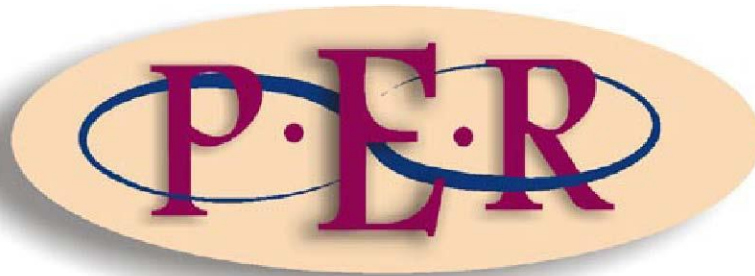


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## THE SOUTH AFRICAN CONSTITUTIONAL COURT'S USE OF FOREIGN PRECEDENT IN MATTERS OF RELIGION: WITHOUT FEAR OR FAVOUR?

C Rautenbach\*

### 1 Introduction

For more than three hundred years the South African judiciary has, "with a minimum of fuss - and mostly without specific mention that they were doing so - adopted a comparative law approach" with regard to foreign precedent.<sup>1</sup> The mixed nature (a mix of Roman-Dutch and English law) of South Africa's legal system necessitates a comparative legal approach to find, develop and make the law, and the South African courts were discreetly doing this behind the scenes, particularly since the unification of South Africa in the 1910s. They were consistently seeking guidance from foreign high court judgments, especially in the Commonwealth countries, the USA, the Netherlands, Germany, and other parts of Western Europe where the reception of Roman law also took place.<sup>2</sup>

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<sup>1</sup> Ackermann 2006 *SALJ* 500.

<sup>2</sup> Ackermann 2006 *SALJ* 500.

South Africa's re-entry into the global community after the abolition of its notorious Apartheid laws and the birth of a new democratic political dispensation in 1994, coupled with the judiciary's continued willingness to engage themselves in global judicial debates,<sup>3</sup> remains a prominent feature of constitutional adjudication in South Africa. It is trite that South Africa's two consecutive constitutions<sup>4</sup> have introduced a new constitutional dispensation based on the supremacy of the *Constitution*,<sup>5</sup> the rule of law<sup>6</sup> and a Bill of Rights. It is believed, ostensibly without foundation, that the most important catalyst for judicial comparativism in South Africa today is the (almost) unique interpretation clause in the *Constitution* (section 39(1)), which stipulates:<sup>7</sup>

*When interpreting the Bill of Rights, a court, tribunal or forum—*

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) *may consider foreign law*.<sup>8</sup>

This provision codifies the interpretation rules relevant for the interpretation of the South African Bill of Rights which was, at the commencement of the interim *Constitution*, a new development in South African law.

The wording of subsections (b) and (c) suggests a difference in approach to international and foreign law. In the case of international law the court *must* consider it, and in the case of foreign law the courts *may* consider it. Though there is a clear difference between the two auxiliary verbs "may" and "must", both of them are linked with the verb "consider", which has a variety of meanings such as to "think carefully about (something)"; to "regard (someone or something) as having a specified quality"; to "take

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<sup>3</sup> See Rautenbach "South Africa: Teaching an 'Old Dog' New Tricks?" 185-209.

<sup>4</sup> *Constitution of the Republic of South Africa* 200 of 1993 (the interim *Constitution*) was in operation from 27 April 1994 to 3 February 1997; and the *Constitution of the Republic of South Africa* 1996 (the *Constitution*) has been in operation since 4 February 1997.

<sup>5</sup> See ss 1(c) and 2 of the *Constitution*.

<sup>6</sup> The rule of law is a founding value of the *Constitution*, see s 1(b).

<sup>7</sup> Section 11(2) of the *Constitution of the Republic of Malawi*, 1997 contains a similar provision. It reads: "In interpreting the provisions of this Constitution a court of law shall - (a) promote the values which underlie an open and democratic society; (b) take full account of the provisions of Chapter III and Chapter IV; and (c) where applicable, have regard to current norms of public international law and comparable foreign case law."

<sup>8</sup> Emphasis added. Also see the discussion of Dugard 1997 *EJIL* 85 with regard to the role of international law in the interpretation of the *Constitution*.

something into account when making a judgement"; and to "look attentively at".<sup>9</sup> As will be illustrated, these types of actions are all employed by the Constitutional Court in one way or another during its reasoning process.

In the case of international law, the courts are obliged to go through (ie "must consider") this considering process, whilst in the case of foreign law there is no such obligation (ie "may consider").<sup>10</sup> In other words, the courts have the discretion to consider foreign law in terms of section 39(1)(c), but an obligation to consider international law in terms of section 39(1)(b). In addition, international law may include binding and non-binding law.<sup>11</sup> Both forms may be used in the interpretation process.<sup>12</sup> There is no similar distinction in respect of foreign law and the statutory permission to consider foreign law during the interpretation process authorises courts only to "'have regard to' such law"; there is "no injunction to do more than this".<sup>13</sup> Thus, foreign law, in the domestic context, can never have more than persuasive force, while some international law may well be as binding on or prescriptive to domestic law.<sup>14</sup> This sets international and foreign law apart, and this distinction has to be reckoned with in constitutional interpretation, and as a matter of fact in the interpretation and application of all law.<sup>15</sup>

Although section 39(1)(c) has seeped into South Africa's constitutional jurisprudence beyond the interpretation of the Bill of Rights,<sup>16</sup> it has been regarded by some scholars

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<sup>9</sup> See the definition of "consider" in the *Oxford Dictionaries* (Oxford University Press 2015 <http://www.oxforddictionaries.com>).

