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Translation Policy in the Constitutional Courts of Western Europe: Authenticity vs. Authority*

Mathilde Kamal-Girard

Université de Guyane (France) / University of French Guiana
Laboratoire MINEA (UR 7485)
mathilde.kamal-girard@univ-guyane.fr
https://orcid.org/0009-0005-0697-1224

Abstract. This paper deals with the translation policy in the constitutional courts of Western Europe. These courts, which are set in unilingual systems, employ 'disseminative translations' as part of a mutual strategy of influence. More precisely, the aim of the article is to demonstrate a distortion between what a constitutional court intends to translate, what the court effectively translates, and how a counterpart court receives it in another legal system. The paper emphasizes the concept of translation authenticity in these courts and its consequences on normativity. Furthermore, it underlines that even with a lax conception of authenticity, these translations have a normative effect—albeit indirect.
Keywords: legal translation; constitutional courts; precedents; legal sociology; strategical analysis.

Vertimo politika Vakarų Europos konstituciniuose teismuose: autentiškumas ir / arba autoriteto įtvirtinimas

Santrauka. Straipsnyje nagrinėjama vertimo politika Vakarų Europos konstituciniuose teismuose. Šiuose teismuose, veikiančiuose vienakalbėse sistemose, naudojami sklaidos vertimai kaip abipusės įtakos strategijos dalis. Straipsnyje siekiama išryškinti neatitikimą tarp to, ką konstitucinis teismas ketina išversti, ką teismas iš tikrųjų išverčia ir kaip tą priima analogiškas teismas kitoje teisinėje sistemoje. Taip pat pabrėžiama, kaip šiuose teismuose suprantamas vertimo autentiškumas ir kaip ši samprata veikia normatyvumą. Pažymėtina, kad net ir laisvai interpretuojant vertimo autentiškumą, šie vertimai turi – nors ir netiesioginį – norminamąjį poveikį.
Pagrindiniai žodžiai: teisinis vertimas, konstituciniai teismai, precedentai, teisės sociologija, strateginė analizė.

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Introduction

At the beginning of this research about translation policy in the constitutional courts of Western Europe was the observation of an increasing phenomenon in some courts set in unilingual legal systems: they translate their judgments, although there is no legal requirement to do so. The first step of my research consisted in observing this phenomenon before the constitutional courts set in France, Spain, Portugal, Italy and Germany. The particularity of these translations regarding law is that they are not meant to be normative. Normativity is the obligation for the subjects of law to obey legal norms. In unilingual systems, translations of court judgments do not need to have legal effects within the national audience, comprising citizens or foreigners under the court's jurisdiction. Instead, these translations are targeted at a foreign audience interested in understanding the organization of another legal system. For scholars and researchers, this facilitates comparisons between different legal orders, while courts and tribunals might use translations to explore more appropriate legal solutions. These observations lead to two key remarks.

Firstly, this paper does not deal with translations made in bilingual/multilingual systems, where constitutional or supreme courts' decisions have to produce direct legal effects in all official languages, so that all linguistic versions must produce the same effects on the law subjects. The translations I will study here are not normative. This is the reason why I call them 'traductions cognitives' when I work and publish in French. It was a real difficulty to find the appropriate terminology in English, as the literal expression 'cognitive translation' does not really fit.[1] The first objection to the term of 'cognitive translation' is that it appears artificial, for it is close to 'informative translation.' The difference between 'cognitive translations' and 'informative translations' is that the first ones aim at the institution itself (justices, but also services inside the court) (Scarpa 2011: 230), whereas the second ones aim at an audience outside the court (other constitutional or supreme courts, but also law scholars and students, lawyers, etc.) (Kamal-Girard 2022: 248). Even if we consider that 'informative translation' is not the suitable expression to speak about the translations described hereupon, and that we need another notion to describe the phenomenon, one can object that using 'cognitive translation' may lead to more confusion. The criticism comes from the collision of both languages and fields. 'Cognitive translation' designates studies about the translation process, named in France *approche cognitive de la traduction*.

