Addressing an external audience: an empirical analysis of citation practices of the Belgian Constitutional Court

Abstract

Constitutional courts are expected to justify their rulings with a clear reason-giving. This justification is intended to stimulate compliance with the judgment and enhances the legitimacy of the court. To maximize clarity on this justification, courts may cite external authorities (for instance, international case law or preparatory parliamentary documents). While scholars in *common law* countries have studied the citation practice of their (Supreme) courts extensively, this field is relatively unexplored in continental Europe. Moreover, European legal scholars only rarely apply empirical methods for their research. This article aims to contribute to these theoretical and methodological challenges by analysing the citation practice of the Belgian Constitutional Court (BeCC). In particular, I aim to explore how the grounding of judgments has developed over time and which case-specific features affect this practice. In addition, I hypothesize that increased case salience and/or the invalidation or modulation of challenged legislation pushes the amount of cited authorities (citation density) upwards. For this purpose, I developed a unique database containing relevant procedural and substantial information on all judgments of the CC since its inception (1983) until the most recent rulings from 2015 (n=3145). I combine this with data on how the news media reported on each ruling, considering media-coverage as a *proxie* for salience.

1. Introduction

Although the study of judicial reason-giving practices has gained considerable importance, empirical analyses have been, up till now, mostly territorially concentrated to the United States[1], Canada[2], Australia[3] and New Zealand[4].[5] In continental Europe, this field has been relatively unexplored.[6] More generally, European legal scholars are only recently catching up with regard to empirical research on the functioning of (constitutional) courts.[7] Yet, an extensive study of judicial reason-giving practice provides a window into the legal culture and the performance of courts. In each ruling, the reason-giving gives insight in the path of legal logic used to reach the judicial outcome.[8] Citation patterns reveal where judges find their cues and what values they seek to promote.[9] It is a good indicator to understand what arguments are considered as legitimate for a given period of time.[10] However, as a

[1] E.g. L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981); J. H. MERRYMAN (1978); I. NIELSEN AND R. SMYTH (2008); F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010).
[2] E.g. P. MCCORMICK (1993) (1995); V. BLACK, N. RICHTER (1993).
[3] E.g. R. SMYTH (1999) (2009); D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007).
[4] E.g. R. SMYTH (2000).
[5] Morevore, since data gathering is labour-intensive, time-consuming and often quite expensive, most studies focused on citation practices within a single year of few selected years, see M. HEISE (2002), 826-829.
[6] Nonetheless, there have been recent contributions to fill in this gap, e.g. S. LAMBRECHT (2013) and J. STABEN (2015). Most studies on national European Courts, however, are limited to the citation of foreign (case) law. See footnote 56. In addition, there have been some studies on the citation practice of international courts, including the ECHR, e.g. LUPU Y. AND VOETEN E. (2012).
[7] E.g. A. DYEVRE (2010); M. BOBEK (2013); GAROUPA, N., ET AL. (2013); J. KANTOROWICZ AND N. GAROUPA (2015); V. GREMBI, AND N. GAROUPA (2015). Nonetheless, many studies on European constitutional courts are still executed by (US) political scientists, e.g. G. VANBERG, (2005), S. BROUARD, (2009); C. HONNIGE (2011).
[8] P. MCCORMICK (1995), 454: *"the outcome matters less than the reasons, which constitutes both a signal to other similarly-situated actors and a resource which such actors can use for their own purposes".*
[9] P. MCCORMICK (1993), 287.
[10] D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007), 735, 804.; L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 773, 794, 818.

means for understanding the reasoning process that judges go through, citations remain only a rough guide. The set of explicitly cited authorities may only partially reflect the reasoning process that the Court has gone through.[11] Hence, low citation counts should not necessarily be interpreted as a lack of conducted research. Also, a mere citation count does not consider the manner in which the authority was cited.[12] Finally, every legal system has its own rules and traditions relating the proper presentation of a judicial decision.[13] European supreme court courts seem to be more selective than their Anglo-American counterparts, which tend to cite (possibly in footnotes[14]) the majority of sources that served as inspiration. [15] Nonetheless, used appropriately and with proper awareness of these limitations, analyses of judicial citations can improve our understanding of the judicial role. This article aims to contribute to these substantial and methodological challenges by exploring salient features of the reason-giving practice of the Belgian Constitutional Court (BeCC).

The plan of this article is as follows. In the first section, it is explained why it is essential for judges to demonstrate the reasons for their decisions. In short, clarity on the justificatory ground stimulates compliance with the ruling and enhances the legitimacy of the court. Additionally, it is explored how constitutional courts may use citations to authorities to underpin their rulings. Courts should at least refer to *some* authority when solving a constitutional question. Nonetheless, *which* or *how many* authorities are appropriate depends on the specific case. Courts should cite authorities that are applicable, persuasive and relevant to the case. Also, some cases require more legitimation than others. I hypothesize that the more salient a case is - indicated by an increased media-coverage, a high participation rate and/or the composition of the Court in full session - the more authorities will be cited. Additionally, cases in which the Court (partially) invalidates or modulates the challenged legislation are also candidates for more citations.

The second part of the paper concentrates on the dataset. Before going into detail on the data, I briefly introduce the competences and procedural framework of the Belgian Constitutional Court. The purpose of this overview is to explain which variables were coded and may be useful when interpreting the empirical results. Next, I present the collected data. For the purpose of a broader research project, the total population of the Court's rulings (1985-2015, n=3145) has been coded, collecting a wide range of procedural and substantial information, including the citations to authorities. In addition, I can rely on an internal database of the BeCC providing information on how the news media reported on each ruling.

In the final section, the results are presented in two parts. Before embarking upon our analysis of citation density, we offer some descriptive information on the different categories of citations. In order to lay bare evolutions over time, figures 1A-1G display the yearly percentages of cases in which each type of citations have occurred. Also, to determine the extent to which the legal substance of a case affects referencing, correlations are calculated between the different authorities and (1) the domain in which the case is situated (e.g. criminal law, administrative law) and (2) the references norms against which the legislation is reviewed (e.g. equality clause, European legislation). In the

[11] As BOBEK argues, there is a difference between the process of discovery (where judges are looking for a solution) and the process of representation (where judges are seeking to convince others that the solution they found is correct and acceptable). One the one hand, not all sources that were consulted will be explicitly cited. On the other hand, some citations might just serve as *ex post* justification without having genuinely contributed to reaching the decision. M. BOBEK (2013), 222, 225.

[12] F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 521.

[13] M. BOBEK (2013), 224, 230. In general, in Anglo-American countries, the authorities used for discovery and for representation overlap. This practice is not fully shared on the European Continent.

[14] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 814: "many [academic] citations are relegated to footnotes"; R. SMYTH (1999), 58.

[15] This is said to be a difference in tradition. See infra footnote 26.

second part, I apply a regression analysis to test the hypothesis with regard to expected increase of citation density in cases that are more salient or that lead to the invalidation or modulation of the challenged legislation.

2. The reason-giving requirement

2.1. Persuading an external audience: a matter of legitimacy

The requirement to give reasons for their judgments is a special burden that weighs on courts. [16] More specifically, constitutional courts must clarify why they consider challenged legislation to be mandated by the Constitution or not.[17] Their rulings should be supported by an elaborate but precise justification that clarifies which arguments were found most persuasive.[18] The claims of those who are touched by the decision should be addressed, not by merely enumerating all individual viewpoints, but by showing that they were seriously considered.[19] As a corollary of this reason-giving requirement, judicial rulings should be made publically accessible.[20] In Belgium, the CC's rulings are published online in the three official Belgian languages –Dutch, French and German.[21] Since recently, a selection of rulings is also available in English.[22]

The reason-giving requirement is considered essential for two reasons. First, as Shapiro argues, *'a decision-maker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decision-maker able to proceed by simple fiat.'.*[23] By demanding the display of reasons, judgments become verifiable and arbitrary decision-making can be avoided.[24] Secondly, the quality of the reason-giving affects the degree to which their decisions are perceived as legitimate.[25] This substantive legitimacy[26] is important, since it affects how external actors will react to the court's rulings. [27] More precisely, courts must partially rely on a qualitative reason-giving to convince their audience to comply with their rulings.[28]

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[16] A. STONE SWEET AND J. MATHEWS (2008), 78, 83; C.H. MENDES (2013), 93 and T. BUSTAMATE (2015), 388: *"The awareness of the 'the fact that the legitimacy of judicial review is conditional', entails a burden of justification for the decisions of the constitutional court."*

[17] O. FISS (2003), 152:.

