



**Interpreting Rights Collectively**

**Comparative Arguments in Public Interest Litigants' Briefs  
on Fundamental Rights Issues**

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## List of Abbreviations

American Civil Liberties Union	ACLU
Amnesty International	AI
Council of Europe	CoE
European Commission of Human Rights	ECmHR
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Parliament	EP
European Union	EU
International Federation for Human Rights	FIDH
Human Rights Watch	HRW
Inter-American Commission on Human Rights	IACmHR
Inter-American Convention on Human Rights	IACHR
Inter-American Court of Human Rights	IACtHR
International Covenant on Civil and Political Rights	ICCPR
International Commission of Jurists	ICJ
European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association	ILGA-Europe
Legal Defense Fund	LDF
National Coalition for Gay and Lesbian Equality	NCGLE
Non-Governmental Organization	NGO
Legal Resources Center (South Africa)	LRC
The National Association for the Advancement of Colored People	NAACP
United Nations Human Rights Committee	HRC
United Kingdom	U.K.
United Nations	UN
United Nations Convention Against Torture	UNCAT
United Nations Convention on the Rights of the Child	CRC
United States of America	U.S.
United States Supreme Court	U.S. Supreme Court



## Introductory Chapter

*Argumentation can never come to rest.*<sup>1</sup>

### 1. Introduction and Hypotheses

1. Adjudication resolutely faces the challenges of interpretation and legal indeterminacy.<sup>2</sup> This is even more valid regarding ‘hard cases’ – which “provoke sharp conflict between interpretive choices (...) and produce heated moral debate in the public sphere”.<sup>3</sup> In particular regarding these types of cases, there is no firmly established list of sources of law and their status continues to be discussed.<sup>4</sup> Although of course some choices are made (and are often specific to a particular culture), there is no real substantial or comprehensive ‘police’ on argumentation.<sup>5</sup> This thesis looks at the use of comparative arguments in interpretation and adjudication of some specific fundamental rights, which by their nature often constitute hard cases.
2. The field of fundamental rights has a number of characteristics which make it particularly interesting for this study. First, the formulation of these rights is most often vague, their precise scope disputed and their interpretation can be highly contentious. This indeterminacy offers the advantage of being open to an evolving determination, lending itself to creative argumentation and potential influence by social action.<sup>6</sup> Second, it has been suggested that fundamental rights have a great ability to travel, due largely to their being shared by all and

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<sup>1</sup> N. Luhmann, “Legal Argumentation: An Analysis of its Form”, *The Modern Law Review*, Vol. 58, No. 3 (1995), p. 290.

<sup>2</sup> K. Klare, “Legal Culture and Transformative Constitutionalism”, *South African Journal on Human Rights*, Vol. 14 (1998), p. 157. Interpretation in the strict sense designates 1) the purely cognitive intellectual operation aiming at establishing the meaning of a statement, that is to say a set of linguistic signs and 2) the result of this operation; A. Dyevre, “Comprendre et analyser l’activité décisionnelle des cours et des tribunaux: l’intérêt de la distinction entre interprétation et concrétisation”, *Jus Politicum*, No. 4 (2010), p. 7. I focus more on the interpretation as process than as effect of this process; E. Łętowska, “Transformations in Law Interpretation: Towards a Universal Approach – The Phenomenon, Causes and Symptoms” in Joanna Jemielniak and Przemysław Miklaszewicz (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Berlin: Springer, 2010), p. 32. The connection between interpretation and argumentation lies in the dependence of legal argumentation on texts; N. Luhmann, “Legal Argumentation: An Analysis of Its Form”, *op. cit.*, p. 290.

<sup>3</sup> B. Harcourt, “Mature Adjudication Interpretive Choice in Recent Death Penalty Cases”, *Harvard Human Rights Journal*, Vol. 9 (1996), p. 255. According to R. Dworkin, we are in the presence of ‘hard cases’ “when no settled rule dictates a decision either way”; R. Dworkin, “Hard Cases”, *Harvard Law Review*, Vol. 88, No. 6 (1975), p. 1060.

<sup>4</sup> According to Karl Klare “there seems no option but to invoke sources of understanding and value external to the texts and other legal materials”; K. Klare, “Legal Culture and Transformative Constitutionalism”, *op. cit.*, p. 157. Stéphanie Henneville-Vaucher writes that interpreting also involves making political decisions – even if it is under a legal form; S. Henneville-Vaucher, “Oxymore ou tautologie? La notion du Judicial Politics expliquée par la théorie du droit américaine contemporaine”, *Les Cahiers Du Conseil constitutionnel*, No. 24 (2008), p. 91.

<sup>5</sup> P. Moor, “Dire le droit”, *Revue européenne des sciences sociales*, Vol. 35, No. 107 (1997), p. 48. He calls ‘bricks’ what the legal order makes available to the interpreter: provisions, precedents, concepts, etc.

<sup>6</sup> C. Colliot-Thélène, “Pour une politique des droits subjectifs : la lutte pour les droits comme lutte politique”, *L’Année sociologique*, Vol. 59, No. 1 (2009), p. 249.

aspiring to common goals.<sup>7</sup> Because their essence transcends notions of boundaries and nationhood, cases dealing with fundamental rights seem best suited for the application of some form of comparative analysis.<sup>8</sup>

3. The comparative approach is said to be an important foundation of fundamental rights and a key method to interpret them.<sup>9</sup> It finds more and more echoes in interpretation and adjudication due to their “increasingly transnational nature which has been brought by globalization”.<sup>10</sup> Globalization has indeed also produced effects on the judicial function,<sup>11</sup> one of them being the greater circulation of arguments, interpretations and legal solutions among courts.<sup>12</sup> The migration of ideas among judges has intensified and what is often termed ‘judicial dialogue’ has spurred a great deal of controversy and a large body of scholarly literature. But while the comparative approach to interpretation used by the courts has recently seen a surge of interest, the role of ‘actors behind the scenes’ has not yet been explored.<sup>13</sup> This research looks at actors behind selected important cases and explores the roles played by public interest litigants (most of them being civil society organizations) in the circulation of comparative information before courts.
4. In general, much attention is paid to the outcomes of courts’ deliberations regarding fundamental rights issues (that is to say decisions), but the genesis of these decisions remains undisclosed, particularly the upstream influence of activist movements.<sup>14</sup> Too often, the doctrine (especially the continental one) has largely ignored the multiple ways in which the concepts and legal standards are disseminated, received and opposed,<sup>15</sup> despite the recognized

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<sup>7</sup> For example it is said that the Universal Declaration of Human Rights aspires to express a common ideology for the entire humanity; F. Sudre, *Droit européen et international des droits de l’homme*, 9th ed., (Paris: Presses universitaires de France, 2008), p. 38.

<sup>8</sup> R. Glensy, “Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority”, *Virginia Journal of International Law*, Vol. 45, No. 2 (2005), p. 433.

<sup>9</sup> C. McCrudden, “Human Rights Histories”, *Oxford Journal of Legal Studies*, (2014), p. 24.

<sup>10</sup> M. Kende, *Constitutional Rights in Two Worlds* (Cambridge: Cambridge Univ. Press, 2009), p. 4. According to Jean-Bernard Auby, fundamental rights are one of the key areas of the globalization of law; J.-B. Auby, *La globalisation, le droit et l’état* (Paris: Montchrestien, 2003), p. 57.

<sup>11</sup> C. L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court”, *Tulsa Law Journal*, Vol. 34 (1998), p. 16; A.-M. Slaughter, “Judicial Globalization”, *Virginia Journal of International Law*, Vol. 40 (1999), pp. 1103–1124.

<sup>12</sup> J.-B. Auby, *La globalisation, le droit et l’état, op. cit.* Fundamental rights are a privileged field of dialogue; E. Dubout and S. Touzé, “La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques” in Edouard Dubout and Sébastien Touzé (eds.), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Paris: Pédone, 2009), p. 12.

<sup>13</sup> E. Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts”, *American Journal of International Law*, Vol. 102 (2008), p. 241.

<sup>14</sup> Harlow and Rawlings note that the origin of many cases – even the landmark ones – as sponsored test cases is overlooked or ignored. They explain this partly “because this is not what lawyers are looking for when they read cases” but also “because cases need to be sanitized if they are to stand as precedents for future generations of lawyers and if the popular fiction of law as apolitical is to be maintained”; C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge, 1992), p. 57. See also R. Hirschl, “From Comparative Constitutional Law to Comparative Constitutional Studies”, *International Journal of Constitutional Law*, Vol. 11, No. 1 (2013), p. 3.

<sup>15</sup> D. Jackson, M. Tolley et al., “Conclusion” in *Globalizing Justice. Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (New York: State University of New York, 2010), p. 275.

necessity for an actor-based perspective for example regarding the study of legal change.<sup>16</sup> The same applies to the comparative references found in the judgments.

5. Notwithstanding the growing coverage of related topics, the role of civil society groups and other actors in this cross-pollination process has not yet been examined in depth in scholarly literature. For example, William Twining suggests that there is a large gap between the social science literature on diffusion and the legal literature on reception and transplantation.<sup>17</sup> Then, while today a lot more is known about the procedural aspects related to the presence of groups before the courts<sup>18</sup> and even their roles (particularly in regard to the third-party intervention mechanism), few studies look at the arguments employed and their possible impact on the development of the interpretation of rights. Similarly, non-governmental organizations' normative influence at the international level has received increased attention (for example in relation to the drafting of treaties),<sup>19</sup> but the same cannot be said regarding their actions and strategies pertaining to judicial arenas. The increasing participation of non-state organizations and networks as products of globalization in various fora has been the subject of various studies,<sup>20</sup> and in cases where their litigation activity is mentioned, their argumentative work is

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<sup>16</sup> M. Graziadei, "Comparative Law as the Study of Transplants and Receptions" in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford Univ. Press, 2006), p. 474. "Students of legal transplants have often emphasized that the correlation between law and society is not self-evident as the law migrates. Here, we also need to take into account the communities and individuals involved in the transfer. As we have seen, to understand transfer, one must first consider the role of those who bring it about, whether they are state authorities, individuals, groups, global actors, or members of the academic or professional elite."; *Ibid.*, p. 471.

<sup>17</sup> W. Twining, "Social Science and Diffusion of Law", *Journal of Law and Society*, Vol. 32, No. 2 (2005), p. 203. Regarding the literature on legal transplants, see for example A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., (Athens: University of Georgia Press, 1993). For Watson, sociological influences on law are generally unimportant: "Law is largely autonomous and not shaped by societal needs"; A. Watson, *The Evolution of Law* (Oxford: Blackwell, 1985), p. 119. See also P. Legrand, "The Impossibility of 'Legal Transplants'", *Maastricht Journal of European and Comparative Law*, Vol. 4 (1997), pp. 111–124; D. Berkowitz, K. Pistor et al., "The Transplant Effect", *The American Journal of Comparative Law*, Vol. 51, No. 1 (2003), pp. 163–203; E. Wise, "The Transplant of Legal Patterns", *The American Journal of Comparative Law*, Vol. 38 (1990), pp. 1–22; W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", *The American Journal of Comparative Law*, Vol. 43, No. 4 (1995), pp. 489–510.

<sup>18</sup> J.-F. Flauss, "La présence de la jurisprudence de la Cour Suprême des Etats-Unis d'Amérique dans le contentieux européen des droits de l'homme", *Revue trimestrielle des Droits de l'Homme*, (2005), pp. 313–331.

<sup>19</sup> See for example G. Breton-Le Goff, *L'influence des organisations non gouvernementales sur la négociation de quelques instruments internationaux* (Bruxelles: Bruylant, 2001).

<sup>20</sup> J. Mertus, "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society", *American University International Law Review*, Vol. 14, No. 5 (1999), p. 1341; W. Korey, *NGO's and the Universal Declaration of Human Rights. "A Curious Grapevine"* (New York: Palgrave Macmillan, 1998); S. Charnovitz, "Nongovernmental Organizations and International Law", *The American Journal of International Law*, Vol. 100, No. 2 (2006), pp. 348–372; H. Cullen and K. Morrow, "International Civil Society in International Law: The Growth of NGO Participation", *Non-State Actors and International Law*, Vol. 1 (2001), pp. 7–39; A. Bernard and S. Guillet, "La pratique de la Fédération Internationale des Ligues des Droits de l'Homme au sein des organes de l'ONU" in Gudmundur Alfredsson, Jonas Grimheden, et al. (eds.), *International Human Rights Monitoring Mechanisms* (Leiden: Martinus Nijhoff, 2001), pp. 875–889; G. Breton-Le Goff, "Le rôle des ONG dans la mondialisation de la justice", *Lettre de Recherche Droit & Justice*, No. 28 (2007), p. 11. Breton-LeGoff suggests that sometimes NGOs have helped establish a coherent and universalizing case law; *Ibid.*, p. 11. See also Aryeh Neier's book, that advances that "the driving force behind the protection of human rights worldwide, today and for roughly the past thirty-five years, has been the nongovernmental human rights movement"; A. Neier, *The International Human Rights Movement: A History* (Princeton: Princeton Univ. Press, 2013), p. 7.

seldom explored in detail.<sup>21</sup> This is all the more unusual as it is not totally new that “ideas and practices in respect of human rights are created, re-created, and instantiated by human actors in particular socio-historical settings and conditions”<sup>22</sup> and that the struggle for the recognition of new rights (or interpretations thereof) is “a collective act”.<sup>23</sup>

6. Then, as stated above, the literature on global judicial dialogue has grown exponentially in the last decade, describing the phenomenon, establishing typologies of comparative references – most often by taking sides for or against the practice of comparative reasoning – and contrasting the different attitudes of courts. Indeed, courts have different stances with regard to comparative reasoning. In this regard, three jurisdictions ranging on a continuum from weaker to stronger versions of engagement with comparative material are studied: the United States Supreme Court, the European Court of Human Rights and the South African Constitutional Court. The selection of these courts will be substantiated more in detail hereunder. Despite this important literature, much remains to be explored in terms of “how judges learn about foreign law developments”.<sup>24</sup>
7. The hypotheses of this thesis are first that public interest litigants participate in the interpretation debate and are a key actor in conveying comparative material to the judges. Then, that differences in the features of the comparative argumentation presented before the three analyzed jurisdictions (such as the form of the comparative references and the identity of those bringing them forward) help explain the courts’ diverging attitudes towards this material. Finally, while constrained by the environment in which they argue, public interest litigants’ comparative argumentation also shapes this environment, disconcerting the traditional sources relied on in adjudication and influencing the judges.
8. The inception of these hypotheses derived from a number of elements. First, a few often-discussed cross-references were accompanied by a mention referring to an amicus curiae brief. For example, in the famous case of *Lawrence v. Texas*, Justice Kennedy referred to the amicus curiae brief of Mary Robinson and a few NGOs when citing cases from the European Court of Human Rights in his decision striking down a Texas sodomy law.<sup>25</sup> Second, some judges expressed in statements or in interviews that their comparative efforts are often limited and that external aid is welcome.<sup>26</sup> For instance, the President of the European Court of

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<sup>21</sup> F. Ermacora, “Non-governmental Organizations as Promoters of Human Rights” *Promoting Human Rights: the European Dimension. Studies in Honour of Gérard Wiarda*, Carl Heymanns Verlag, (Köln, 1988), pp. 171–180. See for example an early study of human rights public interest law groups; H. Tolley, “Interest Group Litigation to Enforce Human Rights”, *Political Science Quarterly*, Vol. 105, No. 4 (1990), pp. 617–638.

<sup>22</sup> N. Stammers, “Social Movements and the Social Construction of Human Rights”, *Human Rights Quarterly*, Vol. 21, No. 4 (1999), p. 981.

<sup>23</sup> C. Colliot-Thélène, “Pour une politique des droits subjectifs”, *op. cit.*, p. 249.

<sup>24</sup> R. Black and L. Epstein, “(Re-)Setting the Scholarly Agenda on Transjudicial Communication”, *Law & Social Inquiry*, Vol. 32, No. 3 (2007), p. 805.

<sup>25</sup> *Lawrence v. Texas*, 539 U. S. 558, 577 (2003). Another often cited case is *Roper v. Simmons* in which Justice Kennedy referred to the brief submitted by various NGOs in support of the statement that there is an international opinion against the juvenile death penalty; 543 U.S. 551, 577 (2005).

<sup>26</sup> See also Sandra Day O’Connor, according to whom “this very term we are considering a case involving the constitutionality of executing people who are mentally retarded. Several of the briefs focus on the practice of other nations. We have even received an amicus brief from a group of American diplomats, discussing the difficulties posed for their missions by the American death penalty practice; Sandra Day O’Connor, “Keynote Address”, in *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 96 (2002), p. 351

Human Rights, Judge Spielmann, said that if the comparative information provided by the internal services of the Court is confirmed by NGOs “then it is very important”.<sup>27</sup> In South Africa, where the Constitution specifically authorizes the courts to consider foreign law, Justice Mokgoro wrote in the early landmark case abolishing the death penalty that “[t]he broad legal profession, academia and those sectors of organised civil society particularly concerned with public interest law, have an equally important responsibility and role to play by combining efforts and resources to place the required evidence in argument before the courts”.<sup>28</sup> Then, some scholarly writings – especially on the European Court of Human Rights<sup>29</sup> – have suggested a link between the comparative material and the presence of non-governmental organizations. Some critics of the use of comparative material in adjudication also associated it with the presence of external parties.<sup>30</sup> Finally, another element suggesting that litigants with no immediate interests in the case might be those advancing comparative arguments is that, given the uncertain authority of the latter, these actors might be the ones in a position to formulate more ‘risky’ arguments that the parties may be reluctant to make, for example for strategic reasons.<sup>31</sup>

9. Exploring the roles of actors – here public interest litigants – involved in selected important cases supplements the literature on judicial dialogue with empirical insights regarding the identities of the actors behind the circulation of legal arguments (revealing who is behind the

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or E. Myjer, “Pieter van Dijk and His Favourite Strasbourg Judgment. Some Remarks on Consensus in the Case Law of the European Court of Human Rights” in Marjolein van Roosmalen, Bob Vermeulen, et al. (eds.), *Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk* (Antwerp: Intersentia, 2013), p. 69.

<sup>27</sup> Judge Spielmann interviewed by K. Dzehtsiarou; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, *op. cit.*, p. 97.

<sup>28</sup> *State v. Makwanyane and Another*, 1995 (3) SA 391(CC), §306.