[1] I used that literal expression during my presentation at the conference *Translation, Ideology, Ethics: Response and Credibility*, Vilnius University, Lithuania, 22–24 September 2022. I would like to thank Gökhan Fırat (University of Surrey), Joseph Lambert (Cardiff University) and Adrià Martín-Mor (California State University Long Beach) for discussing it and for their very constructive critics about the translation of *traduction cognitive*. This paper owns them a lot.

The second difficulty lies in the specific focus of Law Studies. One thing very important for us, lawyers and law scholars, is to know what is normative and what is not. In the expression 'traduction cognitive,' I use 'cognitive' as the opposite of 'normative,' as something made to give the audience knowledge related to the courts' rulings, thanks to translation. I must admit that a literal translation of the adjective 'cognitive' was not the right way to make my point. From now on, when I will present the subject of my research in English, I will use the expression 'disseminative translations.'

After conceptualizing and classifying disseminative translations, I went a step further, taking a historical and sociological approach. Translation in the constitutional courts of unilingual systems began in the 1980s. At that time, courts became aware that they were entangled in a web of courts, including other national courts, as well as supranational courts such as the CJEU and the ECHR. Constitutional courts wanted to spread their own case law to other courts, promoting their legal grounds and solutions in some way. However, the professionalization and organisation of translation units was an ongoing process and still varies significantly from one court to another, leading to variable results. What we find under the name 'translations' on the constitutional courts' websites can be mere summarized translations, sometimes realized by people who are not professional translators—for instance, junior lawyers in internships, whose mother language is the target language of the translation—or translations with excised parts. The practises are not unified, even within a single court.

Now I would like to come to the crux of the matter. We have translations that are not made to create direct normative effects, although they are clearly made to influence other constitutional courts. The use of foreign precedents is characteristic of this influence. Some constitutional courts make explicit references to judgements ruled by foreign courts (Germany, Spain), while others simply allude to them (France) (Le Quinio 2014: 594). That means that a court can quote a translated decision to use it as a motive of its own ruling. By doing so, it will give disseminative translations an *indirect* normative effect. What I aim to show here is that there is a distortion—real or potential—between the translation published and the translation received, and that distortion can produce effects on legal aspects.

1. Disseminative Translations: Meaning above the Content

Constitutional courts of Western Europe set in unilingual systems use translation as a strategical operating mode (Kamal-Girard 2023). Putting the meaning above the content itself, sometimes putting aside the authenticity of the translation, they aim at giving a specific vision of their case law.

1.1. Lax Authenticity

A numerous part of disseminative translations are not 'full' translations. Most of them are condensed translations, achieved through synthesis, excision or both.[2] The constitutional court that employs condensed translations the most is the Constitutional Court of Portugal. On its website, the Constitutional Court of Portugal offers a selection of translated decisions—*Jurisprudência traduzida*—as 'summaries.'[3] These summaries impel readers to interpret the decisions the way the Court intends. If we examine the presentation of the rulings in Portuguese—*Acordão*—we immediately observe that the Court has chosen to differentiate it from the presentation of the 'summaries.' Some information is missing in the target language—in this case, English—such as the proceeding number of the judgment, the ruling information, and the rapporteur. However, some information has been added, such as the subject matter. We can make another comparison, this time between two kinds of summaries that can be found on the website of the Constitutional Court of Portugal. On the one hand, there are summaries made in Portuguese—*Decisões Sumárias*—and, on the other hand, there are summaries made in English—*Summaries*. The decisions that are summarized are not the same, depending on whether the Court addresses the national audience (in Portuguese) or a foreign audience (in English), and vice versa. The Court's intentions are clear, as it chooses what the audience should read, how it should be read, and by whom it should be read. Translations form a specific discourse, whose production is controlled (Foucault 1971).

A summary is "*a short, clear description that gives the main facts or ideas about something*" (*Cambridge dictionary*), but also a "*short statement that gives main information about something, without giving all the details*" (*Longman dictionary*). Summarizing is selecting the information, choosing what is 'main' and what is not, as well as choosing how much 'main' must be translated. It is a two-level selecting process: the court shows what should be considered as the main rulings of each year and what should be considered important inside these rulings. Indeed, there are different levels of summarizing: from 'full text version' to plain summaries, passing by 'extended summary version.' Nonetheless, the Constitutional Court of Portugal goes further by choosing what is important for a foreign audience. In brief, the whole comprehension is imposed by indicating the subject matter, specifying keywords, adding headnotes—a summary of the summary—and in some cases, supplementary information at the end of the summary. This lax conception of authenticity is a real demonstration of authority by the Court.