[18] J. ELSTER ET AL. (1998), 9; A. GUTTMAN AND D. THOMPSON (2002), 156; LUPU Y. AND VOETEN E. (2012), 8.

[19] V.F. COMELLA (2009), 33.; C.H. MENDES (2013), 46; E. BREMS AND L. LAVRYSEN (2013), 181, call this 'substantive participation', which is more than simply providing the opportunity to speak (formal participation).

[20] COMELLA argues that a Constitutional Court should be designed in ways that help enhance its public visibility. V.F. COMELLA (2009), 34.

[21] www.const-court.be

[22] More precisely, a complete English translation is available for two cases of 2015. In addition, the BeCC has published a summary of a selection of cases from 1985-2014.

[23] M. SHAPIRO (1992), 180.

[24] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 793; M. SHAPIRO AND A. STONE SWEET (2002), 232: *"a decision-maker who is stimulated to give reasons may be less prone to arbitrary, capricious, self-interested or otherwise unfair judgment.";* M. BOBEK (2013), 233.

[25] LUPU Y. AND VOETEN E. (2012), 2. S

[26] Substantive legitimacy compels acceptance by the force of its argument, while institutional legitimacy relies more on the authority of the issuer of the decision. M. BOBEK (2013), 231.

[27] As Lasser argues, the substantive reason-giving in a judicial decision may be supplemented by societal trust in an institution. M. LASSER (2004). Bobek argues that European constitutional courts are historically believed to have considerable institutional legitimacy and therefore have the tradition not to fully display their reaons. M. BOBEK (2013), 231-233.

[28] P. MCCORMICK (1995), 454;. D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007), 734; M. CLAES, M. DE VISSER, P. POPELIER AND C. VAN DE HEYNING (2012), 1.

A constitutional court potentially addresses a broad audience. Most importantly, the reason-giving has an important dialogue dimension for the participants involved in the specific review procedure.

When there is no constitutional infringement, courts provide an indirect but explicit justification for the legislative outcome. This might cause the litigants to accept the decision because they substantively agree with it. Nonetheless, acceptance might also occur despite the fact that the parties disagree with the decision.[29] As empirical research has shown, the perception that the decision-making procedure was fair is at least as important as a favourable decision for the satisfaction from the parties in the procedure.[30] Citations to external authorities are a way for judges to stimulate this perception and, therefore, ensure compliance from litigants.

On the other hand, the review procedure can also expose a constitutional infringement. This type of rulings is primarily directed at the policy makers.[31] By resolving constitutional questions, the Court defines the boundaries of what is constitutionally acceptable. Like many constitutional courts, the BeCC has developed diversified methods to send –whether enforceable or not- incentives stimulating reaction from the legislator.[32] In particular, the BeCC may simply declare the legislation unconstitutional or modulate its meaning in order for it to be constitutional. To facilitate the follow-up of these recommendations, the Court should make clear (for instance, by referring to international case law) why the legislation was invalidated or modulated.[33] In addition, the BeCC can point out (for instance, by referring to scientific studies) that the unconstitutionality was caused by a deficient policy-making process.[34] This should make the legislator aware of the importance of a proper *ex ante* assessment of the legislative proposal.[35] Consequently, the citations made by the Court may affect the quality of the parliamentary debate and the policy decisions ensuing this debate.

In addition, the court's rulings may be relevant for other members of the domestic or foreign judiciary. Citations to external authorities may help judges to comprehend the outcome of the case. For domestic judges, the judgments of the BeCC provide guidelines on the interpretation and application of Belgian legislation. Foreign judges, on the other hand, may rely on the BeCC's case law for inspiration when they come across a similar constitutional question. It has been noticed that constitutional courts often face common issues, and that they increasingly scan foreign jurisdiction to solve these issues.[36] Finally, the Court's case law is publicly accessible for the society at large. This allows others, such as legal scholars or the media to study and discuss the case law profoundly.[37] Clarity on the justificatory ground will enhance the depth of this public debate. The practice of widespread debate on difficult and

[29] They might accept the collective outcome as the result of a reasoned exchange of diverging viewpoints when they understand why their claim was found wanting. J. D. FEARON (1998), 57; M. VAN HOECKE (2013), 190.
[30] S. G. GRIMMELIKHUIJSEN, A. J. MEIJER (2012); Also see C.H. MENDES (2013), 68 and E. BREMS AND L. LAVRYSEN (2013), 183-184.
[31] C.H. MENDES (2013), 23.
[32] E.g. courts can maintain the consequences of an annulled law, enquiring the legislator to act within a certain time limit. Another possibility is to pronounce a modulated ruling, wherein the court declares that a certain legal provision should be interpreted differently, or altered, so that it can applied in a constitutional way. M. SHAPIRO AND A. STONE SWEET call this the 'pedadogical authority' of past jurisprudence. They also argue that these creative techniques have strengthened the dominance over policy outcomes. M. SHAPIRO AND A. STONE SWEET (2002), 187-189.
[33] I. NIELSEN AND R. SMYTH (2008): *"a fourth reason for citing authority, and in particular secondary authority, is to critise the developt of the law or make recommendations to parliament for a law reform."*
[34] E.g. the scientific inquiries were implemented in an unsatisfactory way; or the legislative decision does not logically follow from the presented empirical results.
[35] AS ALEMANNO stated, this can promote a broader culture of proof, evidence and rationality in policymaking. A. ALEMANNO (2013), 13.
[36] C. MOON (2003), 245.
[37] VAN HOECKE argues that the involvement of the professional community, a public forum and the whole public sphere of society, is exactly what legitimates constitutional review. M. VAN HOECKE (2013), 190-192.

important constitutional questions led scholars to the conclusion that constitutional review should be considered as a countermajoritarian *opportunity*, instead of difficulty .[38]

2.2. The extent of the requirement

As LAWRENCE FRIEDMAN and his colleagues put it, judges are expected to decide *'according to the law'*, which means *'they are not free to decide cases as they please, [but instead] are expected to invoke appropriate legal authority for their decisions'*.[39] To maximize clarity on the justification for their rulings, constitutional courts may document their judgments with citations to a variety of authorities.[40] This provides a means for judges to relate their reasons back to other relevant sources. As MERRYMAN argued, a judgment should always contain the citation of *some* authority. [41] References to external sources reflect that the Court took the claim seriously and made the effort to explore available information on the issue. [42] Ultimately, the external audience addressed by the Court should be able to understand and accept the decision. The proper use of citations helps to make this more convincing.[43]

2.2.1. Selecting applicable, persuasive and relevant authorities

The question rises as to *which* citations are appropriate in a specific case. In general, courts are restricted by pre-existing legal materials and factual information.[44] To begin with, cited authorities should be applicable – or discussed to find inapplicable – to the constitutional question.[45] Additionally, the cited authorities should be persuasive[46], by virtue of their institutional embedding and/or because of their content.[47] In general, four types of authority appear in case law of constitutional or supreme courts: precedents; (inter)national case law; legislative history documents and secondary authorities.