<sup>10</sup> Also see *S v Makwanyane* 1995 3 SA 391 (CC) para 37 (the *Makwanyane* case).

<sup>11</sup> Binding international law will be international law ratified and acceded to in terms of s 231 of the interim *Constitution*, which is similar to s 231 in the final *Constitution*. Also see s 232 regarding the position of customary international law and s 233, which obliges courts to give preference to international law when alternative interpretation outcomes exist.

<sup>12</sup> *Makwanyane* case para 35. The court considered the implication of s 35(1) of the interim *Constitution*, which is almost identical to s 39(1) of the *Constitution*. For a general discussion of the Constitutional Court's use of international law, see De Wet 2005 *Fordham Int'l LJ* 1529-1565.

<sup>13</sup> In the *Makwanyane* case para 37.

<sup>14</sup> Section 11(2) of the *Constitution of the Republic of Malawi*, 1997, which contains a similar provision. It reads: "In interpreting the provisions of this Constitution a court of law shall - (a) promote the values which underlie an open and democratic society; (b) take full account of the provisions of Chapter III and Chapter IV; and (c) where applicable, have regard to current norms of public international law and comparable foreign case law."

<sup>15</sup> See for example the position of international law as set out in ss 231-233 of the *Constitution*, and also Rautenbach and Du Plessis 2013 *German LJ* 1553.

<sup>16</sup> Klug *Constitution of South Africa* 79-80.

as the main catalyst for judicial comparativism in South Africa.<sup>17</sup> Ackermann points to this misconception and says: "I have not the slightest doubt that, because of the comparative law ethos in South Africa, the Court would have placed the same reliance on foreign law even had there been no such provision in the Constitutions."<sup>18</sup> To prove his point he refers to the comment of Justice Chaskalson in *S v Makwanyane* (the *Makwanyane* case):<sup>19</sup>

The international and foreign authorities are of value [to the judges] because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. *For that reason alone they require our attention.* They may also have to be considered because of their relevance to s 35(1) of the Constitution.

Notwithstanding the fact that the South African judiciary were comparing foreign law on an ongoing basis even before 1994, they did it with the necessary discretion and circumspect. As eloquently put by Chaskalson:<sup>20</sup>

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. *We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.*

Kriegler J also warned in *Sanderson v Attorney-General, Eastern Cape*<sup>21</sup> that "the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management".

The constitutional reasoning of the South African Constitutional Court counts among those systems still in - or just beyond - their infancy, but it has nevertheless, over the past two decades, earned itself high praise among both its peers and expert observers

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<sup>17</sup> See Lollini 2007 *Utrecht L Rev* 60.

<sup>18</sup> Ackermann 2006 *SALJ* 500 points out: "I have not the slightest doubt that, because of the comparative law ethos in South Africa, the Court would have placed the same reliance on foreign law even had there been no such provision in the Constitutions."

<sup>19</sup> The *Makwanyane* case para 34. Emphasis added. S 35(1) of the interim *Constitution* is the counterpart of s 39(1) of the final *Constitution*.

<sup>20</sup> The *Makwanyane* case para 39. Emphasis added.

<sup>21</sup> *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 26. The case dealt with the constitutionality of criminal proceedings where the accused had not been brought to trial within a reasonable time after having been charged.

worldwide.<sup>22</sup> It has been commended for its ground-breaking and courageous judgments on numerous occasions.<sup>23</sup> Since its establishment in 1994 until the end of 2011,<sup>24</sup> the Court has handed down 437 judgments. More than half of these judgments (223 in total) have cited more than 3047 foreign cases.<sup>25</sup> Although these cases deal with all matters of the law, especially human rights issues, the Court's use of foreign cases in the area of religion is noteworthy. During the 16-year period under investigation the Court cited foreign cases dealing with religion from various jurisdictions more than a 109 times – no small feat if one considers that those citations were made in only five judgments of the Constitutional Court.<sup>26</sup>

Against this background, this contribution deliberates on the propensity of the South African Constitutional Court to look beyond its borders to deal with issues of religion. My observations are based on statistical results obtained in the period 1994 to 2011.<sup>27</sup> The empirical survey follows both a quantitative and a qualitative approach by counting and evaluating explicit citations of foreign cases. The quantitative results deal with statistics such as the number of citations per judge, country and foreign case, and the qualitative approach makes use of formal and substantive factors to determine the actual or potential influence of foreign cases on issues of religion in South Africa. From the outset it should be made clear that the author does not criticise the Constitutional Court for its abundant use of foreign cases in its judicial reasoning. On the contrary, the results reveal that the Court uses foreign case law as "sources for specific lines of argument and justification and ... for supporting the general role of the court and judicial review in particular".<sup>28</sup>

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<sup>22</sup> Kende *Constitutional Rights* 33.

<sup>23</sup> O'Regan "From Form to Substance" 15.

<sup>24</sup> The results from 2012 are not available yet, but irrelevant for this discussion regardless.

<sup>25</sup> The results and methodology are available at <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>. See the information provided in the first footnote.