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2 In French, the terminology I use is the following: *traductions résumées*, *synthétisées*, *parcellaires et mixtes* (Kamal-Girard 2022: 251).

3 https://www.tribunalconstitucional.pt/tc/en/acordaos/

The translation policy at the Constitutional Court of Portugal is the most significant example of a lax conception of authenticity and its consequences. Nevertheless, not all Courts studied here act the same. Some Courts put forward 'full' translations. Which makes us wonder if this policy aims at more authenticity and, consequently, at a less authoritarian way of considering the translation.

Let us focus on the cases of the Federal Constitutional Court of Germany—with the tab 'decisions'[4]—, the Constitutional Council of France—with the tab 'case law'[5]—, the Constitutional Court of Spain—also with the tab 'case law'[6]—and the Constitutional Court of Italy—with the tab 'judgments.'[7]

When you go on these Constitutional Courts' websites, you might easily imagine that you will find full translations. In fact, you can encounter them quite frequently, but they are not always complete translations. Some Court explicitly informs you, e.g. the Federal Constitutional Court of Germany states clearly that "*Translations are generally abridged*;"[8] other Constitutional Courts also abridge their decisions, but do not have any disclaimer. I would like to underline the meaning of the word 'abridged' here before developing further. The adjective 'abridged' signifies something slightly different from 'summed up.' "*An abridged book, play, etc. has been made shorter but keeps its basic structure and meaning*" (*Longman dictionary*). When abridging a translation, the Constitutional Courts retain the structure of the translated rulings, ensuring that the judgment's various parts are well identified. Some parts are not translated at all—usually those relating to the proceedings, while other parts are fully translated—typically those concerning the legal grounds and solutions. The postulate is also that these translations preserve the meaning of the judgments, leading to the conclusion that the Courts consider this goal achieved even if less important parts of the rulings are omitted.

We realize here that the implicit postulate is that the audience is not interested in knowing the proceedings, only the substantive rights, and that you can cut off a reasoning path without altering the meaning of a judgment. This represents a very specific vision of the Constitutional Courts' case law displayed by the Courts themselves.

4 https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html;jsessionid=FE42BF80F55C6DFD10FA4C6F659E45E7.2_cid319

5 https://www.conseil-constitutionnel.fr/en#autres

6 https://www.tribunalconstitucional.es/en/paginas/default.aspx

7 https://www.cortecostituzionale.it/actionJudgment.do

8 For an example: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html.

1.2. Specific Vision of the Court's Case Law

This overview of the translation policy in the constitutional courts of Western Europe brings up various issues related to Law Studies, Translation Studies and Legal Translation Studies. I report here on some of them.

One puzzling point is that proceedings appear somewhat as a 'minor law' in the translation policy of the constitutional courts of Western Europe. Scholars in Law have demonstrated that lawsuits are as essential as substantial fundamental rights (Chiovenda 1930; Motulsky 1964). However, the legal system is usually conceived through substantial human rights. Are substantial rights then more important than procedural rights? Certainly not, if we consider that lawsuit is a guarantee to fundamental rights, and that there is no thick border between procedural and substantial rights. This argument is based on the ECHR's jurisprudence about Article 6, as due process of law is both a procedural and a substantial right. This leads to another question: do the Constitutional Courts studied here believe that proceedings constitute some kind of minor law? It appears that their point is more strategic than ideological. One cannot easily transpose proceedings from one legal system to another. On the contrary, one can adapt substantial rights with some flexibility, vary the argumentation a little, and transform a solution to make it fit the legal order.

Courts, which have limited human and material resources in translation, focus their policy on the parts of the decisions that can influence their constitutional counterparts. Some of the fallouts are visible, while others are more subtle. Certain Constitutional Courts, such as those in Spain, Germany, and Italy, do quote the jurisprudence of other Courts (Conference of European Constitutional Courts 2017). Others, like the Constitutional Council in France, do not cite decisions ruled by foreign Courts but import foreign legal solutions (Le Quinio 2014). Thanks to translation, there is a mutual reception of the Courts' jurisprudence inside Western Europe—and beyond. Besides, the circulation of legal solutions involves constitutional courts as well as supreme courts, in both unilingual and multilingual legal systems.