First, courts may refer to their own decisions.[48] By citing precedents, courts show they are self-reflective. It gives decisions historical depth, without wasting too much energy. [49] Also, it improves the efficiency in the internal workings of the Court.[50] By building on their precedents, courts develop an internally consistent body of case law and comply with the general principles of continuity and the legal value of predictability in the law. [51] Contrariwise, a court that simply disregards its past decisions would disturb legitimately formed expectations, and might create the impression that its

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[38] J. FEREJOHN AND P. PASQUINO (2010), 360.
[39] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 793-793. See also J. H. MERRYMAN (1978), 418
[40] M. BOBEK (2013), 225.
[41] J. H. MERRYMAN (1978), 418. Merryman states that '*the obligation to cite authority seems indisputable*.' See also H.P. GLENN (1987), 264: *"adherence to binding law may itself be perceived as highly arbitrary, in the absence of any elements of persuasion".*
[42] J. PARKINSON (2006), 99; M. BOBEK (2013), 225.
[43] J. H. MERRYMAN (1978), 418.
[44] J. FEREJOHN AND P. PASQUINO (2010), 366; C. GUARNIERE AND P. PEDERZOLI (2003), 10-11.
[45] J. H. MERRYMAN (1978), 420-421.
[46] H.P. GLENN (1987), 263: an*"authority which attracts adherence as opposed to obliging it."*
[47] Or, as described by FLANDERS: An authority is persuasive by virtue of what they are (e.g. opinions of courts situated higher the judicial hierarchy) or by virtue of what they say (e.g legislative history, academic scholarship etc.) However, the extent of this persuasiveness differs between legal systems. For instance, the cogency of precedents is considered stronger in the United States constitutional system than in Europe, C. FLANDERS (2009), 58-64. European scholars sometimes classify European (case) law as 'mandatory'. See M. BOBEK (2013), 25-27.
[48] This type of citations are also called 'consistency citations', R. SMYTH (2009), 43.
[49] C. H. MENDES (2013), 181-182.
[50] LUPU Y. AND VOETEN E. (2012), 1.
[51] D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007), 738; LUPU Y. AND VOETEN E. (2012), 7.

rulings are arbitrary and *ad hoc*.[52] This does not mean, however, that courts cannot overturn precedents, when justified with solid arguments.

A second type of citable authorities is jurisdiction of other courts, whether they are on an equal foot or higher in the judicial hierarchy.[53] References to other courts are considered one of the most important forms of judicial conversations, because they display consideration given to each other's arguments.[54] Also, references to each other's case law maintain the coherence of the judicial system.[55] Prior studies have shown that court opinions are often amongst the most cited authorities. It is likely that this preference is rooted in the idea that courts speak the same legal language.[56] Citing judgments of the domestic judiciary mostly serve to clarify how the challenged legislation is currently interpreted. It is up to the constitutional court to determine whether this interpretation is mandated by the Constitution or not. Depending on the status of the inter- or supranational judiciary in a legal order, their case law may also carry considerable weight. By referring to these authorities, courts may strengthen their own position.[57] Finally, courts may cite foreign case law. There is particular and growing interest in this phenomenon[58], due to a series of reasons. Constitutional courts increasingly face common issues.[59] By treating similar cases alike, courts create a sort of uniformity across jurisdictional systems.[60] This increases legal stability and predictability and stimulates the perception of fairness.[61] However, some have also formulated concerns regarding the citation of foreign decisions. Before considering or applying a decision from a foreign court, they argue, the basis and reasoning of the foreign decision must be considered in the context of the originating country.[62] Nonetheless, comparative constitutional analysis offers unique opportunities to learn about new methods of analysis and new approaches to issues that domestic courts have yet to address. In sum, engaging in judicial conversation may lead to better-reasoned outcomes and increases the Court's legitimacy.[63]

Third, legislative documents may shed light on the underlying policy objective and the *ex ante* evaluation of the challenged provisions. This may be especially helpful when there is a discussion on their interpretation. One the one hand, courts may refer to these documents to show deference to the legislator. One the other hand, citations to these documents may also serve to show that legislation is unjustifiable, for instance to demonstrate that the policy objective is illegitimate or that the consequences of the law are disproportionally harmful in comparison with the policy objective. In the latter cases, these citations may be combined with secondary authories.

This fourth type of authorities, for instance academic articles, scientific studies and news sources, are considered to have a principal utility as research aids.[64] For example, the consultation of these sources allows judges to weigh costs and benefits of the rules through which the policy rationale

[52] C. FLANDERS (2009), 83.
[53] D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007), 739
[54] Next to preliminary questions and the reasoning in judicial decisions, which may bring the courts arguments or perspectives in greater focus. See P. POPELIER (2012), 76.
[55] C. H. MENDES (2013), 183-184 and 189-194
[56] C . FLANDERS C. (2009), 69-72
[57] P. POPELIER (2012), 99.
[58] This interest had spread more broadly than the traditional, more general, studies of citation patterns. In addition to the *common law* countries, there have been studies for European Constitutional Courts and the Constitutional Court of South-Africa. E.g. U. BENTELE (2009); M. BOBEK (2013); T. GROPPI AND M.-C. PONTHOREAU (2013);
[59] C. MOON (2003), 245.
[60] A 'transnational judicial community' C. FLANDERS (2009), 86.
[61] C. FLANDERS (2009), 75.
[62] C. MOON (2003), 245.
[63] P. POPELIER (2012), 99.
[64] J. H. MERRYMAN (1978), 423.

is implemented.[65] Citations to these authorities support the notion that the law does not exist in a vacuum. By mentioning them explicitly, these sources become verifiable. This may be a benefit as well as a pitfall. On the one hand, it may strengthen the justificatory ground for the judicial outcome. On the other hand, this may incite others to raise concerns regarding the authenticity and credibility of these authorities. This is especially delicate for scientific evidence, since judges are usually not familiar with the statistical language used in sources from other academic fields.[66] Some scholars have noticed a global trend towards the use of more procedural arguments as a part of substantive judicial review. This 'evidence-based judicial reflex' would be translated in more citations to scientific evidence and consultation input. [67]

Which of these persuasive authorities are selected by the court depends on the topic of the dispute and the pleas that were raised by the parties. [68] Importantly, courts should make the effort to explore available relevant information in order to formulate their decision. [69] For example, when the case before the court concerns administrative law, it would be appropriate to take into account administrative jurisdiction. Also, when a court is enquired to review legislation against international law, it seems relevant to explore the case law of the international court competent to interpret this legislation. Such citation patterns would show that the BeCC relies on relevant authorities to reach a conclusion. Which authorities are deemed appropriate may also evolve over time. In particular, one might expect that the BeCC increasingly takes in a wider range of premises and more diverse knowledge as food for decision-making.

2.2.2. The appropriate amount of authorities

There is no standard to guide a judge in *how much* authority is needed. What is "enough"[70] depends on the constitutional question, the available pool of authorities[71] and the audience that the Court addresses. Also, as mentioned before, not every constitutional court is equally citation-intensive. In general, excessive citation to authority as well as oversimplification should be avoided.[72] Too many (redundant) citations clutter the judgment and add to the possibility of errors, such as citing authorities which are not to the point or that contradict one another. [73] Some have argued that this is associated to a weakening of public understanding and confidence in the role of courts. [74] On the other hand, a judge that does not cite *any* authority may fail to convince its external audience of the accurate basis of the decision. Also, some decisions require more legitimation and thus more display of authorities than

[65] L. ALEXANDER (1998); D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007),742. Some authors argue that courts are expected to check arguments and assumptions forwarded by the legislator against available scientific or other factual information, see P. POPELIER AND C. VAN DE HEYNING (2013), 260. Others have noticed a recent tred towards a more 'evidence-bases judicial reflex, see A. ALEMANNO (2013).

[66] Most Law Faculties, especially in continental Europe, do not include a course on statistical methods in their curriculum. Hence, many judges are not trained to interpret empirical results. E. BARBIER DE LA SERRE AND A.-L. SIBONY (2008), 942. E. BREMS AND L. LAVRYSEN (2013), 187.

[67] A. ALEMANNO (2013). According to Allemanno, this 'the evidence-based judicial reflex' can be situated within the broader phenomenon of rationalization ('the hunt for objectivity') of the legislative policy process.

[68] M. SHAPIRO AND A. STONE SWEET (2002), 238; C. FLANDERS (2009), 69.

[69] J. PARKINSON (2006), 99; M. BOBEK (2013), 225.

[70] J. H. MERRYMAN (1978), 418-419.: *"Enough to show the continuous relation with prior law, enough to show that the judge has done his homework, enough to justify the decision as the law, enough to persuade us that it is right, and so on."*

[71] J. H. MERRYMAN (1978), 418-419: *"If the question is narrowly defined, the range of applicable authority is narrowed; the broader the question and the more sensitively perceived its implications are, the greater the number of authorities potentially applicable to its decision*."