<sup>29</sup> See among others: L. Burgorgue-Larsen, “Les interventions éclairées devant la Cour européenne des droits de l’homme ou le rôle stratégique des amici curiae” in *La conscience des droits - Mélanges en l’honneur de Jean-Paul Costa* (Paris: Dalloz, 2011), pp. 67–82. A. Schahmaneche, “Pluralisme et motivation des arrêts de la Cour européenne des droits de l’Homme” *Pluralisme et juges européens des droits de l’Homme* (Bruxelles: Bruylant, 2010), p. 100; K. Dzehtsiarou, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal*, Vol. 12 (2011), pp. 93–98.

<sup>30</sup> Michael Ramsey for example writes “[t]he most trenchant critique of this use of international materials is that it serves as a mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international”; M. Ramsey, “International Materials and Domestic Rights: Reflections on Atkins and Lawrence”, *American Journal of International Law*, Vol. 98, No. 1 (2004), p. 69. Lawrence J. Connell is of the opinion that “the Court’s recent tendency to cite and defer to foreign authorities and values is not accidental, but is the product of a concerted effort by people and organizations that see the courts as the only practical way of imposing their values upon the American people. Much of this advocacy is done by American non-governmental organizations (NGOs) and American-based “human rights” (sic) activists, who seize upon the concept of evolving standards of international law to make their points. Unable to implement their moral and social agendas through the democratic processes of elected legislatures, these NGOs and activists seek to have them imposed through the courts, which generally are unaccountable to the electorate”; L. Connell, “The Supreme Court, Foreign Law and Constitutional Governance”, *Widener Law Review*, Vol. 11 (2004), p. 68. Robert Bork does not take issue with American groups, as for him “foreign elites understand the importance of having the Supreme Court on their side, which is precisely why their human-rights (sic) organizations have begun filing amicus briefs urging our Court to adopt the foreign, elite view of the American Constitution”; R. Bork, “Travesty Time, Again: In Its Death-Penalty Decision, the Supreme Court Hits a New Low”, *National Review*, (2005), p. 17.

<sup>31</sup> B. Ennis, “Effective Amicus Curiae Briefs”, *Catholic University Law Review*, Vol. 33, No. 3 (1984), pp. 606–607.

nebulous ‘globalization’ often mentioned),<sup>32</sup> the sort of material presented to the judges and the arguments utilized to encourage the use of comparative law in legal argumentation. These observations can also help explain the different courts’ attitudes towards comparative material.

10. This thesis will also inform about how new interpretations of rights are ‘built’<sup>33</sup> and about one aspect of the ‘repertoires of contention’ that public interest litigants use.<sup>34</sup> Finding cross-references in the discourses of activists also helps to illustrate a particular concretization of the globalization of the human rights movements, furnishing “images of what th[e] opportunities [for thought and action] and resources are”<sup>35</sup> and alluding to the “connectivity of human rights discourse suggesting that there are mutually shared interests in defining the content of national, transnational and international norms”.<sup>36</sup> Finally, this thesis also throws light on a particular use of the comparative method.<sup>37</sup>
11. The following subsections of this introduction elaborate on the central notions used in this thesis, the research methodology and outline the study.

## 2. Public Interest Litigation: Notion and History

12. Public interest litigation is ‘litigation in the interest of the public’; yet, “the more attempts to be specific about the scope of public interest litigation, the less satisfactory becomes this general description (and) terms like litigation, public, or interest have different meanings and scope in different situations”.<sup>38</sup> The term *public interest* is a fertile ground for competing ideas (also depending on the disciplines).<sup>39</sup> Many definitions have been suggested<sup>40</sup> and some

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<sup>32</sup> S. Silbey, “1996 Presidential Address: “Let Them Eat Cake”: Globalization, Postmodern Colonialism, and the Possibilities of Justice”, *Law & Society Review*, Vol. 31, No. 2 (1997), pp. 207–235.

<sup>33</sup> For an analysis on how new rights emerge, see B. Clifford, “Introduction: Fighting for New Rights” *The International Struggle for New Human Rights* (Philadelphia: University of Pennsylvania Press, 2008); P. Naftali, *la Construction du Droit à la Vérité en Droit International* (Brussels: Université Libre de Bruxelles, 2013).

<sup>34</sup> C. Lennox and M. Waites, “Conclusion: Comparative Analysis of Decriminalisation and Change across the Commonwealth: Understanding Contexts and Discerning Strategies” in C. Lennox and M. Waites (eds.) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (London: University of London, 2013), p. 529. The phrase ‘repertoires of contention’ is borrowed from Tilly’s study of collective actions’ mechanisms; see for example C. Tilly, *From Mobilization to Revolution* (Reading: Addison-Wesley, 1978). See also M. Hagan, “The Human Rights Repertoire: its Strategic Logic, Expectations and Tactics”, *The International Journal of Human Rights*, Vol. 14, No. 4 (2010), p. 560.

<sup>35</sup> P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), p. 3.

<sup>36</sup> V. Jackson, “Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality”, *Loyola of Los Angeles Law Review*, Vol. 37 (2003), pp. 280–281.

<sup>37</sup> P. Carozza, “Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights”, *Notre Dame Law Review*, Vol. 73, No. 5 (1997), pp. 1217–1237; A. Mansouri, “Approche méthodologique et fonctionnelle du droit comparé”, *Revue de droit international et de droit comparé*, Vol. 83, No. 3 (2006), pp. 173–196.

<sup>38</sup> N. Ahmed, *Public Interest Litigation, Constitutional Issues and Remedies* (Dhaka: Bangladesh Legal Aid and Services Trust, 1999), p. 49. See for a short summary of the different theories of the public interest: A. McHarg, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights”, *The Modern Law Review*, Vol. 62, No. 5 (1999), pp. 674–677.

<sup>39</sup> N. Ahmed, *Public Interest Litigation*, *op. cit.*, p. 52. “[T]o talk about public interest lawyering is to take on irresolvable disputes about what is, or is not, in the public interest.”; S. Scheingold and A. Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford: Stanford Univ. Press, 2004), p. 5.



even use different terms – entailing slight nuances too – such as human rights litigation, interest group litigation,<sup>41</sup> strategic litigation,<sup>42</sup> planned litigation,<sup>43</sup> test case litigation and impact litigation.<sup>44</sup> Gathering different definitions, the one suggested here understands public interest litigation as the participation in litigation by a litigant with no direct interest in the case<sup>45</sup> in order to influence the judicial law-making process in a way the litigant considers to be in the public interest.<sup>46</sup>

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<sup>40</sup> See the different definitions listed by James Goldston, such as “litigation designed to reach beyond the individual case and the immediate client”; E. Rekosh, K. Buchko et al. (eds.), *Pursuing the Public Interest. A Handbook for Legal Professionals and Activists* (New York: Public Interest Law Initiative, Columbia Law School, 2001), p. 81, cited in J. Goldston, “Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges”, *Human Rights Quarterly*, Vol. 28, No. 2 (2006), p. 496. In order to distinguish it from ordinary litigation, Ahmed Naim suggests that public interest “aims to enhance social and collective justice and there must be a public cause involved as opposed to a private cause. This includes several situations; where the matters in question affect the entire public or the entire community, (...) a vulnerable segment of the society, (...) or one or more individuals but the nature of the act is so gross or serious that it shocks the conscience”; N. Ahmed, *Public Interest Litigation*, *op. cit.*, p. 51. Olivier De Schutter defines it on the basis of the difference in size that exists between the parties; an individual, claiming that his rights have been violated, acts against an actor of ‘big size’ (the State for example) and if his claim is valid, the legal decision will benefit other persons; O. De Schutter, *Fonction de Jurer et Droits Fondamentaux. Transformation du Contrôle Juridictionnel dans les Ordres Juridiques Américain et Européen* (Bruxelles: Bruylant, 1999), p. 88. For Sarah Hannett, participation in this type of litigation is motivated “less by the outcome of a particular case than by the legal principles applied to resolve one or more of the issues that are raised by the case”; S. Hannett, “Third Party Intervention: in the Public Interest?”, *Public Law*, No. 1 (2003), p. 131. A judicial definition describes a public interest challenge as one in which the issues are of general importance and where the litigant “has no private interest in the outcome of the case”; C. Harlow, “Public Law and Popular Justice”, *The Modern Law Review*, Vol. 65, No. 1 (2002), p. 6, citing the case of *R v Lord Chancellor ex p CPAG* (1999) 1 WLR 347. According to an NGO report, “cases in the public interest are those which raise a serious issue which affect or may affect the public generally or a section of it”; JUSTICE, *To Assist the Court. Third Party Interventions in the UK* (London: JUSTICE, 26 October 2009), <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/To-Assist-the-Court-26-October-2009.pdf>, p. 5. Another report, by two British civil society groups, qualifies a public interest case as a case “where the issues raised are ones of general public importance and the public interest requires that those issues should be resolved”; J. Welch, *Litigating the Public Interest. Report of the Working Group on Facilitating Public Interest Litigation* (London: Liberty and the Civil Liberties Trust, 2006), p. 10. Sometimes the civil society groups find it difficult too to determine whether a case or not is in the public interest; D. Cote and J. Van Garderen, “Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest”, *South African Journal on Human Rights*, Vol. 27 (2011), p. 178.

<sup>41</sup> David Feldman distinguishes public interest litigation from interest group litigation; D. Feldman, “Public Interest Litigation and Constitutional Theory in Comparative Perspective”, *The Modern Law Review*, Vol. 55, No. 1 (1992), p. 45.

<sup>42</sup> A. Lejeune and J.-F. Oriane, “Choisir des cas exemplaires la Strategic litigation face aux discriminations”, *Déviance et Société*, Vol. 38, No. 1 (2014), pp. 55–76.

<sup>43</sup> S. Wasby, “How Planned Is “Planned Litigation”?”, *American Bar Foundation Research Journal*, Vol. 9, No. 1 (1984), pp. 83–138.

<sup>44</sup> J. Goldston, “Public Interest Litigation in Central and Eastern Europe”, *op. cit.*, p. 496.

<sup>45</sup> Of course, there is “often a close relationship between the interests of those who are likely to be affected by the decision in a particular case and those who are concerned about the impact of the legal rules that may be developed in order to decide the case”; P. Bryden, “Public Interest Intervention in the Courts”, *Canadian Bar Review*, Vol. 66, No. 3 (1987), p. 498. In a similar vein, it has also been demonstrated that members of public interest groups join in order to receive certain selective benefits (such as a feeling of efficacy, a policy commitment or a sense of civic duty); C. Cook, “Participation in Public Interest Groups Membership Motivations”, *American Politics Research*, Vol. 12, No. 4 (1984), p. 409.

<sup>46</sup> This definition is inspired by P. Bryden, “Public Interest Intervention in the Courts”, *op. cit.*, p. 490. See also L. Bartholomeusz, “The Amicus Curiae before International Courts and Tribunals”, *Non-State Actors and International Law*, Vol. 5, No. 3 (2005), p. 279. This is the entire paradox: public interest groups often exist precisely because their members do not share official views of the ‘public interest’; C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 143.

13. Despite its imperfections, the term ‘public interest litigants’ is used to designate the entities participating in the cases of litigation examined. Since there are no rigorous, widely accepted criteria, authors usually specify what they understand by the term.<sup>47</sup> In this thesis, the selected ‘public interest litigants’ include all entities (individuals or groups) with no direct interest in the case using procedural avenues to participate in the litigation. It will be assumed that as they act without a direct personal interest, they act in the public interest. Public interest litigation can take various forms. It can originate in the claim of an individual acting in the public interest, it can take the form of third-party interventions, actions brought in the collective interest, etc. The first chapter outlines these different forms of participation and shows that not all jurisdictions allow them. I chose to include all entities with no direct interest in the case explicitly allowed to participate in the proceedings and entities specifically claiming to be acting in the public interest when this avenue is available. Concretely, for the scope of this thesis, the surveyed public interest litigants are *amicus curiae* (hereinafter “amicus”, singular, or “amici”, plural) as well as organized groups acting as claimants before the South African Constitutional Court. This procedural criterion was chosen over an organic or a finalist criterion, as investigating the structures or motivations of each individual or group would have been almost impracticable.<sup>48</sup> This term allows not to use other labels such as NGOs, charities, pressure groups,<sup>49</sup> interest groups,<sup>50</sup> lobbyists<sup>51</sup> or campaigning groups.<sup>52</sup> Indeed, these labels also come with many definitional problems<sup>53</sup> and often require

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<sup>47</sup> For example, for her study on public interest legal organizations, Deborah L. Rhode included “nonprofit tax-exempt groups that attempted to use law to achieve social objectives”; D. Rhode, “Public Interest Law: The Movement at Midlife”, *Stanford Law Review*, Vol. 60, No. 6 (2008), p. 2029. Other authors choose to privilege groups that devote large share of their programs to litigation or organizations that represent unrepresented interests; see for example B. Weisbrod, “Conceptual Perspective on the Public Interest” *Public Interest Law: An Economic and Institutional Analysis* (Berkeley and Los Angeles: University of California Press, 1978), p. 22. Laura Beth Nielsen and Catherine Albiston define the public interest legal organization as an organization in the voluntary sector that employ at least one lawyer at least part time and whose activities seek to produce significant benefits for those who are external to the organization’s participants and involve at least one adjudicatory strategy; L. Nielsen and C. Albiston, “The Organization of Public Interest Practice: 1975-2004”, *North Carolina Law Review*, Vol. 84, No. 5 (2006), p. 1601. Public interest litigants are classically understood to be legal services programs, pro bono lawyers or law firms, private public interest law firms, law school clinics, bar organizations and other non-profit groups; S. Cummings and D. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, *Fordham Urban Law Journal*, Vol. 36, No. 4 (2009), pp. 603–651.

<sup>48</sup> Although they are here excluded, there can of course be individual claims brought in the private interest of the claimant where the ensuing legal decision (intentionally or unintentionally) benefits other persons; O. De Schutter, *Fonction de Juge et Droits Fondamentaux*, *op. cit.*, p. 88.

<sup>49</sup> In the United Kingdom, charities were traditionally understood as non-political entities and opposed to pressure groups, seen as organized entities with a defined membership and stated objectives regarding public policy; M. Hilton, N. Crowson et al., *A Historical Guide to NGOs in Britain* (London: Palgrave Macmillan, 2012), pp. 2–6.

<sup>50</sup> Box-Steffensmeier and Christenson “broadly define an interest group as any organization that at any time has an interest in political outcomes”; J. Box-Steffensmeier and D. Christenson, “The Evolution and Formation of Amicus Curiae Networks”, *Social Networks*, Vol. 36 (2014), p. 84. Although they recognize that there may be individual lobbyists, they only include non-individual and non-state organizations in their data; *Ibid.*

<sup>51</sup> Many groups dislike the label of ‘lobbyists’ because of the stigma related to the word (probably because it is understood by many as non-transparent and prone to corruption); C. Koumli, “Lobbying et séparation des pouvoirs en France” (Oslo: IX World Congress of Constitutional Law, 2014), p. 3.

<sup>52</sup> Carol Harlow uses the term “campaigning groups” to include interest, pressure and social action groups rather than the term NGO in order to stress the shift underlying the legal process that she wants to describe; C. Harlow, “Public Law and Popular Justice”, *op. cit.*, p. 1.

<sup>53</sup> C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 7. A. Vakil, “Confronting the classification problem: Toward a taxonomy of NGOs”, *World Development*, Vol. 25, No. 12 (1997), pp. 2057–2070.

investigation into the goals or structures of the organizations, in addition to the fact that they are deeply embedded within legal, historical, social and political contexts and thus not easily transposable.<sup>54</sup> Finally, although there is a large overlap between public interest litigants and the associational life of voluntary associations or civil society, not all surveyed public interest litigants can be said to belong to the latter.<sup>55</sup> Moreover, known variously as the ‘nonprofit’, the ‘voluntary’, the ‘third’, the ‘NGO’,<sup>56</sup> or the ‘charitable’ sector, ‘civil society’ is an elusive notion too.<sup>57</sup> Using the notion of public interest litigation also allows to draw on the rich scholarly work already existing on it, in particular as relates to its origin, evolution and identified challenges.

14. The term public interest litigation and the associated term public interest law<sup>58</sup> were first coined in 1976 in the United States, by Abram Chayes.<sup>59</sup> A number of movements can be identified at the roots of public interest law: first, the legal aid movement that started during the 1870s in the United States and the institutionalization of pro bono work. Second, the progressive era reform, when new legislation protecting the consumer and workers appeared. The third direct antecedents are the activities of the American Civil Liberties Union and the National Association of the Advancement of Colored People and its Legal Defense and Educational Fund.<sup>60</sup> While these organizations had forerunners,<sup>61</sup> none made such a

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<sup>54</sup> M. Hilton, N. Crowson et al., *A Historical Guide to NGOs in Britain*, *op. cit.*, p. 10.

<sup>55</sup> In particular, among the *amicus curiae* there are States, the European Union or companies.

<sup>56</sup> According to the *European Commission* for example “[t]he NGO-sector has often been described as extremely diverse, heterogeneous and populated by organisations with hugely varied goals, structure and motivations. It is therefore not an easy task to find a common definition of the term “non-governmental organisation”. It cannot be based on a legal definition given the wide variations in laws relating to NGO activities, according to which an NGO may have, for instance, the legal status of a charity, non-profit association or a foundation”; Commission of the European Communities, “The Commission and Non-Governmental Organisations: Building a Stronger Partnership”, Commission Discussion Paper, COM(2000)11, 18 January 2000.

<sup>57</sup> “Civil society has become a notoriously slippery concept”; M. Edwards, *Civil Society* (2004, Cambridge, UK: Polity) vi. See R. Steinberg and W. Powell, “Introduction” *The Non-Profit Sector. A Research Handbook*, 2nd ed., (New Haven: Yale Univ. Press, 2006), pp. 1–10. For a historical review of the concept and an introduction to Habermas’ vision of the public sphere see C. Calhoun, “Civil Society and the Public Sphere”, *Public Culture*, Vol. 5 (1993), pp. 267–280. According to the Center for Civil Society of the London School of Economics, “Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. (...) Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women’s organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups.”; Centre for Civil Society, *The CSS Report on Activities: July 2007-August 2008* (London: Centre for Civil Society, London School of Economics, 2008). The Johns Hopkins Comparative Nonprofit Sector Project, defined the “civil society sector” as composed of entities that are organizations (requiring some structure and regularity to their operations), private (not part of the apparatus of the state), not profit distributing (not primarily commercial in purpose), self-governing (in control of their own affairs) and voluntary (membership or participation in them is not legally required); L. Salamon and H. Anheier, “Civil Society in Comparative Perspective” *Global Civil Society: Dimension of the Nonprofit Sector* (Baltimore: The Johns Hopkins Center for Civil Society Studies, 1999), pp. 3–4.