Another ambiguous point is linked to the paratext of the translations. Both the Spanish and the German Constitutional Courts have disclaimers to their readers. When searching for translated decisions on the Federal Constitutional Court of Germany's website, there is an alert: "*Please note that only the German version is authoritative. Translations are generally abridged.*"[9] On the Constitutional Court of Spain's website, the warning is slightly different. As a headnote in some translated judgments, one can read: "*This translation is not official. In case of discrepancy, the Spanish version*

[9] However, the mention does not figure for the six translations from German to French.

prevails." Besides, as a preamble above all decisions translated by the Court, you find the following sentence:

> These are not official translations of the Judgments: the texts are provided to allow the consultation of legal grounds and the knowledge of the Court's case law.[10]
>
> *La traduction des jugements n'est pas officielle : elle est proposée* ***à titre d'information*** *et dans le but de faciliter la consultation des arguments juridiques contenus dans les décisions rendues par le Tribunal Constitutionnel.*[11]

Let us first consider the Constitutional Court of Spain. Both versions of the preamble are similar—using the word 'official' but also slightly different, particularly in the second part of the sentence. The terms 'official' (in English) and 'officiel' (in French) bear resemblance.[12] However, the disclaimer in French includes another idea, brought by the second part of the sentence. Consequently, should we focus on the word *officiel* or should we have an entrenched reading of both parts of the sentence? The latter case implies that we must focus on the audience: an external audience, a foreign audience, seeking to easily consult the legal arguments. Consequently, we can infer that 'not official' means here 'not authentic.'

The Federal Constitutional Court of Germany employs another semantic field, underlying that "only the German version is authoritative,"[13] which applies to both abridged and complete translations. The word "authoritative" holds both a common and a legal meaning. On the one side, "*an authoritative book, account etc. is respected because the person who wrote it knows a lot about the subject*" (Longman Dictionary); on the other side, 'authoritative' signifies what is "*able to be trusted as being reliable, true, or accurate,*" what is "*coming from an official source; having the force of law*" (World Law Dictionary). The Federal Constitutional Court of Germany indicates that its translations are not authentic—which is understandable as they are generally abridged—but also underscores that they are not normative.

While we may agree with the idea that disseminative translations are not authentic, the link between unauthenticity and a-normativity is less obvious and requires further consideration.

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10 https://www.tribunalconstitucional.es/en/jurisprudencia/Paginas/resoluciones-traducidas.aspx

11 https://www.tribunalconstitucional.es/fr/jurisprudencia/Paginas/resoluciones-traducidas.aspx

12 Official: "approved of or done by someone in authority, especially the government" (Longman Dictionary) / *Officiel: "Qui émane du gouvernement ou d'une autorité administrative reconnue" / "Qui est certifié par l'autorité publique ou une autorité compétente" (Dictionnaire Trésor de la Langue Française).*

13 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html. The Constitutional Council (France) uses a similar sentence: "*These translations are published solely for reference. Only the original French versions are the authoritative texts.*" For an example: https://www.conseil-constitutionnel.fr/en/decision/2013/2013669DC.htm.

2. Disseminative Translations: A Wavering Normativity

The disseminative translations are not directly normative. Nonetheless, they are *indirectly* normative. We have the proof that they circulate inside the web of constitutional courts. As the indirect normative effect of disseminative translations does exist, it implies that courts should implement a more ethical approach to translations they aim to publish.

2.1. Indirect Normativity

Access to legal solutions ruled by constitutional courts is a way to influence their constitutional counterparts. This influence can take numerous aspects, and produce an indirect normativity with a variable strength. One good example of the circulation of legal solutions through translation policy is about the constitutionality of the same-sex marriage. The Constitutional Court of Spain is used to mentioning the jurisprudence of other constitutional courts in its decisions. It was the case with the *Sentencia STC 198/2012* of November the 6th 2012. If we look closer at the decision, the Constitutional Court of Spain does not quote any part of the foreign precedents mentioned: it simply underlines how each legal system deals with the matrimonial issue. The Court does not motivate regarding one particular legal solutions. The decision emphasizes a change of paradigm in many states towards the acceptance of homosexual unions. At the end of the decision, the court holds the same-sex marriage constitutional. The reason why disseminative translations are generally condensed is clear: a constitutional court's influence generally goes through the spread of the main idea of the judgement—not the details.