[72] M. BOBEK (2013), 236: *"the solution to the tension between transparency and conciseness is obviously not a bipolar cut of the type either/or. It is an evolving compromise."*

[73] J. H. MERRYMAN (1978), 419-422. BOBEK calls this the 'transparancy trap', M. BOBEK (2013), 233.

[74] I. NIELSEN AND R. SMYTH (2008), 194-195.

others.[75] More specifically, citation density (counted as the number of different authorities cited to support the ruling) is believed to be affected by the salience and the outcome of the case. A significant increase of citations when these factors are present would show that judges anticipate responses from external actors, for example when pressure of non-compliance is high or pushback from politicians is expected.[76]

First, case salience may affect the court's activities. If a case relates to a relatively easy and uncontroversial question, a concise reason-giving can suffice. In those cases, it seems reasonable to expect a rather limited amount of citations. Salient cases may require a more detailed account of all considered arguments. There are several explanatory variables that potentially indicate case salience. First, media-attention is considered as *proxie* for public salience in political science literature.[77] It indicates that the issue brought before the Court is perceived as newsworthy. Hence, one can expect that the Court would have a special concern for legitimating such rulings.[78] Next, salient cases will likely attract a variety of actors. The participation of large and diverse group of litigants in the procedure might push the number of citation upwards, since each participant may bring forward information on which the Court can rely for support. Finally, a court that deliberates in full session tends to take on more salient cases. It indicates that the court itself considers it appropriate to discuss the case more elaborately. Research has shown that more intra-court bargaining occurs in salient cases.[79] Additionally, some authors have suggested that when the amount of bargaining between judges increases, the more they will rely on external authorities to convince each other to follow their opinion.[80] Consistent with this prior research on the embedding of judgments by Anglo-American courts and by the ECtHR[81], I expect that the BeCC displays more effort to embed judgments in authorities when these variables are present rather than absent.

H1: The BeCC cites more authorities when the case is more salient, indicated by an extensive media-coverage, an elevated participation rate and/or a deliberation in full session

Second, stronger justification may be needed in cases that are more closely associated with judicial activism.[82] More precisely, classic cases subject to criticism are cases wherein the courts (partially) invalidate or modulate a statute. The cases are also defined as 'legally salient' because they influence the development of the law, regardless of whether they are known to the public.[83] Courts, anticipating pushback from political actors, would be more inclined to signal that an invalidation or modulation was compelled by external authorities rather than ideological reasons. Therefore, they are considered candidates for more citations. However, it is important to mention that studies on the effect of the finding of a violation are inconsistent. A study on the US Supreme Court suggested a significant effect[84], while a similar study on citations by the ECtHR only suggested a very modest effect.[85]

H2: The BeCC cites more authorities in cases in which the challenged legislation is (partially) invalidated or modulated.

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[75] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 777; R. SMYTH (1999), 54.
[76] LUPU Y. AND VOETEN E. (2012), 10, 15.
[77] E.g. L. EPSTEIN AND J. A. SEGAL (2000); T. A. COLLINS AND C. A. COOPER (2012); T. S. CLARK ET AL. (2015).
[78] F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 543.
[79] L. EPSTEIN AND J. A. SEGAL (2000), 66.
[80] F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 550-551.
[81] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 777, 800; F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 541-543; LUPU Y. AND VOETEN E. (2012),27.
[82] F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 541-543.
[83] T. A. COLLINS AND C. A. COOPER (2012); T. S. CLARK ET AL. (2015).
[84] Y. LUPU AND J. H. FOWLER (2013).
[85] Significant only at the 0.072 level (two-tailed). LUPU Y. AND VOETEN E. (2012), 25.

3. The data-collection

3.1. Introduction: the Belgian Constitutional Court

Unlike countries with a *common law* tradition, Belgium established (in 1983) a centralized, Kelsenian Constitutional Court.[86] Initially, the 'Court of Arbitration' was only meant to guard the strict observance of the competence allocating rules between the federal and sub-national government levels.[87] Nowadays, the BeCC may additionally review parliamentary statutes against fundamental rights.[88] Most of these rights find equivalents in international human rights treaties, such as the European Convention of Human Rights (ECHR). Through the equality principle laid down in articles 10 and 11 of the Constitution, the BeCC incorporated international norms, including European law, into its set of reference norms.[89]

There are two access routes to lodge a constitutional complaint before the BeCC.[90] First, any individual or legal entity with an interest in the case or any government may initiate an annulment procedure. The petitioners have a term of six months after the official publication of legislation to lodge a case before the court. Second, other domestic judges, when they come across a constitutional question in a concrete case are, in principle, enquired to send a preliminary reference to the BeCC. There is no time limit to initiate the preliminary procedure, which may relate to legislation that has already been applied in practice for several years or decades. In contrast with, for example, the US Supreme Court, there is no docket control limiting the case load presented to the Court. When the complaint is admissible, which is usually the case, it will lead to a final ruling.

In principle, the BeCC may (partially) declare the challenged legislation constitutional or unconstitutional.[91] In annulment procedures, a declaration of unconstitutionality will lead to retroactive removal of the unconstitutional (part of the) legislation from the Belgian legal order.[92] A preliminary ruling of unconstitutionality does not have the same *erga omnes* effect, but will alternatively open a new six months period in which actors may institute an action for annulment.[93] In practice, like many other courts, the BeCC developed a middle way with diversified methods to answer a question of constitutionality.[94] More specifically, like in many other European countries[95], it is common practice that the CC tries to preserve the validity of legislation through interpretative or

[86] The establishment of the 'Court of Arbitration' was confirmed in Article 142 of the Constitution and the Special Law of 28 June 1983, which has been updated several times (from now: the Special Law)
[87] Appendix to the government statement of 28 February 1978, annex, 992.
[88] Article 1 (annulment procedure) and 26§1 (preliminary procedure) of the Special Law.
[89] See 39/1991, 6.B.6.: *"the constitutional rules of equality and non-discrimination were applicable with respect to all the rights and all the freedoms afforded to Belgians, including those resulting from the international conventions by which Belgium was bound, made applicable in the domestic legal order by a law of assent and having direct effect".* and see BeCC 30 March 2010, no. 30/2010, B.6.1.:*"The Court, which has direct review jurisdiction in respect of Articles 10,11 and 23 of the Constitution, also assumes jurisdiction for verifying […] that the provisions submitted for review are compatible with the rules of international law and European law by which Belgian is bound […].",* confirmed by BeCC 22 November 2012, no. 144/2012, B.8.1. and BeCC 13 February, no. 29/2014, B.4.1.
[90] Article 2 (annulment procedure) and 26§2 (preliminary procedure) of the Special Law.
[91] Article 8 (annulment procedure) and 26§1 (preliminary question) of the Special Law.
[92] Article 9§1 of the Special Law. When appropriate, the Court can moderate this retroactive effect of an annulment (Article 8 of the Special Law). This gives the legislator a delay to 'repair' unconstitutional legislation.
[93] Article 4, 2° of the Special Act. A similar possibility to moderate a declaration of unconstitutionality in preliminary procedures is not legally provided. Nevertheless, the CC has accepted, without explicit legal foundation, that it can, exceptionally, moderate the retroactive effect of a declaration of constitutionality in preliminary procedures. S. VERSTRAELEN (2014).
[94] J. DE JAEGERE (2014), 22-32. See infra footnote 30.
[95] V. F. COMELLA (2009), 74.

constructive modulations, in order for it to be in harmony with the Constitution. These rulings are controversial, because, in principle, the BeCC does not have the competence to alter legislation passed by Parliament.[96] A ruling in an annulment procedure is binding on the courts with respect to the points of law settled by the Court.[97] After a preliminary ruling, the referring court and any other court of law passing judgment in the same case should comply with the ruling.[98] Finally, other courts are dispensed of their obligation to refer a constitutional question to the BeCC when there has already been a similar judgment, however under the condition of compliance with this judgment.[99]

3.2. A unique database: case population 1985-2015 (n=3000)

For a broader research project, I collected data on all rulings in which the BeCC proclaimed a definitive and substantive judgment[100], for the period between its first ruling (1985) until 2015 (n=3145). In contrast with most studies on Anglo-American Courts, focusing on citation practices within a single year or a selected period of time[101], this database addresses the full scope of BeCC's case law. A long-term study has the advantage that it can reveal how quickly, and to what extent, citation patterns change over time. The database contains information that may be divided in five groups of variables: (1) basic procedural information (e.g. preliminary or annulment procedure), (2) initiating and intervening parties (e.g. individuals, interest groups) (3) identification of the judges, (4) reasoning (e.g. reference norms, citations) and (5) the outcome of the case.

