at a slightly differing angle could have pierced vital organs.

The lower court recognised the Appellant's case in legal terms as attempted intentional serious bodily injury. Although the Court basically proceeded on the basis of a self-defence situation, it did however consider the use of the knife itself, and certainly the deep stab in the flank of the attacker as disproportionate. This is because it is impossible to execute such a stab without risking grave, even life-threatening injuries. What is significant is that the Appellant has not suffered any serious injuries himself. The cases he described, in which punches and kicks led to the most serious and occasionally fatal injuries, were exceptional cases. The Court was not entitled to assume that in every fight the victim's life is in danger. With his defensive actions, the Appellant had largely exceeded the limits of permitted self-defence.

The massive self-defence excess is also not excusable. The action with the knife is not to be understood as a desperate escape attempt, but as a targeted counter attack. According to his own statement in the investigation, the Appellant did not go into a state of fear during the attack, but rather became very angry, and found that he did not have to run away from such people.

2. The Appellant alleges a breach of arts 15 and 16 para 2 StGB. The lower court incorrectly recognised that he was guilty of exceeding self-defence by overstepping the limits of the defence in an inappropriate way. He was demonstrably attacked by two people with punches and kicks, and therefore had to reckon with considerable and even life-threatening injuries. To defend against an attack with hands and feet was not an option. The use of the knife was therefore justified, all the more so as he had used gradual degrees of counter-violence in the practical use of the knife. The first stab went into the knee. Only when the injured person continued or rather, refused to leave him alone, did he stab again. In his defence he had maintained the principles of proportionality and subsidiarity.

3.

3.1 If someone is attacked without cause or is directly threatened with an attack, then the attacked person and anyone else is entitled to ward off the attack in a way appropriate to the circumstances (art 15 StGB). If the defender exceeds the limits of self-defence, the court may still reduce the sentence (art 16 Abs 1 StGB). If they

exceed the limits of self-defence in excusable excitement or panic over the attack, they do not act culpably (art 16 Abs 2 StGB).

3.2 According to the case law the defence in a self-defence situation must appear proportionate in the totality of the circumstances. Above all, the severity of the attack, the interests threatened through the attack and the defence, the type of deterrent and its actual use, play a role (*BGE 102 IV 65*,[46] at 2a with references, particularly *BGE 79 IV* 148 at 1). The adequacy of the defence is to be judged on the basis of that situation, in which the illegally attacked person was found at the time of his act.

It must not subsequently be made too subtle a consideration about whether the attacked, could and should have been content with other, less drastic measures (*BGE 107 IV 12* at 3a with reference). This case law follows scholarly writing (see Kurt Seelmann in *Basler Kommentar, Strafrecht*, Bd. I, 2. Aufl. 2007, N. 12 to art 15 StGB; see also José Hurtado Pozo, *Droit pénal*, Partie générale, 2008, S. 239 Rz. 718).

3.3 Special restraint is necessary when using dangerous tools for defence (knives, firearms etc.), as their use always brings the risk of serious or even fatal injuries. The defence is appropriate if the attack could not have been averted with less dangerous and reasonable means, such as warning the offender, and if the defendant has taken the necessary precautions to avoid excessive damage before use of the dangerous tool. The legal interests at stake are also an essential consideration. However the result of this consideration must be obvious to the attacked person, who usually must act swiftly. (*BGE 107 IV 12* at 3b; for "adequate" defence in the sense of the case law, see also Günter Stratenwerth, *Die Straftat*, 3. Aufl. 2005, § 10 Rz. 75 and 76; Donatsch/Tag, *Strafrecht I, Verbrechenslehre*, 8. Aufl. 2006, § 19 Ziff. 5.2 S. 225 f.).

4.

4.1 That the Appellant found himself in a self-defence situation at the time when he defended himself with the knife, is rightly affirmed in the contested decision. The Appellant saw himself confronted with two attackers, who beat him with punches and kicks. Since he did not create the antecedent cause for the self-defence situation, or rather there was no provocation on his part preceding the defensive action, he was not obliged to avoid the unlawful attack, but was allowed to stand up for himself, or rather he was authorised to defend himself (*BGE 101 IV 119*).

