

South African Constitutional Court's Decisions as Tools for Litigants Abroad

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Abstract

The South African Constitutional Court's participation in global judicial dialogue has been documented and appraised. Indeed, since its founding, Justices have referred to and discussed many foreign judicial decisions. But how has the Constitutional Court's case law influenced debates before other courts?

The approach of this contribution is to look at South African constitutional jurisprudence as a 'sender' of information. It scrutinizes some landmark cases of the US Supreme Court and the European Court of Human Rights on issues similar as those decided by the South African Constitutional Court to see whether the South African precedents were considered. More specifically, the content of the parties' submissions and the amicus curiae briefs submitted in these landmark cases are analyzed to see whether South African cases are referred to and in what form. The contribution also explores which actors refer to South African cases and to what purpose they cite South African cases.

Two themes have been chosen to undertake the analysis: cases concerning inhuman and degrading treatment and cases on sexual orientation. This principally requires looking at the legacies of *S. v. Makwanyane* and *Mohamed v. President of the Republic of South Africa* in death penalty and extraditions cases and *National Coalition for Gays and Lesbian I and II*, *Du Toit* and *Fourie* in sexual orientation cases examined in Washington and Strasbourg.

It is found that South African precedents, which themselves encapsulate external influences, now serve litigants worldwide to argue their point of views. The ground-breaking cases coming from a relatively young Court are used, mainly in amicus curiae briefs, as resources to advance the interpretation of human rights. However, these references do not (yet?) find an explicit and 'engaging' echo in the judgments of the US Supreme Court and the European Court of Human Rights.

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1. Introduction

Judicial dialogue (and other closely related topics such as comparative constitutional law, transnational cross-references etc.) has become the cradle of a huge amount of academic scholarship, especially in the US. Although the South African Constitutional Court holds an important place in this landscape,² its activity has been analyzed mainly as a 'receiver'³ and not as a 'contributor' to judicial dialogue. This article looks at South African jurisprudence from the other perspective: how does the South African Constitutional Court cases nourish case law elsewhere?⁴ The hypothesis is that South African precedents, which themselves encapsulate external influences, now serve litigants worldwide to argue their point of views. The ground-breaking cases coming from a relatively young Court are used as resources to advance the interpretation of human rights elsewhere and feed an ever-growing transnational judicial dialogue.

I have chosen to look for traces of references to the South African Constitutional Court case law in the activity of two important, influential courts:⁵ the United States Supreme Court and

² As Prempeh frames it, the South African Constitutional Court "has emerged as the undisputed favorite of comparative constitutional law scholars and social scientists"; H. Kwasi Prempeh, « African Judges, in Their Own Cause: Reconstituting Independent Courts in Contemporary Africa », *International Journal of Constitutional Law* 4, n° 3 (2006): 592.

³ See for example Hoyt Webb, « The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law », *University of Pennsylvania Journal of Constitutional Law* 1 (1998): 205; A. Lollini, « Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court », *Utrecht Law Review*, Vol. 3, No. 1, pp. 60-74, June 2007, 2007; A. Lollini, « The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law », 2012; Christa Rautenbach, « South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010) », in *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing (Oxford: Groppi T. & Ponthoreau M.-C., 2013), 185-209; D. M. Davis, « Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience », *International Journal of Constitutional Law* 1, n° 2 (2003): 181-95.

⁴ There are authors who have adopted a similar approach, but they merely pointed out that foreign jurisdictions *could* be inspired by South African cases. However, they have not examined if such an inspiration has already taken place. See Heidi Joy Schmid, « Decriminalization of Sodomy under South Africa's 1996 Constitution: Implications for South African and U.S. Law », *Cardozo Journal of International and Comparative Law* 8 (2000): 163. Adrien K. Wing, « The South African Constitution as a Role Model for the United States », *Harvard BlackLetter Law Journal* 24, n° 73 (2008); Adrien Katherine Wing, « The Fifth Anniversary of the South African Constitution: A Role Model on Sexual Orientation », *Vermont Law Review* 26 (2002): 821; Mark S. Kende, *Constitutional Rights in Two Worlds* (Cambridge University Press, 2009); Mark S. Kende, « The Constitutionality of the Death Penalty: South Africa as a Model for the United States », *George Washington International Law Review* 38 (2006): 209; Carol S. Steiker, « Pretoria, Not Peoria - S v. Makwanyane and Another, 1995 (3) SA 391 », *Texas Law Review* 74 (1996): 1285.

⁵ See for the choice to compare these courts: Robert Wintemute, *Sexual orientation and human rights. The United States Constitution, the European Convention and the Canadian Charter* (Clarendon Paperbacks, 2002), 3-4 and Kende, *Constitutional Rights in Two Worlds*, 4.

the European Court of Human Rights.⁶ I expressly look at the 'litigation activity' before the courts and not only the judgments, as it is known that "the Supreme Court has not yet cited a South African Constitutional Court opinion"⁷ and because the situation before the European Court is less documented.⁸ It has indeed been repeated numerous times that by focusing on 'end references', i.e. cross references in the judgments, one might miss the complete picture, as comparative elements may be discussed but then not cited ultimately. I chose to narrow down the number of cases by focusing on questions raised in death penalty and sexual orientation cases (more particularly, on one side the death penalty and the issue of extradition and on the other side, cases related to the decriminalization of sodomy and marriage of and adoption by same-sex couples). These two topics were chosen for various reasons. First because the two cases which really spurred the heated debate on cross-references in the US – *Lawrence v. Texas* and *Roper v. Simmons* – are part of these two themes, which have been designated as strong examples of sites where judicial dialogue could take place.⁹ Second because the cases encompassed in those two themes are often 'hard' ones, which "provoke sharp conflict between interpretive choices (...) and produce heated moral debate in the public sphere".¹⁰ Within those two themes indeed, the provisions at play are vague and much opposed positions are defended, often by organized groups that turn to courts in a keenly elaborated way. Finally, because the South African Constitutional Court decided cases on these issues which have been labeled as 'landmark cases' and because the two other courts dealt with similar questions. The method has been to look for traces of the six following cases

⁶ In another research, it would also be of interest to look at South African judgments' influence within the Commonwealth or African countries. The website of the now closed NGO Interights, which published human rights digests, allows to search for references and shows that South African cases are cited by many jurisdictions. See <http://www.interights.org/search/index.html> (last consulted October 5, 2014).

⁷ Kende, *Constitutional Rights in Two Worlds*, xi.

⁸ A search through the online database of the European Court of Human Rights ('HUDOC') for the term 'South Africa' and an analysis of the results rendered 22 judgments in which South Africa was mentioned either in the 'comparative law' section of the judgment, or in the summaries of the third parties interventions. I excluded all the cases where South Africa is mentioned in the facts and all the judgments which refer to the International Court of Justice case "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)" often cited on jurisdictional questions.

⁹ See for example David C. Gray, « A Prayer for Constitutional Comparativism in Eighth Amendment Cases », *Federal Sentencing Reporter* 18, n° 4 (2006): 237-39; Paolo Carozza, « "My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights », *Texas Law Review* 81 (2003): 1031; William Araiza, « Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use and Whose Law? », *32 Wm. Mitchell L. Rev.* 455 32 (2006): 455; Carl F. Stychin, « Same-Sex Sexualities and the Globalization of Human Rights Discourse », *McGill Law Journal* 49 (2004): 951; R. Leckey, « Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights », *Columbia Human Rights Law Review* 40, n° 2 (2009): 425-78.

¹⁰ Bernard E Harcourt, « Mature Adjudication : Interpretive Choice in Recent Death Penalty Cases », *Harvard Human Rights Journal* 9 (1996): 255. According to Ronald Dworkin, we are in the presence of 'hard cases' « when no settled rule dictates a decision either way » ; Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, no. 6 (1975): 1060.

outside their birthplace: *State v. Makwanyane*¹¹ and *Mohamed v. President of the Republic*¹² regarding the issues of death penalty and extradition and *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*,¹³ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,¹⁴ *Du Toit v. Minister of Welfare*¹⁵ and *Population Development and Minister of Home Affairs v. Fourie*¹⁶ on sexual orientation questions.

I similarly selected landmark cases on these issues in the two other jurisdictions (posterior to the South African cases), collected all publicly available documents related to these European and American cases (i.e. the parties' submissions and the amicus curiae briefs if any) and analyzed their content. The results are presented per jurisdiction, first in a section focusing on landmark death penalty and extradition cases (2.1) and second on sexual orientation cases (2.3). The analysis then examines the type of references found (3.1) and the profiles of those who use these references (3.2). With the empirical picture at hand, a few points are suggested to open a broader discussion (4) before concluding (5).

2. Results

2.1. Capital punishment and extradition

2.1.1. South Africa

Even before being fully established, the Constitutional Court of South Africa was confronted with the issue of capital punishment. Indeed, the Technical Committee on Fundamental Rights, the drafting committee for the future multi-party Bill of Rights, had not been able to solve the issue.¹⁷ The very long ruling *State v. Makwanyane* was delivered on 6 June 1995 and unanimously declared the death penalty unconstitutional. The majority judgment was written by the President of the Court, Justice Chaskalson. All the other justices agreed with

¹¹*State v. Makwanyane and Another*, CCT 3/94, [1995] ZACC 3.

¹²*Mohamed & Another v. President & Others*, CCT 17/01 (2001).

¹³*National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs and Others*, (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

¹⁴*National Coalition for Gay and Lesbian Equality v. Minister of Justice* (CCT11/98) [1998] ZACC 15.

¹⁵*Du Toit v. Minister of Welfare*, (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006 ; 2003 (2) SA 198 (CC) (10 September 2002).