This article concentrates on the citation practice of the Court. The ten most common references were coded as dummy-variables (*CIT_1-10*). Following the categorization in groups from section 2.2.1, I could identify precedents; case law of the Court of Cassation or Council of State (national courts), the ECJ or ECtHR (international courts); parliamentary preparatory documents, political agreements, the legislative advice of the Council of State; scientific evidence and consultation input.[102] Additionally, for each case, I counted the amount of different cited authorities *(CIT_DENSITY).* This count variable is the dependent variable in the poisson regression (section 4.2.).

To uncover patterns in the Court's case law, the other variable groups are also taken into account. More specifically, to determine the extent to which the legal substance of a case affects referencing, I evaluate how the invoked reference norms/the domain in which the case is situated relates to the cited authorities[103]. First, the reference norms against which the BeCC may review were coded in one of following categories *(REFN_1-7)*: the competence allocating rules, the equality clause, other fundamental rights in the Belgian Constitution, EU law, the ECHR, other international law and general principles of law. In addition, each case was registered in one of following legal domains (*DOMAIN_1-15*): law of persons and family law, tax law, judicial organization and civil procedure, constitutional law, spatial planning, environmental and energy law, other administrative law, labour

[96] J. DE JAEGERE (2014).
[97] Article 9§2 of the Special Law
[98] Article 28 of the Special Act.
[99] 'reinforced authority' M.-F. RIGAUX AND B. RENAULD (2009), 257.
[100] In other words, provisional rulings which are –usually- followed by a later definitive judgment (such as in suspension procedures or preliminary questions to the ECJ) and rulings in which the BeCC declared the request inadmissible were not coded.
[101] For an overview, see D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007),735-736.
[102] One should remark that citations to academic scholarship and foreign jurisdiction are left out the analysis, since the BeCC does not explicitly takes these authorities into account. With regard to foreign jurisprudence, GROPPI and PONTHOREAU argue that, even it is not explicitly cited, this jurisprudence unquestionably exercises a hidden influence on all jurisdictions T. GROPPI AND M.-C. PONTHOREAU (2013), 6-7.
[103] Only correlations above 0,1 that are significant to the 0,001 level (***) are discussed in the results section.

and social security law, educational law, migration law, commercial and financial law, substantive and procedural criminal law, property law and special contracts, cultural issues and social services.

Finally, four independent variables are taken into account to analyze the influence on citation density (section 4.2). The first provides information on the group of participants in the procedure. More precisely, for each case, it is calculated how many different categories of participants (e.g. individuals, interest groups, governments) were involved in the procedure (*PART_RATE*). A second dummy variable specifies whether the Court deliberated in full session or not (*DEL_FULL*). Third, whether the Court has (partially) invalidated or modulated the challenged legislation is equally registered as a dummy variable *(VIOLATION)*. In addition, I can rely on an internal database of the BeCC relating to the media-coverage of the Court's case law. More specifically, for each case, it provides information on the amount of newspaper articles that were published before and after the ruling. Considering the dispersed distribution of the data, this information was recoded into a fourth categorical variable *(MEDIA_CAT)* with three values, depending on whether zero articles; 1-10 articles or more than ten articles were published on this specific case.[104] These values represent the non-salient (0), low-salient or (1) highly salient (2) cases.

4. Exploring the results: citation practices of the Belgian Constitutional Court

4.1. Categories of citations: descriptive analysis

4.1.1. Evolution in citation density

Figure 1A: evolution citation density

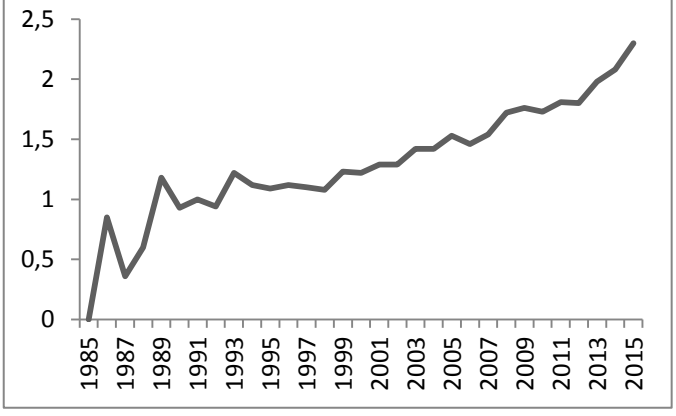


Figure 1A demonstrates that the average amount of citations per case has steadily increased over the years. There are several factors that may explain this upward trend. To begin with, the pool of available citable authorities has simply increased extensively. The more time has passed since the establishment of the BeCC, the more likely that the judges may find precedents or other (inter)national case law relevant to the case before them. [105] Next, the growing amount of legal information is also more and more accessible due to the changes in information technology. [106] The existence of proper searching tools reduces the citation costs for the preparation of judgments considerably.[107] In addition, the number of law clerks, who may supply those citations for the court, has increased over the years. [108] Having additional drafting

[104] The distribution of the categorical variable is as follows: 2262 cases did not receive any media-attention, 796 cases were covered in 1-10 articles and only 87 cases were intensively covered in more than 10 journal articles.
[105] F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 531-533; LUPU Y. AND VOETEN E. (2012), 19.
[106] I. NIELSEN AND R. SMYTH (2008), 212.
[107] J. H. MERRYMAN (1978), 426-427.
[108] Initially, a maximum of ten legal secretaries could assist the judges (Article 23 of the Special Law from 1983). In 1989, this amount was increased up to a maximum of 14 (Article 35 of the Special Law from 1989). Nowadays, a maximum of 24 legal secretaries work for the Constitutional Court. .

assistance has been said to produce lengthier and better supported reasons.[109] Finally, some have argued that the acceleration in socio-economic changes has intensified the struggle between competing interests and has increased demands on courts to be seen to be administering due process. This may result in an increase of citations, since judges have to look for legitimization in the eyes of these competing interests.[110]

Nonetheless, with an average of two different citations per ruling in 2014, the Belgian CC cites less authorities than its counterparts in *common law* systems. Also, although this proportion of cases has decreased over the years, many rulings do not contain any citation to authority.[111] As mentioned before, judgment style may partially explain this difference in citations patterns. In addition, when judges have more control over their dockets –which is usually the case in *common law* courts- they will presumably choose to hear a higher proportion of salient cases.[112] As discussed above, a higher proportion of salient cases may push the average citation levels upward. However, some have argued that this practice may raise certain concerns. If judges are, by virtue of this tradition, not inclined or allowed to openly cite their source of inspiration, will they be, over time, less likely to keep looking for it?[113]