<sup>26</sup> *S v Lawrence*, *S v Negal*, *S v Solberg* 1997 4 SA 1176 (CC) (the *Lawrence* case); *Christian Education South Africa v Minister of Education* 1999 2 SA 83 (CC); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) (the *Christian Education* case); *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) (the *Prince* case); *MEC for Education KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) (the *Pillay* case).

<sup>27</sup> As already explained, the author collected and captured the results in a database hosted on the website of the North-West University. The methodology followed in capturing the data is explained in detail at <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>.

<sup>28</sup> These words were uttered by Klug *Constitution of South Africa* 79 as a comment on the Court's use of foreign law in the *Makwanyane* case. The overall statistics reveal that this is indeed what the court

## 2 Constitutional provisions protecting freedom of religion

The aim of my contribution is not to discuss the content given to freedom of religion in South African law, but to comment on the propensity of the Constitutional Court to engage in foreign law in the context of religion. In order to do so, it is necessary to refer to the most important constitutional provisions dealing with religion. Most importantly, the right to freedom of religion, belief and opinion is protected as an individual right in section 15, which provides as follows:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
  - (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising-
  - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
  - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

The right to freedom of religion, belief and opinion is also protected as a group right in section 31(1), which stipulates:

- Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
- (a) to enjoy their culture, practise their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The relationship between these two provisions has been explained by Justice Ngcobo in *Prince v President, Cape Law Society*<sup>29</sup> as follows:

This Court has on two occasions considered the contents of the right to freedom of religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to

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has been doing on an ongoing basis even though the citation rate of foreign cases seems to be in decline. In 2011 (the last year of the empirical results), only 106 foreign citations were counted, whilst the amount was 645 in 1995. Results obtainable at <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>.

<sup>29</sup> The *Prince* case paras 38-39. The case is discussed at 3.3.

entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the "absence of coercion or restraint". Thus "freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs".

Seen in this context, ss 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion.

Other provisions, such as the right to equality (section 9), the right to freedom of expression (section 16), the right to freedom of assembly (section 17) and the right to freedom of association (section 18) are all relevant in the context of religion but will not be discussed here.

### **3 Judicial engagement with foreign religion cases: making sense of statistics**

#### **3.1 *S v Lawrence, S v Negal, S v Solberg 1997 4 SA 1176 (CC) (the Lawrence case)***

The first judgment of the Constitutional Court that dealt with religious issues was the *Lawrence* case. The three cases were dealt with as one, because they were concerned with a contravention of the *Liquor Act* by three employees of what used to be known as the Seven Eleven stores. The three appellants were employees who had been convicted in separate cases in the Magistrate's court. The appeal case was concerned with, amongst other issues, the constitutionality of certain provisions of the *Liquor Act*,<sup>30</sup> especially those preventing the selling of liquor after hours,<sup>31</sup> at a particular place<sup>32</sup> or on closed days.<sup>33</sup> One of the contentions was that the prohibition imposed on the selling of wine on closed days (Sundays, Good Friday and Christmas Day) is inconsistent with the constitutional

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<sup>30</sup> *Liquor Act* 27 of 1989. The case was decided when the interim *Constitution* was still in operation.

<sup>31</sup> Section 90(1)(a) of the *Liquor Act* 27 of 1989 allows for the sale of liquor on weekdays between 09:00 and 20:00.

<sup>32</sup> Section 88(1) of the *Liquor Act* 27 of 1989 prohibits the sale under a grocer's wine licence of any liquor other than table wine.

<sup>33</sup> Section 90(1)(b) read with s 2 of the *Liquor Act* 27 of 1989 prohibits the sale of liquor on Sundays, Good Friday and Christmas Day.



right to freedom of religion, particularly the free exercise of religion.<sup>34</sup> One of the appellants contended that:

... the purpose of prohibiting wine selling by grocers on "closed day(s)" was "to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays or, perhaps, to compel the observance of the Christian Sabbath and Christian holidays". This, so the argument went, "coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose", and was inconsistent with the freedom of religion of those persons who do not hold such beliefs and do not wish to adhere to them.<sup>35</sup>

The majority held that the connection between the Christian religion and the restriction against grocers selling wine on Sundays was too tenuous to be characterised as an infringement of religious freedom, because Sundays in South Africa have required a secular as well as a religious character.<sup>36</sup> The judgment was delivered when the interim *Constitution* was still in operation. Section 35(1) allowed the Court to "have regard to comparable foreign case law" in interpreting the provisions of the Bill of the Rights.<sup>37</sup> Three of the nine presiding judges cited 21 cases from four countries at least 57 times (Canada,<sup>38</sup> USA,<sup>39</sup> UK<sup>40</sup> and India<sup>41</sup>) in the course of their reasoning.<sup>42</sup>

Justice Chaskalson, who delivered the majority judgment, cited foreign cases 23 times. He did so in the absence of any hint from the text of the judgment that he was doing

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<sup>34</sup> Interim *Constitution* s 14: "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

<sup>35</sup> *Lawrence* case para 85.

<sup>36</sup> *Lawrence* case paras 84-105. At para 96 the court explained: "Amongst those who observe Sundays as rest days, are many who do so because it has become the most convenient day for such purpose, and not because of any wish to observe the Christian Sabbath. The secular nature of Sundays is evidenced by the ways in which many people spend their Sundays, engaging in sport and recreation rather than in worship."

