Ius Gentium: Comparative Perspectives on Law and Justice 75

Andrew Novak

Transnational Human Rights Litigation

Challenging the Death Penalty and Criminalization of Homosexuality in the Commonwealth

Springer

Ius Gentium: Comparative Perspectives on Law and Justice

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ISSN 1534-6781 ISSN 2214-9902 (electronic)
Ius Gentium: Comparative Perspectives on Law and Justice
ISBN 978-3-030-28545-6 ISBN 978-3-030-28546-3 (eBook)
https://doi.org/10.1007/978-3-030-28546-3

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This book is dedicated to my mother,
Laura René Novak (1953–2017)

Acknowledgements

This book began as an exploration of the doctrine, evolved into an exploration of the strategy, and ended as an exploration of the lawyers. The theory presented in this book was first developed as part of the dissertation I wrote for a Ph.D. by Public Works from Middlesex University School of Law. I appreciate the helpful feedback that I received from my supervisors, Nadia Bernaz, William Schabas, and Alice Donald, as well as from my examiners Roger Hood and Dirk van zyl Smit. Since completing my Ph.D., I refined the theory in several journal articles for *Cardozo Journal of International and Comparative Law*, *Journal of African Law*, *Journal of Human Rights Practice*, and, most recently, *Human Rights Law Review*. Each of these articles used different case studies, but all revolved around the same theory: that human rights lawyers are well served by citing international and foreign law in their pleadings and generating a transnational body of global jurisprudence to persuade the holdouts. The assistance of these journal editors and my reviewers was invaluable.

The subjects of my research have always been gracious. On the death penalty side, I have worked with Saul Leurfreund, Parvais Jabbar, and Annette So at the Death Penalty Project, as well as barrister Joseph Middleton at Doughty Street Chambers. On the LGBT rights side, I appreciate assistance from Téa Braun at Human Dignity Trust, whose comments on Chap. 5 greatly helped improve the book. Kuda Hove at Veritas Zimbabwe assisted with my research on the *Makoni* decision. On the topic of human rights litigation, I have interacted with a much broader circle of scholars on social media, by correspondence, and at conferences, including Matthew Waites, Daniel Pascoe, Vikram Raghavan, Bharat Malkani, Sarah Cooper, Lill Scherdin, John Bessler, Leonie Steinl, and many others. Portions of the research here were presented at conferences, including at the Netherlands Institute of Rights at the University of Utrecht in September 2016, and at the

Comparative Capital Punishment Conference at the University of Texas at Austin in April 2017. I would like to thank the organizers, the SIM Institute and Profs. Carol and Jordan Steiker. My research assistant at George Mason University, Chelsea van Dijk, assisted me proofing and footnotes.

Washington, DC, USA

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Chapter 1
Introduction

Lawyers, Strategic Litigation, and the Transnational Judicial Dialogue

Abstract Courts throughout the Commonwealth are engaged in a transnational judicial dialogue on human rights issues, citing, following, and distinguishing one another's decisions and building a global "common law" on issues such as the death penalty and decriminalization of homosexuality. A common colonial legal inheritance, constitutional similarities, and membership in the Commonwealth reinforce this sharing process by bringing together policymakers, judges, and activists. Strategic human rights litigation can take advantage of these connections and help contribute to genuine law reform. By citing jurisprudence from other Commonwealth members, human rights litigators can pressure and persuade more reluctant states and further entrench global norms. These "transnational litigation networks" bring together advocacy on human rights issues with technical expertise and strategic knowledge in human rights litigation.

Keywords Commonwealth of nations · Comparative constitutional law · Legal profession · Strategic litigation · Transnational judicial dialogue

1.1 Putting Lawyers into the Picture

Constitutions define and shape the domestic legal order, but they are also by nature social documents that represent a country's relationship with other countries and define it as "acting in a world community."[1] Interpreting a constitution is not an insular process. Constitutions learn from one another; while the documents represent the desires and particularities of their jurisdictions, drafters by necessity experiment with and are influenced by foreign and international legal traditions.[2] The guardians of the constitution, superior or constitutional court judges, likewise do not live in a vacuum in which they are immune from global developments, especially when those developments parallel the ones at home. It is axiomatic that judges increasingly share jurisprudence across borders, citing, following, and distinguishing one another's

[1] Jackson (2010), 8.

[2] McCrudden (2000), 501.