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46 *BGE* refers to the *Amtliche Sammlung der Entscheidungen des schweizerischen Bundesgerichts*, the official German language collection of Tribunal judgments.

4.2 The view of the lower court, that the Appellant has exceeded the limits of the permitted self-defence, cannot be maintained however. The contested decision lies, in this respect, on a narrow conception of the scope of the power of self-defence in terms of an adequate defence based on the specific situation.

According to the findings of the lower court, the Appellant was attacked by two persons. He was therefore numerically and physically outmatched. The attackers kicked him with their feet and beat him with their fists. A punch hit the Appellant's face. For this reason, overall the attack proved to be in no way harmless, but was violent, if not brutal. Therefore, the view of the attacked or rather the Appellant, that he would be seriously injured due to further such kicks and punches – potentially leading to a serious fall - cannot be dismissed as unfounded. On the one hand, this happens all the time, which is why one may have a corresponding fear, and on the other hand, it corresponds to general life experience, that such acts of violence especially against a person's head area can lead to grave impairment of physical integrity (fractures, concussion, loss of consciousness or coma, cerebral haemorrhages etc.) Under these circumstances, the Appellant was not restricted to managing the dispute with bare hands and feet or trying to fend off the attack with sheer force of body. The right of self-defence not only gives the right to fend off an attack with the same means with which it occurs, but also with such that would enable an effective defence. This means that the defender may apply the anticipated effective means from the start (*BGE 107 IV 12* at 3b; Stratenwerth,a.a.O, § 10 Rz. 75). Given the nature and the severity of the attack, the numerical advantage of the attackers and the risk of also possibly sustaining serious bodily injuries in the course of the dispute, the Appellant cannot be accused of having actually fended off the attack with the knife. The use of the knife as such therefore does not appear to be impermissible from the outset.

However, the Appellant was obliged to exercise particular restraint in use of the knife. In principle, such can only be the last resort of defence. Therefore, the attacked person is required to threaten the use of the knife or warn the attacker. The Appellant did not do that, in fact he struck abruptly. It arises from the contested decision however, that the Appellant initially attempted a gentler or milder use of the knife for achieving defensive success, by which he "only" stabbed the knee, before reverting to a dangerous use of the knife. With this first stab he also attached the threat that the injured person would be killed if he continued. In other words, after a first mild or milder use of the knife, he indicated to the attacker or attackers his intention of an attack with more serious or even life-threatening consequences if they would not let him go. The attackers did not react to this, but continued their actions unperturbed, according to the findings of the lower court. Only at this point in time, after a relatively small dangerous defensive action combined with a verbal warning

of the danger threatening the attackers, which remained ineffective, did the Appellant stab the injured person in the flank (and shoulder) during the continuing attack. Under these circumstances, the type of defence, which was restricted in avoidance of excessive damage, cannot be considered disproportionate, contrary to the opinion of the lower court. The use of the knife, especially the stab in the flank, was essential in a successful defence of the attack, considering also the relationship to its severity from the point of view of imminent legal infringements.

It is to be noted, that the actual circumstances in the case at hand cannot be compared with those underlying *BGE 102 IV 228* or *BGE 109 IV 5*. In the aforementioned decisions, recognised as excess of self-defence, the attacked stood – unlike here – in each case, against a single attacker and he fought the punches and kicks, or the strokes with a cable, directly with one or more life-threatening knife wounds in the stomach – or the chest area of the attacker (see also the judgment of the Federal Court 6B_239/2009 of 13 July 2009 at 4.4).

4.3 In summary, the defence to be assessed in this case proves itself appropriate. Incidentally, no evidence exists that the Appellant should not have acted with defensive intentions. That he was made angry because of the groundless attack and executed a targeted counter-attack, according to the findings of the lower court, cannot push the defensive purpose of his actions into the background. The conviction for attempted serious bodily injury thus contravenes federal law. The lower court has to acquit the Appellant on this point. With the acquittal it will also have to reassess the damages and compensatory demands of the injured party.

V TRANSLATION NOTES

These notes are in three sections: the first is a general section covering any non-language-specific general translation points, the second and third sections contain specific features of each of the cases, *BGE 122 IV 1* (French) and *BGE 136 IV 49* (German).