<sup>37</sup> Section 35(1) of the interim *Constitution* was the counterpart of s 39(1) of the *Constitution* and provided as follows: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." Emphasis added.

<sup>38</sup> Six cases which were cited 22 times.

<sup>39</sup> Seventeen cases which were cited 31 times.

<sup>40</sup> One case cited only once.

<sup>41</sup> Three cases which were cited 3 times.

<sup>42</sup> Chaskalson P delivered the majority judgment and cited foreign cases 23 times, Sachs J delivered a concurring but separate judgment and cited foreign cases 22 times and O'Regan J, who delivered a dissenting judgment, cited foreign cases 12 times.

anything more than compare,<sup>43</sup> distinguish<sup>44</sup> or approve<sup>45</sup> foreign case law. Particularly significant is how Chaskalson embraced the content given to freedom of religion by the Canadian case of *R v Big M Drug Mart Ltd* (the *Drug Mart* case), viz.:<sup>46</sup>

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.

According to Chaskalson he could not "offer a better definition than this of the main attributes of freedom of religion".<sup>47</sup> Since its approval by Chaskalson, the Canadian definition of freedom of religion has been accepted on a few other occasions by the Constitutional Court, and it would be safe to conclude that the contribution of the Canadian case in providing a workable definition for religion seems to be a given.<sup>48</sup> The purposive (teleological) approach followed by the Constitutional Court to determine the meaning of freedom of religion is also a transplantation from the Canadian court in the *Drug Mart* case based on the following passage:<sup>49</sup>

The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.

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<sup>43</sup> For example, he compares the approach of the United States Supreme Court with that of a legal academic and comes to the conclusion that "[t]his accords with" its approach. The *Lawrence* case para 43.

<sup>44</sup> For example, he distinguished the decision of the Supreme Court of Canada, which declared provisions of the *Canadian Lord's Day Act*, 1970 (RSC) unconstitutional, from the provisions of the *Liquor Act* 27 of 1989, which prevents the selling of liquor on Sundays. The *Lawrence* case para 87.

<sup>45</sup> For example, he referred with approval to the content of freedom of religion as set out in the Canadian case of *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (hereafter the *Drug Mart* case).

<sup>46</sup> *Lawrence* case para 92. The *Drug Mart* case in turn also engaged in comparative descriptions of freedom of religion, such as the one given in the case of *Board of Education v Barnette* 319 US 624 (1943) 653.

<sup>47</sup> *Lawrence* case para 92.

<sup>48</sup> *Christian Education* case para 18; *Prince* case para 38.

<sup>49</sup> *Drug Mart* case 344. Cited with approval in the *Makwanyane* case para 19.

This reception of Canadian concepts into South African law has been made possible by the accommodating attitude of the South African constitutional judges which, in turn, has a trickle effect overall as a result of the principle of *stare decisis* followed by the South African judiciary.<sup>50</sup> The influence of the *Drug Mart* case in the judgments of the Constitutional Court has been quite profound. From 1995-2011 it has been cited at least 31 times in the Constitutional Court in cases dealing with a variety of issues.<sup>51</sup> Besides providing the South African judiciary with a definition of the attributes of freedom of religion and a purposive approach to constitutional interpretation, its reasoning *re* the principle of proportionality in the context of the limitation of rights was also adopted and developed to fit South African needs.<sup>52</sup>

Justice Sachs, who delivered a separate judgment, cited foreign cases 22 times. He was the only judge that cautioned against the unqualified use of foreign jurisprudence to solve cases, but nonetheless recognised the necessity to look elsewhere for guidance to develop legal doctrines in South Africa:<sup>53</sup>

Our solutions to all these problems and difficulties will, of course, be found not in the complex and often contradictory North American jurisprudence on the subject but in the text and context of our own Constitution. In *Prinsloo v Van der Linde and Another* this Court cautioned against simplistic transplantation into our jurisprudence of formulae, modes of classification and legal doctrine developed in other countries where the constitutional texts and socio-historical situations were different from ours. At the same time we stated that in developing doctrine we had to take account both of our specific situation and of problems which we shared with all humanity. ... If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their *dicta* articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/State relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.

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<sup>50</sup> In accordance with this rule, a South African court is bound to former precedents when the same points arise again in litigation. See Du Bois "Part 1: General" 76-92 for a detailed discussion.

<sup>51</sup> See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) – 6 citations; the *Makwanyane* case – 2 citations; *S v Zuma* 1995 2 SA 642 (CC) – 1 citation; *Shabalala v Attorney-General, Transvaal* 1995 2 SACR 761 (CC) – 1 citation; the *Lawrence* case – 12 citations; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) – 1 citation; *President of the Republic of South Africa* 1997 4 SA 1 (CC) – 1 citation; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) – 1 citation; *Prince* case – 1 citation; *S v Jordan* 2002 6 SA 642 (CC) – 3 citations; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) – 1 citation; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) – 1 citation.

<sup>52</sup> See the *Makwanyane* case para 105 (proportionality) and para 325 (purposive approach).

<sup>53</sup> The *Lawrence* case para 141. Footnotes omitted.

According to Sachs, foreign cases could not be treated as precedent, although they did illuminate the text of the South African *Constitution*, which was at the time of the judgment still experiencing growing pains.