One year later, the French Parliament adopts a law on the very same subject and an action of unconstitutionality is brought before the Constitutional Council of France. It is not in the Constitutional Council's tradition to mention precedents—even more foreign precedents (Le Quinio 2014)—and we cannot find any mention of a court's judgment in the *décision n° 2013-669 DC* of May the 17th of 2013. However, preparatory work for the decision mentions the ruling of the Constitutional Court of Spain and presents its translation. If we look thoroughly at the preparatory work—called *dossier documentaire annexe-Eléments de comparaison*[14]—we can find the reference to three decisions. The first one is from the Constitutional Court of Belgium. As it is in French, there is no problem concerning the translation. The second one is from the Constitutional Court of Spain and the third one from the Constitutional Court

[14] https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2013669dc/annexedoc.pdf.

of Portugal. For the latter two judgements, a translation was needed. This translation existed from Spanish to French and was added to the file. There is nothing else with reference to the Portuguese decision, the document simply stating that the decision was not available in French.[15] We have a proof of the use of a disseminative translation outside the state it comes from, in its whole length. On the other side, the influence is more subtle to measure, even if the Constitutional Council rules that the law on the same-sex marriage is constitutional. There is no hint of the decision ruled by the Constitutional Court of Spain within the decision itself.

The dialogue between the Constitutional Courts through translation has reached another level when the Constitutional Council decided to translate the decision on the constitutionality of the law providing for same-sex marriage into English, Spanish and German. We can suppose that translation into English aims at a global audience (Kamal-Girard 2022), but that the Spanish and German versions are specifically dedicated to the Constitutional Courts concerned. The translation into Spanish will allow the Constitutional Court of Spain to compare its own decision with the French one. The translation into German could be useful for the Federal Constitutional Court of Germany if it stated on the constitutionality of a potential future law on same-sex marriage in Germany. When the Constitutional Council of France translated its decision, Germany did not have legislation about same-sex marriage—only about civil unions. The Parliament adopted the law "*Ehe für alle*" in 2017. As no action of unconstitutionality was held before the Court of Karlsruhe, we do not know how it would have been used: mentioning the precedent, quoting the decision, and so on. However, the Court *could* have used it, giving the translation an indirect normativity into the German constitutional order.

The example of the same-sex marriage legislation and rulings in Western Europe makes us consider translation as an operating mode, which produces actual or potential indirect normative effects. Constitutional courts use and manipulate translation as a tool either in dissemination and assimilation processes. Translation serves to share legal grounds and solutions, and constitutional courts choose what subjects they want to influence other courts on. The horizontal relationships between the courts—no hierarchy here—make translations a soft power. Nevertheless, as soft as it can be, this power is still a power, and thus courts should consider using it in a more ethical way.

[15] *Ibid.*, p. 24. Nevertheless, there was a translation available in English: https://www.tribunalconstitucional.pt/tc/en/acordaos/20100121s.html.

2.2. Improving the Ethical Approach

While they seek to influence their counterparts, courts analyse translations as a resource with a chance of great success (Paour 2019). Translating a decision is never a neutral choice for constitutional courts. In this process, a constitutional court emitting translations can tell if they are authentic or not, directly normative or not. However, translations are there to be read and to be used for comparison by other courts—that is the purpose of disseminative translations. We have shown that courts can refer to translated decisions in their preparatory works or in their rulings, but translated decisions can also serve parties' or *amici curiae*'s argumentation. The movement of translations, passing from one court to another, more or less immediately has two consequences. The first one is that an a-normative translation in the source legal system can turn out to be normative in the target legal system. The second one is that an unauthentic translation in the source legal system can become authentic when quoted in the target legal system. For these reasons, constitutional courts should be cautious in either spreading translations or including them in their decisions. This means improving their ethical approach.