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A. Novak, *Transnational Human Rights Litigation*, Ius Gentium: Comparative Perspectives on Law and Justice 75,
https://doi.org/10.1007/978-3-030-28546-3_1

decisions.[3] They face a variety of pressures and motivations in doing so: a court may want to emulate or refuse to emulate another; judges may use foreign or international law to buttress decisions that might be unpopular at home; constitutions may even require that judges look to foreign or international law. Whether this "dialogue" leads to legal harmonization or necessarily favors a rights-expanding agenda is a debatable point.[4] But the dialogue is occurring, and, as legal materials (especially those in foreign languages) become more accessible, we might assume that the scope of this dialogue will only grow.

This constitutional sharing process—the metaphorical "transnational judicial dialogue"—presents an enormous opportunity for lawyers engaged in strategic human rights litigation. It is for this reason: judges do not cite foreign jurisprudence or international law in a vacuum. Rarely do judges have expertise in comparative or international law; expertise in the workings of a foreign legal system would be even more unusual, though it happens.[5] Taiwan's constitutional court, for instance, has traditionally been staffed by academics who research international and comparative law.[6] Another exception might be the advocates-general at the Court of Justice of the European Union (EU), by nature comparative experts who give advice to the EU judges, sensible given the supranational legal structure of the Court.[7] The exceptions prove the rule. A large literature has focused on the motivations of judges to cite and rely on foreign and international law, and the frequency with which judges do so, especially in human rights claims and especially by constitutional or supreme courts.[8] This book does something different. It focuses on the motivations of *lawyers*—as parties, as litigators, as *amici curiae*, as third-party intervenors—in bringing international and foreign law to judges' attention. Lawyers, not judges, are the instrumental drivers of this dialogue. As Helen Duffy writes, third-party interventions and amicus briefs may draw judges' attention to comparative, foreign, and international law perspectives; these briefs and the parties' pleadings are "the vehicle that make possible the judicial comparisons and borrowing."[9]

The use of the comparative method in strategic human rights litigation is itself an expertise that litigators may develop and transmit through their linkages with other organizations and partners. This book begins with a discussion of Margaret Keck and Kathryn Sikkink's model of "transnational advocacy networks," which are constellations of activists and civil society organizations that can alter state behavior through direct and indirect pressure.[10] Strategic litigation is a particular kind of advocacy, and lawyers are a unique breed of advocate: through their pleadings and citations, they too can diffuse human rights norms and pressure states to conform to their international

[3] Slaughter (2000), 1104.

[4] Frishman and Benevenisti (2016), 328.

[5] Jackson (2003), 324 n. 193.

[6] Law and Chang (2011), 561–563.

[7] Jacobs (2003), 549.

[8] Whytock (2010), 45; Benvenisti (2008), 241; Shany (2006), 341; Kochon (2006), 507.

[9] Duffy (2018), 22.

[10] Keck and Sikkink (1998).

obligations. *Transnational litigation networks* may develop to share jurisprudence, transmit legal strategy and expertise, and communicate successes to other jurisdictions to pressure more reluctant states to comply. These networks have specific human rights goals in mind; they are made up of classic "cause lawyers" who use their legal skills not just to benefit their clients but to achieve broader law reform.[11] By bringing strategic litigation in domestic courts and supranational tribunals, these litigation networks can build and cultivate a body of comparative persuasive jurisprudence that they can cite in future litigation challenges elsewhere. Over time, the dialogue among domestic courts and the weight of the body of jurisprudence can itself alter international law as the norm becomes more widely diffused.[12] Transnational litigation networks are not just norm diffusers; they may also be norm creators.

This book will focus on two of these transnational litigation networks, which have as their mission the abolition of the mandatory death penalty and anti-sodomy laws in many postcolonial jurisdictions. Marrying the comparative law expertise of specialized human rights NGOs, the resources of law firms, the pro bono commitment of lawyers and law school clinics, and the grassroots commitment of local activists and partners on the ground, these litigation networks have successfully challenged colonial era laws and used that precedent in other jurisdictions. This type of litigation generates its own momentum. The more cases that the litigation networks win, the more they can show that a global trend or consensus is emerging, strengthening, for example, the normative case against mandatory capital punishment and laws that criminalize consensual same-sex relations. To be sure, both litigation networks are part of much larger advocacy networks on abolition of the death penalty and expansion of lesbian, gay, bisexual, and transgender (LGBT) rights protections, respectively. What makes the lawyers different is that their expertise is in one particular mode of advocacy: namely, transnational litigation, and in particular the use of foreign and international law in their court pleadings and briefs.