In general, the minority judgments of South African judges rarely have persuasive value in other South African courts, but the same attitude apparently does not apply to foreign case law. Sachs, for example, referred with approval to the dissenting judgment of Stewart J of the US Supreme Court in *Braunfeld v Brown*<sup>54</sup> to illustrate the effect that statutory limits on trading on Sundays might have on non-Christian traders. In the *Braunfeld* case the position of Orthodox Jews was a case in point. Their religion obliged them to cease trading on Saturdays in addition to the statutory limit on trading on Sundays. According to Sachs there were two ways in which the determination of Sundays as closed days might involve the infringement of someone's freedom of religion. The first one, as described in the dissenting judgment in the *Braunfeld* case, involved the impact closed Sundays have on non-Christian liquor sellers who are also prevented by their religion from selling on any other day. The second had to do with the "negative radiating symbolic effect that state endorsement of the Christian Sabbath might have".<sup>55</sup> Although Sachs referred to the dissenting judgment in the *Braunfeld* case, he gave no indication of whether it had had a sincere impact on his reasoning or whether he had merely referred to it in passing.

The third judge, who cited 12 foreign cases, was Justice O'Regan.<sup>56</sup> She delivered a dissenting judgement and was of the opinion that Sundays as reflected in the *Liquor Act* were days of Christian significance and that therefore the relevant provisions did not pass constitutional muster. She also compared foreign case law in the absence of any hints as to what the influence of those cases on her judgment was, This is therefore another illustration of the fact that comparative judicialism is part and parcel of the South African judiciary's paraphernalia without them having to justify themselves for referencing it.

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<sup>54</sup> *Braunfeld v Brown* 366 US 599 (1961) 616. See the *Lawrence* case para 137.

<sup>55</sup> In terms of s 14 of the interim *Constitution*. See the *Lawrence* case paras 137-138 and also the USA case referred to in fn 100 of the judgment.

<sup>56</sup> See the *Lawrence* case from para 109 onwards.

### **3.2 *Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC) (the Christian Education case)***

Whereas the *Lawrence* case was decided in the context of the interim *Constitution*, the *Christian Education* case dealt with religion in the context of the final *Constitution*. In this case the appellant, a voluntary association consisting of a group of concerned parents, approached the courts to strike down a provision of the *Schools Act*<sup>57</sup> which prohibits corporal punishment in any public or private school. The facts of the case first came before the Constitutional Court in an application for direct access to challenge the validity of the relevant provision in the *Schools Act*, but the application was regarded as premature and dismissed by Justice Langa.<sup>58</sup> After the case had taken its course in the High Court it came before the Constitutional Court again in the form of an appeal.

The central question before Justice Sachs, who delivered the majority decision in the Constitutional Court, was whether or not the provision in the *Schools Act* that prevented corporal punishment infringed the religious rights<sup>59</sup> of parents with children in private Christian schools who believed that corporal punishment was in line with their religious convictions and a necessary requirement in the upbringing of children. In support of their contention that corporal punishment be allowed and was the responsibility of Christian parents, various verses from the Bible were put forward as justification.<sup>60</sup>

Cases which involve children's rights are undeniably hard to adjudicate, especially where the likelihood of a tug-of-war between seemingly self-same rights and freedoms exist. Justice Sachs was well aware of this tension.<sup>61</sup> In essence, he agreed that the provisions

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<sup>57</sup> *Schools Act* 84 of 1996. The offending provision, s 10 reads: "(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes ss (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."

<sup>58</sup> Langa DP cited 8 foreign judgments in the course of his reasoning but none of them had to do with religion.

<sup>59</sup> In terms of the *Constitution*, these rights include the rights in ss 15 and 31.

<sup>60</sup> See *Christian Education* case para 4: "*Proverbs 22:6* Train up a child in the way it should go and when he is old he will not depart from it. *Proverbs 22:15* Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him. *Proverbs 19:18* Chasten thy son while there is hope and let not thy soul spare for his crying. *Proverbs 23:13 and 14* Do not withhold discipline from a child, if you punish with a rod he will not die. Punish him with a rod and save his soul from death."

<sup>61</sup> The *Christian Education* case paras 13-15. On the one hand, parents have the right to direct the education of their children in accordance with their religious beliefs but, on the other hand, it is in the best interest of children not to be subjected to degrading corporal punishment.

of the *Schools Act* limited the religious rights of parents, but found nonetheless that they imposed an acceptable limitation<sup>62</sup> on the parents' exercise of their religious beliefs, and dismissed the appeal.

In the course of his reasoning Justice Sachs cited foreign cases 18 times. He referred to the definition of freedom of religion as given in the *Drug Mart* case - cited with approval in the *Lawrence* case - apparently conceding, without much ado, that it had already been received into South African religious jurisprudence.<sup>63</sup> With regard to the question if the limitation the *Schools Act* placed on the religious rights of the parents could be justified, Justice Sachs referred to the controversy regarding the "strict scrutiny" test in the United States and cited with approval the viewpoint of Judge Scalia in the Supreme Court, who rejected this test in the context of freedom of religion.<sup>64</sup>

Justice Sachs' citation of foreign case law is accompanied by formulations such as "courts throughout the world have shown"<sup>65</sup> and "the trend in Europe and neighbouring countries",<sup>66</sup> illustrating the long-established use of foreign law by the South African judiciary to use comparative materials as sources for judicial review, especially where its own jurisprudence is underdeveloped.<sup>67</sup>

### **3.3 *Prince v President, Cape Law Society 2002 2 SA 794 (CC) (the Prince case)***

The third case dealing with freedom of religion was the *Prince* case. The appellant had a law degree and had satisfied all the academic requirements to be admitted as an

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<sup>62</sup> *Constitution s 36(1)* stipulates: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

<sup>63</sup> The *Christian Education* case para 18.