¹⁶*Minister of Home Affairs v. Fourie and Another*, CCT 60/04 [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

¹⁷ For a history of capital punishment in South Africa and a review of the negotiations on these issues see Peter Norbert Bouckaert, « Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa », *Stanford Journal of International Law* 32 (1996): 287.

the conclusion but each wrote a separate opinion. This famous case has been thoroughly analyzed and commented and some foresaw that it could "act as persuasive authority"¹⁸ for other courts. Although decided by a very young court, *Makwanyane* opinions have been qualified as "mature" and as offering "a vision of transparent adjudication that articulates the values that underlie the interpretive choice".¹⁹ Harcourt argues that this paradox is reconciled by means of comparative law, which constitutes the most significant portion of the opinions.²⁰ The justices indeed entered into dialogue with many other jurisdictions: the Hungarian and Canadian Constitutional Court, the European Court of Human Rights, the Indian Supreme Court, the UN Human Rights Committee, etc. ... The justices also extensively engaged with US Supreme Court and State courts cases to draw inspiration but also to note the differences among the constitutional provisions.

When *Makwanyane* was decided, a New York Times editorial praising the South African decision sums up its importance and shows that it might be considered elsewhere to 'compare' nations:

"South Africa, which once led the world in executions, has abolished the death penalty by unanimous vote of its new Constitutional Court. The courageous decision leaves the United States in a dwindling company of democratic countries with the dubious distinction of executing their citizens."²¹

Six years after *Makwanyane*, the Constitutional Court dealt with a case in which a suspect terrorist had been handed over to US authorities, which transferred him to New York where he stood trial on a number of capital charges. In *Mohamed v. President of the Republic of South Africa* the Court again mobilized various foreign cases to reach its decision that "[i]n handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment."²²

This case is also interesting because the trial of the handed suspect terrorist was being argued before the US District Court for the Southern District of New York. The South African

¹⁸Lilian Chenwi, *Towards the abolition of the death penalty in Africa. A human rights perspective* (Pretoria University Law Press, 2007).

¹⁹Harcourt, « Mature Adjudication », 263.

²⁰Ibid., 266.

²¹ New York Times, "South Africa Shows the Way", 10 June 1995, <http://www.nytimes.com/1995/06/10/opinion/south-africa-shows-the-way.html> (last consulted 11 October 2014).

²²*Mohamed v. President of the Republic of South Africa and Others*, CCT 17/01 [2001] ZACC 18, §49.

Constitutional Court rendered its judgment one day before the jury returned its verdict in the US. The US Court denied Mohamed’s motion requesting that the US government be precluded from seeking the death penalty. The Court however accepted that the jury may consider the South African decision as a mitigating factor.²³ Mohamed was later sentenced to life imprisonment without possibility of parole.

2.1.2. United States

As everyone knows, in the US, the picture is very different.²⁴ The Eighth Amendment to the US Constitution stipulates that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”. In 1958, in *Trop v. Dulles*, the Supreme Court explained that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”²⁵ but did not enunciate a clear justification for their use.²⁶ For some, this quote licensed the use of comparative legal materials in Eighth Amendment jurisprudence,²⁷ for others the issue is not settled and the role of comparative analysis in adjudication remains disputed.²⁸ In 1976, only four years after *Furman*,²⁹ which stroke down the death penalty under the cruel and unusual punishment clause, the Supreme Court reaffirmed the constitutionality of the death penalty,³⁰ rejecting claims that capital punishment was unconstitutional *per se* and is since then “involved in the ongoing business of determining which state schemes could pass constitutional muster.”³¹

In the 2002 case of *Atkins v. Virginia*³² the constitutionality of executing mentally retarded individuals was at stake. One striking element of this case is that for the first time, the European Union submitted an amicus curiae brief to the US Supreme Court. This brief mainly argues that there is growing international consensus against the execution of persons with mental retardation, which the US is invited to join.

²³*United States v. Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. Jul. 23, 2001).

²⁴As of October 2014, 32 States and the US Federal Government and the US military retain the death penalty. 18 States have abolished it; Death Penalty Information Center, “Facts about the death penalty”, 2 October 2014, p. 1.

²⁵*Trop v Dulles*, 356 U.S. 86 (1958), 101.

²⁶Louis J. Blum, “Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication”, *San Diego Law Review* 39 (2002): 157, 159.

²⁷Yitzchok Segal, “The Death Penalty and the Debate over the U.S. Supreme Court’s Citation of Foreign and International Law”, *Fordham Urban Law Journal* 33 (2005): 1421, p. 110.

²⁸Blum, « Mixed Signals ».

²⁹*Furman v. Georgia*, 408 U.S. 238 (1972).

³⁰*Gregg v. Georgia*, 428 U.S. 153 (1976).

³¹*Ibid.*

³²*Atkins v. Virginia*, 536 U.S. 304 (2002).

According to the brief, there is an “overall trend toward general abolition of the death penalty throughout the world. That trend among the nations of the world accelerated over the last decade. In every corner of the globe countries have limited or abolished the imposition of the death penalty” and it cites the example of South Africa which abolished the death penalty in 1995. It further argues that the US Supreme Court decision in this case will unquestionably affect the extradition practices from other countries. Indeed, many countries are demanding assurances that individuals extradited from their countries to the United States be protected from the possible imposition of the death penalty. The European Union refers to the provision of the EU Charter of Fundamental Rights of the European Union, a recent Canadian case and the South African case of *Mohamed and another v. President of South Africa*.³³

The Court found the practice of executing mentally retarded individuals to be unconstitutional. In a footnote, after finding that a national consensus had developed against the execution of mentally retarded offenders, Justice Stevens, who delivered the opinion of the Court, wrote

“Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. (...) Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4. (...) Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue”.³⁴

This quote shows that the Court reinforced its finding by relying among others upon the observation that other nations overwhelmingly disapprove the practice and by the same token, locates the source of this information in an amicus curiae brief.

The other important case that caught widespread attention from the international community is *Roper v. Simmons*,³⁵ which concerned the execution of a person who was under eighteen at the time of the offense. The case attracted many amicus curiae briefs and one of them in particular was submitted by seventeen Nobel Peace Prize Laureates. They try to convince the Court that international opinion and state practices condemn the death penalty for child offenders. Under the heading ‘practice of the British Commonwealth and Europe’ the brief develops the case of South Africa:

³³ Brief of Amicus Curiae European Union in support of petitioner, *McCarver v. North Carolina*, p. 14. The briefs were then considered in *Atkins v. Virginia*, 536 U.S. 304.

³⁴ *Atkins v. Virginia*, 536 US 304, 316 (2002).

³⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

“In South Africa, during apartheid, national law prohibited the death sentence for offenders under age eighteen. [...] When South Africa completed the transition to full democracy, a new South African Constitution was adopted. The basic premise of its Bill of Rights is similar to that of the United States Constitution - it “enshrines ... and affirms the democratic values of human dignity, equality, and freedom.” [...] In 1995, the Constitutional Court abolished the death penalty for all offences, holding that it was incompatible with the new constitution's rights to life and dignity. [...] The South African Constitution now explicitly incorporates the international legal definition of “child,” affording numerous, specific, personal rights to children “under the age of 18 years.”³⁶

It might have played an influence that among the Nobel Peace Prize Laureates, two come from South Africa (President Frederik De Klerk and Archbishop Desmond Tutu).

The issue of the relevance of citing foreign and international law was salient in the judgment that found that executing minors is “cruel and unusual punishment” prohibited by the Eighth Amendment. Justice Kennedy, who delivered the opinion of the Court pointed out that

“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of “cruel and unusual punishments.”³⁷

He refers to a number of treaties and to amicus curiae briefs having brought international material (but not the one submitted by the Nobel Peace Prize Laureates) and underlines that “the United States now stands alone in a world that has turned its face against the juvenile death penalty”.³⁸

2.1.3. Council of Europe

The picture in Europe is quite different, being today described as a “death-penalty free zone”.³⁹ It was not the case at the creation of the Council of Europe, and it is due among others to the actions of the Member States, the active role of the Parliamentary Assembly of the Council of Europe and the jurisprudence of the European Court of Human Rights. The

³⁶ (citations omitted) Brief of Amici Curiae Nobel Peace Prize Laureates in support of Respondent, *Roper v. Simmons*, *op. cit.*, p. 13.

³⁷ 543 U.S. 551, 575 (2005).

³⁸ 543 U.S. 551, 577 (2005).

³⁹ Robert Badinter, Hugo Adam Bedau, et al., *Death penalty: Beyond abolition* (Strasbourg: Council of Europe Publishing, 2004).

latter indeed held in 1989, in *Soering v. the United Kingdom*,⁴⁰ that the extradition of an individual to the US to stand trial facing the death penalty would constitute inhuman and degrading treatment or punishment contrary to the Convention.

The first time the conventionality of the death penalty was challenged as such was in the case of *Öcalan v. Turkey*.⁴¹ Öcalan, the leader of the Worker's Party of Kurdistan, was sentenced to death. He turned to the European Court of Human Rights with a team of lawyers that included Sir Sydney Kentridge. Sir Sydney Kentridge, a South African born lawyer, had been part of Nelson Mandela's legal team and is one of the founding trustees of the Legal Resources Centre (LRC) established in 1978 in South Africa.⁴² He also sat as an acting judge of the Constitutional Court, delivered the first reported judgment the court gave⁴³ and wrote on comparative constitutional law.⁴⁴

Öcalan's application contains many comparative references. For example, he claimed that his deprivation of liberty was unlawful among others by relying on *Mohamed v. President of the Republic of South Africa*.⁴⁵ Regarding the issue of death penalty more precisely, the applicant argued that "[d]evelopments in international and comparative law showed that the death penalty could also be seen to be contrary to international law" and in that respect, he made reference *inter alia*, to *S. v. Makwanyane*.⁴⁶ These references are cited in the judgment, but only in the summaries of the parties' submissions, not in the analysis of the merits. The Court held that the imposition of a death sentence following an unfair trial would amount to inhuman treatment contrary to the Convention.⁴⁷

In 2008, an event that mobilized both the US Supreme Court and the European Court of Human Rights involved the extradition of Algerian and Bosnia and Herzegovina citizens to

⁴⁰ ECtHR, *Soering v. the United Kingdom*, Appl. No. 14038/88, 7 July 1989.