<sup>58</sup> Public interest law is broader and besides litigation, consists also in the use of public advocacy (i.e. lobbying by representation or publication), in J. Cooper and R. Dhavan, *Public Interest Law* (Oxford: Blackwell Publisher, 1986), p. 5.

<sup>59</sup> A. Chayes, “The Role of the Judge in Public Law Litigation”, *Harvard Law Review*, Vol. 89, No. 7 (1976), p. 1282.

<sup>60</sup> In 1940, the LDF was created as a separate arm of the NAACP to litigate cases and raise money for its legal program; see for a short historical overview: S. Patton, *LDF@70. 70 Years Fulfilling the Promise of Equality* (2010), [http://www.naacpldf.org/files/publications/ldf@70\\_0.pdf](http://www.naacpldf.org/files/publications/ldf@70_0.pdf), p. 6.

consistent use of the litigation technique over such a sustained period. Mainly a citizens' lobbying group described as 'a watchdog of Negro liberties',<sup>62</sup> the National Association of the Advancement of Colored People is the oldest American organization supporting the civil rights of African Americans. Quite early in its history it opted for a litigation strategy to pursue its goals.<sup>63</sup> It hired lawyers, gathered a staff to plan campaigns, acted as amici curiae and supported 'test cases'. They collected favourable commentaries in law reviews or dissenting opinions of respected judges in 'lost' cases, obtained the support of other interest groups and in general, through the use of precedents, tried to create a 'legal culture' more favourable to their rights. In 1959, Clement Vose, in his book *Caucasians Only* contributed the first full-scale case study of this pressure group litigation strategy, by analysing the Supreme Court cases brought by the NAACP to test the legality of racially discriminatory restrictive covenants.<sup>64</sup> The NAACP's efforts were famously known to have been rewarded in the 1954 landmark case *Brown v. Board of Education of Topeka* (hereinafter, "*Brown*").<sup>65</sup> That decision, which has come to exemplify the ability of lawyers to structure and execute a legal strategy designed to produce substantial changes in the law or practices, remains an important subject of study and the campaigns have served as models for generations of activists.<sup>66</sup>

15. For a brief period, the term 'public interest law' may have been widely understood to apply to a well-specified set of practices and policy agendas. For example, a report on 'public interest law' in the mid-1970s, funded by the Ford Foundation defined it as: "[A]ctivity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of underrepresented interests (...); and (3) involves the use of law instruments, primarily litigation".<sup>67</sup> It was suggested that public interest litigation might improve the lot of 'have-nots', by facilitating their organization into "coherent groups that have the ability to act in coordinated fashion, play long-run strategies, [and] benefit from high-grade legal services".<sup>68</sup>

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<sup>61</sup> Among those forerunners were the women's suffrage organisations that had attempted a text-case strategy before the turn of the century, the AfroAmerican League which was the first black organisation to consider a litigation strategy and the Niagara Movement, which, in tandem with the Constitution League, also sought 'to seek legal redress' early on; C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 79.

<sup>62</sup> *Ibid.*, p. 80.

<sup>63</sup> M. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: The University of North Carolina Press, 2005).

<sup>64</sup> C. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Oakland: University of California Press, 1959) cited in C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 4.

<sup>65</sup> *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) supplemented 349 U.S. 294 (1955). The two major studies analysing the litigation strategy behind this case are R. Kluger, *Simple Justice. The History of Brown v. Board of Education and Black America's Struggle for Equality*, 2nd ed., (New York: Vintage Books, 2004); M. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950*, *op. cit.*

<sup>66</sup> S. Scheingold, *The Politics of Rights. Lawyers, Public Policy and Political Change*, 2nd ed., (Ann Arbor: University of Michigan Press, 2004), p. 173. The interest for this case also stems from the fact that its reasoning depended on a controversial 'Brandeis brief' submitted by an educational psychologist (see C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 83.) and that despite numerous scholarly efforts, no constitutional theory satisfactorily explains the outcome; M. Klarman, "Civil Rights Law: Who Made It and How Much Did It Matter", *Georgetown Law Journal*, Vol. 83 (1994), p. 434.

<sup>67</sup> B. Weisbrod, "Conceptual Perspective on the Public Interest", *op. cit.*, p. 22, cited in A. Southworth, "What Is Public Interest Law? Empirical Perspectives on an Old Question", *DePaul Law Review*, Vol. 62, No. 2 (2013), p. 496.

<sup>68</sup> M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", *Law and Society Review*, Vol. 9 (1974), pp. 143-144.

With some exceptions, ‘have nots’ often correspond to a category of litigant Marc Galanter labelled ‘one-shotters’, claimants who have only occasional recourse to the courts, as opposed to ‘repeat players’, who are engaged in many similar litigations over time.<sup>69</sup> In his famous article, Galanter posited that repeat players have ‘advance intelligence’, develop expertise and credibility, can select cases they regard as most likely to produce favourable outcomes for them, and are thus at an advantage.<sup>70</sup>

16. This emphasis on the disadvantaged or under-privileged segment of society<sup>71</sup> was one of the ambiguous elements at the heart of the concept and “contained the seeds of the term’s potentially vast application”.<sup>72</sup> The practice’s vague contours “made it an inviting vehicle for all sorts of groups that appreciated the potential advantages of enlisting lawyers in the nonprofit sector in their efforts to achieve public policy goals”.<sup>73</sup> And indeed, “a tremendous variety of groups now claim to speak for underrepresented constituencies”.<sup>74</sup>
17. In the U.S. in particular, because of the impact of the rise of organizations litigating against the position of original civil rights organizations, scholars found that the very meaning of ‘public interest law’ was undermined.<sup>75</sup> Maybe Clement Vose’s study contributed to projecting the view of pressure through law as essentially a liberal phenomenon, invented by the NAACP in defence of civil rights.<sup>76</sup> Lee Epstein redressed the balance with her study of *Conservatives in Court*, documenting the progress made by right-wing groups.<sup>77</sup> As a result, scholars searched for alternative concepts and the notion of ‘cause lawyering’ emerged in the 1990s. Legal activism was redefined on the basis of lawyer motivation rather than a particular conception of the public interest or a specific political agenda.<sup>78</sup> “Thus, instead of debating the imponderable question—just what is the public interest? — the cause lawyering project asks: Does the lawyer pursue ends that transcend client service?”<sup>79</sup> However, this effort to sidestep one terminological problem gave rise to another: what does the term ‘cause’ cover?<sup>80</sup>
18. But this is not the only challenge ‘public interest litigation’ faces, and it is criticized on various fronts. Beyond the general criticisms that decision-making by unelected judges

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<sup>69</sup> *Ibid.*, p. 97 and p. 103.

<sup>70</sup> *Ibid.*, pp. 100–101.

<sup>71</sup> See also the definition by N. Ahmed, *Public Interest Litigation, Constitutional Issues and Remedies*, *op. cit.*, p. 51.

<sup>72</sup> A. Southworth, “What Is Public Interest Law?”, *op. cit.*, p. 497.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, p. 493. Already in 1976, Marc Galanter noted that “the ‘public interest’ format can be used to augment the representation of ‘haves’ as well of unorganized ‘have-nots’”; M. Galanter, “Delivering Legality: Some Proposals for the Direction of Research”, *Law & Society Review*, Vol. 11 (1976), p. 240, note 32.

<sup>75</sup> S. Cummings, “The Future of Public Interest Law”, *University of Arkansas at Little Rock Law Review*, Vol. 33 (2011), p. 369.

<sup>76</sup> C. Harlow and R. Rawlings, *Pressure Through Law*, *op. cit.*, p. 4. In general, it has been deplored that the litigation behind *Brown* and the Supreme Court decision in which it culminated have cast a shadow on the legal historiography of the civil rights movements; K. Mack, “Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*”, *Yale Law Journal* 115 (2005), p. 256.

<sup>77</sup> *Ibid.* L. Epstein, *Conservatives in Court* (Knoxville: University of Tennessee Press, 1985).

<sup>78</sup> S. Cummings, “The Future of Public Interest Law”, *op. cit.*, p. 369.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

undermines democratic governance<sup>81</sup> (which is here reinforced “if we allow the campaigning style of politics to invade the legal process”),<sup>82</sup> it is also criticized on the basis that courts are ill-equipped to deal with important policy questions, that their decisions are inherently limited and that in the end, they draw important resources away from groups which could be more beneficial if used differently<sup>83</sup> or, indeed, that public interest litigation even creates a backlash.<sup>84</sup> S. Halpern has argued that “an excessive concentration on the law has meant a failure to address the real issues that perpetuate inequality by masking those continuing inequalities with the illusion of progress”.<sup>85</sup> This must be seen in the context of the legacy of *Brown*, which has not achieved desegregation in U.S. schools and on which much has now been written. A large debate took place about the effectiveness of public interest litigation between many authors. It was launched in the United States by Gerald Rosenberg’s book “The Hollow Hope: Can Courts Bring about Social Change?”<sup>86</sup> which concludes that legal decisions – even famous cases like *Brown* – only have an impact when the legislative and the executive branches act in tandem and that, in the end, courts drain precious resources from activists to little or no benefit. Different articles<sup>87</sup> criticized Rosenberg’s methods and shortcomings (such as the lack of explanation of why groups continue to deploy judicial strategies or the fact that he neglected certain dynamic effects triggered by courts decisions)<sup>88</sup>

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<sup>81</sup> *Ibid.* J. Cooper, “Public Interest Law Revisited”, *Commonwealth Law Bulletin*, Vol. 25 (1999), p. 139. In addition, as public interest litigants often subscribe to an instrumentalist view of the law – using the law as a means to achieve their varied ends, some authors see dangers in the willingness of organizations to use the judicial arena to etch their policy preferences into law. B. Tamanaha for example writes that “[i]n situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends. (...) Rather than function to maintain social order and resolve disputes, as Hobbes suggested was the role of law, combatants will fight to control and use the implements of the law as weapons in social, political, religious, and economic disputes. Law will thus generate disputes as much as resolve them. Even when one side prevails, victory will mark only a momentary respite before the battle is resumed. (...) Even those groups that might prefer to abstain from these battles over law will nonetheless be forced to engage in the contest, if only defensively to keep their less restrained opponents from using the law as a hammer against them.”; B. Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge Univ. Press, 2006), pp. 1–2.

<sup>82</sup> C. Harlow, “Public Law and Popular Justice”, *op. cit.*, p. 2. She even speaks of “colonization” or “corruption” of the legal process.

<sup>83</sup> H. Hershkoff, “Public Law Litigation: Lessons and Questions”, *Human Rights Review*, Vol. 10, No. 2 (2009), p. 170.

<sup>84</sup> According to Cass Sunstein, “[t]he Court may not produce social reform even when it seeks to do so. It may instead activate forces of opposition and demobilize the political actors that it favors. It may produce an intense social backlash, in the process delegitimizing both the Court and the cause it favors. More modestly, it may hinder social deliberation, learning, compromise, and moral evolution over time. A cautious course – refusal to hear cases, invalidation on narrow grounds, democracy-forcing rulings – will not impair this deliberative process and should improve it”; C. Sunstein, “Foreword, The Supreme Court, 1995 Term: Leaving Things Undecided”, *Harvard Law Review*, Vol. 110 (1996), p. 33.

<sup>85</sup> S. Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act* (Baltimore: Johns Hopkins Univ. Press, 1995), pp. 11–12.

<sup>86</sup> G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed., (Chicago: University of Chicago Press, 2008). (The first edition dates from 1991).

<sup>87</sup> M. McCann, “Reform Litigation on Trial”, *Law & Social Inquiry*, Vol. 17, No. 4 (1992), pp. 728–741; M. McCann, “Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)”, *Law & Social Inquiry*, Vol. 21, No. 2 (1996), pp. 476–477.

<sup>88</sup> H. Hershkoff, “Public Law Litigation”, *op. cit.*, p. 174.

and the debate is not closed.<sup>89</sup> This is primarily linked with the problem of the measurement of the efficiency of public interest litigation. Due to methodological problems and issues of causality,<sup>90</sup> the impact of litigation and of legal decisions on society in general is very difficult to measure.<sup>91</sup> The goals of a lawsuit are complex<sup>92</sup> and there are different types of influence that courts may exert (producing change mainly through a judicial path and/or an extrajudicial path).<sup>93</sup> Furthermore, the effects of judicial decisions should ideally be isolated from the effects of other events, especially since legal strategies are often only one aspect of a broader campaign.<sup>94</sup> Additionally, the outcome of public law litigation may often depend on the iterative and cumulative effect of multiple filings of lawsuits<sup>95</sup> (indeed, many courtroom victories are accomplished piecemeal, with incremental successes matched by repeated failures over the course of many years).<sup>96</sup>

19. But no one suggests that public interest litigation can never bring about social change. Gerald Rosenberg, known for being the main critic of the mechanism, precised that his claim was that there is a set of constraints and conditions under which courts can produce significant social reform.<sup>97</sup> If it is probably naive to expect courts to solve problems where other branches of government cannot, it is also short-sighted to deny that the courts played an important role in producing significant reform in the last half-century.<sup>98</sup> Despite obstacles,

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<sup>89</sup> Many articles question or attack the different findings and attempt to prove exactly the opposite, to refine or to update their contributions (See F. Munger, “Afterword: Studying Litigation and Social Change”, *Law & Society Review*, Vol. 24, No. 2 (1990), pp. 595–615.) According to the ideological predispositions “each may select an illustration here, an example there, which seems to prove the case”; J. Handler, E. Hollingsworth et al., *Lawyers and the Pursuit of Legal Rights* (San Diego: Academic Press, 1978), p. ix.

<sup>90</sup> M. McCann, “Reform Litigation on Trial”, *op. cit.*, p. 741. J. Denvir, “Towards a Political Theory of Public Interest Litigation”, *North Carolina Law Review*, Vol. 54 (1975), p. 1135.

<sup>91</sup> J. Denvir, “Towards a Political Theory of Public Interest Litigation”, *op. cit.*, p. 1135. In addition, organizations often lack mechanisms to evaluate their effectiveness and measure the outcomes of their interventions in this field (for example because they do not have explicitly stated goals); C. C. Barber, “Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations”, *The International Journal of Human Rights*, Vol. 16, No. 3 (2012), pp. 411–435.

<sup>92</sup> H. Hershkoff, “Public Law Litigation”, *op. cit.*, p. 174.

<sup>93</sup> Social change produced through ‘the judicial path’ is based on the authority of the court. This path focuses on the direct result of the decision and whether the change required by the court happened. It is thus needed to identify and determine what is considered ‘successful’; A. Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies”, *Journal of Law and Society*, Vol. 17, No. 3 (1990), p. 319. Alternatively, the influence of the court may follow an alternative, ‘extrajudicial path’, involving its powers of persuasion, its legitimacy and its capacity to give visibility to certain questions. The causal chain is more subtle and complex. Here, courts do not change behaviour in the short term, but can inspire people or public authorities to act, to change their opinions, are symbols of change, affect the intellectual climate, place items on the political agenda etc. The evidence of these indirect effects will then be found in public opinion polls, media coverage, support for these causes, etc.

<sup>94</sup> P. Waddington, “Book Review: Law and Social Movements.”, *British Journal of Criminology*, Vol. 47, No. 2 (2007), p. 351. D. NeJaime, “Winning through Losing”, *Iowa Law Review*, Vol. 96 (2011), pp. 941–1012.

<sup>95</sup> H. Hershkoff, “Public Law Litigation”, *op. cit.*, p. 173.

<sup>96</sup> H. Hershkoff and A. McCutcheon, “Public Interest Litigation: An International Perspective” in Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice. The Law-Related Work of Ford Foundation Grantees Around the World* (New York: Ford Foundation, 2000), p. 289. Authors speak of a ‘building block approach’ which depends on steady and persistent efforts; *Ibid.*

<sup>97</sup> G. Rosenberg, “Knowledge and Desire: Thinking About Courts and Social Change” *Leveraging the Law: Using Courts to Achieve Social Change* (Bern: Peter Lang, 1998), p. 255.

<sup>98</sup> G. Rosenberg, *The Hollow Hope*, *op. cit.*, p. 10. Two leading scholars in the field, Cummings and Rhode, are also of the opinion that although imperfect, litigation remains an indispensable strategy of social change; S. Cummings and D. Rhode, “Public Interest Litigation”, *op. cit.*, p. 604.

there is evidence indicating that these legal tactics may be useful.<sup>99</sup> The experience of civil rights is the best demonstration that they can provide a stimulus that can initiate and consolidate a social or political movement.<sup>100</sup> According to Helen Hershkoff: “[n]ew empirical research suggests that lawsuits in some settings have greater impact in affecting social conditions than previously recognized; discussions no longer look to single-factor causes of social change but instead emphasizes the judiciary’s complex interactions with other actors”.<sup>101</sup>

20. Despite all these criticisms, “[s]ince the NAACP Legal Defense Fund’s landmark success in *Brown v. Board of Education*, public interest law has occupied a special place in American conceptions of law and social change. The efforts of lawyers in the civil rights movement led other groups to see law as an instrument for social justice”.<sup>102</sup> Many activists turned to the U.S. civil rights movement for inspiration<sup>103</sup> and the practice of using courts, often described as “a culture-specific phenomenon developed in America”<sup>104</sup> then spread as a wide-reaching phenomenon,<sup>105</sup> found in many countries. But even before looking at how it influenced activists worldwide, it is important to recall that *Brown* was influenced by the world climate of the era in which it was decided, which bears resemblance to elements developed in this thesis.
21. When entering the war to fight Nazism and its “rank racism”,<sup>106</sup> U.S. troops were still racially segregated. Later, segregation in the U.S. also attracted attention at the United Nations.<sup>107</sup> When *Brown* appeared on the U.S. Supreme Court docket, the Cold War was unfolding. These elements set the debate on this civil rights issue.<sup>108</sup> As Michael Klarman recalls “[i]n the ideological contest with communism, U.S. democracy was on trial”<sup>109</sup> and criticisms came from every corner of the world.

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<sup>99</sup> R. Stryker, “Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies”, *Annual Review of Law and Social Science*, Vol. 3, No. 1 (2007), pp. 69–97.

<sup>100</sup> For example, discussing the work of “three eminent theorists of backlash” (Cass Sunstein, William Eskridge and Michael Klarman), R. Post and R. Siegel are of the opinion that the contemporary scholarly debate does not sufficiently appreciate the ways that citizen engagement in constitutional conflict may contribute to social cohesion in a normatively heterogeneous polity; R. Post and R. Siegel, “Roe Rage: Democratic Constitutionalism and Backlash”, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 42 (2007), p. 377.