<sup>64</sup> See *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990) referred to by Justice Sachs in the *Christian Education* case para 29, note 30.

<sup>65</sup> The *Christian Education* case para 41.

<sup>66</sup> The *Christian Education* case para 43.

<sup>67</sup> As explained by Smithey 2001 *Comp Polit Stud* 1188: "Judges confronted with new situations typically reason by analogy to extrapolate the appropriate course from existing principles of law, custom, and 'social utility'. These forces allow the judge to fashion the law from workable principles that will be tested over time by their application to real controversies. The more novel the question faced, the more resourceful the judge will have to be."

attorney. The Law Society refused to register him as a candidate attorney, because he had two previous convictions for the possession of cannabis and also a declared an intent to continue using it for religious purposes as required by the Rastafarian religion. Prince put his legal education to good use, and he first approached the High Court to challenge the decision of the Law Society, but failed.<sup>68</sup> Then he appealed to the Supreme Court of Appeal, where the appeal was dismissed,<sup>69</sup> and finally he lodged an appeal with the Constitutional Court.<sup>70</sup> The Constitutional Court delivered two judgments. The first judgment was an interim judgment<sup>71</sup> to allow the litigants to adduce additional evidence, because - as explained by Justice Ngcobo, the right to freedom of religion in the "open and democratic society contemplated by the *Constitution* is important", and because the appellant belonged to a minority group<sup>72</sup>

[t]he constitutional right asserted by the appellant goes beyond his own interest - it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. ... Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.<sup>73</sup>

The Court in the second and final case was divided five to four against Prince.<sup>74</sup> The *ratio* underlying the majority's decision was that the use of cannabis by Rastafari could not be sanctioned without impairing the state's ability to enforce its statutes in the public interest. The failure to make provision for an exemption to accommodate adherents of the Rastafari religion was thus a reasonable and justifiable limitation under the *Constitution*.<sup>75</sup>

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<sup>68</sup> *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C).

<sup>69</sup> *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA).

<sup>70</sup> Two judgments were delivered in the Constitutional Court, namely *Prince v President, Cape Law Society* 2001 2 SA 388 (CC) (the interim *Prince* case) and *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) (the final *Prince* case).

<sup>71</sup> The interim *Prince* case.

<sup>72</sup> The interim *Prince* case para 25.

<sup>73</sup> The interim *Prince* case para 26.

<sup>74</sup> The final *Prince* case.

<sup>75</sup> The final *Prince* case para 139.

The record of the final *Prince* case contains 29 foreign case citations. The *Drug Mart* was mentioned once again for its definition of freedom of religion (and is by now firmly entrenched in South African law).<sup>76</sup> A number of the foreign cases cited in the judgment of the majority had to do with Prince's contention that he accepted the fact that the legislation prohibiting the possession and use of cannabis served a legitimate government purpose, but that an exemption had to be made in favour of the use for religious purposes.<sup>77</sup> The Court compared some of the approaches in the judgments of the US Supreme Court and distinguished them from the facts *in casu*.<sup>78</sup> The tendency of the Court to use foreign case law to support its role as comparative jurists is illustrated in phrases such as "... I do not believe that read as a whole his judgment is inconsistent with the granting of a narrowly tailored religious exemption in South Africa for the sacramental use by Rastafari of dagga ...".<sup>79</sup>

Comparing foreign cases is not the same as being bound to foreign precedents in accordance with the principle of *stare decisis* followed in South Africa. Thus, it is not extraordinary that some of the Constitutional Court judges have referred to, and occasionally followed, an approach of the minority of a foreign court. As suggested by the majority in the final *Prince* case:<sup>80</sup> "... the approach of the minority of the Court in *Smith's*<sup>81</sup> case is more consistent with the requirements of our *Constitution* and our jurisprudence on the limitation of rights than the approach of the majority", although, in the end, the Court also did not follow the approach of the minority but developed its own proportionality analysis in dealing with the limitation of rights. The *Smith's* case was

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<sup>76</sup> The final *Prince* case para 38.

<sup>77</sup> The final *Prince* case paras 113-114.

<sup>78</sup> The final *Prince* case paras 119 and further.

<sup>79</sup> The final *Prince* case para 152 footnote 22. The Court referred to the judgment of *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990), where the court evaluated the significance the "drug peyote has for native Americans".

<sup>80</sup> The final *Prince* case para 128.