⁴¹ ECtHR, *Öcalan v. Turkey*, Appl. No. 46221/99, 12 May 2005.

⁴² See for more on the LRC, ... "Prior to the 1994 elections, the LRC primarily used litigation to assert the rights of disadvantaged South Africans and reasserted its position in post-apartheid South Africa too; David J. McQuoid-Mason, « Delivery of Civil Legal Aid Services in South Africa, The », *Fordham International Law Journal* 24 (2001 2000): S111. oral history project

⁴³ *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995).

⁴⁴ See for example, Sydney Kentridge, "Comparative Law in Constitutional Adjudication: The South African Experience," *Tulane Law Review* 80 (2005): 245.

⁴⁵ ECtHR, *Öcalan v. Turkey*, *op. cit.*, §79.

⁴⁶ ECtHR, *Öcalan v. Turkey*, *op. cit.*, §159.

⁴⁷ ECtHR, *Öcalan v. Turkey*, *op. cit.*, §175.

Guantanamo Bay.⁴⁸ At stake before the ECtHR was the failure to enforce a decision ordering Bosnia and Herzegovina to protect the well-being of the terrorist suspects.

Two well-known NGOs, Interights and the International Commission of Jurists, submitted an amicus curiae brief to the Court. Among the many points they develop, one concerns the duty to restore the situation of a wrongfully transferred person. After looking at the Convention practice and the international law practice, the brief looks to two 'domestic practices': the South African and the Canadian one. Here is the extract:

“With regard to practice before domestic courts, the jurisprudence of the South African Constitutional Court supports the view that where the State has wrongfully facilitated the transfer, it has a duty to remedy the breach. In *Mohamed & Another v. President & Ors*, where the South African government had worked with US agents to unlawfully render to US custody a Tanzanian national seeking asylum in South Africa, the Court placed a duty on the relevant organs of South Africa “to do whatever may be in their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him”. The principle was confirmed in *Kaunda v. President of the Republic of South Africa*, although in that case no obligation to take measures to protect rights was held to arise as “nowrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated.”⁴⁹

The Court responded (negatively) to the suggestion of Interights and the ICJ to examine whether the State authorities had an obligation to intervene for the applicants even in the absence of domestic decisions ordering so,⁵⁰ but without mentioning the South African cases. The Court concluded that Bosnia and Herzegovina had obtained assurances that the applicants would not be subjected to inhuman or degrading treatment or punishment and had taken all possible steps to protect the basic rights of the applicants and therefore declared the application ill-founded.⁵¹

The recent case of *Al Nashiri* also involved the issue of transfer of suspected terrorists to the United States. Currently detained in Guantanamo, Al Nashiri, represented by three lawyers

⁴⁸ *Boumediene v. Bush*, 553 U.S. 723 (2008) and ECtHR, *Boumediene and Others v. Bosnia and Herzegovina*, Appl. No. 38703/06 and others, 18 November 2008.

⁴⁹ (citations omitted) Amicus curiae brief of Interights and the International Commission of Jurists submitted in the case of *Boumediene and Others v. Bosnia and Herzegovina*, *op. cit.*, p. 8.

⁵⁰ ECtHR, *Boumediene and Others v. Bosnia and Herzegovina*, *op. cit.*, §62.

⁵¹ *Ibid.* §67.

affiliated with the Open Society Justice Initiative based in New York,⁵² alleged before the ECtHR that Poland and Romania participated in the ‘extraordinary renditions programs’ of the CIA and transferred him despite substantial grounds for believing that there was a real risk that he would be subjected to various Convention’s violations, among which the infliction of the death penalty.⁵³

Arguing that Romania had a post-transfer obligation to ensure that he would not be subjected to the death penalty or a flagrantly unfair trial, the applicant cites the Court’s case law and emphasizes that “[o]ther courts have realised that time is of the essence in order to affect a capital trial for terrorism charges in the United States”. He develops the facts at issue in *Mohamed v. President of the Republic of South Africa and six others*, the allegations of Mohamed, and how the Constitutional Court reacted:

“The South African Constitutional Court expedited the case and “foreshortened” the preliminary steps for a hearing based on the express recognition that the relief sought by the applicant in South Africa “could have a bearing” on the criminal trial in New York. The Court rejected the argument that it should not give instructions to the executive, and held that “it would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case”, as “important issues of legality and policy [were] involved and it was] necessary that [the court] say plainly what [its] conclusions as to those issues [were]”. Moreover, the Court observed that “it [was] desirable that [its] views be appropriately conveyed to the trial court”, in light of the fact that the Constitutional Court’s decision had a bearing on the case pending in New York. The Court further directed that the full text of its judgment be drawn to the attention of the federal court in New York “as a matter of urgency”.⁵⁴

At the time of writing the case of *Al Nashiri v. Romania* is still pending, it is thus unknown whether the references to the Johannesburg Court will find an echo in the ECtHR’s judgment.

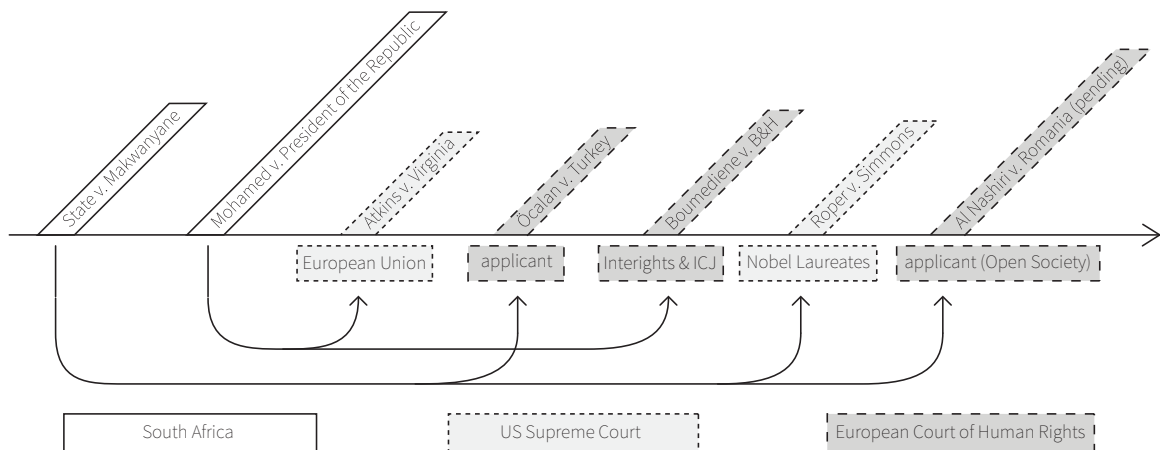
This figure illustrates the cross-references found in death penalty and extradition cases:

⁵²Al Nashiri is represented by three lawyers affiliated with the Open Society Justice Initiative based in New York: James Goldston, who has extensively written about the use of strategic litigation, Rupert Skilbeck and Amrit Singh.

⁵³ECtHR, *Al Nashiri v. Poland*, Appl. No. 28761/11, 24 July 2014 and *Al Nashiri v. Romania*, Appl. No. 33234/12, pending.

⁵⁴(citations omitted) Application in ECtHR, *Al Nashiri v. Romania*, *op.cit.*, §355. *See infra*.

DEATH PENALTY AND EXTRADITION CASES



2.2. Sexual orientation cases

2.2.1. South Africa

After having experienced a tradition of legally-sanctioned discrimination against gays and lesbians,⁵⁵ South Africa became the first Constitution in the world that expressly protects their rights.⁵⁶ The National Coalition for Gay and Lesbian Equality together with the South African Human Rights Commission “sought an order declaring all common law and statutory offenses which criminalized sexual acts engaged in by men, unconstitutional and invalid under the 1996 Constitution”,⁵⁷ which was granted in the case *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998).⁵⁸

⁵⁵ For a review of the legal position of gays and lesbians during the years leading to the end of apartheid, see Edwin Cameron, « Sexual Orientation and the Constitution: A Test Case for Human Rights », *South African Law Journal* 110 (1993): 450.

⁵⁶ Section 9 (3) of South Africa’s final constitution, under the heading “Equality” provides: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth ». On the efforts to include this clause in the Constitution, see Carl F. Stychin, « Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights », *Journal of Law and Society* 23, n° 4 (1996): 455-83 and Eric Christiansen, « Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process », *New York University Journal of International Law and Politics* (2000), 997. According to Kenneth Norrie, “it would be no exaggeration to describe [the adoption of the South African Constitution] as a milestone in world legal history”; Kenneth McK Norrie, « Marriage and Civil Partnership for Same-Sex Couples: The International Imperative », *Journal of International Law and International Relations* 1 (2005): 251.

⁵⁷ Schmid, « Decriminalization of Sodomy under South Africa’s 1996 Constitution », 176.

⁵⁸ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (CCT11/98) [1998] ZACC 15. See for more on this case Gustavo Gomes da Costa Santos, « Decriminalizing homosexuality in Africa: lessons from the South African experience », in *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth:*

The second case of the selection is *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*.⁵⁹ It involved the discriminatory exclusion of benefits for same-sex life partners of South African residents. Both the Minister and the Coalition made extensive use of comparative elements in their argumentation and a similar picture can be described of the numerous cross-citations found in the unanimous judgment.