4.1.2. Precedents

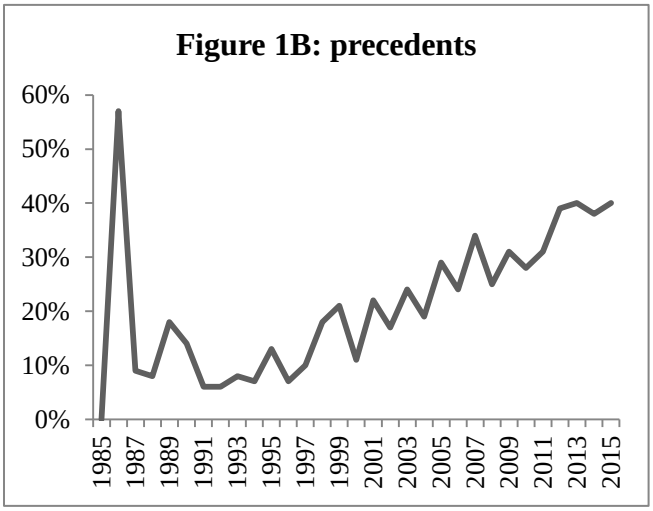


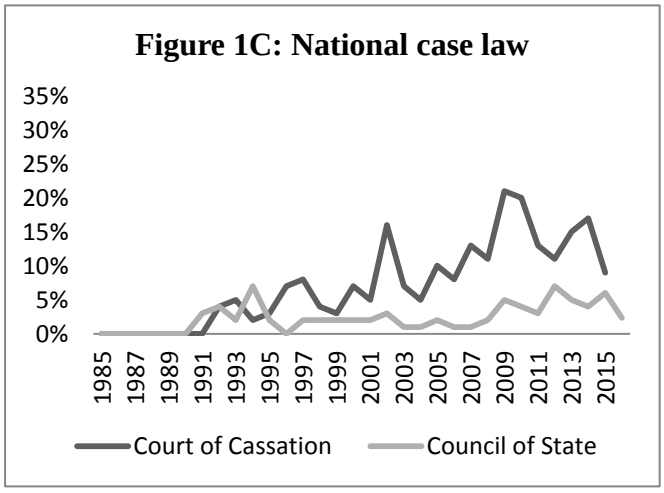
Figure 1B demonstrates that the BeCC increasingly cites precedents.[114] As mentioned before, this may be simply explained by the fact that, over time, the volume of citable cases has grown considerably.[115] Whether the BeCC cited precedents does not seem to depend on the subject matter of the case. Only for migration law (0,103***), the results show a moderate correlation, suggesting that the BeCC takes into account its precedents more strongly when the challenged legislation concerns a migration issue. When studying these cases more in detail, one can infer a certain pattern. Instead of referring to one 'landmark' case, the BeCC prefers to cite recent cases which, in turn, build on older cases. This results in a certain track line that connects the most recent cases to, ultimately, the oldest cases relating to migration law.[116] This practice to build continuously on

[109] R. SMYTH (1999), 60;.F.B. CROSS, J.F. SPRIGGS, T.R. JOHNSON, P.J. WAHLBECK (2010), 531-533.
[110] R. SMYTH (2009), 54.
[111] In total, 9,4% do not contain any citation to authority. In 2015, however, this percentages dropped to 2,5%.
[112] L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 778, 783, 800.
[113] M. BOBEK (2013), 223. Bobek formulated this concern about citations to foreign jurisdiction, but this might be valid for the citation practice in general.
[114] The percentages have to be interpreted with consideration to the amount of cases proclaimed in each year. For example, the peak in 1986 (57%) only represents nine cases, while 40% of the cases in 2015 represent 64 cases.
[115] R. SMYTH (2009), 54.
[116] An example of a such a track line of case law is: CC 1 October 2015, no. 133/2015; CC 30 June 2014, no. 95/2014; CC 27 July 2011, no. 135/2011; CC 1 March 2001, no. 21/2001; CC 30 June 1999, no. 80/99; CC 29 June 1994, no. 51/94.

precedents also appears in other subject matters, such as law of persons/family law[117] and criminal law[118]. Studies on *common law* courts, for which precedents carry more weight due to the 'stare decisis' principle, have led to similar observations. In these studies, several potential explanations were put forward. First, judges might prefer to cite judgments which they wrote. Also, the stock of older decisions will decline over time because cases may be overruled. Lastly, recent cases may be more relevant because the social context has changed.[119] Building on precedents also gives the Court the opportunity to differentiate between similar, but not equal situations and, therefore refine constitutional boundaries. Finally, citations to precedents may serve to legitimate an act of judicial activism. More specifically, when previous case law has pointed out that a legislative initiative is required, and the legislator has not acted upon this request, this gives the Court a strong mandate to invalidate or modulate the challenged legislation.[120]

Another observation is that the BeCC uses its precedents to avoid an overload of work. In particular, the judges-rapporteur may ask for a summary procedure when the preliminary question evidently calls for a negative reply or when the case is manifestly unfounded or relatively straightforward.[121] The data demonstrate that the BeCC refers to precedents in 61,9% of these cases (0,214***).[122] This suggests that this summary procedure is mostly used for cases relating to issues on which the BeCC already took a stance. In those case, BeCC may avoid losing time or energy on drafting a new ruling, by simply taking over the reasoning from the prior case.[123]

4.1.3. Case law of other (inter)national courts



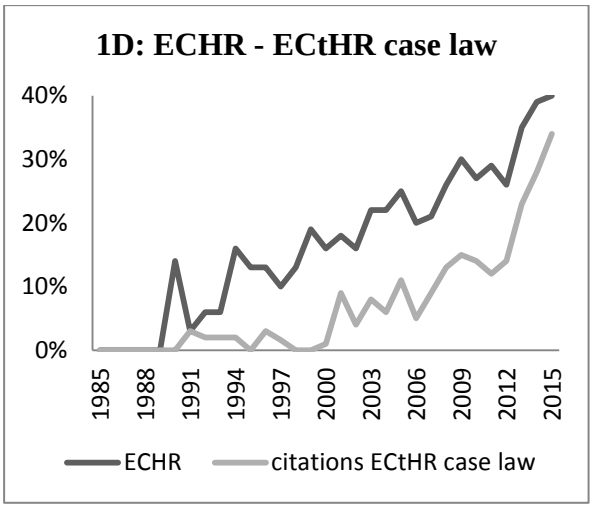
Although citations to the Court of Cassation's case law have fluctuated strongly over the years, figure 1C also suggests an upward trend. A large majority (87,3% [124]) of the cases in which the BeCC cites cassation case law are preliminary questions. This makes sense, since these questions often deal with the interpretation of an existing legal provision. In principle, it belongs to the Court of Cassation, the final appellate court in criminal and civil proceedings, to determine how legal provisions should be applied in practice. The results show that the BeCC especially takes into account case law of the Court of Cassation in

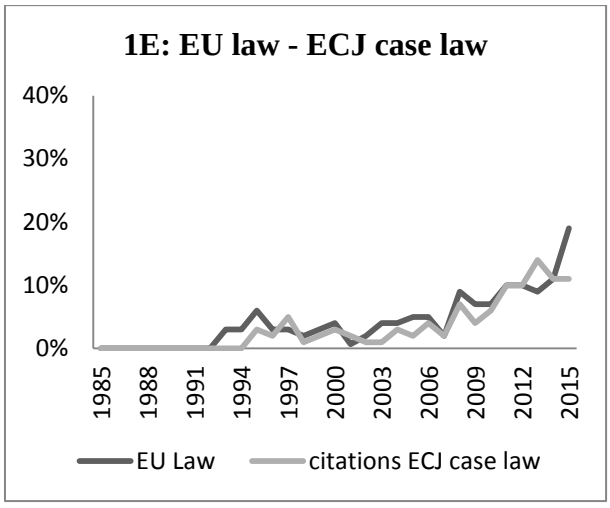
[117] E.g. CC 17 July 2014, no. 118/2014; CC 5 December 2013, no. 165/2013; CC 6 April 2011, no. 54/2011; CC 16 December 2010, no. 144/2010; CC 17 September 2003, no. 112/2003; CC 6 June 1996, no. 36/96.
[118] E.g. CC 19 September 2014, no. 123/2014; CC 19 December 2013, no. 178/2013; CC 11 January, no. 5/2007; CC 26 January 2005, no. 24/2005; CC 22 July 2003, no.104/2003.
[119] R. SMYTH (1999), 62-63; I. NIELSEN AND R. SMYTH (2008), 206.
[120] E.g. CC 21 January 2016 no. 10/2016, building on the precedents CC 8 July 1993, no. 56/93 and CC 7 July 2011, no. 125/2011.
[121] Article 72 of the Special Law.
[122] In contrast, these cases do not significantly correlate with the other citation categories, with the exception of a negative and limited correlation for citations to parliamentary documents (Pearson -0,069; sign 0,000).
[123] E.g. in case no. CC 28 May 2015, 82/2015, the BeCC stated that the challenged legal provision was similar to an provision that had already been declared unconstitutional in case CC 16 February, no. 35/2005.
[124] This deviates strongly from the distribution for the total population of cases (67,2 % preliminary rulings and 32,6 % annulment procedures.)