1.2 Commonwealth Laws, Links, and Networks

Colonialism was an exercise in legal harmonization. British colonial officials imposed similar penal codes on the colonies, frequently based on the Indian Penal Code of 1861 or its successor codes.[13] The retention of these colonial-era laws after independence is a kind of "legal path dependence." It was simpler to retain the legal framework left behind by the colonial power; transitioning to something new would have required significant cost and effort.[14] Common to these imperial-era penal codes are a variety of anachronisms that persist in many former British colonies: criminal adultery laws, adult and juvenile corporal punishment, and states of emergency

[11] Scheingold and Sarat (2004), 3.
[12] Waters (2010), 465.
[13] Morris (1974), 6–7.
[14] Kane (2015), 281.

provisions, to name a few.[15] This book will focus on two of them: the mandatory death penalty and criminalization of consensual same-sex intercourse. Both legal issues are arguably colonial-era holdovers that are increasingly seen as violations of international human rights law. And both have been the target of constitutional litigation in former British colonies in the Caribbean, common law Africa, South and Southeast Asia, and the South Pacific.

The British left the colonies with anachronistic penal codes that did not benefit from legal reforms in the United Kingdom itself during the late 1950's.[16] But the British left two other legacies behind, which made the current legal challenges possible. The first was a global constitutional inheritance that protected fundamental rights and freedoms, such as the rights to equality, privacy, and free expression, as well as a prohibition on cruel and degrading punishment. The European Convention on Human Rights applied to British colonies after 1953, giving even far-flung regions a skeletal framework for domestic application of international human rights law.[17] The country that never wrote a constitution for itself helped draft at least thirty "Whitehall constitutions" between 1956 and 1980, almost all of which contained justiciable human rights provisions.[18] Many of these constitutions were repealed, replaced, or amended beyond recognition, but the bills of rights portions usually survived and are still present today. The second legacy of the British—more fragile—is a tradition of judicial review in which domestic judges can nullify or alter laws that offend the constitution.[19]

The Commonwealth of Nations, the global consortium of 53 primarily former British colonies with a combined population of more than 2 billion people, is hardly itself a human rights organization. As an entity, it tends to favor collegial decision-making and prioritizes the principle of state sovereignty, which are reflected in a

[15] For judicial corporal punishment, see e.g., *Pinder v. Queen*, [2002] UKPC 46 (appeal from Bahamas); *Pinder v. Queen*, [1984] B.L.R. 14 (Botswana CA); *State v. Ncube*, [1987] 2 Z.L.R. 246 (Zimbabwe SC); *State v. Williams*, 1995 (3) S.A. 632 (CC); *Yong Vui Kong v. Public Prosecutor*, [2015] SGCA 11 (Singapore). For criminal adultery laws, see e.g., *Joseph Shine v. Union of India*, Writ Petition (Criminal) No. 194 of 2017 (27 September 2018) (India SC); *J.S. v. L.C.*, Case No. SA 77/2014 (19 August 2016) (Namibia SC). For states of emergency laws, Hussain (2009), 5.

[16] See especially *Report of the Royal Commission on Capital Punishment*, 1949–1953 (1953) and the *Report of the Departmental Committee on Homosexual Offences and Prostitution* ("Wolfenden Report") (1957). Both led to changes in law: Homicide Act of 1957 (abolishing the death penalty for most ordinary crimes) and Sexual Offences Act of 1967 (repealing anti-sodomy laws in England and Wales).

[17] Vasak (1963), 1207. The original application of the European Convention on Human Rights to the colonies was by Article 63, though, after the coming into force of Article 2(3) of Protocol 11 to the Convention, E.T.S. 115, this provision is now Article 58.

[18] Dale (1993), 80–81.

[19] Joireman (2001), 575, 581 (noting that a tradition of judicial review existed in British colonial Africa by the time of independence, but weaknesses in the judiciary and legal profession undermined the judicial check on executive power after independence).

structure that favors informal dialogue rather than strict constraints.[20] Yet the Commonwealth provides a forum in which judges, lawyers, activists, academics, legislators and others can engage in cross-national legal discourse. Judges from different Commonwealth countries may meet at colloquia and conferences; they may even sit on one another's courts as contract judges or countries may retain a line of appeal Judicial Committee of the Privy Council to the in London, the highest court for the old British Empire.[21] Lawyers from different Commonwealth countries may have reciprocal licensing arrangements to allow cross-border legal practice and may be members of the Commonwealth Lawyers Association, which provides further opportunity for exposure to one another's laws.[22] And of course, activists themselves may organize into networks that specifically target Commonwealth members on human rights issues. The LGBT rights organization Commonwealth Equality Network, a coalition of LGBT rights organizations in the Caribbean, South Asia, and Sub-Saharan Africa (as well as the United Kingdom and other developed countries), has targeted Commonwealth Heads of Government meetings and other events for advocacy.[23] The combination of a common law colonial legal inheritance and an existing forum for networking and strategic linkages in the Commonwealth contribute to the growth of transnational litigation networks such as those focused on death penalty abolition and LGBT rights, even if the Commonwealth organization itself is not the driver of this process.