The case of *Du Toit v. Minister of Welfare and Population Development*⁶⁰ concerns the rights of same-sex life partners jointly to adopt children. The unanimous judgment found that the statutory provisions discriminate on the grounds of sexual orientation and marital status and that the dignity rights of the partner who could not adopt are infringed. It was also held that the legislation infringes the principle of the paramountcy of a child's best interests.⁶¹ Except for a few discrete foreign references, does not really engage in a comparative undertaking.

The last case, *Minister of Home Affairs v. Fourie*,⁶² addressed both the exclusion of a lesbian couple from the common law definition of marriage, which says that marriage is 'a union of one man with one woman, to the exclusion, while it lasts, of all others' and the problematic marriage formula in the Marriage Act 25 of 1961 that refers to a person taking another person as his or her 'lawful wife (or husband)'. Sachs J. gave a judgment on behalf of the majority finding that the common law and the formula in the Marriage Act were inconsistent with the Constitution and invalid to the extent that they prevent same-sex couples from enjoying the status and benefits coupled with responsibilities accorded to heterosexual couples. The decision was based primarily on the right to equality in South Africa's Bill of Rights⁶³ and the references to comparative elements are more discrete than in previous cases.⁶⁴

Struggles for Decriminalisation and Change, ed. by Corinne Lennox & Matthew Waites, University of London, 2013, 313-37.

⁵⁹*National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs and Others*, (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

⁶⁰*Du Toit v. Minister of Welfare and Population Development* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002).

⁶¹*Ibid.*, §37.

⁶²*Minister of Home Affairs v. Fourie and Another*, CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005)

⁶³Beth Goldblatt, « Case note: Same-sex Marriage in South Africa – the Constitutional Court's Judgment », *Feminist Legal Studies* 14, n° 2 (2006): 262.

⁶⁴The Court suspended its order for one year to give Parliament the chance to deal with the matter; see for an overview on the adoption of the Civil Union Act thereafter; Pierre De Vos, « A judicial revolution? The court-led achievement of same-sex marriage in South Africa », *Utrecht Law Review* 4, n° 2 (2008): 162-74.

2.2.2. Council of Europe

Unlike the South African Constitution, the European Convention on Human Rights' provisions "were not drafted with the rights of LGBT persons in mind".⁶⁵ In the last years, the Court has been more and more confronted to LGBT rights claims, mostly based on the right to private and family life (article 8), the right to marry (article 12) and the prohibition of discrimination (article 14).

One of them is the case of *Karner v. Austria*⁶⁶ which concerned the right to succeed the tenancy of the residence of same-sex partners. Karner's male partner died and the Austrian Supreme Court granted the landlord the right to terminate the lease as the protection due to the "life companion" in the law was not to include persons of the same sex. Karner was assisted by several NGOs to bring the case to Strasbourg, arguing a breach of articles 8 and 14.

A consortium of NGOs submitted an amicus curiae brief: the International Lesbian, Gay, Trans and Intersex Association – European Region (ILGA-Europe), Liberty and Stonewall. Robert Wintemute, professor at King's College London, drafted the brief in *Karner*. As this article shows, his name reappears in various amicus curiae briefs on same-sex and family issues before the European Court of Human Rights. The brief examines among other the question whether unmarried same-sex partners enjoy "family life" and in that context explains that

"Some of the most persuasive statements on this question have been made by the Constitutional Court of South Africa, a country that is painfully aware of the meaning of "discrimination", in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999), 2000 (2) SA 1, <http://www.concourt.gov.za/archive.html>. The Court held, by 11 votes to 0, that Section 9(3) of the 1996 Constitution of the Republic of South Africa, which expressly prohibits discrimination based on "sexual orientation" and "marital status", does not permit the Government of South Africa to allow only married different-sex partners of permanent residents to immigrate, while threatening the unmarried same-sex partners of permanent residents with deportation. Although the legal issue was different in that case, because the difference in treatment was between unmarried same-sex partners and married different-sex partners, the Court's reasoning would have applied *a fortiori* if the difference in treatment had been between unmarried same-sex partners and unmarried different-sex partners.

Justice Ackermann said: "49. The impact of section 25(5) [of the Aliens Control Act] is to

⁶⁵Sarah Lucy Cooper, « A Review of the Concurrent Debates about the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States », *Phoenix Law Review* 5 (2011): 47.

⁶⁶*Karner v. Austria*, 24 July 2003, Appl. No. 40016/98.

reinforce harmful and hurtful stereotypes of gays and lesbians. ... '... The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual [spouses or] parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' ..." ... 53. ... Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity ... They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household ... Finally, ... they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses. ..."⁶⁷

The Court noted that the third-party interveners pointed out that a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, but did not detail this information.⁶⁸ It held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples.

A few years later, in *E.B. v. France*⁶⁹ the Grand Chamber of the ECtHR was confronted with the claim of a woman in a stable same-sex relationship who had been denied the right to adopt among others because of a "lack of a paternal referent".⁷⁰ Only a few years earlier, in a similar case, *Fretté v. France*,⁷¹ the Court had considered that the refusal to grant authorization to a homosexual man to adopt a child did not constitute a violation of Article 14 combined with Article 8.⁷²

Written comments were submitted on behalf of the Fédération Internationale des ligues des Droits de l'Homme (FIDH), ILGA-Europe, the British Agencies for Adoption and Fostering (BAAF), and the *Association des Parents et futurs parents Gays et Lesbiens* (APGL) by Robert Wintemute.

⁶⁷ Amicus curiae brief of ILGA-Europe, Liberty and Stonewall submitted in the case of *Karner v. Austria*, *op. cit.*, p. 10.

⁶⁸ *Karner v. Austria*, 24 July 2003, Appl. No. 40016/98, §36.

⁶⁹ ECtHR, *E.B. v. France*, 22 January 2008, Appl. No. 43556/02, §15.

⁷⁰ *Ibid.*, §15.

⁷¹ *Fretté v. France*, 26 February 2002, Appl. No. 36515/97. The amicus curiae brief submitted in this case by ILGA-Europe mentions that the post-apartheid Republic of South Africa included sexual orientation as an enumerated ground in the non-discrimination provision; Amicus curiae brief of ILGA-Europe in *Fretté v. France*, *op. cit.*, p. 16.

⁷² The Court found a violation of Article 6 (right to a fair trial) as the applicant had been denied a fair hearing in adversarial proceedings; European Court of Human Rights, « Factsheet: Sexual orientation issues » (Press Unit of the European Court of Human Rights, mars 2014). See for a criticism Michele Grigolo, « Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject », *European Journal of International Law* 14, n° 5 (2003): 1038.

According to the brief "[s]ince Fretté, the most significant decision has been that of the Constitutional Court of South Africa in *Du Toit*". In this brief, Professor Wintemute develops the facts of the case and the reasoning of Justice Skweyiya and the holding that unmarried same-sex couples be allowed to adopt children jointly in the same way as married different same-sex couples.⁷³ Wintemute also added that courts in the US and the UK have taken similar views of 'the best interests of the child'.⁷⁴

The Court, without mentioning any comparative element this time, considered that the sexual orientation of the applicant had been a decisive factor in the decision to refuse the adoption and that the domestic authorities had not provided convincing and weighty reasons to justify the difference in treatment.

Another case against Austria, entitled *Schalk and Kopf v. Austria*,⁷⁵ involved a same-sex couple living in Vienna willing to marry. As they could not, they complained of a violation of their right to marry and the right to respect for their private and family life in conjunction with the right to non-discrimination.⁷⁶ The questions raised were thus whether same-sex couples could be considered as families and whether the State should grant them equal access to legal marriage.

Again, an amicus brief was prepared by Robert Wintemute, this time on behalf of a slightly different group of NGOs: the FIDH, the ICJ, ILGA-Europe and the Centre for Advice on Individual Rights in Europe. On the question whether same-sex couples enjoy 'family life', the amici believe that *Karner* implies that they do. They then argue that they are treated as such by "[t]he highest courts of the UK, New York, Canada and South Africa".⁷⁷ The brief explains that

"In *National Coalition for Gay & Lesbian Equality*, Case CCT10/99 (2 Dec. 1999), South Africa's Constitutional Court went further, holding by 11 to 0 that unmarried same-sex couples must be granted the same immigration rights as married different-sex couples. Justice Ackermann said: "49. The ... Act ... reinforce[s] harmful and hurtful stereotypes of gays and lesbians ... 53. ... Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection,

⁷³ Amicus curiae brief of FIDH, ILGA-Europe, BAAF & APGL in *E.B. v. France*, §14-18.

⁷⁴ *Ibid.*, §19.

⁷⁵ ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, Appl. No. 30141/04.

⁷⁶ See for more details and an analysis; Nicholas Bamforth, « Families But Not (Yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation' », *Child and Family Law Quarterly* 23, n° 1 (2011): 128-43.

⁷⁷ Amicus curiae brief of the International Federation for Human Rights, the ICJ, ILGA-Europe and the Centre for Advice on Individual Rights in Europe submitted in the case of *Schalk and Kopf v. Austria*, *op. cit.*, §10.

friendship, eros and charity ... They are ... as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household ... [T]hey are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses. ..."⁷⁸

The judgment has a 'comparative section' in which European Union law is mainly developed as well as a quick overview of the state of the legislation in Council of Europe member States.⁷⁹ In the 'merits' phase, the judgment exposes that the four NGOs referred to the judgments of seven courts outside the Council of Europe,⁸⁰ but does not develop these cases. The Court concluded that the relationship of the applicants fell within the notion of 'family life' and that serious reasons had to be provided for a difference of treatment based on sexual orientation but ultimately held that Article 12 did not impose an obligation on States to grant same-sex couples access to marriage.