<sup>101</sup> H. Hershkoff, “Public Law Litigation”, *op. cit.*, p. 159.

<sup>102</sup> L. Nielsen and C. Albiston, “The Organization of Public Interest Practice”, *op. cit.*, p. 1592. Their study describes the landscape in the United States.

<sup>103</sup> M. Goodwin, “White Knights On Chargers: Using The US Approach To Promote Roma Rights In Europe?”, *German Law Journal*, Vol. 5, No. 12 (2004), p. 1432.

<sup>104</sup> R. Dhavan, “Whose law? Whose interest?” *Public Interest Law* (Oxford: Blackwell, 1986), p. 38. This must however be nuanced but the impression probably derives from the sophisticated American literature having covered the topic.

<sup>105</sup> H. Hershkoff, “Public Law Litigation”, *op. cit.*, p. 157.

<sup>106</sup> R. Ginsburg, “Brown v. Board of Education in International Context - October 21, 2004”, *Columbia Human Rights Law Review*, Vol. 36 (2004), p. 493.

<sup>107</sup> The NAACP had submitted a petition on the treatment of blacks in the United States but the United Nations took no action; see for all the references M. L. Dudziak, “Desegregation as a Cold War Imperative”, *Stanford Law Review*, Vol. 41, No. 1 (1988), pp. 94–96.

<sup>108</sup> *Ibid.*, p. 65.

<sup>109</sup> M. Klarman, *From Jim Crow to Civil Rights* (New York: Oxford Univ. Press, 2004), p. 182, cited in R. Ginsburg, “Brown v. Board of Education in International Context”, *op. cit.*, p. 495.



22. The United States filed an amicus brief, in which the Attorney General urged:<sup>110</sup>

“It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove flaws in our democracy. The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.”<sup>111</sup>

23. The brief then quoted a letter from Secretary of State Dean Acheson stating that the existence of discrimination against minority groups has an adverse effect upon relations with other countries and creates suspicion and resentment.<sup>112</sup>

“The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country (...) Soviet spokesmen regularly exploit the situation in propaganda against the United States (...) the continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.”<sup>113</sup>

24. The Court’s unanimous conclusion that the existence of separate educational facilities for black and white students was inherently unequal was immediately broadcasted around the globe. The U.S. Information Agency placed articles on the decision in almost every African journal and many journals commented.<sup>114</sup>

25. Although there is no mention of these foreign policy considerations in the judgment, “there is no doubt that they significantly influenced the decision”.<sup>115</sup> Its author, Chief Justice Earl Warren, reflected some 18 years after the judgment:

“[The] reversal of race relations policies [in the United States] (...) was fostered primarily by the presence of [World War II] itself. (...) The segregation and extermination of non-Aryans in Hitler’s Germany were shocking for Americans, but they also served as a troublesome analogy. While proclaiming themselves inexorably opposed to Hitler’s practices, many Americans were tolerating the segregation and humiliation of nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America.”<sup>116</sup>

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<sup>110</sup> R. Ginsburg, “Brown v. Board of Education in International Context”, *op. cit.*, p. 495.

<sup>111</sup> Amicus curiae brief of the United States in *Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas, et al.*, p. 6.

<sup>112</sup> Letter to the Attorney General, 2 December 1952, cited in Amicus curiae brief of the United States in *Brown et al. v. Board of Education of Topeka, op. cit.*, p. 7.

<sup>113</sup> *Ibid.*, p. 8.

<sup>114</sup> R. Ginsburg, “Brown v. Board of Education in International Context”, *op. cit.*, p. 496.

<sup>115</sup> A. Lester, “Brown v. Board of Education Overseas”, *Proceedings of the American Philosophical Society*, Vol. 148, No. 4 (2004), p. 459.

<sup>116</sup> E. Warren, “Introduction Notre Dame Law School Civil Rights Lectures”, *Notre Dame Law Review*, Vol. 48, No. 1 (1972), p. 41, cited by R. Ginsburg, “Brown v. Board of Education in International Context”, *op. cit.*, p. 495.

26. If the litigation strategy and the justices were influenced by these external elements, they also contributed to influencing some of their foreign counterparts, in particular the two other jurisdictions chosen for this analysis.
27. As stated above, the NAACP strategy culminating in *Brown* had an impact on the methods used by advocates worldwide.<sup>117</sup> Many activists have been looking at the approaches and strategies used in the United States. Various handbooks explain for example how to set up a public interest organization and how it can help address some problems, specifically referring to the U.S. experience.<sup>118</sup> In addition, many civil society organizations were heavily supported by American foundations, in particular those that started emerging in Central and Eastern Europe in the 1990s.<sup>119</sup> According to Edwin Rekosh, two in particular had a fundamental impact on the spread of public interest law: the Ford Foundation and the Open Society Institute.<sup>120</sup> Among the many organizations influenced by the work of the NAACP, the European Roma Rights Center illustrates the various links between the two continents. It famously conducted a test case litigation regarding the treatment of Roma children by the Czech authorities,<sup>121</sup> in which *Brown* was cited by the applicants and by two amici.<sup>122</sup>
28. The decision's content was to find echo too: *Brown* resonated in Europe. According to Bob Hepple, "[t]he concept of equal protection from *Brown* and other American precedents has been a crucial stimulus for legal development in Europe",<sup>123</sup> in particular in the field of antidiscrimination. They affected the development and interpretation of the European

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<sup>117</sup> A. Lester, "Brown v. Board of Education Overseas", *op. cit.*, p. 459. Regarding the U.S., Justice Ginsburg recalls that *Brown* influenced the women's rights litigation in the 1970s. She writes: "[t]he ACLU's Women's Rights Project, which I helped to launch and direct, was among the organizations inspired by the NAACP Legal Defense and Education Fund's example"; R. Ginsburg, "Brown v. Board of Education in International Context", *op. cit.*, p. 500.

<sup>118</sup> E. Rekosh, K. Buchko et al. (eds.), *Pursuing the Public Interest. A Handbook for Legal Professionals and Activists*, *op. cit.*

<sup>119</sup> T. Carothers, "Western Civil-Society Aid to Eastern Europe and the Former Soviet Union", *East European Constitutional Review*, Vol. 8 (1999), pp. 54–62.

<sup>120</sup> They both organized an international conference bringing together the leaders of civil society organizations that were experimenting with legal approaches to their advocacy; E. Rekosh, "Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe", *UCLA Journal of International Law and Foreign Affairs*, Vol. 13 (2008), p. 76. Of course, the U.S. models that arrived were transformed and adapted; *Ibid.*, p. 79. See on the litigation work of the Open Society in particular Open Society Justice Initiative, *Global Human Rights Litigation* (October 2013), <http://www.opensocietyfoundations.org/reports/global-human-rights-litigation-report>.

<sup>121</sup> R. Ginsburg, "Brown v. Board of Education in International Context", *op. cit.*, p. 501.

<sup>122</sup> Application in *D.H. v. Czech Republic*, Appl. No. 57325/00, 13 November 2007, § 6.15 and Amicus curiae brief of Minority Rights Group International, the European Network Against Racism and European Roma Information Office in *D.H. v. Czech Republic*, *op. cit.*, p. 7, and Amicus curiae brief of the International Federation of Human Rights in *D.H. v. Czech Republic*, *op. cit.*, p. 7.

<sup>123</sup> These precedents were frequently cited in early British and EC cases interpreting antidiscrimination laws. They have operated in very different ways in both continents. "They have been reconstructed and in some cases transformed to fit the different social and political milieu of the European countries"; B. Hepple, "The European Legacy of Brown v. Board of Education", *U. Ill. L. Rev.*, (2006), p. 605. In general, anti-discrimination litigation also tries to raise awareness that there is a problem, gain justice for the victims, act as a deterrent to those who would continue to discriminate; act as inspiration to the oppressed and change wider societal perceptions; Goodwin, "White Knights On Chargers: Using The US Approach To Promote Roma Rights In Europe?", p. 1434.

Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>124</sup> under the auspices of English and Irish lawyers influenced by the American civil rights movement, among others.<sup>125</sup> In *East African Asians v. United Kingdom*,<sup>126</sup> Anthony Lester (today Baron Lester of Herne Hill) who had been educated on both sides of the Atlantic, was co-counsel for a group of citizens who were denied entry to the U.K. and he cited American precedents. Advised by the American Professor Charles Black, he was able to persuade the Commission that racial discrimination is inherently degrading and hence contrary to the prohibition against degrading treatment contained in Article 3 of the ECHR.<sup>127</sup>

29. In South Africa, there were already parallels and connections between the domestic liberation movement and the American civil rights protests.<sup>128</sup> When *Brown I* and *II* were decided, they were considered by anti-apartheid activists as models of civil rights litigation.<sup>129</sup> During the years that followed, “leading United States civil rights protagonists played a crucial role in helping South African lawyers (...) craft tactics to fight apartheid through the courts”.<sup>130</sup> Prior to 1994, although “the mechanisms for public interest litigation were very limited” (as there was no Bill of Rights and almost complete parliamentary sovereignty), some form of public interest litigation existed. Indeed, “[d]espite its flagrant violation of human rights, government purported to hold the judiciary in the highest esteem and professed respect for the rule of law. This attitude, combined with government’s attempts to use the law to entrench apartheid, ironically created opportunities for public interest lawyers to exploit gaps in the system”.<sup>131</sup> Moreover, given the importance of the issue and the interest of the international community, groups received considerable funding to engage in public interest litigation. These groups

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<sup>124</sup> B. Hepple, “The European Legacy of *Brown v. Board of Education*”, *University of Illinois Law Review* (2006), p. 609.

<sup>125</sup> M. Goldhaber, *A People’s History of the European Court of Human Rights* (Rutgers Univ. Press, 2009), p. 181.

<sup>126</sup> Report adopted by the European Commission of Human Rights, *East African Asians v. The United Kingdom*, Appl. Nos 4403/70 et al., 14 December 1973.

<sup>127</sup> *Ibid.* See for more on this test case: A. Lester, “Thirty Years on: the East African Case Revisited”, *Public Law*, (2002), p. 59. The first cases against the United Kingdom for its conduct in Northern Ireland were brought by a Chicago lawyer, James C. Heany, Kevin Boyle, an Irish having studied at Yale Law School and the professors Hanumm and Newman from the University of California at Berkeley; M. Goldhaber, *A People’s History of the European Court of Human Rights*, *op. cit.*, p. 182. Michael Goldhaber provides other examples where litigation campaigns were patterned on American precedents.

<sup>128</sup> M. Kende, *Constitutional Rights in Two Worlds*, *op. cit.*, p. 45.

<sup>129</sup> R. Goldstone and B. Ray, “The International Legacy of *Brown v. Board of Education*”, *McGeorge Law Review*, Vol. 35 (2004), p. 105.

<sup>130</sup> *Ibid.*, p. 114, and R. Ginsburg, “*Brown v. Board of Education* in International Context”, *op. cit.*, p. 499. Jack Greenberg who was Director of the NAACP Legal Defense and Education Fund for a long time, played a lead role in establishing the Legal Resources Center in South Africa and another lawyer on the *Brown* team, U.S. District Court Judge Constance Baker Motley, also encouraged black lawyers to use the law to help free black South Africans from oppression; *Ibid.*

<sup>131</sup> S. Budlender, G. Marcus et al., *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Johannesburg: The Atlantic Philanthropies, 2014), p. 6. The use of public interest litigation in this period is addressed in detail in R. L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (Oxford: Taylor & Francis, 1995). See also M. Heywood, “Debunking ‘Conglomo-talk’: A case study of the amicus curiae as an instrument for advocacy, investigation and mobilisation”, *Law, Democracy and Development*, Vol. 5, No. 2 (2001), p. 134, and R. Maiman, “Political Cultures in Conflict: Contextualising Constitutional Litigation in South Africa” in Frans Viljoen (ed.), *Beyond the Law: Multi-Disciplinary Perspectives on Human Rights* (Pretoria: Pretoria University Law Press, 2012), pp. 17–39.

were the Legal Resources Centre (LRC), the Centre for Applied Legal Studies (CALS) and Lawyers for Human Rights (LHR).<sup>132</sup>

30. *Brown* was still significant in the 1990s as South Africans began to embark on negotiations that would lead the country towards non-racialism and democracy: it represented “an unequivocal rejection of notions of racial superiority and racial inferiority, (and) provided succor to those in South Africa who believed that a societal route towards racial equality was possible”.<sup>133</sup> The enactment of a new Constitution containing many fundamental rights and wide standing provisions and the establishment of the Constitutional Court changed the landscape for public interest litigation – although it remains challenging.<sup>134</sup> Finally, as the retired justice of the South African Constitutional Court, Richard Goldstone, and one of its foreign law clerks write, the South African Constitutional Court (among other courts) cited *Brown* on a few occasions as persuasive authority.<sup>135</sup>
31. These examples demonstrate first that the practice of public interest litigation has internationalized<sup>136</sup> and that today it takes place before courts elsewhere in the world.<sup>137</sup> Second, *Brown* shows that adjudication can take a wider audience into consideration (making it explicit or not in the judgment) and that a ruling may resonate beyond its borders. This thesis looks in particular at some of the ingredients at play here, such as the different mechanisms used by public interest litigants to influence the judges, the comparative arguments brought forward in the argumentation and the justifications given to sensitize

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<sup>132</sup> S. Budlender, G. Marcus et al., *Public Interest Litigation and Social Change in South Africa*, *op. cit.*, p. 7. See for more on the early activities of the Legal Resources Center G. Budlender, *Lawyers and Poverty: Beyond “Access to Justice”* (Cape Town: Second Carnegie Inquiry into Poverty and Development in Southern Africa, 13 April 1984), p. 20.

<sup>133</sup> P. Andrews, “Perspectives on Brown”, *Safundi*, Vol. 6, No. 3 (2005), p. 2. She concludes however that “although *Brown* was of tremendous symbolic value to South Africans, the South African constitutional framework, negotiated in the early 1990s, reflected global human rights developments more substantially than it did the American civil rights struggle”; *Ibid.*

<sup>134</sup> First, there were not many lawyers trained in constitutional law and many experienced advocates versed in public interest litigation joined the government. Then access to funding decreased as the general situation had improved in the eyes of foreign donors; S. Budlender, G. Marcus et al., *Public Interest Litigation and Social Change in South Africa*, *op. cit.*, pp. 8–10. Today, the use of rights in a context of enduring social and economic inequality remains; J. Dugard and M. Langford, “Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism”, *South African Journal on Human Rights*, Vol. 27 (2011), p. 63.

<sup>135</sup> R. Goldstone and B. Ray, “The International Legacy of *Brown v. Board of Education*”, *op. cit.*, p. 105.

<sup>136</sup> Bringing changes in the US too: S. Cummings, “The Internationalization of Public Interest Law”, *Duke Law Journal*, Vol. 57, No. 4 (2008), pp. 891–1036. R. L. Abel, “The Globalization of Public Interest Law”, *UCLA Journal of International Law and Foreign Affairs*, Vol. 13 (2008), pp. 295–305.

<sup>137</sup> Facing the same difficulties of evaluating the effects of public interest litigation and similar criticisms. For example, regarding the European Court of Human Rights, a famous test case brought by public interest litigants on the discrimination experienced by Roma children in education, *D.H. v. Czech Republic* (Eur. Ct. H. R., Appl. No. 57325/00, 13 November 2007), did not dramatically change the situation and years after, considerable progress still needs to be achieved; H. Smekal and K. Sipulova, “DH v Czech Republic Six Years Later: On the Power of An International Human Rights Court to Push Through Systematic Change”, *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3 (2014), pp. 288–321. Morag Goodwin also noted that litigation regarding Romani rights does not seem to be changing public opinion towards Roma in Central and Eastern European countries; M. Goodwin, “White Knights on Chargers: Using The US Approach To Promote Roma Rights In Europe?”, *op. cit.*, p. 1443. See for an example of not effective change in South Africa (here on judgments upholding asylum-seekers and refugee rights); R. Amit, “Winning isn’t everything: Courts, context, and the barriers to effecting change through public interest litigation”, *South African Journal of Human Rights*, Vol. 27 (2011), pp. 8–38.

judges to them and the questions raised by the possible ramifications of the actions of other nations on the adjudication of fundamental rights.

### 3. Fields and Methodology

32. This thesis aims to respond to the need for more evidence-based human rights research<sup>138</sup> and draws upon the rich traditions of various strands of research, belonging to different disciplines.<sup>139</sup>
33. First, the ambition of this research being to explain and understand the unfolding and the evolution of a legal phenomenon, it employs sociology of law<sup>140</sup> and adopts a user-based perspective.<sup>141</sup>
34. This research parallels the ‘new civil rights history’ field, defined by Risa Goluboff as “interested less in legal output at a single level of the legal system than in the movement of consciousness, arguments, and doctrine throughout the process of law creation”.<sup>142</sup> It thus takes her recommendation to combine a traditional approach to the legal history of the subject — ‘major-case-centered’ focus — with that of traditional social history — the “movement on the ground in particular communities”.<sup>143</sup>

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<sup>138</sup> H.-O. Sano and H. Thelle, “The Need for Evidence-Based Human Rights Research” *Methods of Human Rights Research* (Antwerp: Intersentia, 2009), pp. 91–109. Mikael Madsen for example deplores that “the gradual emergence and expansion of human rights (law) tend to be presented from an insider view mainly concerned with the legal effectiveness and expansion of these doctrinal regimes” with “very little emphasis on the social and historical context of these legal and institutional innovations”; M. R. Madsen, “Reflexivity and the Construction of the International Object: The Case of Human Rights”, *International Political Sociology*, Vol. 5, No. 3 (2011), p. 269. He argues that “the study of the legal and institutional aspect of human rights might equally benefit from an analysis which instead takes a starting point in the adversarial nature of this social space: How it was—and continues to be—produced at the crossroads of a set of different agendas and actors and how human rights law and institutions are gradually formed by these stakes”; *Ibid.*

<sup>139</sup> See for an effort to integrate different strands of literature and different domains of rights to grasp the emerging field of transnational human rights in a socio-legal approach; H. Klug, “Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights”, *Annual Review of Law and Society*, Vol. 1 (2005), pp. 85–103. Following the median way suggested by F. Ost and M. Van de Kerchove between ‘an internal point of view’ and an ‘external point of view’, this thesis tries to adopt a ‘moderate external point of view’, designed as the search for an interdisciplinary approach to law in which the recourse to other disciplines (such as history, sociology, political science, etc.) tries to help explaining ‘internal’ representations of the legal system; F. Ost and M. van de Kerchove, “Towards an Interdisciplinary Theory of Law”, *Theory of Legal Science*, Vol. 176 (1984), p. 502. This undertaking parallels the search for a “comprehensive explanation” of the legal phenomenon under scrutiny; J. Commaille, “L’interdisciplinarité aux regards de la sociologie. A propos de l’ouvrage de François Ost et Michel Van de Kerchove, Jalons pour une théorie critique du droit”, *Droit et Société, Facultés Universitaires Saint-Louis*, Vol. 10 (1987), p. 526.