That is important for another reason. Human rights litigation exists in an unequal world and lawyers come from a closed, elite profession. Strategic litigation may privilege networks based in the Global North and may treat activists in postcolonial nations as junior partners, perpetuating the inequalities of the international system and the Commonwealth itself.[24] To the extent that these transnational litigation networks pursue an agenda that is more global than local, they may generate resistance among grassroots activists, their allies, and a backlash from local political elites and opponents.[25] The lawyers—and the law—are likely to come from the Global North. This is perhaps more of a risk with LGBT rights than it is with the death penalty. In

[20] Duxbury (1997), 345; Duxbury (2006), 428.

[21] Kirby (2008), 179–180, 182.

[22] For the East African Community as an example, see e.g., Omondi (2017) (noting that the East African Community Common Market is liberalizing legal services among member states).

[23] Waites (2017), 648–650, 655–657.

[24] Lennox and Waites (2013), 41–43; Blake and Dayle (2013), 469–470.

[25] The litigation against the mandatory death penalty and anti-sodomy laws have generated a backlash. For instance, Barbados amended its constitution to preserve the mandatory death penalty from constitutional challenge. Barbados Constitution (Amendment) Act, No. 14 of 2002 (saving the mandatory death penalty). Jamaica did the same with its anti-sodomy laws. In its 2011 Charter of Fundamental Rights, laws dealing with sexual offenses, pornography, or the traditional definition of marriage are specifically saved from constitutional challenge. Jamaica Charter of Fundamental Rights and Freedoms (Constitution Amendment) Act of 2011, No. 12 of 2011, Section 13(12) ("Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to…sexual offences…shall be held to be inconsistent with or III contravention of the provisions of this Chapter").

death penalty cases, the primary motives of local counsel and international counsel are aligned: to save the life of the client. That may not be true with LGBT rights. For instance, international counsel may wish to target anti-sodomy laws, while local activists may be more concerned about police brutality or hate crimes, particularly as prosecutions for sodomy-related offenses are so unusual. Nonetheless, citing international and foreign law in pleadings has tended to reinforce this inequality; in their pleadings, lawyers are much more likely to cite the European Court of Human Rights, United States and Canadian Supreme Courts, United Nations Human Rights Committee, and a small handful of others such as the South African Constitutional Court or the Supreme Court of India.[26] True engagement with the Global South and even a South-South judicial dialogue would help improve the legitimacy of human rights litigation, reduce the risk of opposition, and contribute to meaningful change.

As this book will argue, South-South dialogue is happening. Many Commonwealth courts, especially in resource-constrained legal systems that do not publish official law reporters, are increasingly sharing their decisions in free, open-access online databases.[27] Regional integration in the Caribbean Community, East African Community, and elsewhere have made the decisions of one's neighbors even more strongly persuasive.[28] Judges and lawyers increasingly attend transnational conferences and colloquia, creating opportunities for in-person dialogue. In 2017, the Kenya Supreme Court relied even more heavily on a decision of the Supreme Court of Uganda in striking down the mandatory death penalty than it did on earlier precedent from the United States, India, or the Privy Council in London.[29] In September 2018, the Indian Supreme Court decision invalidating Section 377, which criminalized consensual sex between two men, cited the most recent jurisprudence in Belize and Trinidad and Tobago. In May 2019, the Kenya High Court considered the same constitutional jurisprudence—and decided the issue the opposite way.[30] In both the mandatory death penalty litigation and the litigation against anti-sodomy laws, London-based transnational human rights organizations partnered with local organizations on the ground, sharing resources, strategy, and expertise and allowing local activists ownership over the successes. The Commonwealth networks have the potential to reinforce inequalities between the developed and developing members, but they can also create genuine opportunities for South-South dialogue to a much greater extent than ever before.