The case of *Gas and Dubois v. France*⁸¹ concerned the establishment of dual parentage rights for same-sex couples. One amicus curiae brief was submitted by a group of NGOs that included FIDH, ILGA-Europe, ICJ, BAAF and the Network for European LGBT Families Association. The third-party interveners again spoke through the voice of Robert Wintemute. To demonstrate that denying the possibility for the female unmarried partner of adopting the child of his mother amounts to discrimination, the brief relied among others on the fact that there is "growing consensus in Council of Europe and other democratic societies that the best interests of the child require the possibility of second-parent adoption in the case of a same-sex couple".⁸² It cited legislation and case law from Australia, Canada, USA and South Africa. It devoted the same five paragraphs to the reasoning held in the South African case of *Du Toit v. Minister for Welfare and Population Development*,⁸³ as it did in *E.B. v. France* (see supra) and added one paragraph on Justice Skweyiya's order regarding joint adoption. Professor Wintemute was permitted to submit oral arguments to the Court and finished by saying: "[t]he question of whether it is better for a child to have two legal parents, or only one, was considered by the New York Court of Appeals in 1995, the Constitutional Court of South Africa in 2002, the United Kingdom's House of Lords in 2008, and Brazil's Superior Tribunal

⁷⁸*Ibid.*, §13.

⁷⁹*Schalk and Kopf v. Austria*, 24 June 2010, Appl. No. 30141/04, §§24-34.

⁸⁰*Ibid.*, §48

⁸¹ ECtHR, *Gas and Dubois v. France*, 15 March 2012, Appl. No. 25951/07.

⁸² Amicus curiae brief of the FIDH, ICJ, ILGA-EUROPE, BAAF & NELF submitted in the case of *Gas and Dubois v. France*, *op. cit.*, p. 3.

⁸³ *Ibid.*, pp. 5-6. Cf. *infra*.

of Justice in 2010. All of these courts concluded that the answer is clear: two legal parents are better for a child than one”.⁸⁴

The Court only referred to these cases in a summary of the third party interventions. The Court found that the applicants’ legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent, as they had entered a civil partnership agreement. The Court observed that opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order and that the applicants had thus not been discriminated against on the basis of their sexual orientation.

The last case in this selection concerned an Austrian law similar to the French one, preventing the adoption of a child by the same-sex partner of a biological parent.⁸⁵ Five amicus curiae briefs were submitted and among them,⁸⁶ one by six NGOs (FIDH, ICJ, ILGA-Europe, BAAF, Network of European LGBT Families Associations and the European Commission on Sexual Orientation Law) some being thus repeat-players in this type of cases before the ECtHR. The brief was submitted on their behalf by Prof. Robert Wintemute. It contains many comparative elements. The legislative situation for second-parent adoption is overviewed regarding the US, Canada, South Africa, Australia, New Zealand, the Federal District of Mexico, Brazil, Uruguay and Argentina and an entire section develops the judicial reasoning held by courts in South African, New York, Brazil, Mexico.⁸⁷ The brief devotes five paragraphs to outline the facts and the reasoning held in the South African case of *Du Toit v Minister of Welfare and Population Development* already discussed earlier.⁸⁸

The Court summarized the intervention without mentioning this case and limited its comparative law analysis on European States.⁸⁹ It found that the Government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child and therefore condemned the distinction as discriminatory.

⁸⁴Oral submissions on behalf of the third-party interveners, FIDH, ICJ, ILGA-Europe, BAAF and NELFA in the case of *Gas and Dubois v. France*, op. cit., p. 10.

⁸⁵ ECtHR, *X and Others v. Austria*, Appl. No. 19010/07, 19 February 2013.

⁸⁶ Two briefs come from Christian-inspired NGOs, one from Amnesty International and one from the Attorney General for Northern Ireland.

⁸⁷ Amicus curiae brief of the FIDH, ICJ, ILGA-EUROPE, BAAF, NELFA and ECSOL submitted in the case of *X. and Others v. Austria*, pp. 7-9.

⁸⁸ *Ibid.*, §§20-24.

⁸⁹ ECtHR, *X. and Others v. Austria*, op. cit., §§55-57.

2.2.3. The United States

Globally, "the United States has been slow to extend basic human rights to sexual minorities".⁹⁰ LGBT rights organizations really started being interested in using the courts after the Supreme Court articulated the notion of a fundamental right to privacy in 1965.⁹¹ One of their legal battles concerned sodomy laws. In the 1986 case of *Bowers v. Hardwick*,⁹² the US Supreme Court ruled that the Constitution does not confer upon homosexuals a fundamental right to engage in sodomy and upheld the State power to criminalize it.⁹³

In 2004, a case involving a Texas statute prohibiting same-sex intimate sexual conduct was again on the Supreme Court docket: *Lawrence v. Texas*.⁹⁴

The Cato Institute, which defines itself as "a public policy research foundation dedicated to the principles of individual liberty, free markets, and limited government"⁹⁵ was of the opinion that *Bowers* should be overruled. It provides many reasons to support this claim and adds "[c]ourts all over the world have refused to follow *Hardwick* and have reasoned that fundamental principles of liberty and equality in the modern state are inconsistent with criminalization of private sodomy between consenting adults".⁹⁶ In footnote it refers to the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, and to two cases of the European Court of Human Rights and one decision of the UN Human Rights Committee.⁹⁷ The counsel for the Cato Institute in this case was William Eskridge, a professor who not only writes extensively on sexuality and the law, but also envisages a comparative approach to the treatment of cases.⁹⁸

An interesting brief is the one submitted by Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights and Minnesota

⁹⁰Holning Lau, « Sexual Orientation: Testing the Universality of International Human Rights Law », *The University of Chicago Law Review* 71, n° 4 (2004): 1689-1720.

⁹¹*Griswold v Connecticut*, 381 U.S. 479 (1965).

⁹²*Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹³478 U.S. 186, 196-7 (1986).

⁹⁴*Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁵ Amicus curiae brief of the Cato Institute in *Lawrence v. Texas*, *op. cit.*, p. 1.

⁹⁶ Amicus Brief of Cato Institute, in *Lawrence v. Texas*, *op.cit.*, p. 27.

⁹⁷ Amicus Brief of Cato Institute, in *Lawrence v. Texas*, *op.cit.*, p. 27.

⁹⁸ See for example William N. Eskridge, « United States: Lawrence V. Texas and the Imperative of Comparative Constitutionalism », *International Journal of Constitutional Law* 2, n° 3 (2004): 555-60 ; William N. Jr Eskridge, « Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition », *McGeorge Law Review* 31 (2000 1999): 641.

Advocates for Human Rights. Counsels for record included the already mentioned Harold Hongju Koh and Kenji Yoshino, two eminent professors who had been contacted by Lambda Legal which represented the petitioner. The two professors brought in two other colleagues: Robert Wintemute and Ryan Goodman.⁹⁹ These scholars wrote extensively on international human rights law, comparative law and transnational litigation.¹⁰⁰

The brief argues that the US Supreme Court “should pay decent respect to these opinions of humankind” and that “[i]nternational and foreign court decisions have triply rejected the understanding of the right to privacy in this Court’s decision in *Bowers v. Hardwick* (...)”.¹⁰¹ In that context, it makes multiple reference to South Africa, in particular the rulings in NCGLE I and II.¹⁰²

Amici conclude by saying

“The United States is not the world’s only civilized society. In a globalizing world, it would be folly to ignore foreign practice and precedent at a time when courts across the world are “increasingly caught up in a process of cross-fertilization among legal systems.” This Court cannot disregard the rest of the civilized world in addressing the privacy and equality issues raised by this case. Left undisturbed, the lower court’s parochial analysis will undermine U.S. influence in the global development of human rights and compromise the United States’ reputation as ‘the world’s foremost protector of liberties’.”¹⁰³

A group of constitutional law professors¹⁰⁴ also submitted a brief, arguing that the Texan statute fails equal protection analysis because it is not rationally related to the achievement of a legitimate state interest. They quote Justice Sachs’ concurrence in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, as for them it presents “a particularly eloquent articulation of the relationship between liberty and equality that is also at issue

⁹⁹Yale Law School News Archives, Profs. Koh and Yoshino submit briefs to Supreme Court on *Lawrence v. Texas*, available at <http://www.law.yale.edu/news/4517.htm> (last consulted October 10, 2014).

¹⁰⁰ See for example Harold Hongju Koh, « Transnational Public Law Litigation », *The Yale Law Journal* 100, n° 8 (1991): 2347-2402; Harold Hongju Koh, « The Globalization of Freedom », *Yale Journal of International Law* 26 (2001): 305; Ryan Goodman and Derek Jinks, « How to Influence States: Socialization and International Human Rights Law », *Duke Law Journal* 54, n° 3 (2004): 621-703; Kenji Yoshino and Michael Kavey, « Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law », in *The Oxford Handbook of Comparative Constitutional Law*, ed. by Michel Rosenfeld & András Sajó (Oxford University Press, 2012).

¹⁰¹ Amicus curiae brief for Mary Robinson et al. in *Lawrence v. Texas*, *op.cit.*, p. 2.

¹⁰²*Ibid.* See pp. 12-14, 17, 19-21, 23 and 28-29.

¹⁰³ (citations omitted) *Ibid.*, pp. 29-30.

¹⁰⁴The professors are Bruce A. Ackerman, Jack M. Balkin, Derrick A. Bell, Jr., Paul Brest, Evan Caminker, Erwin Chemerinsky, David D. Cole, David B. Cruz, Thomas C. Grey, Pamela S. Karlan, Kenneth L. Karst, Andrew Koppelman, Sanford Levinson, Frank Michelman, William B. Rubenstein, Steven H. Shiffrin, Geoffrey R. Stone, and Kenji Yoshino.

here”¹⁰⁵.

The Supreme Court overruled *Bowers v. Hardwick* and held that the Texas statute was unconstitutional as applied to adult males engaging in consensual sexual acts. Justice Kennedy’s opinion contains comparative elements, in particular some references to the European Court of Human Rights.¹⁰⁶

“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P. G. & J. H. v. United Kingdom* (...); *Modinos v. Cyprus*, (...) (1993); *Norris v. Ireland*, (...) (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries”¹⁰⁷.