cases that relate to criminal law (0,120; sign 0,000). Nonetheless, although this case law should thus be considered an important guideline for the BeCC, the Court only explicitly cites cassation case law in 13% of the preliminary procedures. If so, the BeCC doesn't limit these citations to recent case law but, on the contrary, regularly refers to cases that are at least a few years old.[125] Sometimes, the BeCC even deviates from the interpretation given by the Court of Cassation.[126] In annulment procedure, the BeCC very rarely cites cassation case law.[127] However, this occurred more in the years 2002, 2009 and 2014, which explains the peaks in figure 1C. In annulment procedures, there may not be many cassation case law to cite, since the challenged legislation has not yet been applied in practice. Also, these citations generally serve other functions, for example to explain the situation prior to the new legislation or to specify that the legislator wanted to legally consolidate a certain judicial interpretation.[128]

A similar upward trend cannot be noted for the case law of the administrative judiciary[129]. Moreover, with an average of only 2% for the total population of cases, these citations seem negligible. A possible explanation is that administrative jurisdiction may simply not be relevant as often as case law of the Court of Cassation. More precisely, the results demonstrate that case law occurs more in cases that relate to spatial planning (0,128; sign 0,000) and 'other' administrative law (e.g. disciplinary matters) (0,105; sign 0,000). However, these subject matters together only represent 6,7% of the cases, while for example criminal law represents 10,4% of the cases. Nonetheless, these citation exceptionally occur, in preliminary as well as annulment procedures. In the first type of procedure, the administrative case law usually serves to interpret the legislation under review.[130] In annulment procedures, the BeCC also regularly cites administrative case law when the legislation under review concerns a validation of a previous executive decision, which was invalidated by the administrative judiciary.[131] In these cases, the administrative case law may shed light on the ground for this invalidation and, more specifically, to evaluate whether the legislator has succeeded in remedying this error.

[125] E.g. in CC 6 November 2014, no. 2014/163, the BeCC refers to case law that dates back to 1973.
[126] These cases usually result in a 'double interpretation' outcome in which the BeCC states that two interpretations are possible but only one is constitutional. E.g. 24 September 2015, no. 127/2015, B.12.
[127] In 39 cases (3,8%) of the annulment procedures, the BeCC cited case law of the Court of Cassation.
[128] E.g. CC 8 May 2002, no. 2002/086; CC 3 December 2009, no. 2009/196; CC 17 September 2014, no. 2014/120, B.4.4.
[129] Most citations concern case law of the Council of State but, occasionally, the BeCC also refers to the Council of Alien Law Litigation (e.g. CC 16 January 2014, no. 2014/001, B.8.2.) or Council of Permit Disputes (CC 4 November 2015, no. 2015/158, B.5.1.). No citations are known to the case law of the Council for disputes about decisions on study progress.
[130] E.g. CC 4 November 2015, no. 158/2015; CC 10 December 2014, no. 180/2015.
[131] E.g. CC 17 September 2015, no. 119/2015 and CC 19 September 2014, no. 124/2014





As shown in figures 1D and 1E, the BeCC also increasingly accepts the intrusion of EU and ECtHR case law into its jurisdiction.[132] Also, the results suggest that the BeCC is more oriented towards international than national case law. There are several reasons that may explain this evolution. The BeCC is a relatively young court, established when the European legal order was already in place. By then, institutions such as the ECJ and ECtHR had gained considerable importance. Hence, there was already a considerable amount of ECJ and ECtHR judgments to cite. [133] Initially, however, the BeCC only had jurisdiction to review legislation against competence allocating rules. During this period (1985-1989), there was evidently little room for European case law. In 1989, the BeCC was additionally given the competence to review against certain *constitutional* fundamental rights. Through the equality principle, the BeCC incorporated international norms, including European law, into its set of reference norms.[134] Moreover, the BeCC stated that an 'extricable' bond exists between analogous human rights in the Constitution and human rights treaties, such as the ECHR. Hence, it seems appropriate that the BeCC demonstrates it takes into account relevant international case law. Nonetheless, although the data show that the BeCC has been reviewing legislation against these international norms from 1990 onwards, figures 1D and 1E show that the share of cases in which the BeCC cites ECtHR and ECJ case law have long been limited, with a noticeable 'turn' in 2000 for ECtHR case law and again after 2006-2007 for both judicial institutions.

Considering the bond between human rights provisions in the Constitution and the ECHR, the case law of ECtHR is considered a major directive for the interpretation of the constitutional rights.[135] However, before 2000, the BeCC did not often cite ECtHR case law in cases in which it had to apply the ECHR (0,172***).[136] This contrasts immensely with the period after 2000 (0,498***).[137] Moreover, this correlation has grown stronger ever since (2015: 0,672***). These results suggest that something else than an increased invocation of the ECHR is additionally pushing these citation levels upwards.

[132] Previous, more limited, studies on the BeCC have already suggested the existence of these tendencies, see P. POPELIER (2012), 86 and S. LAMBRECHT (2013), 312-315.
[133] P. POPELIER (2012), 89: *"In contrast with, for example the German Bundesverfassungsgericht, the BeCC is therefore not hampered by a long tradition of constitutional review giving rise to a comprehensive national doctrine of fundamental rights."*
[134] See supra footnote 87.
[135] P. POPELIER (2012), 89.
[136] More precisely, in only 5,3% of these cases.
[137] The results also suggest a strong correlation between ECtHR case law and other reference norms: constitutional rights (other than the equality clause), international human right treaties, EU law and general principles of law. However, this is explained by the fact that these reference norms are usually invoked together with the ECHR. When excluding the cases with this combination from the dataset, the correlation disappears.

An alternative explanation may be that the Court, and more specifically the law clerks who prepare the judgments, are nowadays more oriented towards European jurisdiction. Also, the ECtHR itself encourages domestic supreme courts to take into account (to a greater extent) its case law. More specifically, the ECtHR states that a broader margin of appreciation is given when its case law was comprehensively analysed.[138] Even so, in 2015, the BeCC still neglected to mention relevant ECtHR case law in 26,6% of the cases it was requested to apply the ECHR.[139] This may cause issues for the margin of appreciation given by the ECtHR, but also might go against basic principles of transparency and adequate reasoning.[140]

The ECtHR seems to especially shape constitutional decisions of the BeCC relating to the law of persons and family law (0,119***) and criminal law (0,113***). This can only be partially explained by the prominence of articles 6 (right to a fair trial) and 8 (right to respect for one's private and family life) ECHR as reference norms in the BeCC's case law.[141] In addition, as recent cases no. 101/2015[142] and 155/2015[143] confirm, ECtHR case law also serves as an inspiration in this type of case even when these articles were not invoked. The BeCC is less willing to accept this kind of intrusion of EctHR case law in other subject matters.[144]

Figure 1D demonstrates that the ECJ plays a less prominent role in the BeCC's case law. In addition, a different pattern appears with respect to the bound between the invocation of EU law and citations to the ECJ. In contrast to the ECHR-ECtHR combination, the BeCC has quickly explicitly looked for guidance at the European Court of Justice. This bound between the invocation of EU law and the ECJ case law (0,460***) has remained relatively stable [145], but did not intensify similar to the ECtHR case law. Another situation where it would be appropriate to take into consideration ECJ case law is when the legislation under review has been adopted to fulfil an international obligation, such as the implementation of a European directive (0,283***). Finally, these citations evidently also appear in rulings that ensue a preliminary procedure before the ECJ, initiated by the BeCC (0,224***). Nonetheless, the BeCC still regularly fails to demonstrate it took into account ECJ relevant case law when appropriate, meaning in one of above three situations. More specifically, in 2015, the BeCC did not cite any ECJ case law in more than half (55,3%) of these cases.[146] Although this does not mean that ECJ case law was not consulted, exhibiting this more strongly would enhance the transparency and quality of the BeCC's reasoning.

In conclusion, although there is room for improvement, these results confirm the BeCC's reputation of taking a Europe-friendly stance.[147] While national jurisdiction together explicitly contributed to shaping constitutional decisions in 17% of BeCC's rulings in 2014-2015, the ECJ and ECtHR together were cited in 38% of these rulings. Studies on other European constitutional courts have equally confirmed that both the ECHR as EU-law play a considerable role in their decision-making process.