<sup>140</sup> O. Corten, *Méthodologie du droit international public* (Bruxelles: Université libre de Bruxelles, 2009), p. 36.

<sup>141</sup> V. Rousset, “Le droit et ses formes. Éléments de discussion de la sociologie du droit de Pierre Bourdieu”, *Droit et société*, Vol. n°56-57, No. 1 (2004), p. 52. E. Desmet, “Analysing Users’ Trajectories in Human Rights. A Conceptual Exploration and Research Agenda”, *Human Rights and International Legal Discourse*, Vol. 8, No. 2 (2014), pp. 121–141. See in general the work produced by the research project ‘The Global Challenge of Human Rights Integration: Towards a Users’ Perspective’, a Interuniversity Attraction Pole funded by the Belgian Science Policy Office: <http://hrintegration.be/> (last accessed 22 July 2015).

<sup>142</sup> R. Goluboff, “Lawyers, Law, and the New Civil Rights History”, *Harvard Law Review*, Vol. 126 (2013), p. 2323.

<sup>143</sup> *Ibid.*, p. 2319.

35. As stated above, there is an important American literature on judges as actors in the political game<sup>144</sup> and on the issue of law and social change and the mobilization of law, that tries among other things “to identify the conditions under which law is successfully mobilized, with some disagreement about what constitutes ‘success’”.<sup>145</sup> For example, Charles Epp’s famous study emphasized the crucial role played by support structures for legal mobilization and rights revolution, consisting of rights advocacy organizations, rights advocacy networks, lawyers, sources of financing etc.<sup>146</sup> Legal scholars have thus explored the roles of social movements and of courts to understand how constitutional meaning is constructed.<sup>147</sup> Robert Post and Reva Siegel have developed a theory describing the role that social movements play in creating new forms of constitutional understanding. Under the term ‘democratic constitutionalism’, they describe a process by which actors engage in norm contestation to challenge existing interpretations that can lead to changes over time, simultaneously insisting on the essential role of judicially enforced rights.<sup>148</sup>
36. Finally, the analysis also relies to a certain extent on studies (often from sociologists or political scientists) having examined the construction of social movements’ discourses. This literature has been dominated by the concepts developed by Snow and Benford of frame and framing,<sup>149</sup> used to conceptualize the signifying work produced by social movements. These movements “frame or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents to garner bystander support and to demobilize antagonists”.<sup>150</sup>
37. As this thesis aims at describing a phenomenon in greater detail and at identifying the conditions for its occurrence,<sup>151</sup> a comparative case study approach will be applied.<sup>152</sup> The

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<sup>144</sup> M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford Univ. Press, 2002).

<sup>145</sup> J. Barnes and T. Burke, “The Diffusion of Rights: From Law on the Books to Organizational Rights Practices”, *Law & Society Review*, Vol. 40, No. 3 (2006), p. 496. See *supra* §18 for the references on the debate between Rosenberg & McCann.

<sup>146</sup> C. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, 1st ed., (Chicago: University Of Chicago Press, 1998), p. 3.

<sup>147</sup> C. Soohoo and S. Stolz, “Bringing Theories of Human Rights Change Home”, *Fordham Law Review*, Vol. 77, No. 2 (2008), p. 478. According to NeJaime, this scholarship has persuasively demonstrated how the labor, civil rights, and women’s movements have shaped constitutional norms and in turn have been shaped by those norms; D. NeJaime, “Constitutional Change, Courts, and Social Movements”, *Michigan Law Review*, Vol. 111, No. 6 (2013), p. 879. Among many, see the large and captivating study of William Eskridge demonstrating how “most twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements” of that century; W. Eskridge, “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century”, *Michigan Law Review*, Vol. 100, No. 8 (2002), p. 2064. See also the work of J. Novkov, *Constituting Workers, Protecting Women* (Ann Arbor: University of Michigan Press, 2001). She demonstrates that it is mostly the efforts of white working class women during the early nineteenth century that shaped the jurisprudence of due process. She uses the term of ‘nodes of conflict’ to designate “moments in the development of doctrine during which the various groups of actors who have access to the legal community struggle among themselves and with each other to establish their interpretations of a particular legal concept or phrase as the dominant norm”; *Ibid.*, p. 16.

<sup>148</sup> R. Post and R. Siegel, “Roe Rage”, *op. cit.*, p. 379.

<sup>149</sup> See for more S. Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 2nd ed., (Cambridge: Cambridge Univ. Press, 1998), chap. 7.

<sup>150</sup> D. Snow and R. Benford, “Ideology, Frame Resonance, and Participant Mobilization”, *International Social Movement Research*, Vol. 1, No. 1 (1988), p. 198.

<sup>151</sup> U. Flick, “Mapping the Field” *The SAGE Handbook of Qualitative Data Analysis* (SAGE Publications Ltd, 2013), p. 6.

main methodology will be a quantitative and qualitative content analysis,<sup>153</sup> where the units of analysis are primarily the briefs submitted by the identified public interest litigants and the judicial decisions. In addition to the courts' archives, the documents produced by the public interest litigants were collected and analyzed and a lot of doctrinal sources were consulted, without distinguishing whether they originated from the legal, sociological, political or historical registers.

### 3.1. A Comparative Approach

38. The thesis is located at the angle of comparative law and legal sociology (also said to be inseparable)<sup>154</sup> – some suggesting the term ‘comparative sociology of law’, the sociological study of law from a comparative perspective.<sup>155</sup> This is because sociology of law, by focusing on “the study of behavior and social phenomena, insofar as they can be determining factors in the development of some legal norms”<sup>156</sup> will naturally have to take into consideration the existence of a formally valid legal system requiring specific behaviors.<sup>157</sup>
39. The comparative approach serves a mainly epistemological goal here,<sup>158</sup> to gain insights on the differences and similitudes,<sup>159</sup> to identify the extent to which the phenomenon of cross-citations is shaped by universal factors and the extent to which it is shaped by unique and

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<sup>152</sup> Case analysis is a method of choice in comparative constitutional law; T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011), p. 13. It has been opted for the examination of a small number of case studies (‘small-N’) which is a classic way of theory testing in the study of politics and society; Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law” *American Journal of Comparative Law* 53 (2005), p. 132. To recall, case studies “are generalizable to theoretical propositions and not to populations or universes”. Therefore, analytical generalizations will be suggested (in contrast with statistical generalization); R. Yin, *Case Study Research: Design and Methods* (London: SAGE Publications Ltd., 2013), pp. 13–14.

<sup>153</sup> Defined as a systematic examination of a particular body of material on an effort to identify patterns and meanings; B. Berg, *Qualitative Research Methods for the Social Sciences*, 6th ed., (London: SAGE Publications Ltd, 2007), p. 303. The documents submitted to courts are here approached as resources but also as topics themselves; L. Prior, “Documents and Action”, in Pertti Alasuutari, Leonard Bickman, and Julia Brannen (eds.), *The SAGE Handbook of Social Research Methods* (London: SAGE Publications Ltd, 2008), p. 480.

<sup>154</sup> R. Cotterell, “Comparatists and Sociology” in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge Univ. Press, 2003), p. 131. Sociology of law might employ methods that are central to comparative law (and thus they have a very close relationship); G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014), pp. 10–11.

<sup>155</sup> R. Cotterell, “Comparative Sociology of Law” in David S. Clark (ed.), *Comparative Law and Society* (Cheltenham, United Kingdom: Edward Elgar Publishing, 2012), pp. 39–60.

<sup>156</sup> A.-J. Arnaud and M. J. Farinas Dulce, *Introduction à L'analyse Sociologique Des Systèmes Juridiques* (Bruxelles: Bruylant, 1998), p. 6.

<sup>157</sup> *Ibid.*

<sup>158</sup> See R. Sacco, *La Comparaison Juridique Au Service de La Connaissance Du Droit* (Paris: Economica, 1991), p. 8. For Peer Zumbansen “[c]omparative constitutional law (...) withers away as a field focusing on ‘comparison’, on ‘constitutions’, and on ‘law’, only to reemerge as a critical enterprise in scrutinizing law’s relation to a complex world society”; P. Zumbansen, “Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism” in Michel Rosenfeld and Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford Univ. Press, 2012), pp. 75–97. Otto Pfersmann, “Le droit comparé comme interprétation et comme théorie du droit”, *Revue internationale de droit comparé*, Vol. 53, No. 2 (2001), p. 287.

<sup>159</sup> In particular it helps explore how the manifestations of the comparative reasoning in the judgements vary between jurisdictions, the explanations of this phenomenon, and the differences in the contexts in which it arises; M. Palmberger and A. Gingrich, “Qualitative Comparative Practices: Dimensions, Cases and Strategies” *The SAGE Handbook of Qualitative Data Analysis* (London: SAGE Publications Ltd, 2014), p. 95.

specific factors,<sup>160</sup> to uncover global patterns that span across them and the networks surrounding the task of interpreting fundamental rights provisions.<sup>161</sup>

40. Regarding the first chapter as well as the choice of documents to analyze, a functional approach was adopted, comparing mechanisms and documents fulfilling similar functions.<sup>162</sup> Regarding the analysis developed in the last part, the approach is hermeneutical and resembles more that of Pierre Legrand, where the object of the comparison is the legal *mentalité*. The term legal *mentalité* refers to “the cognitive structure that characterises the legal culture under investigation”.<sup>163</sup> According to Legrand, “the aim is to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law the way it does”.<sup>164</sup> Here, the comparative approach serves to highlight the legal regimes as expressions of structures of thought and underlying ideas.<sup>165</sup>
41. The analysis of the cases and presentation of the results follow the method of structured, focused comparison, in which identical questions dealing only with certain aspects of the cases “are asked of each case under study to guide and standardize data collection, thereby making systematic comparison and cumulation of the findings of the cases possible”.<sup>166</sup> Their analysis yields ‘ethnography-like’ accounts.<sup>167</sup> It also shares features of the comparative

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<sup>160</sup> D. de Vaus, “Comparative and Cross-National Designs” in Pertti Alasuutari, Leonard Bickman, et al. (eds.), *The SAGE Handbook of Social Research Methods* (London: SAGE Publications Ltd, 2008), p. 251. For example, according to Dezalay and Madsen, adopting “a transnational starting point, which invariably also involves elements of comparative analysis, in many ways facilitates the outlined processes of deciphering law and legal practices, as it helps to repose and reframe a whole series of key questions related to the foundational issues of law, politics, the state, etc. Basically, it provides a way to break with the historically ingrained structures of law in national culture, language, and the state”; Y. Dezalay and M. R. Madsen, “The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law”, *Annual Review of Law and Social Science*, Vol. 8 (2012), p. 444.

<sup>161</sup> As Lewis writes “the value of a qualitative comparative approach is in understanding rather than measuring difference”; J. Lewis, “Design Issues” in Jane Ritchie and Jane Lewis (eds.), *Qualitative Research Practice* (London, Thousand Oaks, New Dehli: SAGE Publications, 2003), p. 50.

<sup>162</sup> There are various definitions but functionalist comparatists agree on the idea that functionalist comparative law is factual, that law and society are related and that the function itself serves as *tertium comparationis*; Ralf Michaels, “The Functional Method of Comparative Law”, in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford Univ. Press, 2006), p. 342. According to him, “[i]nstitutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems”; *Ibid.*

<sup>163</sup> P. Legrand, “European Legal Systems Are Not Converging”, *The International and Comparative Law Quarterly*, Vol. 45, No. 1 (1996), p. 60.

<sup>164</sup> *Ibid.*

<sup>165</sup> C. Valcke, “Comparative Law As Comparative Jurisprudence - The Comparability of Legal Systems”, *American Journal of Comparative Law*, Vol. 52 (2004), p. 713; C. Valcke, “‘Droit’ réflexions sur une définition aux fins de comparaison” in Pierre Legrand (ed.), *Comparer les droits, résolument* (Paris: Presses Universitaires de France, 2009), p. 100.

<sup>166</sup> A. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: MIT Press, 2004), p. 67.

<sup>167</sup> K. Scheppele, “Constitutional Ethnography: An Introduction”, *Law & Society Review*, Vol. 38, No. 3 (2004), pp. 389–406.



historical analyses which are concerned with the unfolding of processes over time and the identification of causal configurations.<sup>168</sup>

### 3.2. Selection of Jurisdictions

42. As stated above, U.S.-American scholarship has dealt for over fifty years with the role of courts and judges as political actors and as targets of interest group strategies, whereas this perspective has only recently emerged in Europe.<sup>169</sup> The United States Supreme Court's use of comparative references has also received a lot of attention from scholars.<sup>170</sup> It has been suggested "that European scholars ought to take crucial assumptions of the U.S.-American

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<sup>168</sup> J. Mahoney and D. Rueschemeyer, "Comparative Historical Analysis: Achievements and Agendas" *Comparative Historical Analysis in the Social Sciences* (Cambridge: Cambridge Univ. Press, 2003), p. 11.

<sup>169</sup> A. Vauchez, "La justice comme "institution politique": retour sur un objet (longtemps) perdu de la science politique", *Droit et Société*, Vol. 63-64 (2006), pp. 491–506. For example of such American works: J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (London: Academic Press, 1978); D. Chong, *Collective Action and the Civil Rights Movement* (Chicago: University of Chicago Press, 1991). C. E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900* (Massachusetts: Lexington, 1972) and many other references cited in K. O'Connor and L. Epstein, "The Role of Interest Groups in Supreme Court Policy Formation" in R. Eystone, *Public Policy Formation* (Greenwich: JAI Press, 1984), p. 63. Many explanations are provided for the differences between US and European scholarship on this issue – such as the (related) lesser use of public interest mechanisms in civil law countries, which will be touched upon in the next chapter. See M. Garcia Villegas, "Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States", *Law & Social Inquiry*, Vol. 31, No. 2 (2006), pp. 343–382. For example, it is often insisted (by quoting Tocqueville) on the fact that, in the U.S., many political questions are resolved as judicial decisions. Mark Graber deplores that Tocqueville's thesis has been constantly cited without analysis. According to him, in Jacksonian American (the era in which Tocqueville described his understanding of American politics), political questions were not automatically resolved into judicial questions. When compared, "[a]t present, virtually all political questions that are resolved into constitutional questions are further resolved into judicial questions"; M. Graber, "Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited", *Constitutional Commentary*, Vol. 21 (2004), p. 534. Another distinction could be located in conceptions of the State and the role of civil society, also basing itself on a classification proposed by Alexis de Tocqueville, differentiating strong and weak States. The United States would stand for a 'weak' State model, where it is less tangible, more diffuse and influenced by non-governmental interests, as the society acts by itself; A. Lejeune, "Les professionnels du droit comme acteurs du politique: revue critique de la littérature nord-américaine et enjeux pour une importation en Europe continentale", *Sociologie du Travail*, Vol. 53, No. 2 (2011), p. 227. France would illustrate the opposite model, in which the individuals abandon their power to the State and where "the state has special unbiased authority to determine and act for the collective welfare"; E. Boyle and M. Thompson, "National Politics and Resort to the European Commission on Human Rights", *Law & Society Review*, Vol. 35, No. 2 (2001), p. 323. See also E. Archambault, "Les institutions sans but lucratif hier et aujourd'hui: comparaison France - États-Unis", *The Tocqueville Review/La revue Tocqueville*, Vol. 32, No. 2 (2011), pp. 81–98. This classic notion is rapidly evolving however, insisting on the establishment of narrower links with interest groups; F. Fages and F. Rouvillois, "Lobbying: la nouvelle donne constitutionnelle", *Recueil Dalloz*, No. 5 (2010), pp. 277–281. In general, the postwar spread of judicial review has undermined the assumption that the transformation of political questions into litigation is distinctive of the United States; J. Sellers, "Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States", *Law & Society Review*, Vol. 29, No. 3 (1995), p. 475. Moreover, various phenomena – such as the globalisation of law, the legal mobilizations for political goals by social movements, the reciprocal influences between legal traditions and the complexification of legal systems – contributed to put socio-legal studies at the heart of the interest of French scholars; M. Garcia Villegas and A. Lejeune, "La sociologie du droit en France De deux sociologies à la création d'un projet pluridisciplinaire", *Revue interdisciplinaire d'études juridiques*, Vol. 66, No. 1 (2011), p. 3. These two authors show that many pioneer sociologists already undertook a socio-legal reflexion. See also the work of Liora Israël.

<sup>170</sup> See Chapter 2. These bodies of scholarship being particularly developed in the U.S., they also explain their large presence among the doctrinal sources mobilized in this thesis.

research tradition more seriously”.<sup>171</sup> The European Court of Human Rights was my initial field of research and indeed, the fields of public interest litigation before this Court as well as its use of the comparative approach in adjudication were largely undocumented.<sup>172</sup> It was chosen to add another court to the analysis, and among the handful of interesting ones in terms of the hypotheses (such as the Canadian Supreme Court or the Israeli Supreme Court for example), the South African Constitutional Court was chosen, as it is “prototypical”,<sup>173</sup> exhibiting as many relevant archetypal characteristics as possible,<sup>174</sup> as will be demonstrated hereunder.

43. Above all, these three courts were chosen for their different attitudes towards the use of comparative material in adjudication.<sup>175</sup> The U.S. Supreme Court has been generally reluctant to adopt the process, as evidenced by the discrete place of explicit comparative references in judgments and the important controversy and debate these citations have launched. The European Court of Human Rights has a lukewarm attitude towards the comparative material coming from outside the Council of Europe. While some cross-citations are visible in its case law, they remain modest compared to the general caseload, and the weight and role of these references is not really clear. What markedly differs between the European situation and the American is that these references did not generate particular controversy among the judges and the public. Finally, the South African Constitutional Court has been characterized by a continued dialogue with foreign counterparts, evidenced by a high numbers of cases engaging with comparative law. Judges have expressed positive but also cautious approaches towards these optional sources.
44. Despite their different attitudes, there are common characteristics that facilitate the comparison of cases of these three courts. First, they are high courts, before which the debates on the most indeterminate provisions are most likely to occur<sup>176</sup> and they all have mechanisms allowing for public interest litigation. They grew out of historical periods rejecting totalitarianism and oppression, developed partly thanks to foreign experiences and all three are seminal institutions. The United States Supreme Court interprets the oldest written constitution in the world – a model for many that followed.<sup>177</sup> Its framers relied on the

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<sup>171</sup> B. Rehder, “What is political about jurisprudence?: courts, politics and political science in Europe and the United States”, *Max-Planck-Institute for the Study of Societies*, Vol. 07/5 (2007), p. 3. See her article for reasons for this research gap between the two sides of the Atlantic.

