

## JUDICIAL REVIEW AND STRATEGIC BEHAVIOUR



JUDICIAL REVIEW  
AND STRATEGIC BEHAVIOUR

An Empirical Case Law Analysis  
of the Belgian Constitutional Court

Josephine DE JAEGERE



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## 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.

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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.

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