This all may sound a little too rosy. Perhaps the transnational human rights organizations *are* engaged in litigation tourism, "bounty-hunting" colonial laws that are

[26] Reinold (2016), 282; Hirschl (2016), 214.

[27] World Legal Information Institute, "Declaration on Free Access to Law," available at: www.worldlii.org/worldlii/declaration (linking to legal information institutes from many different regions and countries).

[28] The development of regional courts adds additional actors in this sharing process. Alter (2012), 151–152.

[29] See *Muruatetu v. Republic,* Petition Nos. 15/2015 and 16/2015 (14 December 2017) (Kenya SC).

[30] *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76 of 2016 (6 September 2018) (India SC); *EG v. Attorney General*, Petition Nos. 150 & 234 of 2016 (24 May 2018) (Kenya HC).

easy to dispense with without addressing much deeper injustices.[31] Perhaps the litigators who bring strategic human rights claims do represent the global elite and are far removed from the human rights violations that they seek to remedy. It is important to remember that strategic human rights litigation in domestic courts is only one tool among many others for enforcing international human rights norms.[32] The use of comparative and international law in legal pleadings and cross-citations to other jurisdictions are only one method of norm diffusion. Transnational human rights NGOs are a part of the solution; they are not the solutions in themselves. Nonetheless, human rights litigation may well do more good than harm: it "has played an important role in transmitting significant legal advances across the borders of states," and encouraged courts to look outward for answers rather than inward. International legal standards have increasingly become part of domestic constitutional standards or at least interpretive aids. "The result is that human rights litigation can have a much broader effect on shaping standards beyond its immediately apparent national or regional scope of influence."[33] That is the benefit of transnational litigation: even if a decision is unsuccessful or does not have the desired impact in one country, it can still have an impact on the other side of the world.

1.3 The Organization of the Book

Non-state actors such as activists, coalitions, NGOs, and social movements can change the behavior of states and help ensure compliance with international human rights norms. Where states refuse to comply, these networks of activists—what Keck and Sikkink call "transnational advocacy networks"—can go around the state and make links directly with global activists in solidarity and thereby help increase pressure on states to comply. In Chap. 2, this study will define transnational litigation networks, a species of transnational advocacy networks that seeks to use domestic courts to remedy human rights violations. Transnational litigation networks play two roles: first, they have a genuine commitment to the cause and seek to use law and the legal system to create change; and second, they transmit strategy, technical expertise, and legal knowledge relating to international and comparative law. The transnational litigation networks described in this book bring together specialized human rights NGOs, law firms, law school clinics, local grassroots partners, and organized bar and legal professional associations.

Chapter 3 defines the strategy of transnational litigation networks, which aim to build and cultivate a corpus of persuasive jurisprudence from different jurisdictions to persuade reluctant jurisdictions to adopt the new standard. Human rights lawyers will cite foreign and international jurisprudence in their briefs or pleadings, which help to generate their own momentum. The more countries adopt a standard, the

[31] Akers and Hodgkinson (2013), 33.

[32] Duffy (2018), at 5.

[33] Ibid. 20–21.

more these lawyers can show that an emerging trend or consensus exists to pressure states that have not yet complied. In this way, transnational legal citations become a form of norm diffusion. However, the "judicial dialogue" on human rights cases has a tendency to privilege courts in the Global North or courts in large jurisdictions, while voices in smaller or postcolonial jurisdictions are not represented as frequently in transnational legal citations. Nonetheless, courts in the Global South do "share" jurisprudence with one another, on topics that range from life imprisonment to corporal punishment to the criminalization of adultery. Increasingly, courts in the Global South find jurisprudence from other courts in the Global South seemingly more persuasive than jurisprudence from larger, but more distant jurisdictions.

The mandatory death penalty, the subject of Chap. 4, has rapidly retreated across the English-speaking world. In a coordinated series of challenges to the mandatory death penalty in the Commonwealth Caribbean, the Privy Council and later the Caribbean Court of Justice confirmed a global trend toward restricting capital punishment to only the most serious offenses. The network that engineered these challenges included the Death Penalty Project in London and pro bono barristers and solicitors through the London Panel, which coordinated representation of death row inmates in the Caribbean. They were joined by the Capital Cases Charitable Trust; several large law firms and barristers' chambers; local partners such as the Jamaican Council for Human Rights, Veritas Zimbabwe, and the Katiba Institute in Kenya; and mainstream legal professional organizations such as the Commonwealth Lawyers Association. This network has assisted in challenges to the mandatory death penalty in the Caribbean, East Africa, Bangladesh, Malaysia, Singapore, and elsewhere. By petitioning international and regional courts, these lawyers built a body of persuasive jurisprudence that they could use in domestic courts and in this way helped alter international law itself on the death penalty. A Commonwealth-wide consensus is emerging that the mandatory death penalty overpunishes and therefore constitutes cruel and degrading punishment. A prohibition on the mandatory death penalty is now contained in the UN Human Rights Committee's new General Comment on the Right to Life, which is updated to reflect the evolution of state practice.[34]