<sup>172</sup> R. Cichowski, “Civil Society and the European Court of Human Rights” *The European Court of Human Rights between Law and Politics* (New York: Oxford Univ. Press, 2011), p. 77. See however for a recent study on mobilization at different levels in Europe: Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change. Legal Mobilisation in the Multi-Level European System* (Oxford ; Portland, OR: Hart Publishing, 2014).

<sup>173</sup> R. Hirschl, “The Question of Case Selection in Comparative Constitutional Law”, *op. cit.*, p. 133.

<sup>174</sup> *Ibid.*, p. 143.

<sup>175</sup> The comparative design could not follow the method of agreement and difference (based on simple categorical classifications in which countries are classified as being similar or different) built around the logic of J. S. Mill, as the jurisdictions may have more than one circumstance in common; D. de Vaus, “Comparative and Cross-National Designs”, *op. cit.*, p. 252. These forms having shortcomings, a more flexible approach to comparative design has been suggested. The similarity and difference of countries is regarded as a continuum rather than a dichotomy; *Ibid.*, p. 255.

<sup>176</sup> A. Dyevre, “Comprendre et analyser l’activité décisionnelle des cours et des tribunaux: l’intérêt de la distinction entre interprétation et concrétisation”, *op. cit.*, p. 22.

<sup>177</sup> D. Maus, “Le recours aux précédents étrangers et le dialogue des cours constitutionnelles”, *Revue française de droit constitutionnel*, Vol. 80, No. 4 (2009), p. 676; A. Rosenthal and L. Henkin, *Constitutionalism and*

latest jurisprudential, philosophical and political thought from eighteenth-century Europe. As stated earlier, the field of European human rights was pioneered by a handful of lawyers who studied American law during the civil rights era.<sup>178</sup> The jurisprudence of the European Court of Human Rights, which “has developed an American-style body of constitutional law, comparable in its level of ambition”,<sup>179</sup> has enlightened not only national judges throughout the Council of Europe; it has become an “indelible source of inspiration”,<sup>180</sup> among others because of its necessary hybridization work,<sup>181</sup> around the globe.<sup>182</sup> Finally, though relatively new, the South African Constitution has been called “the most admirable constitution in the history of the world”<sup>183</sup> by a leading law professor. Indeed, the South African Constitution framers surveyed the world’s constitutions for the best ideas<sup>184</sup> and the Constitutional Court, “known for its innovative jurisprudence in the area of rights has emerged as the undisputed favorite of comparative scholars and social scientists as well as a lodestar for jurists across the globe”.<sup>185</sup> Lastly, there has already been comparison between these jurisdictions, moreover on the issues that interest us here.<sup>186</sup>

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*Rights: The Influence of the United States Constitution Abroad* (New York: Columbia Univ. Press, 1990). See however H. Klug, “Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism””, *Wisconsin Law Review*, (2000), pp. 597–616; D. Law and M. Versteeg, “The Declining Influence of the United States Constitution”, *New York University Law Review*, Vol. 87, No. 3 (2012), pp. 762–858.

<sup>178</sup> M. Goldhaber, *A People’s History of the European Court of Human Rights*, *op. cit.*, p. 181.

<sup>179</sup> *Ibid.*, p. 1.

<sup>180</sup> E. Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards”, *New York University Journal of International Law and Politics*, Vol. 31 (1999), p. 843.

<sup>181</sup> M. Delmas-Marty, “Mondialisation et montée en puissance des juges” in *Le dialogue des juges. Actes du colloque organisé le 28 avril 2006 à l’Université libre de Bruxelles* (Bruxelles: Bruylant, 2007), p. 108.

<sup>182</sup> See K. Vasak, “The European Convention of Human Rights beyond the Frontiers of Europe”, *International & Comparative Law Quarterly*, Vol. 12, No. 4 (1963), pp. 1206–1231.

<sup>183</sup> C. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford Univ. Press, 2001), p. 261.

<sup>184</sup> M. Kende, *Constitutional Rights in Two Worlds*, *op. cit.*, p. 4.

<sup>185</sup> H. Prempeh, “African Judges, in their Own Cause: Reconstituting Independent Courts in Contemporary Africa”, *International Journal of Constitutional Law*, Vol. 4, No. 3 (2006), p. 593. See also A. Wing, “The South African Constitution as a Role Model for the United States”, *Harvard BlackLetter Law Journal*, Vol. 24 (2008), pp. 73–80; A. Wing, “The Fifth Anniversary of the South African Constitution: A Role Model on Sexual Orientation”, *Vermont Law Review*, Vol. 26 (2001), pp. 821–827.

<sup>186</sup> See for example M. Dubber, “Homosexual Privacy Rights before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies”, *Stanford Journal of International Law*, Vol. 27 (1990), p. 189; J.-F. Flauss, “La présence de la jurisprudence de la Cour Suprême des Etats-Unis d’Amérique dans le contentieux européen des droits de l’homme”, *Revue trimestrielle des Droits de l’Homme*, Vol. 62 (2005), pp. 313–331; M. Kende, *Constitutional Rights in Two Worlds*; L. Helfer and A. Miller, “Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence”, *Harvard Human Rights Journal* 9 (1996), p. 61; J. Brauch, “The Dangerous Search for and Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights”, *Howard Law Journal*, Vol. 52, No. 2 (2009), pp. 277–319. R. Wintemute, *Sexual Orientation and Human Rights. The United States Constitution, the European Convention and the Canadian Charter* (Oxford: Clarendon Press, 2002). For example Robert Wintemute, for his study on sexual orientation discrimination, among the countries in which the issue and been raised and had received serious consideration, chose to present side by side the European Convention of Human Rights, the United States Constitution and the Canadian Charter of Rights and Freedoms for the following reasons: the US Constitution is the oldest and most influential in the world and has the largest body of cases dealing with sexual orientation discrimination; the European Convention has the most effective enforcement mechanism of any international human rights treaty, a significant number of cases on the issue had been decided by the tribunals and the territorial application of the Convention exceeds that of the constitution of any single European country and finally the Canadian situation because of his Canadian background, the newness of the

45. However, the major differences between the jurisdictions should not be overlooked. Indeed, the first being that two engage in constitutional review and one is a supranational court,<sup>187</sup> the intentions of the drafters of their founding document differed, the nature of the latter,<sup>188</sup> the socio-economic context, the state of civil society,<sup>189</sup> etc.<sup>190</sup> These differences do not

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Charter and because the latter appears to be a hybrid between the U.S. Constitution and the European Convention; *Ibid.*, p. 4.

<sup>187</sup> There is a large debate about whether the European Court of Human Rights delivers or should deliver ‘constitutional justice’ and could therefore be compared to a constitutional court. See M. Madsen, “Reflexivity and the Construction of the International Object: The Case of Human Rights”, *International Political Sociology*, Vol. 5, No. 3 (2011), p. 269. Martin Shapiro observes of the ECtHR, “the Court has rendered enough judgments that have caused enough changes in state practices so that it can be counted to a rather high degree as a constitutional judicial review court in the light of realities as opposed to the technicalities”; M. Shapiro, “The Success of Judicial Review and Democracy” *On Law, Politics and Judicialization* (Oxford: Oxford Univ. Press, 2002), p. 155. See also R. White and I. Boussiakou, “Voices from the European Court of Human Rights”, *Netherlands Quarterly of Human Rights*, Vol. 27, No. 2 (2009), pp. 167–189, J. Gerards, “Judicial Deliberations in the European Court of Human Rights” in N. Huls, M. Adams, et al. (eds.), *The Legitimacy of Highest Courts’ Rulings. Judicial Deliberations and Beyond* (The Hague: T.M.C. Asser Institute, 2008), p. 411. Ineta Ziemele, Judge at the ECtHR, is of the opinion that because of the nature of human rights, there inevitably is an important constitutional dimension to the Convention – most prominently where in view of the changes in the society the Court had to interpret the Convention clearly in a new light which was not envisaged at the time of the drafting – “but that it does not turn an international treaty into a constitution in a classical sense”; I. Ziemele, “Other rules of international law and the European Court of Human Rights question of a simple collateral benefit?” in Dean Spielmann, M. Tsirli, et al. (eds.), *La Convention européenne des droits de l’homme, un instrument vivant / The European Convention on Human Rights, a living instrument* (Bruxelles: Bruylant, 2011), p. 753. She replies to Anne Peters (who argues that the European Convention of Human Rights lacks the necessary elements of a constitution) that it does not contradict the view that the Convention has a constitutional dimension in view of its subject-matter; *Ibid.* Rosalind Dixon and Tom Ginsburg, in their handbook, suggest different approaches to define the constitutional domain (and thus the boundaries of the field “comparative constitutional law”). The application of three of them would enable classifying the ECHR as included in the field: the focus on the idea of entrenchment (where rules are immune from change by ordinary legislative processes); the treatment of the document as having an inherently ‘pro-rights’ orientation and finally the way in which actors understand the norms as being constitutional; T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law, op. cit.*, pp. 4–5. The debate must not be settled here as there are sufficient reasons to put side by side two national courts and one supranational court and as others authors have already done without determining this question either (See for example N. Dorsen, M. Rosenfeld et al., *Comparative Constitutionalism: Cases and Materials*, 2<sup>nd</sup> ed. (St. Paul, MN: West Academic Publishing, 2010) and for some these comparisons are necessary (J. Staton and W. Moore, “Judicial Power in Domestic and International Politics”, *International Organization*, Vol. 65, No. 3 (2011), pp. 556–557). Finally to ensure comparability, it was decided not to include the ECtHR’s interactions with Council of Europe national courts.

<sup>188</sup> K. Dzehtsiarou and C. O’Mahony, “Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court”, *Columbia Human Rights Law Review*, Vol. 44 (2013), p. 319.

<sup>189</sup> See J. Smith and D. Wiest, “The Uneven Geography of Global Civil Society: National and Global Influences on Transnational Association”, *Social Forces*, Vol. 84, No. 2 (2005), pp. 621–652. To summarize boldly, countries such as the U.K. and the U.S. – that Salamon et al. classify under an “Anglo-Saxon cluster”, are historically characterized by a relatively small, “hands-off” role for the state and significant reliance instead on private, charitable activity. Although government involvement in social welfare provision has expanded in more recent decades—most notably in the U.K. in the aftermath of World War II—these have all been relatively “reluctant” welfare states that have retained a considerable level of reliance on private charity; L. M. Salamon, S. W. Sokolowski et al., “Global Civil Society: An Overview” *Global civil society: Dimension of the Nonprofit Sector* (Bloomfield, CT: Kumarian Press, 2004), pp. 35–37. Nordic welfare states by contrast, have a rich social movement history but a low paid nonprofit workforce, in correlation with the broad welfare-state policies adopted in these countries early in the twentieth century and the limited reliance placed on private philanthropy and private civil society organizations to deliver basic social and human services. Nordic patterns feature a large civil society sector staffed mainly by volunteers and engaged mostly in expressive rather than service functions; *Ibid.*, pp. 37–39. Elsewhere in Western Europe, the civil society sector is generally quite large, due principally to the substantial levels of public sector support available to it. (In large part due to the power of organized religion, particularly the Catholic Church, the state chose, or was persuaded, to funnel social welfare protections

undermine the project but must be kept in mind as law does not exist in a vacuum<sup>191</sup> and as there are limits to the comparative method.<sup>192</sup>

### 3.3. Selection of Case Studies: Landmark Cases

46. This thesis adopts a case study method, because the boundaries between the phenomenon observed and the context are not clearly demarcated and because there are many variables.<sup>193</sup> As stated above, two main themes were chosen to examine these questions: cases on inhuman and degrading treatment and cases on sexual orientation. The introduction to each theme (presented in chapter 3 and 4) explains in detail why these themes were chosen.<sup>194</sup> In brief, some of the reasons are that all three courts were confronted with these issues, the provisions that govern them are quite vague and indeterminate, international law on these issues is not settled and finally, civil society has mobilized around these questions. For these reasons, I chose to study cases dealing with the death penalty or related questions (such as the death row phenomenon or the questions arising in cases of extradition) and cases dealing with discrimination on the basis of sexual orientation and the rights of same-sex partners.
47. In order to whittle down the number of cases further and to deepen the analysis, I decided to select landmark cases.<sup>195</sup> It is difficult to rely on a specific criterion to determine what a

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extensively through private, voluntary groups, many of them religiously affiliated, rather than delivering the services itself). “The upshot is a distinctive Western European-style welfare partnership pattern characterized by a large civil society sector staffed mostly by paid employees, heavily engaged in service provision, and extensively financed by tax revenues”; *Ibid.*, pp. 39–41. Central and Eastern Europe exhibits yet another pattern of nonprofit sector development: an extremely small scale of the civil society sector in these countries and a relatively high level of reliance on philanthropic support on the part of the region’s civil society organizations; *Ibid.*, p. 50. Of course, a considerably different civil society reality is evident regarding South Africa. Civil society ‘talk’ gained ground during the liberation movement; D. Glaser, “South Africa and the Limits of Civil Society”, *Journal of Southern African Studies*, Vol. 23, No. 1 (1997), p. 8. It has the most highly developed non-governmental sector in the whole continent, with more than 50 000 NGOs. More than one hundred of these may be described as human rights organizations; J. Mubangizi, “The Role of Non-Governmental Organizations in the Protection of Human Rights in South Africa”, *Journal of South African Law* (2004), p. 329. The associational life is however also divided along competing interests; R. Fine, “Civil Society Theory and the Politics of Transition in South Africa”, *Review of African Political Economy*, No. 55 (1992), p. 78. Regarding the concept of civil society within the African continent see K. Appiagyei-Atua, “Civil Society, Human Rights and Development in Africa: A Critical Analysis”, *Journal of Peace, Conflict and Development*, Vol. 2, No. 2 (2002).

<sup>190</sup> See for more regarding the differences between the United States and South Africa: M. Kende, *Constitutional Rights in Two Worlds*, *op. cit.*, p. 5.

<sup>191</sup> *Ibid.*, p. 6.

<sup>192</sup> N. Bonbled, “L’utilisation de la méthode comparative dans la thèse de doctorat”, *Revue de droit international et de droit comparé*, Vol. 3 (2006), p. 284.

<sup>193</sup> See R. Yin, “The Case Study Crisis: Some Answers”, *Administrative Science Quarterly*, Vol. 26, No. 1 (1981), p. 59; R. Yin, *Case Study Research: Design and Methods*, *op. cit.*, pp. 13–14. (emphasis omitted).

<sup>194</sup> I am well aware that in the United States, the debate on judicial comparativism greatly intensified after cases falling under these two themes (in particular the U.S. cases of *Lawrence v. Texas* and *Roper v. Simmons*). However, according to Cheryl Saunders, the intense phase of the debate “follows the use of foreign law in *Thomson v. Oklahoma* 487 US 815 (1988); *Washington v. Glucksberg* 521 US 702 (1997); and *Printz v. United States* 521 US 898 (1997)” which concern, respectively the death penalty, physician assisted-suicide and federalism issues; C. Saunders, “Comparative Constitutional Law in the Courts: Is There a Problem?”, *Current Legal Problems*, Vol. 59, No. 1 (2006), p. 91.

<sup>195</sup> See for a similar approach, K. O’Connor and L. Epstein, “The Role of Interest Groups in Supreme Court Policy Formation”, *op. cit.*, p. 68. To systematically examine the role that interest groups play in constitutional litigation that has led to major policy decisions, they selected important constitutional cases and operationalized the concept of ‘important constitutional cases’ by defining it as any case identified in P. Kurland and G. Casper

'landmark' case is,<sup>196</sup> although the term is frequently used and in practice, all legal systems distinguish between more and less important cases.<sup>197</sup>

48. According to a first approach, a landmark case is portrayed as a milestone in legal development: it consolidates preceding fragmented practices or openly breaks with them; it narrows down established doctrines or extends them to new circumstances; or it declares new principles or resolves new questions of law.<sup>198</sup> This approach is essentially characterized by the analysis of the intrinsic merits of the case.<sup>199</sup> According to another approach, more rooted in social sciences, landmark cases are rather symbolic categories, constructed gradually in legal and political struggle.<sup>200</sup> This approach "looks at the historical contexts in which the cases were decided".<sup>201</sup> Additional factors taken into account when designating cases as landmark are for example "the vital role played by subsequent courts in constructing the canonicity of cases"<sup>202</sup> and other institutional actors and "the role of textbooks and academics

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(eds.), *Landmark Briefs of the Supreme Court of the United States* (Arlington: University Publications of America, 1975); *Guide to the U.S. Supreme Court*, (Washington, D.C.: Congressional Quarterly, 1979).

<sup>196</sup> Scholars deplore that the criteria for the selection of *grands arrêts*, regularly collected and published in printed volumes or textbooks, are very rarely made explicit; U. Sadl and Y. Panagis, "What is a Leading Case in EU Law? An Empirical Analysis", *European Law Review*, Vol. 40, No. 1 (2015), p. 16. One example of explicit criteria is the collection of important ECtHR cases by Frédéric Sudre et al. In the introduction, Sudre explains that the choice for specific cases is based on scientific and pedagogical considerations: scientific when the cases define a key notion of the Convention, determine the content of a provision, establish the principles of the jurisprudential control or proceed from an overruling. He precises that an important case does not necessarily mean a case that extends the protection of human rights. Pedagogical considerations also influenced the choice of cases, favoring cases that formulate in a clearer way the applicable rule than the case in which it appeared for the first time; F. Sudre, J.-P. Marguénaud et al., *Les grands arrêts de la Cour Européenne des Droits de l'Homme*, 7th ed., (Paris: Thémis, 2015), p. 2. See also L. Burgorgue-Larsen and A. Ubada de Torres who explain that they choose major decisions of the IACtHR in collaboration with the Secretariat of this Court; L. Burgorgue-Larsen and A. Ubada de Torres, Amaya, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford : Oxford University Press, 2011), xxxiii.