<sup>81</sup> *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990). The case concerned the criminal prohibition of a hallucinogenic drug Peyote for sacramental purposes at religious ceremonies of the Native American Church. The majority held that the free exercise of religion does not relieve an individual from the obligation to comply with valid and neutral law, whilst the minority concluded that the First Amendment insofar as it applied to religion is not absolute and could be subordinated to a general governmental interest in the regulation of conduct, but "only if the government were able to justify that 'by a compelling State interest and by means narrowly tailored to achieve that interest'." The final *Prince* case paras 121-122.



considered quite extensively by the Court and was cited at least 13 times<sup>82</sup> because, as explained by the Court, it demonstrates "the difficulty confronting a litigant seeking to be exempted for religious reasons from the provisions of a criminal law of general application".<sup>83</sup>

### **3.4 MEC for Education KwaZulu-Natal v Pillay 2008 1 SA 474 (CC) (the Pillay case)**

Although the *Pillay* case did not deal with freedom of religion *per se*, it dealt with the Hindu culture which, in this context, is broad enough to include religion, especially in the context of religious and cultural beliefs and practices in a school setting. In this case Sunali, a Hindu learner, was forbidden by her school to wear a nose stud because the wearing of jewellery was banned by the School's Code of Conduct. Sunali and her mother were not satisfied with the ban and initiated legal steps against the school, which commenced in the Equality Court<sup>84</sup> and reached a conclusion in the Constitutional Court. The Constitutional Court found that a combination of the school's refusal to grant Sunali an exception to wear her nose stud and the provisions of the Code of Conduct, which did not provide for an exception to allow for a reasonable accommodation of religious or cultural beliefs, resulted in unfair discrimination.<sup>85</sup>

The facts of the case were the first of a kind, and extensive reference to alternative approaches by foreign jurisdictions were made by the litigants. Justice Langa, who delivered the majority decision, emphasised the usefulness of foreign jurisprudence but cautioned against the dangers of careless judicial comparativism by emphasising that "the context in which a particular pronouncement was made needs to be carefully examined".<sup>86</sup> In all, he cited foreign cases 19 times.<sup>87</sup> Foreign case citations were used, *inter alia*, with the purpose of proving that "even there" a certain measure was adopted,

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<sup>82</sup> The final *Prince* case paras 47, 119-123, 128, 129, 152, 155 and 163.

<sup>83</sup> The final *Prince* case para 129.

<sup>84</sup> The *Pillay* case para 10.

<sup>85</sup> The *Pillay* case para 119.

<sup>86</sup> The *Pillay* case para 49.

<sup>87</sup> Canada – 7 citations; European Court of Human Rights – 1 citation; Germany – 1 citation; UK – 2 citations, the USA – 7 citations; and Zimbabwe – 1 citation.

which the court intended to adopt "even here".<sup>88</sup> For example, in order to determine whether a practice or belief qualifies as religious, Justice Langa remarked that it is "accepted both in South Africa *and abroad* that in order to determine if a practice or belief qualifies as religious a court should ask only whether the claimant professes a sincere belief", thus performing a subjective enquiry.<sup>89</sup> There was, however, no such consensus concerning culture, and arguments were raised that because culture is "an associative practice, a more objective approach should be adopted".<sup>90</sup> The difference between the two approaches were not greatly important to Justice Langa - according to him it was difficult anyway to distinguish between Hindu religion and culture - and the conclusion was that Sunali "held a sincere belief that the nose stud was part of her religion and culture".<sup>91</sup>

The usefulness of foreign jurisprudence in the absence of South African authority was also recognised by Justice Langa in dealing with the question of whether or not Sunali's wearing of the nose stud should be protected in terms of the *Constitution* and the *Equality Act*,<sup>92</sup> when its practice was voluntary. To develop the jurisprudence *re* this question the use of foreign case law was thought to be valuable because, as acknowledged by Justice Langa, "[t]his question has not yet arisen before South African courts".<sup>93</sup> The school argued that voluntary practices should not be protected or should receive less protection, while Sunali's legal team took the opposite stance.<sup>94</sup> The question Justice Langa was grappling with was whether voluntary practices were "any less a part of a person's identity or whether they did "affect human dignity any less seriously" because they were not mandatory?<sup>95</sup> In order to answer this question Justice Langa affirmed the *Constitution's* commitment to diversity. According to him, "[d]ifferentiating between mandatory and voluntary practices does not celebrate or affirm diversity ... We cannot celebrate diversity by permitting it only when no other option remains".<sup>96</sup> Thus, "whether

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<sup>88</sup> Citations are used with the purpose of proving that a certain measure was adopted elsewhere as well. See the discussion of Rautenbach "South Africa: Teaching and 'Old Dog' New Tricks?" 207.

<sup>89</sup> The *Pillay* case para 52. Footnotes omitted and emphasis added.

<sup>90</sup> The *Pillay* case para 52.

<sup>91</sup> The *Pillay* case para 58.

<sup>92</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

<sup>93</sup> The *Pillay* case para 61.

<sup>94</sup> The *Pillay* case para 61.

<sup>95</sup> The *Pillay* case para 61.