Anti-sodomy laws in the Commonwealth, like the mandatory death penalty, are also largely (though not entirely) a relic of British colonialism. Chapter 5 will trace the passage of these laws from Britain to the Indian Penal Code and then to the penal codes of virtually all British colonies. These laws stigmatize LGBT persons and other sexual minorities, contribute to hate crimes and other forms of insecurity, and have perverse public health consequences, driving same-sex relationships underground and affecting HIV transmission rates. Human Dignity Trust, a London-based NGO that has expertise in comparative and international law on LGBT rights, is connected to large law firms such as Freshfields Bruckhaus Deringer LLP and legal clinics. The Trust has partnered with local organizations such as the United Belize Advocacy Movement and Kenyan National Lesbian and Gay Human Rights Commission. The Trust is part of a larger network of Commonwealth-based LGBT

[34]Human Rights Committee, General Comment No. 36: The Right to Life (Article 6 of the International Covenant on Civil and Political Rights) (2018), para. 39.

organizations such as Kaleidoscope Trust and the Commonwealth Equality Network. Decriminalization of sodomy has occurred not only in the developed members of the Commonwealth, but in countries such as India, Nepal, Belize, and Fiji. By citing international human rights instruments and foreign precedent, human rights litigators have successfully convinced courts in a wide range of jurisdictions that anti-sodomy laws violate the rights to equality, human dignity, privacy, and free expression. Unlike the death penalty, by and large, LGBT rights activists face an opposition that often organized and transnational, supported by evangelical religious networks and others. Nonetheless, the strategy is strikingly similar: by approaching national courts and supranational tribunals, these litigators have developed a body of jurisprudence that can be cited and relied on in future cases.

The Conclusion addresses whether this strategy can be generalized to other human rights issues. Uniformities in inherited laws and constitutional provisions provide the framework for a Commonwealth-wide judicial sharing process. Many colonial-era penal codes, for instance, criminalized adultery and fornication and authorized judicial corporal punishment—human rights issues that could provide an opportunity for judicial sharing. As with all strategic litigation there are risks, and the death penalty and sodomy law challenges have both faced backlashes in different jurisdictions at different times. But strategic litigation may help to harmonize law across borders, transfer legal expertise to the Global South, solidify judicial independence, reduce human insecurity in practice, and secure compensation and closure for victims.

References

Akers KA, Hodgkinson P (2013) A critique of litigation and abolition strategies: a glass half empty. In: Hodgkinson P (ed) Capital punishment: new perspectives. Ashgate, Farnham, pp 29–62

Alter KJ (2012) The global spread of European style international courts. West Eur Politics 35:135–154. https://doi.org/10.1080/01402382.2012.631318

Benvenisti E (2008) Reclaiming democracy: the strategic uses of foreign and international law by national courts. American J Int L 102:241–274

Blake C, Dayle P (2013) Beyond cross-cultural sensitivities: international human rights advocacy in Jamaica. In: Lennox C, Waites M (eds) Human rights, sexual orientation and gender identity in the Commonwealth: struggles for decriminalization and change. Institute for Commonwealth Studies, London, pp 455–476

Dale W (1993) The making and remaking of Commonwealth constitutions. Int Comp L Q 42(1):67–83

Duffy H (2018) Strategic human rights litigation: understanding and maximising impact. Hart Publishing, Oxford

Duxbury A (1997) Rejuvenating the Commonwealth: the human rights remedy. Int Comp L Q 46:344–377. https://doi.org/10.1017/s0020589300060462

Duxbury A (2006) The Commonwealth Secretariat and the implementation of human rights. Round Table Commonw J Int Aff 95:425–440. https://doi.org/10.1080/00358530600757318

Frishman O, Benevenisti E (2016) National courts and interpretive approaches to international law. In: Aust HP, Nolte G (eds) The interpretation of international law by domestic courts: uniformity, diversity, convergence. Oxford University Press, Oxford, pp 317–332