

## JUDICIAL REVIEW AND STRATEGIC BEHAVIOUR



JUDICIAL REVIEW  
AND STRATEGIC BEHAVIOUR

An Empirical Case Law Analysis  
of the Belgian Constitutional Court

Josephine DE JAEGERE



intersentia

Cambridge – Antwerp – Chicago

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and Ireland:*  
NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7PP  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe and all other countries:*  
Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*  
Independent Publishers Group  
Order Department  
814 North Franklin Street  
Chicago, IL 60610  
USA  
Tel.: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985  
Email: orders@ipgbook.com

Judicial Review and Strategic Behaviour. An Empirical Case Law Analysis of the  
Belgian Constitutional Court  
© Josephine De Jaegere 2019

The author has asserted the right under the Copyright, Designs and Patents Act 1988,  
to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or  
by any means, without prior written permission from Intersentia, or as expressly permitted by law or  
under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning  
reproduction which may not be covered by the above should be addressed to Intersentia at the  
address above.

Artwork on cover: Vassily Kandinsky, Développement en brun © Centre Pompidou, MNAM-CCI,  
Dist. RMN-Grand Palais / Jean-Claude Planchet

ISBN 978-1-78068-694-3  
D/2019/7849/57  
NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from  
the British Library.

## FOREWORD

This is a book on the Belgian Constitutional Court and the dynamics of its judicial decision-making. It is an empirical study of the judgments rendered by this Court, revealing the strategic considerations at play, and as such is inextricably linked to the specific context of the Belgian political system.

Yet this book is so much more, and is of interest beyond Belgian borders. This is due to its contribution to more general debates in the two disciplines that it, very proficiently, combines: legal scholarship and empirical legal studies. The global value of this book – beyond the insights it offers to observers of the Belgian legal system – is therefore threefold.

First, the book contributes to the ongoing legal debate on constitutional review and the counter-majoritarian difficulty. To this end, the author views constitutional courts as deliberative institutions which provide a forum for deliberation between governments and stakeholders. In this way, it also contributes to the debate on how constitutional review is best shaped, pointing out the inherent qualities of abstract review by centralised courts from the perspective of deliberative democracy. At the same time, jurisdictions contemplating the introduction of a constitutional court can learn from this book which aspects of constitutional engineering should best be taken into account. Overall, the author is very clear in revealing how the Constitutional Court goes about making its judgments acceptable to the parties, politicians and the wider public, and how this is reflected in judicial reasoning.

Second, the book constitutes a contribution to empirical legal studies. In this discipline, much research is devoted to the factors that determine the outcome of judicial decisions. Whilst these types of studies are more commonplace in the US, this constitutes a germinal approach in Europe. In these studies, political and strategic factors have been the centre of attention, but the legal factor is often carelessly set aside. It has even been held that judicial reasoning serves as a justification *ex post* to hide what is actually going on. One reason is that legal factors are difficult to measure; another reason is that empirical scientists are often not familiar with legal reasoning and how it is intertwined with politics. In contrast to preconceptions in empirical science, political and strategic factors do not necessarily rule out the legal variable; the author, with her legal background, is well aware of that. She, very untypically, is not so much interested in the impact of the political and ideological preferences of the Court's judges. From a deliberative democracy perspective, she is much more interested in the constitutional dialogue that we witness: the participants to the dialogue and the

strategic considerations in how the Court conducts the debate. Legal analysis is utilised in particular where it dissects the argumentation framework for the proportionality analysis, and then reveals through statistical evidence how this is used by the Court to address legitimacy concerns regarding constitutional review and the balance of interests. What is novel is the emphasis on how strategic considerations impact on the detail and method of legal reasoning, but not necessarily on the final outcome.

Finally, this book is truly interdisciplinary. Empirical legal studies often come down to the monodisciplinary (political or economic science) study of legal institutions, with hardly any input in the form of legal analysis. Josephine De Jaegere has succeeded in overcoming the many obstacles to conducting interdisciplinary work – not as a team, but by herself. As a qualified lawyer, she has independently trained herself in statistics and learned to perform regression analyses.

It is my hope, then, that this book will help to bridge legal and empirical scholarship on courts and contribute to a better understanding of the functioning of constitutional courts in particular. With the rise of concentrated forms of judicial review after World War II, in Europe but also beyond, comes an urgent need for this type of research.

Patricia Popelier  
Professor of Law  
University of Antwerp, Belgium

## ACKNOWLEDGEMENTS

This book is the result of an interdisciplinary research project which I undertook at the University of Antwerp, Belgium. I would like to express my gratitude and extend my thanks to the publisher for allowing me to turn my research project into a book, and to the editor for applying the finishing touches to the manuscript.

During my studies in law, concepts such as ‘empirical’, ‘statistics’ and ‘significant’ were nowhere to be found. It was my supervisors, Professors Popelier (Faculty of Law) and Beyers (Faculty of Social Sciences), who introduced me to a new world: that of empirical legal analysis. For giving me this golden opportunity, I owe them my deepest gratitude. Although doing interdisciplinary research has presented me with numerous challenges, this experience has been especially enriching. I would also like to thank my supervisors for their professional guidance, as well as for their valuable and constructive critiques at every point during my research.