The last reference is both puzzling and interesting. Puzzling because Justice Kennedy refers to pp. 11-12 of the amicus curiae brief, which contain the developments on European case law and the beginning of the South African part, but not p. 13 which contains more South African references and the situation before the Colombian Constitutional Court. It is difficult to say whether this is just a small error, as he meant here to illustrate that there were ‘many other countries’ or if it is on purpose that they are left aside, as they are indeed not expressly mentioned in the judgment. At the same time, this quotation is very interesting as it demonstrates that the amicus brief was actually read and considered, which without these mentions would be difficult to know.

Regarding the issue of same-sex marriage, various cases were litigated in US States courts during the last decades.¹⁰⁸ Recently, the Supreme Court selected two cases to deal with the issue: *Hollingsworth v. Perry*¹⁰⁹ and *U.S. v. Windsor*.¹¹⁰ The first one involved Proposition 8,

¹⁰⁵Here is the quote : « The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behavior becomes the foundation for the repudiation of equality”; amicus p. 17

¹⁰⁶ 539 U. S. 558, 572-3 (2003).

¹⁰⁷ (citations omitted) 539 U. S. 558, 577 (2003). For more see Holly Arnould, « Lawrence v. Texas and Roper v. Simmons: Enriching Constitutional Interpretation with International Law », *St. John’s Journal of Legal Commentary* 22 (2008 2007): 693-694.

¹⁰⁸*Baehr v Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) ; *Baker v State of Vermont*, 744 A.2d 864 (Vt. 1999) ; *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁰⁹*Hollingsworth v. Perry*, 570 U.S. __ (2013).

¹¹⁰*United States v. Edith Schlain Windsor*, in Her Capacity as Executor of the Estate of Thea Clara Spyer, et al., 570 U.S. __ (2013).

a California state ballot initiative amending the state constitution to restrict the recognition of marriage to opposite-sex couples¹¹¹ and the other concerned provisions of the Defense of Marriage Act (DOMA), a federal act defining marriage as the union between a man and a woman.¹¹²

A very large number of amicus curiae briefs were submitted. Together, the two cases saw 156 amicus curiae briefs in total.¹¹³ All kinds of profiles are present among those *amici*.

Three briefs mentioning South African case law interest us here: the first was submitted by “foreign and comparative law experts Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer and Ryan Goodman”.¹¹⁴ These law professors with various expertises thus choose to highlight their “foreign and comparative” specialty. The main aim of the brief is to encourage the Court to consider the reasoning of foreign authorities.¹¹⁵ In this context, South Africa is thus mentioned on several occasions. In particular the case of *Fourie*, which is used for several reasons: to demonstrate that the freedom to marry is an essential component of the liberty rights of gays and lesbians,¹¹⁶ to link the denied access to marriage to harms to human dignity,¹¹⁷ to argue that a separate-but-equal institution for same-sex couples did not satisfy constitutional guarantees of dignity and personal autonomy,¹¹⁸ etc.

Another brief whose main approach is comparative is the one by ‘international human rights advocates’. Amici are the following five NGOs: the International Center for Advocates Against Discrimination in the United States, the National Council for Civil Liberties in the United Kingdom, the Canadian Civil Liberties Association, the Legal Resources Center in South Africa, and the Center for Legal and Social Studies in Argentina.¹¹⁹ It is interesting to notice that a domestic human rights NGO like the Legal Resources Center thus decides to participate in US proceedings. Together the amici argue that there is an international trend

¹¹¹See *Hollingsworth v. Perry*, 570 U.S. ___, at 2 (2013) (No. 12-144) (slip. op.). The issue presented to the parties was “[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.”

¹¹²*United States v. Windsor*, 570 U.S. ___, at 2 (2013) (No. 12-307) (slip. op.). In addition to procedural questions of standing, the main issue was “[w]hether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.”

¹¹³Anthony Franze and Reeves Andersen, « The Supreme Court's Reliance on Amicus Curiae in the 2012-13 Term », *The National Law Journal*, 18 septembre 2013.

¹¹⁴Amicus curiae brief for Foreign and Comparative Law Experts Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer, and Ryan Goodman in *Hollingsworth v. Perry*, *op. cit.*

¹¹⁵*Ibid.*, p. 4.

¹¹⁶*Ibid* pp. 18-19.

¹¹⁷*Ibid* pp. 24-25. See also p. 28.

¹¹⁸*Ibid* p. 33.

¹¹⁹ Amicus Curiae Brief of International Human Rights Advocates in *Hollingsworth v. Perry*, *op. cit.*, p. 1.

toward equal marriage rights for same-sex couples. Among various comparative references, a “powerful statement”¹²⁰ of Justice Albie Sachs’ opinion in *Fourie* is quoted linking the exclusion of same-sex couples from marriage and unequal protection and unfair discrimination.

Interestingly, another aspect of *Fourie* is highlighted in the third brief which mentioned it in the US Supreme Court cases on same-sex marriage. This brief was submitted by a group of ‘international jurists and academics’, some of them being former judges on high courts, who supported reversal. At hand of many foreign authorities they argue that the Californian and US approaches to the legal recognition of same-sex unions are within the mainstream of other nations. According to them, “[e]xtensive international authority holds that same-sex marriage should be addressed by democratic institutions, not by the courts”. Under that heading, the amici write

“Even in Canada and South Africa, where courts were the initial impetus for the acceptance of same-sex marriage, adoption of same-sex marriage was ultimately referred to the legislative branch or involved significant legislative input. (...) South Africa’s Constitutional Court gave Parliament a year to create same-sex marriage after interpreting that nation’s constitution as requiring such a step, the resolution was in Parliament. In responding to the court’s direction, however, Parliament declined to amend the existing marriage act. Instead, it created an additional, alternative status of civil unions which includes both civil partnership and marriage.”¹²¹

It is thus interesting that the same case, *Fourie*, is here mobilized in briefs arguing both for reversal and affirmance, each highlighting another aspect of the case that fits its views better.

In *Perry*, the Court disposed of the case on narrow procedural grounds (having the effect of finalizing the US district court decision nullifying Proposition 8). The analysis was limited to the question of standing and there are no mention any comparative argument.

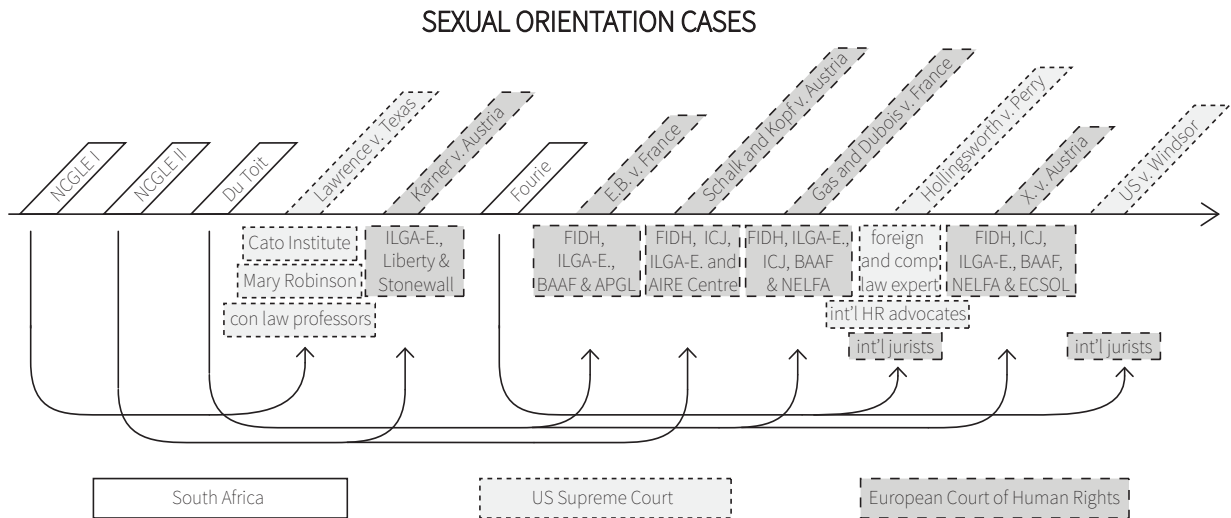
In *US v. Windsor*, the US Supreme Court struck down the central section of DOMA as contrary to an essential part of the liberty protected by the Fifth Amendment of the US Constitution. The liberal majority did not refer to any comparative element, but the dissenters did, although in a very loose manner and without referring to specific foreign authorities.¹²²

¹²⁰*Ibid.*, pp. 16-17.

¹²¹Amicus brief of International Jurists and Academics In Support of Petitioner Hollingsworth and Respondent Bipartisan Legal Advisory Group in *Hollingsworth v. Perry* & *US v. Windsor*, p. 31.

¹²²Chief Justice Roberts wrote that “[i]nterests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.”; *US v. Windsor*, 570 U.S. ___, dissenting opinion of Chief Justice Roberts at 1 (2013) (No.

This figure summaries the various cross-references found in sexual orientation cases:



3. Analysis

This quick overview for traces of South African landmark cases outside of the Republic indicates that indeed these decisions feed judicial debates elsewhere. The analysis shows that South African decisions were mostly referred to in amicus curiae briefs.

Amicus curiae briefs can fulfill this peculiar function of bringing comparative elements to the courts, as they indeed principally play an informational role.¹²³ European Court of Human Rights judges have even underscored the added value of the amici’s comparative law analysis¹²⁴ and a quote from an American ruling illustrates that the source of the comparative information can come from an amicus (see *Lawrence v Texas*).