A General

The format of the texts, including paragraph divisions, has been kept the same as the originals to preserve the structure of the judgments.

1 BGE 122 IV 1 (French)

There were several terms used in the decision which were not left as their literal translations. Two notable examples were "*tyran domestique*" or "domestic tyrant" and "*martyre*." The issue with the former is that it is unclear what this means in English, since tyranny can have many different implications. However on the facts of this case, the Appellant's husband was extremely violent, and it was determined appropriate that he be referred to as a "domestic abuser."

The issue with describing the Appellant as a "*martyr*" is that this is not a New Zealand legal term, and it would be unusual to depict the Appellant in the circumstances of this case as a martyr. To say "she suffered from domestic violence" is an accurate statement, however it is less easy to resolve the final sentence, "*Mais le Code pénal permet, le cas échéant en présence d'excuse absolutoire de disculper celui que tue pour mettre fin à un martyre*." It is possible to simply replace "*martyre*" with "domestic violence," however it is not clear from the wording of the case if this is what the Court actually intended. Because of this uncertainty, it was left in the English translation as "martyrdom," preserving the ambiguity. This was a circumstance where *skopos* gave way to literalism and fidelity to the ST.

Another interesting term used was "*le bien*" or "the good" at point 2b of the case, referring to the lives at stake. Because these "goods" are explained as being the spouses' respective lives, initially seeking an alternative translation was not a priority. The meaning was clear from context, despite the very foreign turn of phrase for English readers. Upon revision however, it was determined that to change "goods" to "interests" would maintain the Tribunal's expression that a balance of the relative value of "the goods" was necessary; this was essential to the decision, and made the translations more readable.

There was some initial difficulty with the repeated used of "*putatif*" / "*putative*". The direct English translation is "putative", its definition being "generally considered or reputed to be."[47] Originally an attempt was made to translate this as "supposed" / "supposedly" but in the Swiss context it is a legal term used in combination with self-defence / state of necessity, meaning that the self-defence / state of necessity is based on the defendant's mistaken belief, something which is confirmed in *BGE 125 IV 49*.[48] In New Zealand, in assessing self-defence, there is a requirement to consider the circumstances as the defendant believed them to be,[49] meaning that if they are mistaken this does not necessarily negate the defence. This is essentially the same as "*légitime défense putative*" / "*nécessité putative*" because in both systems the court must decide whether the defendant's actions were proportionate based on the circumstances as the defendant believed them. However, for the translations, these were left as "putative" as it occurs within the ST because it is classed as a different type of self-defence / necessity defence due to the mistaken fact, whereas in New Zealand it is an implied consideration when applying the statute.

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47 *Oxford Living Dictionaries*, "Putative".

48 *BGE 125 IV 49*, at [C].

49 Crimes Act 1961, s 48.

2 BGE 136 IV 49 (German)

Most of the German text had natural equivalents in English; however there was one instance where a more literal translation of a legal term was not changed, in the third paragraph of point 1 of the judgment. The original German reads, "*eventualvorsätzliche versuchte schwere Körperverletzung*," which was translated as "attempted intentional serious bodily injury." The meaning here is clear, and so it was not changed to the phrase with which one would naturally associate this concept in English, which is that of s 188 of the New Zealand Crimes Act 1961 (assault), "wounding with intent to cause grievous bodily harm." The unofficial English translation of the Code on the Swiss Federal Council website, also translates art 122 assault as "intentional infliction of serious injury."[50] The reason for leaving this as the literal translation, was because change was not necessary in order to communicate the meaning of the ST. In this instance, a decision was made to not domesticate the text, and rather retain some of the foreignness, also bearing in mind the unofficial English translation of the Code.

VI CASE ANALYSIS

Common Law differs from Civil Law in that the courts actively shape the law through interpretation of legislation. Courts are therefore required to apply and follow previous decisions when fact situations are comparable unless the decision was that of the same- or lower-level court. Civil Law, however, draws its law primarily from codes and precedents are not binding. Article 1 of the Swiss Civil Code states:

1. The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
2. In the absence of a provision, the court shall decide in accordance with the customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.
3. In doing so, the court shall follow established doctrine and case law.