Further, I wish to acknowledge the vital support, both substantive and moral, of my colleagues. As an empirical *rookie*, additional assistance on methodological issues, provided by my colleagues at the Faculty of Social Sciences – in particular Sarah Arras and Iskander De Bruycker – was not only necessary, but also greatly appreciated. More generally, my colleagues at both faculties have made useful recommendations which have allowed me to improve the quality of my research.

In addition, I would like to offer my special thanks to Luc Théry and Kris De Put from the library documentation office of the Belgian Constitutional Court for providing me with the news media dataset. Without their willingness to provide me with this data, as well as regular updates, my research could not have turned out a success.

Finally, I am particularly grateful to my husband for his enthusiastic encouragement throughout my years as a research scholar. The most beautiful gift, which came almost exactly one year after my successful defence of my research project, is our little son Hector, to whom I want to dedicate this book.





# CONTENTS

<i>Foreword</i> .....	v
<i>Acknowledgements</i> .....	vii

<b>Introduction</b> .....	1
---------------------------	---

## PART I. NORMATIVE FRAMEWORK: THE DELIBERATIVE PERFORMANCE OF CONSTITUTIONAL COURTS

<b>Chapter 1. Constitutional Review in Democratic Systems: Countering the Counter-Majoritarian Objection</b> .....	13
--	----

1.1. Democratic Policy-Making: An Electoral and a Deliberative Component .....	14
1.2. The Electoral Component .....	18
1.2.1. Power-Sharing as an Alternative to the Majority Rule .....	18
1.2.2. The Belgian Polity: Historical Overview .....	21
1.2.3. The Democratic Credentials of (Super)majoritarian Decision-Making .....	25
1.3. The Deliberative Component .....	32
1.3.1. Deliberative Performance Defined by Five, Interrelated Key Elements .....	32
1.3.2. Constitutional Courts as Deliberative Institutions .....	37
1.3.2.1. Inclusiveness .....	37
1.3.2.2. Internal Deliberation .....	40
1.3.2.3. Transparent Justification .....	42
1.3.2.4. Rational Justification .....	46
1.3.2.5. Constitutional Dialogue .....	52
1.4. Conclusion .....	56

## PART II. THE CONTOURS OF JUDICIAL DECISION-MAKING

<b>Chapter 2. The Institutional Framework of the Belgian Constitutional Court</b> .....	63
---	----

2.1. Introduction .....	63
2.2. Reference Norms .....	66

2.2.1.	Shifting the Focus: From Federalism to the Protection of Human Rights	66
2.2.2.	Evaluation	70
2.3.	Composition of the Court and Internal Dynamics	74
2.3.1.	The Double Parity Rule: Ensuring the Protection of Political Agreements	74
2.3.2.	Evaluation	77
2.4.	Access Routes and Agenda-Setting	81
2.4.1.	From a Limited to an Open-Access Policy	81
2.4.2.	Evaluation	84
2.5.	Investigative Possibilities	88
2.5.1.	The ‘Broadest’ Investigative Possibilities	88
2.5.2.	Evaluation	89
2.6.	Sanctioning Possibilities	90
2.6.1.	A Limited Set of Legal Sanctioning Possibilities	90
2.6.2.	Evaluation	91
2.7.	Transparency	94
2.7.1.	Publication of an <i>Ex Ante</i> Notice and the <i>Ex Post</i> Collective Outcome	94
2.7.2.	Evaluation	96
2.8.	The Prospects of Deliberation	99
2.9.	Conclusion: A Venue for Deliberation in a Consociational Setting	101

**Chapter 3. Variation of Judicial Behaviour within the Institutional Boundaries** . . . . . 103

3.1.	Introduction	103
3.2.	Modelling Judicial Behaviour	104
3.2.1.	The Legal, Attitudinal and Strategic Models	104
3.2.2.	Why the Strategic Model Fits the Belgian Case	108
3.2.3.	Case Salience as a Trigger of Strategic Behaviour	113
3.2.3.1.	Case Salience Measures	115
3.2.3.2.	Strategic Actions in Salient Cases	117
3.3.	Preliminary Conclusion: Launching the Case Law Analysis	122