<sup>96</sup> The *Pillay* case para 65.

a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for protection".<sup>97</sup> It is significant that he refers to the shared values of other jurisdictions, such as Canada, where the Supreme Court has also affirmed the necessity of protecting voluntary religious practices.<sup>98</sup>

Foreign cases were again considered when Justice Langa evaluated the application of the "reasonable accommodation" of diversity, a responsibility which rested firmly on the shoulders of South African society: "Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity."<sup>99</sup> His comparative approach to solving the problem of which steps needed to be taken to accommodate diversity is reflected in his words that the problem had been debated "both in this Court *and abroad* and different positions have been taken":<sup>100</sup>

... although the term 'undue hardship' is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur 'a *de minimis cost*' in order to accommodate an individual's religion, whilst the Canadian Supreme Court has specifically declined to adopt that standard and has stressed that 'more than mere negligible effort is required to satisfy the duty to accommodate.' The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution. Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

The approach to foreign law employed by Justice Langa is in line with what Ackermann said about his own experiences:<sup>101</sup>

Recourse to foreign law often helped me (at least) to identify the correct problem, or to identify it properly, and I am at a loss to see what danger can lurk herein. There are, after all, few human and societal problems that are not, in their essence, universal. It is also useful to see how foreign courts have solved the problem, what methodology has been used to this end, what the competing considerations have been, and whether any potential dangers were identified in the process.

#### **4 Conclusion**

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<sup>97</sup> The *Pillay* case para 67.

<sup>98</sup> The *Pillay* case para 65.

<sup>99</sup> The *Pillay* case para 75.

<sup>100</sup> The *Pillay* case paras 75-76. Footnotes and references omitted.

<sup>101</sup> Ackermann 2006 *SALJ* 508.

Whilst the rest of the world is debating the pros and cons of judicial comparativism,<sup>102</sup> the South African Constitutional Court has been developing, without much ado, an impressive reference list of foreign precedents, without fear or favour. This presentation has dealt with the propensity of the Constitutional Court to look beyond its borders in matters of religion, which we have seen has happened quite often in the few cases discussed. Never considering foreign precedents to be binding or persuasive, the Court has been protecting its independence. It does not share the fears of some that transjudicialism would endanger the sovereignty of courts. In the words of Ackermann:<sup>103</sup>

One may be seeking information, guidance, stimulation, clarification, or even enlightenment, but never authority binding on one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments and solutions.

And also:

The fact that in a particular case, the caution which should accompany the use of foreign constitutional law<sup>104</sup> is not explicitly repeated, does not warrant the inference that due care was not taken.<sup>105</sup>

Transjudicialism, or comparative judicialism as I prefer to call it, enriches judicial reasoning and promises an escape from that which has been described by Ackermann as a "tunnel vision" towards judicial problem solving.<sup>106</sup> A comparative approach enhances one's legal thinking, which may become unimaginative after a few years on the bench. To this end, Ackermann explains, and I fully agree:<sup>107</sup>

One often ends up rehearsing the same line of reasoning or - in a type of inductive process - by trying to find additional authority for the provisional conclusions one has already reached. It is in this context that foreign law can play a particularly valuable role. It may be that, when one commences the enquiry into foreign law, one is (psychologically) hoping to find confirmation for one's hypotheses, but if one remains alive to falsifying possibilities, the foreign law can be of particular value. In any event,

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<sup>102</sup> See, *inter alia*, Bryde 2005 *Tul L Rev* 203-219; Bahdi 2002 *Geo Wash Intl L Rev* 555-603; Buxbaum 2004 *Ind J Global Legal Studies* 183-189; Tawfik 2007 *Queen's Law J* 573-601; Gray 2007 *Stan L Rev* 1249-1280; Slaughter 1994 *U Rich L Rev* 99-137; Wood 2005 *Duq L Rev* 93-119; Black and Lee 2007 *Law and Social Inquiry* 791-807; Markesini 2006 *Tul L Rev* 123-185; Lollini 2007 *Utrecht L Rev* 60-74; and Ackermann 2006 *SALJ* 497-515. See the collection of papers in Groppi and Ponthoreau *Use of Foreign Precedents*, and also Rautenbach and Du Plessis 2013 *German LJ* 1539-1578.

<sup>103</sup> Ackermann 2006 *SALJ* 507.

<sup>104</sup> Although Ackermann gives this explanation in the context of "comparative constitutional law", the same reasoning applies to comparative case law.

<sup>105</sup> Ackermann 2006 *SALJ* 506.

<sup>106</sup> Ackermann 2006 *SALJ* 508.

<sup>107</sup> Ackermann 2006 *SALJ* 509. Footnotes omitted.

foreign law may stimulate, in Einstein's words, "creative imagination" by "rais[ing] new questions, new possibilities ... regard[ing] old problems from a new angle."

It is evident that comparative jurisprudence in the area of freedom of religion has been important so far, particularly in the early stages of legal development. Though foreign law is not binding on South African courts, it can still contribute to shaping and developing South African law - constitutional and human rights law, in particular. Everything depends on the manner in which a court resorts to foreign law, and what it does with the information it gleans from such law. The importance of a properly developed comparative jurisprudence in this context can hardly be overstated. It is evident that the Constitutional Court is confident enough that its independence will not be tainted by its propensity to consider foreign jurisprudence. It is not looking at foreign cases because it is clueless about what to do, but because it is the right thing to do - it is transnational contextualisation in action!

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Comp Polit Stud	Comparative Political Studies
Duq L Rev	Duquesne Law Review
EJIL	European Journal of International Law
Fordham Int'l LJ	Fordham International Law Journal
Geo Wash Intl L Rev	George Washington International Law Review
German LJ	German Law Journal
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
Queen's LJ	Queen's Law Journal
SALJ	South African Law Journal
Stan L Rev	Stanford Law Review
Tul L Rev	Tulane Law Review
U Rich L Rev	University of Richmond Law Review
Utrecht L Rev	Utrecht Law Review