Courts are free to deviate from prior decisions. While this is not infrequent, judges still rely on prior decisions as part of their decision-making process in cases that are not clearly covered by provisions in a code.[51] This reliance is demonstrated in both the cases studied here: there are five judgments referenced in the French case, and nine in the German case. Of the five French case references, two are German (*ATF*

50 Swiss Criminal Code, art 122.

51 Voyame, above n 12, at 7.

108 IV 120 and *ATF 109 IV 156*). All nine cases in the German judgment are German language cases.[52]

Another major difference between Common Law and Swiss Civil Law cases is the role of extra-judicial scholarship. In Common Law jurisdictions, extra-judicial writing from scholars may supplement arguments, but it is not used as authority for a decision. In Switzerland, legal scholarship is an essential consideration in deciding judgments. Voyame explains:[53]

> The judge often bases his opinion on the works of legal scholars. The opinions of certain writers exercise a profound influence on those responsible for making decisions. Criticism made by particularly influential legal scholars often leads to the abandonment of solutions that have been well established in decided cases.

As with case law, legal scholarship is to be followed according to the Civil Code art 1. The Tribunal in the French judgment cites five scholarly works, an expert committee report authorised by the Federal Council, and two German legal publications that publish and provide database access to over 50,000 German judgments. Both the French and the German cases reference German and Swiss criminal law scholar Günter Strathenwerth, but they cite different works. Four different scholars are referred to in the German case, eg Kurt Seelmann, a German legal philosopher and criminal law expert. One of the scholarly works was written in French by José Hurtado Pozo; this is the only reference in the decision to anything not in the German language.

By contrast, it is apparent throughout the French judgment that it was not written in a solely French-language context. A number of words and phrases are given their German and Italian equivalents within the judgment, such as "danger (*Gefahr; pericolo*)" at paragraph 3a of the judgment, and the expression "impossible à détourner autrement (*non altrimenti evitabile; nicht anders abwendbare Gefahr*)" at paragraph 3c. This technique could potentially reduce confusion for readers, assist translators who then have multiple authoritative translations of key terms if there is any ambiguity in meaning, and help legal researchers in keyword searches when they search a term or concept in only one language.

The Tribunal in the French-language case also draws (in paras 3b and 3c) on Germany's law on self-defence / necessity in regard to an abused wife who killed her husband, because there was insufficient Swiss commentary on the point. In doing so,

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52 This may raise issues of unequal treatment of official languages before the law, but this would require research into other German language cases to determine if this is prevalent.

53 Voyame, above n 12, at 8.

the Tribunal first states how the statutory provisions are similar in practice, then looks to German scholarly commentary, and then to decisions from the German Federal Court, essentially examining the German law using the same methods that the Tribunal would apply to Swiss law.

VII CONCLUSION

Translation requires a constant balance between foreignising and domesticating. When confronted with this during the translation process, it was useful to apply *skopostheorie* to help make decisions, the *skopos* being to create translations that were comprehensible but did not distort Swiss law. This required weighing readability against fidelity to the ST and the Swiss legal system. This balancing became most notable when considering a particular legal term, such as "*putative*." Although it may have a functional equivalent in English, to use this functional equivalent would be to lose the term's specific significance in its Swiss context. To ensure comprehension by the target readership, the translator may take a further step and include a note about the term that has not been domesticated, particularly if doing so would highlight a special feature of the ST's law.

For the comparative lawyer in New Zealand looking to Switzerland for guidance on how the judiciary may operate with multiple languages for potential future Te Reo incorporation, there are several things that these translations may reveal. First, it could be helpful to supply in-text annotations or glosses to clarify what the corresponding term is in the other language. Second, the French case shows that having a multilingual legal system need not preclude courts looking to other jurisdictions for guidance. Third, previous legal decisions can be referenced regardless of language.

On a more immediate and pragmatic note, what this case study clearly demonstrates is that establishing an overall *skopos* for a translation provides valuable guidance at the micro-level of sentences, concepts and individual terms. Clarity of end-purpose determines the translational process.