<sup>197</sup> See N. MacCormick and R. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Brookfield: Ashgate/Dartmouth, 1997) cited in U. Sadl and Y. Panagis, "What Is a Leading Case in EU Law? An Empirical Analysis", *op. cit.*, p. 15.

<sup>198</sup> U. Sadl and Y. Panagis, "What Is a Leading Case in EU Law? An Empirical Analysis", *op. cit.*, p. 19. This approach fits with the definition found in dictionaries. According to the Black's Law Dictionary, a landmark case is "a judicial decision that significantly changes existing law"; B. Garner (ed.), *Black's Law Dictionary*, 7th ed., (Saint Paul, Minn.: West Group, 1999), p. 883.

<sup>199</sup> E. Lim, "Of 'Landmark' or 'Leading' Cases: Salomon's Challenge", *Journal of Law and Society*, Vol. 41, No. 4 (2014), p. 524.

<sup>200</sup> A. Cohen and A. Vauchez, "The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited", *Annual Review of Law and Social Science*, Vol. 7 (2011), pp. 417–431. Justice Oliver Wendell Holmes Jr. wrote "great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgments"; *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) cited in U. Sadl and Y. Panagis, "What Is a Leading Case in EU Law? An Empirical Analysis", *op. cit.*, p. 19.

<sup>201</sup> E. Lim, "Of 'Landmark' or 'Leading' Cases", *op. cit.*, p. 524. According to Rauchway, the example of such a landmark case is *Roe v. Wade*. Its qualification by many as landmark (for example in the series "Landmark Law Cases and American Society" (P. Hoffer & N. Hull, University Press of Kansas)) is due more to the circumstances of the case than on the legal issues it (did not) resolve (such as where to find a right to privacy in the Constitution); E. Rauchway, "In Retrospect: Landmark Law Cases in American Society", *Reviews in American History*, Vol. 35, No. 1 (2007), p. 158.

<sup>202</sup> E. Lim, "Of 'Landmark' or 'Leading' Cases", *op. cit.*, p. 523. A parallel could here be made with the 'anticanons', these cases all legitimate decisions refute today (such as *Dred Scott v. Sandford*). According to Jamal Greene, these cases do not involve unusually bad reasoning, but "achieve their status through historical happenstance, and (...) subsequent interpretative communities' use of the anticanon as a rhetorical resource reaffirms that status"; J. Greene, "The Anticanon", *Harvard Law Review*, Vol. 125 (2011), p. 380.

in constructing the canonicity, or extending the influence, of cases”.<sup>203</sup> The criteria are thus flexible and seem tied not only to legal doctrine but to historical circumstances and behavioural idiosyncrasies.<sup>204</sup>

49. A closely related notion is that of ‘issue salience’ (used mainly by political scientists). Segal and Epstein investigated the notion and in particular its application in research on justices. They cite different approaches and their drawbacks, such as the measure of cases excerpted in multiple constitutional law books<sup>205</sup> the indicator of substantial amicus curiae participation,<sup>206</sup> the use of existing compendiums and lists.<sup>207</sup> They offer another approach: the coverage the media affords to a given issue, measured through front-page stories in the New York Times.<sup>208</sup> Other authors use the citation network approach.<sup>209</sup> The criteria used to select landmark cases thus differ from one study to the next, depending among other things on the research question.<sup>210</sup>
50. Sometimes courts themselves give indications as to the landmark features of certain precedents. This is the case regarding the European Court of Human Rights and the South African Constitutional Court.<sup>211</sup> The European Court of Human Rights publishes on its website *Reports of Judgments and Decisions* which is “an official collection of the Court’s leading judgments, decisions and advisory opinions since 1998”.<sup>212</sup> It explains that the selection of the most important cases is made by the Bureau (composed of the President and Vice-Presidents of the Court and of the Section Presidents) following a proposal by the

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<sup>203</sup> E. Lim, “Of ‘Landmark’ or ‘Leading’ Cases”, *op. cit.*, p. 550.

<sup>204</sup> M. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge: Cambridge Univ. Press, 2014), p. 86 cited in U. Sadl and Y. Panagis, “What Is a Leading Case in EU Law? An Empirical Analysis”, *op. cit.*, p. 18.

<sup>205</sup> E. Slotnick, “The Chief Justice and Self Assignment of Majority Opinions: A Research Note”, *Western Political Quarterly*, Vol. 31, No. 2 (1978), p. 220, cited by L. Epstein and J. Segal, “Measuring Issue Salience”, *American Journal of Political Science*, Vol. 44, No. 1 (2000), p. 67.

<sup>206</sup> Maltzman and Wahlbeck use the number of amicus curiae briefs in cases to classify them as important or not; F. Maltzman and P. Wahlbeck, “May It Please the Chief? Opinion Assignments in the Rehnquist Court”, *American Journal of Political Science*, Vol. 40, No. 2 (1996), p. 433.

<sup>207</sup> They cite authors who have been using the Congressional Quarterly List and the *Supreme Court Compendium List*; L. Epstein and J. Segal, “Measuring Issue Salience”, *op. cit.*, p. 67.

<sup>208</sup> L. Epstein and J. Segal, “Measuring Issue Salience”, *op. cit.*, p. 72.

<sup>209</sup> “The starting point of this approach is an image of the web of case-law where individual cases are represented as dots and citations between them as arrows pointing from the citing case to the cited cases”; U. Sadl and Y. Panagis, “What Is a Leading Case in EU Law? An Empirical Analysis”, *op. cit.*, p. 20. They expose the legal scholars’ scepticism towards this approach, mainly because legal relevance should also be assessed qualitatively and not only quantitatively; *Ibid.*, pp. 20–21.

<sup>210</sup> For example, to inquire about cases entangling a confrontation between the government and the court regarding policies in the occupied territories, Ronen Shamir selected the minority of cases (5 out of 65 adjudicated at that time) decided by Israel’s High Court of Justice that upheld the arguments of petitioners from the occupied territories; R. Shamir, “‘Landmark Cases’ and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice”, *Law & Society Review*, Vol. 24, No. 3 (1990), p. 785.

<sup>211</sup> A similar effort can be observed in the list of important pre-accession cases established by the European Court of Justice for candidate states upon their accession to the EU. The website mentions the selection of “historic case law” and these cases were translated in the languages of the 2004, 2007 and 2013 accession countries (and updated in between). The selection criteria are not spelled out either. See Court of Justice of the European Union, “Judgments from the historic case-law in the languages of the 2004, 2007 and 2013 accession countries”, [http://curia.europa.eu/jcms/jcms/Jo2\\_14955](http://curia.europa.eu/jcms/jcms/Jo2_14955), last consulted May 7, 2015.

<sup>212</sup> European Court of Human Rights, “Reports of Judgments and Decisions”, <http://www.echr.coe.int/Pages/home.aspx?p=caselaw&c> (last accessed 20 May 2015).

Jurisconsult (who is generally responsible for case-law monitoring and prevention of case-law conflicts)<sup>213</sup> but does not explicitly state the criteria that qualify cases as ‘leading’. It also ranks the importance of cases (the highest level being ‘case reports’, followed by levels 1, 2 and 3) in its database.<sup>214</sup> In addition, the Press Services also compile lists of cases broken down by area and present them as ‘factsheets’.<sup>215</sup> Regarding South African constitutional cases, the website of the Constitutional Court contains a list of “landmark cases”,<sup>216</sup> introduced as “judgments that have a profound impact on the law in South Africa”.<sup>217</sup>

51. To establish the list of cases, I opted for a broad, dynamic concept of case relevance<sup>218</sup> and established a list of cases combining different criteria: the intrinsic merits of the cases, the historical context in which they appeared, their subsequent use by courts and litigants, the courts’ own indication that some cases are leading (cf *supra*),<sup>219</sup> compendia established by NGOs,<sup>220</sup> the public attention they received (mainly in newspapers articles, blogs and conference themes) and their treatment as important cases by academics<sup>221</sup> (in their writings

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<sup>213</sup> *Ibid.*

<sup>214</sup> See for more on the categories and who decides; European Court of Human Rights, HUDOC User Manual, [http://www.echr.coe.int/Documents/HUDOC\\_Manual\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/HUDOC_Manual_2012_ENG.pdf) pp. 11-12.

<sup>215</sup> European Court of Human Rights, “Factsheets”, <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets>.

<sup>216</sup> South African Constitutional Court, “About the Court”, <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases> (last accessed 20 May 2015).

<sup>217</sup> *Ibid.*

<sup>218</sup> And this is also why the term ‘landmark’ was preferred to ‘leading’ as it puts less emphasis on case law – some cases were indeed labelled as landmark (in the newspaper, by scholars...) before they were adjudicated. For example, on 29 April 2015, two New York Times journalists picked and introduced *Obergefell v. Hodges* among fifteen “Major Supreme Court cases 2015”, although it was to be decided two months later: A. Liptak and A. Parlapiano, “Major Supreme Court Cases in 2015”, *New York Times* (New York, 1 July 2015), <http://www.nytimes.com/interactive/2015/us/major-supreme-court-cases-in-2015.html?smid=tw-nytimes&r=2>. Karl Laird, on the Oxford Human Rights Blog, wrote also in April 2015 that this case “will no doubt be considered one of the most important civil rights cases of our generation” and that “*Obergefell v Hodges* represents a landmark moment in the path towards LGBT equality”; K. Laird, “The Constitutional Status of Same-Sex Marriage - An Issue that Can No Longer be Avoided”, (2015), <http://ohrh.law.ox.ac.uk/the-us-constitutional-status-of-same-sex-marriage-an-issue-that-can-no-longer-be-avoided/>. Similarly, *Hollingsworth v. Perry* is landmark for the attention it received nationally and internationally, even though ultimately, the Court did not reach the merits of the case.

<sup>219</sup> Regarding the European Court of Human Rights, on the death penalty issue, I drew inspiration from the factsheet entitled “Death penalty abolition” found on the website of the Court; (Press Unit of the European Court of Human Rights, July 2014). On sexual orientation, I used the factsheets on “homosexuality: criminal aspects” and on “sexual orientation issues” (European Court of Human Rights, “Factsheet: Homosexuality: Criminal Aspects” (Press Unit of the European Court of Human Rights, November 2013), [http://www.echr.coe.int/Documents/FS\\_Homosexuality\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Homosexuality_ENG.pdf); European Court of Human Rights, “Factsheet: Sexual Orientation Issues” (Press Unit of the European Court of Human Rights, March 2014) and selected the cases which concerned ‘adoption’, ‘civil unions’, ‘right to marry’ and ‘successions’ which are often found in the literature (I thus left aside many cases on ill-treatment, detentions conditions, risk arising from a return to the country of origin, freedom of thought, freedom of expression, etc). Regarding South African constitutional cases, the first cases on this list of landmark cases available on the website of the Constitutional Court concern the death penalty and some of the mentioned cases on equality concern LGBT issues.

<sup>220</sup> See for example the list established by Interights for a workshop on “Lesbian and Gay Rights Litigation before the European Court of Human Rights”, 11 December 2008, updated on 19 January 2011 and the International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (Geneva: International Commission of Jurists, 2011).

<sup>221</sup> For example regarding sexual orientation in the U.S.: W. Rubenstein, C. Ball et al., *Cases and Materials on Sexual Orientation and the Law*, 5th edition, (St. Paul: West Academic Publishing, 2014). Regarding the death penalty; B. Latzer and D. McCord, *Death Penalty Cases, Third Edition: Leading U.S. Supreme Court Cases on*



or through direct discussion with them). In total, 40 cases were analyzed. Although the temporal aspect of the cases plays an important role, it would have severely limited the analysis to adopt a time period common to the three examined jurisdictions.<sup>222</sup> The cases are presented in a chronological order for each jurisdiction, explaining that the section on inhuman and degrading treatment starts with the U.S. Supreme Court as the oldest selected case under this theme comes from the U.S., whereas regarding sexual orientation, the list starts with European cases.

### 3.4. Data Collection

52. As stated above, the decision was taken to collect and analyze the primary documents submitted to courts by public interest litigants, instead of relying – as most studies do – on the limited accounts of these documents in the judgments. The collection of the documents themselves occurred in different ways. Regarding the briefs submitted to the U.S. Supreme Court, the online databases of Westlaw and LexisNexis were used.<sup>223</sup> Many documents are attached to the case (under the heading ‘Filings’) and if a brief could not be found on these databases, I would search the filers’ website or contact the counsel or the amicus directly by e-mail. Looking for documents submitted before the European Court of Human Rights has been more arduous, as the Court’s database (‘HUDOC’) contains the decisions on admissibility, the judgments and some press releases but not the parties’ or the amicus curiae’s briefs. The method used to obtain amicus curiae was as follows: I first looked on the website of the organization that submitted the brief. Many organizations today have a webpage dedicated to their litigation activities which contains the third-party interventions. However, some organizations do not have websites, or they do not publicize the briefs or just post a short summary of their intervention. In that case I would write or call the organization.<sup>224</sup> In case they would not reply to the request, I would write to the Registrar of the European Court of Human Rights, obtaining a variety of answers.<sup>225</sup> As a last resort, I would contact the counsel in the case to ask whether he or she still had the briefs that were submitted. The briefs submitted before the South African Constitutional Court were much more easily accessible: the Court’s own website contains many documents relating to each

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*Capital Punishment*, 3rd ed., (Burlington: Butterworth-Heinemann, 2010). The evolution between editions show that what is understood to be “the most important United States Supreme Court decisions on the death penalty” (*Ibid.*, p. ix) changes over time, as they explain in their preface to have deleted a few cases from the previous edition (see *Ibid.*, p. x).

<sup>222</sup> See for a similar methodological acknowledgment: T. Groppi and M.-C. Ponthoreau, “Introduction: The Methodology of the Research: how to Assess the Reality of Transjudicial Communication?” in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013), p. 9, who left it to the individual authors of the chapters to decide the convenient time frame for each analyzed jurisdiction.

<sup>223</sup> Access to these databases mostly took place during a research stay at the University of Berkeley, California, in 2013.

<sup>224</sup> It must be said that organizations in general have not only been responsive to my requests, they would also easily engage in a conversation and ask about the pros and cons of publishing the documents online. It is also interesting that a few organizations could not find the briefs anymore and asked me to send it back to them in case I would find it elsewhere.

<sup>225</sup> In 2011-2012, the Registrar scanned and sent many third-party interventions. From 2013, the Registrar replied that due to a heavy workload, scholars’ requests were not a priority and therefore the documents could not be sent. When I then announced that I would come myself to the archives in Strasbourg, they expressed their preference for sending everything by electronic format.

case (affidavits, motions, amicus curiae briefs) and in addition, the Registrar of the Court has been very responsive to requests. They thus sent many briefs directly by email.

### 3.5. Analyzing the Data and Revealing the Briefs' Influence

53. William Twining, in his effort to close the gap between sociological accounts of diffusion and legal discussions of transplants, suggested researchers ask a number of basic questions. These questions inspire to a large extent the elements recorded here: “What were the conditions of the process, and the occasion for its occurrence? What was diffused? Through what channel(s)? Who were the main change agents? To what extent were the characteristics of the change agents and their contexts similar or different? When and for how long did the process occur? (...) What were the consequences of the process and what was the degree of implementation, acceptance and use of the diffused objects over time?”<sup>226</sup>
54. The first piece of information sought after in the analysis of the cases and the litigation is whether it was brought or supported by entities that may have a broader interest than an immediate interest in the outcome of the case, by looking at the eventual presence of a civil society organization or if the lawyer is part of or linked to a civil society organization. Sometimes this involvement is expressly indicated, sometimes the facts of the case demonstrate it, and otherwise the secondary sources were scrutinized for this information. To recall, cases might see the involvement of organized interests using different avenues. It is relatively straightforward to know whether a civil society organization is a party to the case, thanks to the name of the case. To discover whether a group has sponsored or ‘supported’ the case, the procedural section of the cases offers insight: sometimes the cases indicate that the counsel of one party belongs to a particular civil society organization. When it does not, further research needs to be undertaken (mainly on the internet and through case comments). When the application is submitted by a group or by someone linked to a group, the name of this organization is recorded to later inquire about the profile of this organization. Another important piece of information which is looked at is whether amicus curiae briefs were submitted in the case. To see whether and by whom amicus curiae briefs were submitted, the judgment was read as it – more often than not –<sup>227</sup> contains this information, usually in the procedural section (or even in the title, as found in the South African case law examined). The preliminary information collected is as follows: how many amicus curiae briefs were submitted in the case? Which party do the briefs support if any? By what constituencies are they submitted?
55. Then, focusing on the content of the briefs, the analysis inquires whether the argumentation includes comparative elements.<sup>228</sup> If the brief contains a comparison, it has been classified as

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<sup>226</sup> W. Twining, “Social Science and Diffusion of Law”, *op. cit.*, p. 221.

<sup>227</sup> A few cases however (particular older cases or ECtHR cases) do not mention the presence of amicus curiae. Additional tools which were used to detect the presence of amicus curiae involve consulting the ‘repeat players’ organizations which would mention it on their website and reading the literature commenting the case. Despite all efforts it could however be that some briefs have been missed.

<sup>228</sup> Despite increasing improvements in automated selection techniques (see M. Evans, W. McIntosh et al., “Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research”, *Journal*

adopting either a ‘sensu lato’ or a ‘sensu stricto’ comparative approach and it is indicated as such in the appendix. The first concerns briefs citing any international law or case law, foreign law as well as a few ‘in vivo’ codes<sup>229</sup> such as vague references to ‘a worldwide consensus’, ‘a universal understanding’, ‘civilized nations’ and similar notions.<sup>230</sup> These elements are not frequently encompassed in the literature on cross-citations, although they play an important role.<sup>231</sup> The label ‘sensu stricto’ comparative approach is reserved for briefs referring to foreign case law, meaning to one or more judicial decisions from courts located outside of the examined jurisdiction (from any level).

56. References to international documents, international law and case law (from judicial as well as quasi-judicial bodies) have also been recorded, inasmuch as they might inform about the larger argumentative context in which foreign cases are cited and the degree of engagement with external materials contained in the briefs and the judgments. However, although international law and case law can be used for a purely domestic purpose,<sup>232</sup> when no international component is involved – that is, in an optional manner – it was decided not to examine these references in detail both in the text and in the appendices because they raise “somewhat different questions from the perspective of both legitimacy and method”<sup>233</sup> and as this would largely extend the presentation of the external material and might distract from the controversy at the heart of the matter.<sup>234</sup> It also avoids the larger problematic question of the status of international law in each jurisdiction and of determining in each case whether the reference is binding or not.<sup>235</sup> References to the case law of regional courts (principally the

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of *Empirical Legal Studies*, Vol. 4, No. 4 (2007), pp. 1007–1039), I chose to manually code each document among others because of the presence of more abstract or nuanced concepts.

