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

C Rautenbach*

SUMMARY

Since its establishment in 1994, the South African Constitutional Court has been quite fearless in its citation of foreign precedents in its reasoning. Compared with that of similar adjudicative institutions elsewhere, the constitutional reasoning of the South African Constitutional Court is still in its infancy, but it has nevertheless earned itself high praise among observers worldwide. The Court has in particular been commended for some ground-breaking and courageous judgments which it handed down without casting either argumentative rigour or judicial self-restraint to the winds. Since its establishment in 1994 the Constitutional Court has cited foreign cases quite extensively. Although these cases deal with all matters of the law, especially human rights issues, the Constitutional Court’s use of foreign cases in the area of religion is noteworthy.

* Christa Rautenbach. BAIuris (cum laude) LLB (cum laude) LLM LLD (PU for CHE). Professor of Law, Faculty of Law, North-West University (Potchefstroom Campus), South Africa. Email: christa.rautenbach@nwu.ac.za. This article is based on empirical research the author did within the context of an international project titled "Cross-Judicial Fertilization: The Use of Foreign Precedents by Constitutional Judges" headed by Tania Groppi and Marie-Claire Ponthoreau (see http://www.iacl-aidc.org/en/blog/13-english-categories/index.php?option=com_content&view=article&id=162&Itemid=201). The empirical data (1994-2011) collected by the author is documented at http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm, and is accessible to scholars. The data after 2011 have not been indexed yet. However, this should not have any influence on this analysis of the statistics, since the Court has not dealt with any religion cases since 2011. The methodology employed in the collection of the data is available at http://library.nwu.ac.za/dbtw-wpd/textbases/ccj_more.htm#methodology. To date, some of the results have been used in Rautenbach "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)" in Groppi and Ponthoreau (eds) The Use of Foreign Precedents by Constitutional Judges (Hart Oxford 2013) 185-209 and Rautenbach and Du Plessis "In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges" 2013 German LJ 1539-1578 at http://www.germanlawjournal.com/. The first part of this contribution draws heavily on these results and publications. The author presented an adapted version of this contribution at the Symposium on Constitutionalism, Religious Freedom and Human Rights: Constitutional Migration and Transjudicialism beyond the North Atlantic held in Hannover, Germany, on 3-6 June 2015. The financial support of the National Research Foundation of South Africa and the Alexander von Humboldt Foundation of Germany is acknowledged with appreciation. The opinions expressed and errors, however, are those of the author. I am also indebted to the anonymous reviewers for their insightful comments.
Against this background, this contribution remarks on the propensity of the Constitutional Court to look beyond its borders to deals with issues of religion within South Africa. The ultimate question is whether the notion of transjudicialism in the case of religion is detrimental to the reputation of the South African Constitutional Court or whether it is a characteristic of a court which is confident enough that its independence will remain intact in spite of its looking elsewhere for answers.

**KEYWORDS:** transjudicialism; foreign precedent, comparative judicialism, *stare decisis*; foreign case law; comparative constitutionalism; Constitutional Court.