12-307). Justice Scalia denounced that the judicial power is not the power ‘to say what the law is’. According to him, “[t]he majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court” and referred to Article 93 of the Basic Law for the Federal Republic of Germany; *United States v. Windsor*, 570 U.S. ___, dissenting opinion of Justice Scalia at 3 (2013). Justice Alito (with whom Justice Thomas joins) insisted that the right to same-sex marriage is not deeply rooted in the Nation’s history and tradition. He then adds “[n]or is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000”; *United States v. Windsor*, 570 U.S. ___, dissenting opinion of Justice Alito at 7 (2013).

¹²³James F. Spriggs & Paul J. Wahlbeck, « Amicus Curiae and the Role of Information at the Supreme Court », *Political Research Quarterly* 50, n° 2 (1997): 365-86; Thomas G. Hansford, « Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case », *Political Research Quarterly* 57, n° 2 (2004): 219-30.

¹²⁴Françoise Tulkens, Sébastien Van Drooghenbroeck, & Frédéric Krenc, « Le soft law et la Cour européenne des droits de l’homme: Questions de légitimité et de méthode », *Revue Trimestrielle des Droits de l’Homme* 91 (2012): 473; K. Dzehtsiarou & V. Lukashevich, « Informed Decision-Making: the Comparative Endeavours of the Strasbourg Court », *Netherlands Quarterly of Human Rights* 30, n° 3 (2012): 296.

3.1. What kind of references are found and what purpose(s) do they serve?

First, the references to the South African cases found in the submissions mostly appear in briefs that have a general comparative approach. They contain many different references and those from South Africa blend in a more or less extended mix of international and foreign citations. Generally, it can also be said that the briefs really 'engage' with the comparative material: more than mere passing 'references' or footnotes, a fair number of briefs develop the facts of the foreign case, an aspect of the reasoning held and finally the ruling. The purposes fulfilled by the references to South African case law in the submissions are very difficult to categorize. Among the non-mandatory uses of foreign references by judges, many scholars have attempted to draw typologies.¹²⁵ The exercise to classify the references is hazardous. It is safe to say that in most cases, comparative elements serve to orient or reinforce a particular interpretation. Using Joan Larsen's typology,¹²⁶ the category of 'substantive use' of foreign guidance seems to apply. Under the latter, foreign guidance serves to define the content of the domestic provision and she further distinguishes reason-borrowing and moral fact-finding.¹²⁷ Reason-borrowing uses look at the *reasons given* by a foreign court to support a domestic interpretation, while a moral fact-finding approach does not look at the reasons given elsewhere but relies upon the *fact* that a particular position has been adopted as a reason to conform (or not). The references to the South African cases fall under these two labels. The moral fact-finding approach (which is more controversial) is present, as often these briefs point out a (growing) trend which the courts are encouraged to follow. This trend is evidenced by international treaties, foreign laws and cases, and in some cases even soft law instruments. It should also be stressed that all the references to South African cases are positive, in the sense that they are presented "with approval".¹²⁸ This is interesting, as South Africa

¹²⁵ See for a short overview Christopher Whytock, « Foreign Law in Domestic Courts: Different Uses, Different Implications », in *Globalizing Justice: Critical Perspectives on Transnational Law and Cross-Border Migration of Legal Norms*, State University of New York Press (Donald W. Jackson, Michael C. Tolley, and Mary L. Volcansek, 2010), 45-63.

¹²⁶ Joan L. Larsen, « Importing Constitutional Norms from a Wider Civilization: Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation », *Ohio State Law Journal* 65 (2004): 1283.

¹²⁷ *Ibid.*, 1293.

¹²⁸ Positive comparativism involves looking to comparative constitutional law with approval, looking to see if the domestic system can borrow. By contrast, negative comparativism looks to comparative constitutional law as a way of devising principles of domestic law by testing what it is not and/or by looking to the failures of other constitutional regimes ; David Fontana, « Refined Comparativism in Constitutional Law », *UCLA Law Review* 49 (2001): 551.

previously served as a mainly negative example.¹²⁹ This past even makes South African constitutional cases more relevant on certain issues, as they come from “a country that is painfully aware of the meaning of ‘discrimination’”.¹³⁰

As stated earlier, the explicit references to the South African Constitutional Court are totally absent from the US Supreme Court case law. There are however broad references to “the world community” and “other nations” which certainly include South Africa. Regarding the European Court of Human Rights, there are mentions to the legal situation in South Africa but the weight accorded to these references is very unclear. Indeed, where they were found in our selection, they were part of summaries of the application or the third party intervention and were not engaged with in the merits section.¹³¹

3. 2. Who refers to South African Constitutional Court cases?

It is difficult to draw a concise picture of the actors who have made use of South African cases outside the Republic but a few striking features clearly stand out which I would like to develop: the prevalence of non-governmental organizations, some of which are active across borders and the recurrent presence of the same lawyers/scholars in the cases mentioning South African precedents.

Most amicus curiae briefs citing South African cases in the results' list are signed by NGOs.¹³² Several of these NGOs are large, transnational NGOs with universal mandate

¹²⁹ See for references to apartheid in the US Supreme Court case law : *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (finding that racial reapportionment “bears an uncomfortable resemblance to political apartheid”). In *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990). Kennedy, J., dissenting, wrote « Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission's racial preference policy: "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." See South Africa and the Rule of Law 37 (1968) (official publication of the South African Government) ». In *Holland v. Illinois*, 493 U.S. 474, 507–08 n.6 (1990), Stevens, J., dissenting wrote « In determining precisely what ancestry would qualify a defendant as black, white, brown or red, courts might find guidance in some older decisions of states that practiced de jure segregation, in the opinions of South African tribunals, and in the precedents of Nazi Germany.", cited in *Ibid.* For a recent case mentioning apartheid South Africa in the European Court of Human Rights case law, see *Vona v. Hungary*, Appl. No. 35943/10, 9 July 2013. Judge Pinto de Albuquerque, concurring, explained the States Parties' obligation under the International Convention on the Suppression and Punishment of the Crime of Apartheid and referred to « the policies and practices of racial segregation and discrimination as practised by the former political regime of South Africa » ; *Ibid.*, Pinto de Albuquerque, concurring.

¹³⁰ See Amicus curiae brief of ILGA-Europe, Liberty and Stonewall submitted in the case of *Karner v. Austria*, *op. cit.*, p. 10.

¹³¹ See however note 8.

¹³² An even the two applications which mentioned South African cases – *Öcalan* and *Al Nashiri* – were drafted by lawyers closely linked with NGOs.

(Human Rights Watch, Amnesty International, Open Society Justice Initiative, ICJ, FIDH, etc.) but there are also smaller associations, which often join a brief. It is also interesting to underline that some ‘national’ NGOs such as BAAF, the Canadian Civil Liberties Association or LRC decide to participate in ‘foreign proceedings’.¹³³ Except for very few exceptions,¹³⁴ it is also noteworthy that no ‘local’ American NGO has made use of South African jurisprudence, despite the very large amount of amici involved at the US Supreme Court level. Finally, and probably because the rulings of the South African Constitutional Court can be qualified as ‘progressive’ and that in our sample, these cases were used, as it has been underlined, in a ‘positive’ perspective, no religious groups or ‘conservative’ groups were found to cite these landmark cases, despite these groups’ significant presence before the courts. Finally, and especially regarding the theme of sexual orientation and in particular before the European Court of Human Rights, there is clearly a number of repeat players, that is, actors that are involved “in many similar litigations over time”¹³⁵ and notably one organization focusing specifically on LGBT rights: ILGA-Europe. Their strategy is “to develop strategic litigation targeted at identified ‘gaps’ areas”¹³⁶ and its presence as a third party intervener in landmark cases is thus unsurprising. All the briefs it submitted¹³⁷ (together with other repeat players) which have been analyzed here have been drafted by one scholar: Robert Wintemute.¹³⁸ Noticeably, this professor of human rights drafted amicus curiae briefs not only for the European Court of Human Rights but also the US Supreme Court. This brings us to another point: the recurring presence of the same few lawyers and/or scholars.

¹³³ The qualification of ‘foreign proceedings’ is of course not entirely correct when a NGO based in one Member State of the Council of Europe acts before the European Court of Human Rights in a case involving another Member State.

¹³⁴ The Lawyers Committee for Human Rights and Minnesota Advocates for Human Rights in Amicus curiae brief for Mary Robinson et al. in *Lawrence v. Texas*, *op.cit.*

¹³⁵ M Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 Law and Society Review 95

¹³⁶ Loveday Hodson, « Activists and Lawyers in the ECtHR: The Struggle for Gay Rights », in *Rights and Courts in Pursuit of Social Change*, éd. par Dia Anagnostou, Hart Publishing, Onati International Series in Law and Society, 2014, 192.

¹³⁷ Other briefs submitted for example by ILGA on other issues (such as transgender issues or freedom of expression) have been drafted by other lawyers. For an overview of their third-party interventions, see http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation (last consulted October 13, 2014).

¹³⁸ This professor also drafted other briefs which were not analyzed here either because the judgment cannot ultimately be labelled as landmark or because the case is still pending. In these amicus curiae briefs, there are again mentions of South African cases. See for example Amicus Curiae Brief of FIDH, ICJ, AIRE Centre and ILGA-Europe in *M. W. v. United Kingdom*, Appl. No. 11313/02 (pending), Amicus Curiae Brief of FIDH, ICJ, AIRE Centre and ILGA-Europe in *Chapin and Charpentier v. France*, Appl. No. 40183/07 (pending), example Amicus Curiae Brief of FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU and LIDU in *Orliari and Others v. Italy and Orliandi and Others v. Italy*, Appl. Nos. 18766/11 and 26431/12 (pending). He also helped setting up the “Equal Love Campaign” aiming at taking a case to the European Court of Human Rights to challenge UK’s system of civil partnerships; see for more info <http://equallove.org.uk/the-legal-case/> (last consulted October 11, 2014).