<sup>229</sup> ‘[i]n vivo’ codes are terms used by the actors themselves, contrary to terms and categories defined by the analyst.

<sup>230</sup> The criteria used for the comparative law ‘sensu lato’ approach bears resemblance with those used by Black, Owens, Walters and Brookhart in their empirical analysis of the U.S. Supreme Court’s use of what they label ‘transnational law’. These four authors included references to international law and case law, international reports, foreign court decisions, the procedures of foreign courts, foreign administrative, legal or constitutional provisions, informal governmental acts of foreign countries (such as proposals), the cultural, economic, political, or historical practices within a foreign country and common law; R. Black, R. Owens et al., “Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine”, *Georgetown Law Journal*, Vol. 103 (2014), p. 29. I did not use the last criterion. Other non-legal extra-systemic materials (such as foreign empirical studies) have been mentioned in the appendix as they may indicate the openness to which the brief strives, but it did not however qualify the brief as containing a comparative law approach in the broad sense.

<sup>231</sup> See for an exception A. Sperti, “United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court’s Jurisprudence” in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013), p. 408. who considered these references in a few ‘cases of great interest’ although they do not mention foreign precedents.

<sup>232</sup> O. Benvenuto, “Reevaluating the Debate Surrounding the Supreme Court’s Use of Foreign Precedent”, *Fordham Law Review*, Vol. 74 (2006), p. 2701.

<sup>233</sup> C. Saunders, “Comparative Constitutional Law in the Courts: Is There a Problem?”, *op. cit.*, p. 97. Cheryl Saunders also excluded references to international law although she writes that the case could be made for including international law (in addition of the fact that the lines between international and national law become increasingly blurred); *Ibid.*, p. 95.

<sup>234</sup> See for similar approaches J. Waldron, *Partly Laws Common to All Mankind* (New Haven: Yale University Press, 2012), p. 8, and T. Groppi and M.-C. Ponthoreau, “Introduction: The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?”, *op. cit.*, p. 5.

<sup>235</sup> In general, see the numerous references cited in Chapter 2. In addition of these references, see, regarding the United States Supreme Court in particular: Curtis Bradley, *International Law in the U.S. Legal System* (New York, NY: Oxford University Press, 2013); John O. McGinnis and Ilya Somin, “Should International Law Be

Inter-American Court of Human Rights, the European Court of Human Rights and the Court of Justice of the European Union) were counted as foreign legal material before the three courts as no hierarchical relationships exist between them.<sup>236</sup> Regarding the European Court of Human Rights, the references to ‘internal’ national sources of the Member States of the Council of Europe have not been counted.<sup>237</sup> The U.S. Supreme Court’s references to old English common law have not been counted either,<sup>238</sup> as they have “a distinct authoritative pedigree in American constitutional analysis”.<sup>239</sup> Finally, special attention has been paid to the cross-references between the examined jurisdictions.

57. In addition to recording the occurrences of comparative elements, and whether they constitute the main argument of the brief or merely anecdotal reference, the analysis observes the role attributed or played by these external references and their form. Among the various typologies developed by scholars, one distinguishing ‘reason-centric’ and ‘norm-centric’ uses of foreign

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Part of Our Law?,” *Stanford Law Review* 59, no. 5 (2006), pp. 1175–1247; Michel Rosenfeld, *Principle or Ideology? A Comparativist Perspective on the U.S. Controversy Over Supreme Court Citations to Foreign Authorities* (Rochester, NY, 2008), <http://papers.ssrn.com/abstract=1081854>; Daniel A Farber, “The Supreme Court, the Law of Nations, and Citations of Foreign Law The Lessons of History,” *California Law Review* 95, no. 5 (2007), p. 1335–65; G. De Burca, “International Law Before the Courts: The European Union and the United States Compared”, *Virginia Journal of International Law*, ((forthcoming)). Regarding the ECtHR, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford Univ. Press, 2010); Christina Binder, *The European Court of Human Rights and Public International Law: Fragmentation or Unity?* ([Baden-Baden]: Nomos-Verl.-Ges., 2014); Ineta Ziemele, “Other Rules of International Law and the European Court of Human Rights: A Question of a Simple Collateral Benefit?,” in *La Convention Européenne Des Droits de L’homme, Un Instrument Vivant / The European Convention on Human Rights, a Living Instrument*, ed. Dean Spielmann, M. Tsirli, and P. Voyatzis (Bruxelles: Bruylant, 2011), 741–58; Luzius Wildhaber, “The European Convention on Human Rights and International Law,” *The International and Comparative Law Quarterly* 56, no. 2 (2007), pp. 217–231. Finally, regarding the South African Constitutional Court, see H. Woolaver, “The Influence of International Law on the Constitutional Jurisprudence of South Africa” (presented at the Twenty Years of South African Constitutionalism, New York Law School: unpublished, 2014).

<sup>236</sup> As the United States has not ratified the American Convention on Human Rights (J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed., (Cambridge: Cambridge Univ. Press, 2012), p. xv.) and the European Union has not yet acceded to the European Convention of Human Rights; See Opinion Pursuant to Article 218(11) TFEU, Case C-2/13 (18 December 2014).

<sup>237</sup> Although a form of dialogue occurs between the ECtHR and Member States’ courts, it is of a different type, labeled by Anne-Marie Slaughter as ‘vertical communication’, in which the supranational and national courts are held to collaborate; A.-M. Slaughter, “A Typology of Transjudicial Communication”, *University of Richmond Law Review*, Vol. 29 (1994), pp. 106 & 120. See for more on this type of dialogue L. Burgorgue-Larsen, “De l’internationalisation du dialogue des juges”, *op. cit.*, pp. 107-115. For a similar approach of discounting these references, see Carla Zoethout, “The European Court of Human Rights and Transnational Judicial Dialogue”, in *Proceedings of the Conference on Transnational Judicial Dialogue held in Oslo, 21-22 June 2013*, to be published – on file with author. For more on this dialogue between the ECtHR and national courts see F. Sudre, “A propos du ‘dialogue des juges’ et du contrôle de conventionnalité”, in *Les dynamiques du droit européen en début de siècle* (Paris: Pédone, 2004), pp. 207–224. This dialogue might take on a new form through the mechanism foreseen in Protocol 16 which allows the States Parties’ highest courts to ask the Court for an advisory opinion on questions of principle relating to the interpretation or application of the Convention or its protocols relevant to cases before them. The Protocol will enter into force once it has been ratified by ten State Parties. As of 5 August 2015, four States had ratified the Protocol. See for more K. Dzehtsiarou and N. O’Meara, “Advisory Jurisdiction and the European Court of Human Rights: a Magic Bullet for Dialogue and Docket-Control?”, *Legal Studies*, Vol. 34, No. 3 (2014), pp. 444–468.

<sup>238</sup> A. Sperti, “Cautious Attempts of Judicial Use of Foreign Precedents,” *op. cit.*

<sup>239</sup> S. Cleveland, “Our International Constitution”, *Yale Journal of International Law*, Vol. 31 (2006), p. 10.

law<sup>240</sup> will be used. In the first, the reason behind the existence of a foreign authority is proposed to help interpret a domestic norm.<sup>241</sup> Applied to case law, these references describe (even shortly) the reasoning of the foreign judgment (or an aspect of it). The other type of reference, the ‘norm-centric’ use, also called by Joan Larsen the ‘moral fact-finding’ approach,<sup>242</sup> consists of citing a foreign reference for or against a given practice by considering the existence of a norm or a judicial decision to be relevant to the issue of whether a particular practice should be permitted.<sup>243</sup> A parallel inquiry also records whether the amici outline the methodology they adopted to gather and select their data. Finally, the research examines whether a justification is used to convince judges to consider foreign case law and, if so, what type of justification is used. These elements are presented in the tables and are mostly utilized in the cross-analysis of the cases.

58. Then, beyond the hypothesis that public interest litigants use comparative law to push the interpretation of fundamental rights and are thus messengers of this information, another part of the exposed hypothesis concerns the influence of this comparative material. Measuring influence and causality in the social sciences is always challenging,<sup>244</sup> for among other reasons because various goals may be pursued and influence felt on different dimensions. In particular, the discourse of public interest litigants will be explored: on the one hand, at a fairly general level, in an effort to develop a more contextual analysis of the comparative argumentation in advocacy. A few propositions on the public interest litigants’ submission to but also influence on legal culture will be set out – by looking more specifically at the frames in which actors evolve and argue and at their influence on the sources of law. Legal culture is a loaded field of research and the part devoted to this influence will make only a few tentative conclusions based on the examination of the content of the briefs and link them with doctrinal discussions on these issues. On the other hand, a concerted effort to establish the existence of influence on the judges will be undertaken. The difficulties intensify here as decades of research on the inscrutable nature of judicial decision making demonstrate. Their deliberations are secret, and the influences on judges can come from many sources,<sup>245</sup> and they seldom cite all the sources that inspired them.<sup>246</sup>
59. Assorted methodologies will thus be used to assess the influence of the public interest litigants’ comparative material on the judges.<sup>247</sup> A broad definition of ‘influence’ is adopted,

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<sup>240</sup> Joan Larsen singles out ‘substantive’ use of foreign law opposed to expository or empirical uses for example and among these substantive uses, she distinguishes between the ‘reason-borrowing’ approach and the ‘moral fact-finding’ approach; J. 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*, Vol. 65 (2004), pp. 1291–1297.

<sup>241</sup> Y. Lee, “International Consensus as Persuasive Authority in the Eighth Amendment”, *University of Pennsylvania Law Review*, Vol. 156, No. 1 (2007), p. 77.

<sup>242</sup> J. Larsen, “Importing Constitutional Norms from a Wider Civilization”, *op. cit.*, pp. 1291–1297.

<sup>243</sup> Y. Lee, “International Consensus as Persuasive Authority in the Eighth Amendment”, *op. cit.*, p. 77.

<sup>244</sup> It is in addition impossible to establish universal laws therein; D. Byrne, “Case-Based Methods: Why We Need Them; What They Are; How to Do Them” *The SAGE Handbook of Case-Based Methods* (SAGE Publications, 2009), p. 1.

<sup>245</sup> R. Sacco, *La Comparaison Juridique Au Service de La Connaissance Du Droit*, *op. cit.*, p. 36.

<sup>246</sup> N. Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford: Hart Publishing, 2001), p. 7.

<sup>247</sup> Although the different models of judicial decision-making designed by (mostly U.S.) scholars offer interesting insights, they will not be substantially used here, as their applicability across the three studied

as others in the legal field have done,<sup>248</sup> such as Neil Duxbury who defines influence as “related but not identical to causality: it occurs when a person’s outlook alters as a result of his or her conscious or subconscious noticing of some external stimulus”.<sup>249</sup> First, mention will be made of various studies undertaken (in particular in the U.S.) on the influence of amicus curiae briefs on judicial-making. Then, to specifically study the influence of the comparative argumentation, the selected cases are carefully analyzed in Chapters 3 and 4, using methods of process-tracing, more commonly used in political science.<sup>250</sup> Process-tracing is an analytical tool of qualitative analysis, used in particular for drawing descriptive and causal inferences.<sup>251</sup> This method is an essential form of within-case analysis.<sup>252</sup> The foundation of process-tracing lies in the careful description of a situation and a sequence of events<sup>253</sup> before elaborating a causal explanation. I thus map the landscape of public interest litigants in each case, examine the content of the submitted briefs and, if a comparative perspective is present, I look for traces of it in the other briefs (if parties responded for example), in the oral arguments if possible and ultimately in the judgments. As part of the causal mechanisms are unknown (the black box of judicial decision-making), the main indication of the influence between the public interest litigants’ actions and the comparative approach in judgments is the citation explicitly referring to the briefs submitted by external parties. But given that a broad definition of influence was retained and that judgments do not always locate the source of information in the briefs, I also record evidence of the briefs having been read (for example if the filings are summarized or if judges engaged with their arguments) and compare the comparative material submitted to the judges and ultimately cited by them. Chapter 5 wraps up the findings of the earlier chapters and supplements the assessment of influence with statements made by judges and with interviews conducted at the European Court of Human Rights, the Court at which the degree of influence of public interest litigants on the use of comparison has been most difficult to measure.<sup>254</sup>

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jurisdictions is uncertain and a field of research in itself. So, for example, although sometimes used in socio-legal research, this thesis thus does not elaborate on the social-psychological paradigm, which holds that political, socioeconomic, professional and other background characteristics and trajectories help explain judicial attitudes and neither does it conduct a prosopographical analysis; See for more on this L. Epstein and J. Knight, “Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead”, *Political Research Quarterly*, Vol. 53, No. 3 (2000), pp. 625–661; G. Sisk, M. Heise et al., “Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning”, *New York University Law Review*, Vol. 73 (1998), pp. 1377–1500.

<sup>248</sup> Jean-Christophe Roda, in his effort of measuring the influence of European law on the American one, suggests to retain a definition close to that of general or of philosophical dictionaries, that refer to the idea of a “*un crédit, (...) un ascendant sur autrui*” or a certain authority that leads to being listened to; J.-C. Roda, “L’influence des droits européens sur le droit américain”, *Recueil Dalloz*, (2014), p. 157.

<sup>249</sup> N. Duxbury, *Jurists and Judges*, *op. cit.*, p. 7.

<sup>250</sup> In particular regarding public policies, europeanization or international relations. But sometimes they apply to legal processes and legal mobilizations. See for example S. Jacquot and T. Vitale, “Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level”, *Journal of European Public Policy*, Vol. 21, No. 4 (2014), pp. 587–604.

<sup>251</sup> D. Collier, “Understanding Process Tracing”, *PS: Political Science & Politics*, Vol. 44, No. 4 (2011), p. 823.

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> Given it rarely locates the source of the information in an amicus curiae brief (previously, it also happened that the Court would not even mention the presence of an amicus); N. Leroux, *La condition juridique des organisations non gouvernementales internationales* (Bruxelles: Bruylant, 2009), pp. 421–422.

#### 4. Outline of the Chapters

60. This thesis espouses an interactive approach to the analysis of legal activities in terms of legal mobilization, as for example Pierre Lascoumes and Evelyne Serverin suggested. In the latter, the actors are not seen as enclosed in rigid molds (defined by law for example) but their actions are conceived as much a product of existing frames as of created situations.<sup>255</sup> The law and the debates surrounding legal practices are here envisaged as being framed and as framing the situation. Among the various factors that might push the public interest litigant to act and to adopt a comparative reasoning in its approach and the judge to be ultimately convinced of cross-citing, this thesis thus starts by focusing on the legal opportunity structure.<sup>256</sup>
61. The first chapter examines the forms of public interest litigation, in particular the entry points through which influence can be exerted.<sup>257</sup> Two principal avenues of access will be explored: the possibility to directly act before the courts in the public interest – which raises the question of standing – and the procedure of the *amicus curiae*. The *amicus curiae* briefs forming the large majority of the material analyzed for this thesis, their different roles, the evolution of the device before the three courts and the literature on their influence are explored.
62. The second chapter looks at other aspects of the opportunity structure surrounding the public interest litigation activity, this time shaping the argumentative strategies brought forward. It is devoted to the issue of comparison in adjudication, exposing the notion of persuasive authority, the main reasons and benefits put forward by proponents of the comparative approach and the risks identified or feared by opponents. To provide a larger and concrete picture of the practice, empirical studies on the use of the comparative material by each analyzed court are presented, together with the interpretation methods favored by these selected courts.
63. The next two chapters analyze the selected cases per theme (inhuman and degrading treatment cases are developed in Chapter 3, sexual orientation cases in Chapter 4) and follow a similar outline. After an introduction to the provisions at hand and a brief historical review of civil society mobilization around these issues, the cases are presented in chronological order, per jurisdiction. The facts or the issue at stake are summarized and then the public interest litigant's intervention is described with an emphasis on its comparative aspect if any. If

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<sup>255</sup> P. Lascoumes and E. Serverin, "Le droit comme activité sociale: pour une approche wébérienne des activités juridiques", *Droit et Société*, Vol. 9 (1988), p. 175.

<sup>256</sup> C. Hilson, "New Social Movements: the Role of Legal Opportunity", *Journal of European Public Policy*, Vol. 9, No. 2 (2002), pp. 238–255. According to an author, there are two major factors commonly recognized as influencing the decision by an NGO to employ human rights litigation: resource availability and degree of access to the courts; N. Gottschalk, "Litigation, Transnational Civil Society and the Protection of Human Rights", *Law and Development*, (2004), p. 5. There are of course numerous other variables central to the mobilization of law by litigants; F. Zemans, "The Neglected Role of the Law in the Political System", *The American Political Science Review*, Vol. 77, No. 3 (1983), p. 700.

<sup>257</sup> For example, according to Elisabeth Zoller, writing in 2000, the possibility to suggest to the judges to be inspired by solutions of foreign jurisdictions is extremely difficult to realize in France because of the very limited number of persons able to set constitutional litigation in motion; E. Zoller, "Qu'est-ce que faire du droit constitutionnel comparé?", *Droits*, Vol. 32 (2000), p. 128.

relevant, mention is also made to the oral hearings. Finally, the judgment is looked at, in particular the foreign references it contains and when possible, the influence of the *amicus curiae* or the participating group is underlined.

64. The last chapter schematizes and completes the findings related to the influence of the comparative material brought by public interest litigants on the judges. It identifies patterns uncovered through the analysis of the cases and links them to elements developed in Chapters 1 and 2. Firstly, various observations are made regarding the presence of groups in the examined cases, in particular their modes of access to the courts and the profiles of the key repeat players. Then, manifestations of comparative material in the submitted briefs are cross-analyzed, in particular their form and their methodological underpinnings, as they might explain features of the judicial dialogue observed before the three courts and the more heated debate surrounding it in the United States. In the same vein, a section delves more specifically into the profiles of the groups citing the comparative elements, to see whether the most influential actors – such as repeat players – are those bringing the comparative material to the fore. The differences in context and approach of public interest litigants acting as ‘messengers’ of comparative information are explained by highlighting the variances in the evolution of the discourse on rights in their respective environments. The final section gathers the different bases provided by litigants to justify recourse to comparative material to inform about how its impetus as a source in the argumentative process could be understood.