At this point, I need to cross this analysis with the history of translation in the European constitutional courts. The courts that notify the audience regarding the non-official or non-authoritative nature of translations tend to be those with highly professional and well-established translation units. At the present time, the structure and composition of translation departments in different courts vary significantly. However, the scheme seems to rely on three main steps. At the first stage, courts externalize their translations. The Federal Constitutional Court of Germany started like that in the eighties; the Constitutional Council of France still works like this. A further step starts when a professional translator is hired. In the 2000s, the Federal Constitutional Court of Germany hired a part-time translator; there is one translator at the Constitutional Court of Spain; recently the Constitutional Court of Italy has announced a job offer for a professional translator to create a specific translation unit.[16] The last step takes place when a court organizes the translation unit with various translators working as a team, such as in Germany and Italy. As the construction of the translation units goes on in a very practical way, these stages sometimes partially mingle. For instance, at first foreign internee lawyers of the Documentation Department used to do translation in the Constitutional Council of France. In Spain and Germany, the in-house professional translators of the Court make most translations, but the Court may call external translators, if needed. In Italy, there already exists a comparative law section with pro-

[16] *Corte costituzionale, Uffizio comunicazione e stampa della Corte costituzionale, Comunicato del 29 aprile 2022. Selezione di esperti in lingue straniere*, https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_.

fessional translators, but a proper translation unit seems to be emerging on the side of the comparative law section.

This sociological insight allows us to understand that translation units in the constitutional courts set in unilingual systems sometimes lack the means and resources, either human or material. We understand the need to focus on the 'main' rulings and their 'main' parts better—this strategy is based on the initial resources. In this context, we read alerts about 'unofficial' and 'not authoritative' translations as an ethical posture. Even if the translated decision appears of high quality, translation units know the limits and weaknesses of their work, and warn us, readers. It is how we explain that the Constitutional Court of Spain sometimes adds as a headnote in translated decisions that "*in case of discrepancy, the Spanish version prevails.*"[17] Perhaps, such a warning should appear in all constitutional courts for all translations, all the more so if the courts continue publishing condensed translations, either by summarizing or excising them.

As the audience must be wary about disseminative translations emitted by constitutional courts, the audience must also be cautious about the way the courts integrate them in their decisions. It implies a more specific approach to disseminative translations by the courts receiving them in their own legal system. For instance, when the Constitutional Council refers to the translated judgment of the Constitutional Court of Spain on the law on same-sex marriage,[18] it never indicates if the translation is from the Constitutional Court of Spain or comes from its own departments. In this case, the translation is from the Constitutional Court of Spain[19]—but the warning has disappeared. In this particular case, the mindless absence has little consequences. The translation is used in a preparatory work, not in the decision. Besides, the decision itself does not mention any precedents, even less quotes precedents. How would the Court have dealt with the opposite situation—quoting the translation in its own decision? How should constitutional courts deal with that issue? For we know that they will have to, as their strategical influence through translation does work. This is the next step, and constitutional courts should begin to think about it—and us, scholars too.

Conclusions and Discussion

The interactions produced by disseminative translations create both linguistic and legal effects. The status of translations can be very different from one case to another (unofficial, unauthentic or unauthenticated, non-normative). Furthermore, the status can move

[17] For an example: https://www.tribunalconstitucional.es/ResolucionesTraducidas/2020-1474STC_EN%20con%20formato.pdf.

[18] https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2013669dc/annexedoc.pdf.

[19] https://www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2012-14602.pdf.

from one (non-normative for instance) to another one (most likely, normative). All these evolutions are clues to identifying the translation function as a form of soft-power. The way these changes manifest is often influenced by practical considerations, such as the available conditions and resources. Throughout this entire process, as translation is an integral part of the strategic influence between constitutional courts, the courts should reflect on how the translated decisions will be used. This would lead to a more ethical approach to the issue.

Nonetheless, the research raised many other questions. Firstly, it would be necessary to know better how disseminative translations are used by justices and by parties, in either preparatory works or decisions. Secondly, the way translations are quoted—if they are—should be studied as well. Are they quoted from a disseminative translation? Is there a double check, with the original version, in a foreign court? There are certainly even more issues to deal with, for disseminative translations is a new field to investigate.

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