PART III. EMPIRICAL ANALYSIS OF THE BELGIAN CONSTITUTIONAL COURT’S CASE LAW

**Chapter 4. Translating Case Salience into Measurable Explanatory Variables** . . . . . 127

4.1.	Introduction	127
4.2.	Participation	128

4.2.1.	Measuring Participation in Constitutional Review Procedures . . . . .	129
4.2.2.	Data Analysis . . . . .	132
4.2.2.1.	Annulment Procedures (n=1027) . . . . .	132
	(1) Private Actors . . . . .	132
	(2) Institutional Actors . . . . .	134
4.2.2.2.	Preliminary Procedures (n=2118) . . . . .	135
	(1) Private Actors . . . . .	135
	(2) Institutional Actors . . . . .	137
4.2.3.	Conclusion: Two Explanatory Variables Related to Litigant Salience . . . . .	137
	4.2.3.1. Size of the Group of Individuals . . . . .	137
	4.2.3.2. Participation Diversity . . . . .	138
4.3.	Media Attention . . . . .	141
4.3.1.	Measuring Media Attention for Constitutional Review Procedures . . . . .	141
4.3.2.	Data Analysis . . . . .	143
4.3.3.	Conclusion: An Explanatory Variable Related to Political Salience . . . . .	149
4.4.	Panel Size . . . . .	150
4.4.1.	Measuring Panel Size . . . . .	150
4.4.2.	Data Analysis . . . . .	152
4.4.3.	Conclusion: An Explanatory Variable Related to Political and Legal Salience . . . . .	156
4.5.	Highly Salient Cases (n=57) . . . . .	156
<b>Chapter 5. Case Outcomes . . . . .</b>		<b>167</b>
5.1.	Introduction . . . . .	167
5.2.	A Deliberative Perspective: Engaging in Dialogue through Constructive Case Outcomes . . . . .	169
5.3.	A Variety of Sanctioning Possibilities: Coding Case Outcomes . . . . .	174
5.4.	Choosing a Case Dictum: Descriptive Trends and Evolution in Time . . . . .	180
	5.4.1. Introductory Overview . . . . .	180
	5.4.2. Annulment Procedures . . . . .	184
	5.4.3. Preliminary Procedures . . . . .	192
	5.4.4. Media Attention on the Court's Rulings, Depending on the Outcome . . . . .	196
5.5.	Strategic Considerations Underlying the Case Dictum . . . . .	201
	5.5.1. Introduction . . . . .	201
	5.5.2. Hypotheses . . . . .	202
	5.5.2.1. Finding a Violation (n=3145) . . . . .	202

5.5.2.2.	Invalidation or Modulation: How to Interpret Judicial Preferences on Case Outcomes? .....	205
5.5.3.	Operationalisation .....	208
5.5.4.	Results .....	210
5.5.4.1.	Hypotheses 1a–c with Regard to the Finding of a Violation (n=3145) .....	210
5.5.4.2.	Hypotheses 2a–b with Regard to Modulated Outcomes (n=1243) .....	215
5.6.	Postscript and Preview of the Following Chapters .....	226
<b>Chapter 6. Citation Practices .....</b>		<b>229</b>
6.1.	Introduction .....	229
6.2.	A Deliberative Perspective: The Reason-Giving Requirement .....	231
6.3.	Citing Authorities: Coding the Court’s Case Law .....	237
6.4.	Citing Authorities: Descriptive Trends and Evolution in Time .....	240
6.4.1.	Evolution in Citation Density .....	240
6.4.2.	Precedents .....	242
6.4.3.	Case Law of (Inter)national Courts .....	244
6.4.4.	Legislative History Documents .....	250
6.4.5.	Secondary Authorities .....	255
6.5.	Strategic Considerations Underlying Citation Practices .....	260
6.5.1.	Introduction: Citations of External Authorities as a Legitimation Strategy .....	260
6.5.2.	Hypotheses .....	262
6.5.3.	Operationalisation .....	265
6.5.4.	Results .....	266
6.5.4.1.	Case Salience .....	268
6.5.4.2.	Case Outcome .....	276
6.6.	Conclusion .....	279
<b>Chapter 7. Proportionality Analysis .....</b>		<b>283</b>
7.1.	Introduction .....	283
7.2.	A Deliberative Perspective: A Structured Approach to the Proportionality Analysis .....	285
7.3.	Establishing a Violation on the Basis of the Proportionality Analysis: Coding the Court’s Case Law .....	289
7.4.	The Court’s Application of the Step-by-Step Framework: Descriptive and Qualitative Analysis .....	292
7.4.1.	The Objectivity of the Criterion for Differentiation (n=4) .....	292
7.4.2.	Illegitimate Policy Objective (n=0) .....	293
7.4.3.	Suitability (n=117) .....	296

7.4.4. Necessity (n=23) . . . . .	298
7.4.5. Proportionality <i>Sensu Stricto</i> (n=233) . . . . .	303
7.4.6. The Court Concludes that the Measure is ‘Not (Reasonably) Justified’ (n=285) . . . . .	305
7.4.7. The Court States that the ‘Legislation is Discriminatory/ Unconstitutional’ (n=48) . . . . .	306
7.5. Strategic Considerations Underlying the Application of the Proportionality Analysis . . . . .	307
7.5.1. Introduction: Opinion Clarity as a Double-Edged Sword . . . . .	307
7.5.2. Hypotheses . . . . .	309
7.5.3. Operationalisation . . . . .	313
7.5.4. Results . . . . .	315
7.6. Conclusion . . . . .	325
<b>Conclusion</b> . . . . .	327
<i>Codebook</i> . . . . .	339
<i>Bibliography</i> . . . . .	345
<i>Index</i> . . . . .	361