As the presentation of the results made clear, a few names systematically showed up. Earlier works already highlighted the broad and strong presence of lawyers both in the anti-death penalty movement¹³⁹ and in LGBT struggles¹⁴⁰ and the general *juridification* of collective action.¹⁴¹ What the analysis of the briefs yields is that the argumentation which contain references to South African cases mostly come from activists (often with a legal background) or law professors in renowned universities (or both). These actors, in addition of being experts in human rights law, are also generally interested in comparative approaches. These findings could further feed the rich debates on 'cause lawyers' and on "epistemic communities".¹⁴²

4. Discussion

South African constitutionalism has achieved a lot during its first twenty years. The Constitutional Court adopted groundbreaking rulings which extensively engaged in comparative exercises. By doing so, the South African justices communicated being "peers"¹⁴³ to other courts.

This contribution shows that these cases are considered by activists in the USA and in Europe who uses them in their argumentative arsenal before courts. They thus relay the information to other judges, but so far the judges do not seem to respond (at least in the two clusters of examined cases). I would like to propose a few disclaimers and points for discussion regarding this issue.

First, the reason why the US Supreme Court and the European Court of Human Rights have not (yet?) really engaged with South African case law goes well beyond the case of South Africa. As has been said, the citation of foreign references in judgments became a real controversy and many factors influence the opportunity to cross-cite. However, it is quite

¹³⁹ Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (OUP USA, 1999), 40.

¹⁴⁰ David Paternotte, "La juridification ou le droit comme matrice de l'action collective: la revendication du droit au mariage entre personnes du même sexe", *Politique et Sociétés* 31, n° 2 (2012): 93.

¹⁴¹ Lars Chr. Blichner & Anders Molander, "Mapping Juridification", *European Law Journal* 14, n° 1 (2008): 36-54.

¹⁴² An epistemic community is defined by Haas as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area". Therefore, epistemic communities are in substance communities of experts, associated with a particular domain or issue area; Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination", *International Organization*, Vol. 46, No. 1 (1992), p. 3.

¹⁴³ Harcourt, « Mature Adjudication », 266.

striking that when foreign jurisdictions have explicitly been mentioned, they stopped short of referring to South Africa.

In line with this, the fact that South African precedents are not mentioned in cases treating similar issues does not indicate that these cases were not considered, on the contrary. The fact that these cases are referred to in the applications and in the amicus curiae briefs – of which there is evidence that they are read – even reinforces the incentive for judges to look for these cases. At the very least, one should not underestimate the weight of the simple knowledge that other courts have ruled in a particular way. This is especially so if they have ruled in the same direction in which the judge in question tends to rule, so that “he wouldn’t be alone”. Jeremy Waldron, stating that references to foreign sources actually draw upon a sort *ius gentium*, explains that foreign authorities “rescue judges from a feeling of intellectual nakedness”.¹⁴⁴ This seems equally valid even when the foreign decisions are not expressly cited, at least from the perspective of the judges.

Although the South African cases do not find an explicit place in the foreign judgments, another point should be stressed: to a certain extent, the mentioning of the cases in the litigants’ briefs shows that they already participate in a collective narrative about the very difficult questions surrounding capital punishment and sexual orientation questions. These narratives, as Austin Sarat points, “take on special significance because they become part of the public record”¹⁴⁵ and have staying power. Some would even argue that these cases participate in the construction of a global *ius commune*, with all the difficulties of the meaning of this concept.¹⁴⁶ If not spelled as such, the references to South African case law can be seen as pieces of a larger patchwork, pieces which might be decorative in the eyes of many, but also as strengthening the others, or as highlighting underlying values. Whether this patchwork is the evidence that some fundamental rights guarantees are cut from a universal cloth where all courts are engaged in the identification of principles,¹⁴⁷ is a matter open for debate.

¹⁴⁴ Jeremy Waldron, « Foreign Law and the Modern Ius Gentium », *Harvard Law Review* 119, n° 1 (2005): 137.

¹⁴⁵ Austin Sarat, « Narrative Strategy and Death Penalty Advocacy », *Harvard Civil Rights-Civil Liberties Law Review* 31 (1996): 368.

¹⁴⁶ See for example Paolo Carozza, « “My Friend is a Stranger”: The Death Penalty and the Global Ius Commune of Human Rights », *Texas Law Review* 81 (2003) who also insists on « the broad variety of actors » in the use of this *ius commune* ; *Ibid.*, p. 1043.

¹⁴⁷ Sujit Choudhry, « Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation », *Indiana Law Journal* 74 (1999 1998): 833.

It remains puzzling that despite the South African Constitutional Court's "international acclaim and the commonality of rights issues",¹⁴⁸ its decisions have not been cited much by courts in the Western part of the hemisphere. First, it has been recognized very early that for the Court, "becoming part of a global judicial conversation has become a badge of legitimacy".¹⁴⁹ However, one can wonder about the type of conversation at play here and it feeds the criticism that 'global judicial dialogue' actually leaves many courts (especially in the South) aside.¹⁵⁰ Even though the South African Constitutional Court had no ambition of being a 'product of export' or had a desire to 'please' or to encourage other jurisdictions to follow its example,¹⁵¹ there is empirical evidence in support of the idea that reciprocity motivates judicial citations,¹⁵² that is, judges cite other judges who cite them. It implies "that there should be no large asymmetries in citation patterns between pairs of courts".¹⁵³ There evidently are other factors at play, but this could also provide an explanation for the decline of comparative references in the South African Constitutional Court's judgments.¹⁵⁴ There is an ironic vicious circle, as at the same time it has been insisted upon the fact that the less judges participate in the transjudicial dialogue, the less they will be able to influence other courts.¹⁵⁵ The analysis presented above should act as a nuance to these statements: South African Constitutional Court's opinions are scrutinized by foreign law professors, activists, NGOs and most probably judges too. The narrative the Court adopted early on, to include views from far away to decide hard cases, is carried by lawyers and activists around the world who believe that these decisions help them design a better egalitarian society. This narrative is thus

¹⁴⁸ Kende, *Constitutional Rights in Two Worlds*, xi.

¹⁴⁹ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004), 74.

¹⁵⁰ Jean du Bois de Gaudusson, « La complexité de la participation des cours suprêmes des pays en voie de développement au dialogue des juges », *Petites Affiches*, 4 juin 2008; Robert J. Delahunty & John Yoo, « Against Foreign Law », *Harvard Journal of Law & Public Policy* 29 (2006 2005): 297.

¹⁵¹ Xavier Philippe, « La motivation des décisions de la cour constitutionnelle sud africaine : Essai d'analyse de la construction d'une jurisprudence de protection des droits fondamentaux », in *La motivation des décisions des cours suprêmes et cours constitutionnelles*, Bruylant (Bruxelles: Fabrice Hourquebie, Marie-Claire Ponthoreau, 2012), 282.

¹⁵² Stephen J. Choi & G. Mitu Gulati, « Bias in Judicial Citations: A Window into the Behavior of Judges? », *The Journal of Legal Studies* 37, n° 1 (2008): 87-130.

¹⁵³ Slaughter, *A New World Order*, 74-75.

¹⁵⁴ Jacob Foster, « The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa », *University of San Francisco Law Review*, n° 45 (2010): 90; Rautenbach, « South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010) », 195.

¹⁵⁵ Slaughter, *A New World Order*, 74-75. Such a reciprocity has often been suggested to explain why the US Supreme Court loses its international influence; Claire l'Heureux-Dubé, « The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court », *Tulsa Law Journal* 34 (1998): 15.

important and might continue to work, even in the shadows of courts, towards a posture of engagement on fundamental rights issues.¹⁵⁶

5. Conclusion

The judgments of the South African Constitutional Court have often been in the spotlight, and rightly so. Many not only embraced the belief in transformation through law but also engaged with many other foreign decisions. This contribution aimed at looking to the legacies of some landmark cases outside of South Africa in order to better assess the South African Constitutional Court's participation in global judicial dialogue. I conducted this exercise in cases concerning inhuman and degrading treatment and sexual orientation issues

I first scrutinized the documents submitted by parties and by amicus curiae before the US Supreme Court and the European Court, and then analyzed the judgments themselves. References to South African precedents have been found in a few applications and in several amicus curiae briefs. It was found that the references to South African cases in the argumentation habitually coexist with other international and comparative material and that the presentation of the South African precedent is often quite articulated. Their uses are 'substantive' and positive, that is, cited with approval to help define the content or the interpretation of a provision.

Most amicus curiae briefs citing South African cases in the results' list are signed by NGOs which are either transnational or work across borders and many of them are repeat-players before the courts. Finally, the recurring presence of a small group of often the same lawyers, who frequently have an inclination towards comparative law, was observed in briefs mentioning cases from Johannesburg.

These findings thus confirm the hypothesis that South African decisions may serve as tools for litigants worldwide. This can provide food for thought on how information circulates and on the identity and methods of actors who are often overlooked in the debates on 'judicial dialogue'. But what may be more complex to explore and to explain is the finding that, despite being 'served' with these references, the Strasbourg and Washington judges seem to have been timid about citing them in their opinions. The fact that these references do not (yet?) find an explicit and 'engaging' echo in the judgments of the US Supreme Court and the

¹⁵⁶See for more on this, Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: OUP, 2010).

European Court of Human Rights raises various questions which are presented here as subjects of discussion for this symposium.

The symposium asked “the question of law’s capacity to contribute to building an egalitarian, free society in South Africa – and by implication elsewhere”. Having both impacts in mind certainly increases the difficulty of the task but highlights also its promise. If one believes that transnational judicial dialogue may help in this regard, this contribution shows that it is a task which lies on the shoulders of many but in particular on South African and foreign judges, on South African and foreign scholars to educate in comparative law and to disseminate the judgments and on South African and foreign lawyers and organizations to use these precedents.