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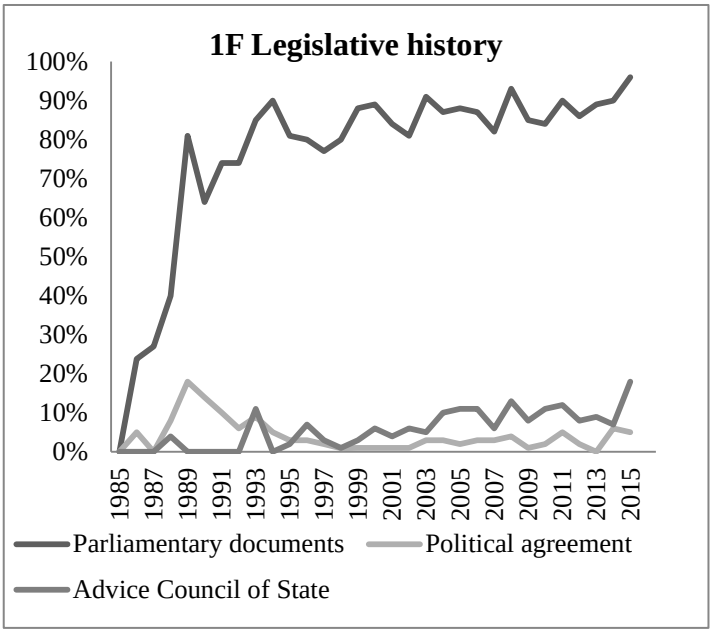
[138] S. LAMBRECHT (2013), 304: *"the more domestic supreme court include ECtHR case law in their motivation, the less risk they bare for a violation."*
[139] E.g. CC 12 February 2015, no. 016/2015.
[140] S. LAMBRECHT (2013), 315.
[141] S. LAMBRECHT (2013), 315.
[142] CC 2 July 2015, no. 101/2015.
[143] CC 29 October 2015, no. 155/2015.
[144] More precisely, 42% of this type of cases relates to these subject matters, while together, these domains only represent 11,5% of the total case population.
[145] Before the increase of citation in 2008 (0,436***) and from 2008 onwards (0,474***).
[146] E.g. CC 28 January 2015, no. 9/2015. In this case, the BeCC was requested to review legislation relating to the fight against terrorism, implementing a European framework decisions.
[147] P. POPELIER (2012), 81.

4.1.4. Legislative history



Regarding the preparatory legislative documents, Figure 1F shows that the BeCC consequently looks into the parliamentary documents preceding the challenged legislation. Since 1993, these percentages have remained relatively stable and –in comparison to any other authority- very high (average 85,5%). These citations occur the most when the BeCC is requested to review against the equality clause (87,9%).[148] In this type of rights adjudication, the CC developed a step-by-step proportionality analysis, inspired by the case law of the ECHR.[149] The last step, the 'justification test' requires an evaluation of the legitimacy of the legislative objective, its necessity and the causality and proportionality between this objective and the challenged legal provision.[150] Logically, the parliamentary documents are an important guideline to makes this evaluation. The BeCC also regularly cites parliamentary documents in cases relating to a conflict of competences (78,7%). In these cases, the consultation of parliamentary documents serve another purpose. In order to judge whether the legislation under review violates the competence allocating rules, the BeCC does not only looks into the parliamentary documents preceding the challenged legislation itself, but also those relating to the allocating rules.[151]

The adoption of these competence allocating rules often ensued difficult political negotiations, culminating in a political agreement. Hence, it is not surprising that citations to these agreements mostly appear in cases relating to constitutional law, such as electoral legislation or legislation that implements a state reform (0,193***).[152] However, citations to political agreements also appear in cases relating to other subject matters, reflecting the Belgian political practice to search for a broad consensus amongst linguistic, political and/or social partners.[153] For example, the BeCC acknowledged the importance of cooperation in social matters.[154] Also, with regard to 1988 "*the octopus agreement*" on the law enforcement reform, the BeCC has repeatedly argued that a partial annulment would upset the balanced character of the overall agreement.[155]

[148] When the equality clause is invoked (combined or not with other fundamental rights), an
[149] EHCR No. 6, *the Belgian Linguistic case*, 23 July 1968.
[150] P. POPELIER (2008); 103-104.
[151] E.g. 28 May 2015, no. 80/2015, B.3.2., B.4.1. (relating to the competence allocating rules) and B.12. (relating to the challenged legislation).
[152] E.g. CC 3 April 2014, no. 57/2014, B.6.5.
[153] The Belgian political system is often categorized as a 'consociational' or 'consensus' democracy. E.g. G. PETERS (2006); A. LIJPHART (2012).
[154] E.g. CC 17 September 2015, no. 116/2015. The BeCC confirms (B.12) that the challenged legislation constitutes a compromise that has been adopted after long and difficult negotiations with the social partners.
[155] E.g. CC 9 June, no. 64/1999, B.4.3.; CC 11 November, no. 149/2006, B.6.; CC 17 January, no. 11/2007, B.4.; CC 19 February, no. 22/2015, B.9.

Although the advices of the Council of State are equally accessible to the members of the BeCC as the parliamentary documents, they are cited only rarely. Figure 1F shows a slow increase, with a recent peak in 2015. It is unclear whether this is an actual trend or a one-time outlier.[156] This does not mean, however, that these advices carry less weight. On the contrary, while parliamentary documents may be cited *pro forma*, these advices regularly contribute substantively to the BeCC's decision. Remarks of the Council of State on the constitutionality of the –then not yet adopted- provision are sustained by the Constitutional Court. More precisely, it seems more difficult for the legislator to justify legislation that has been previously disapproved by the Council of state.[157]

4.1.5. Secondary authorities

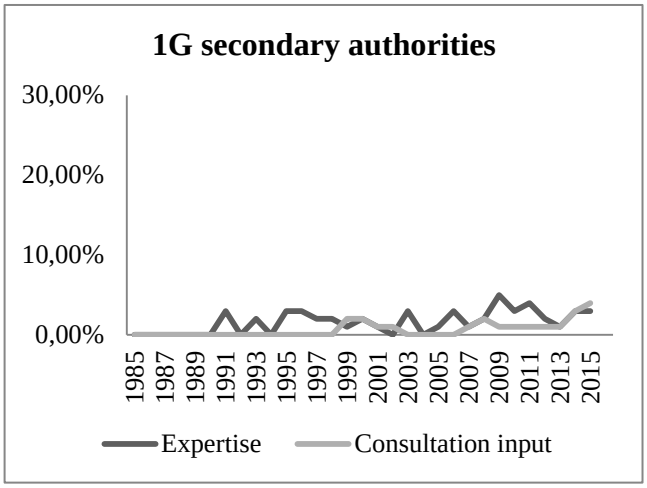


Figure 1G suggests that while the judges may be consulting secondary authorities (such as academic scholarship or scientific studies) at the present time, any such research is hardly reflected in citation patterns. Also, the figure shows no sustained increase of these citations over the years.

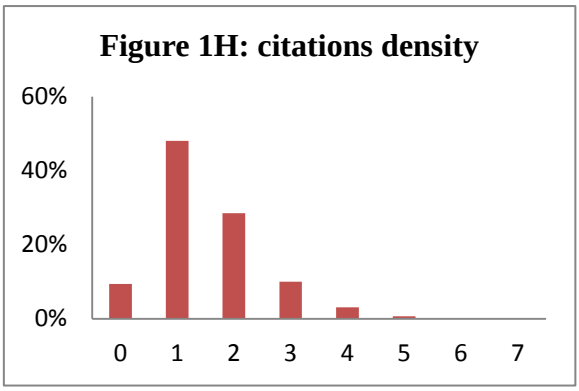
This contrasts immensely with the citation practices of Anglo-American countries, where these secondary sources play an important role. First, supreme courts in *common law* countries regularly cite academic work. [158] Although there have been some critical voices at first[159], in general, this practice is widely accepted. These citations are usually included in footnotes, similar to academic scholarship. Although the internal drafts of the BeCC's rulings probably include references to literature, they are not as such published on the website. Including these references would reveal how and by whom judgments are prepared. For example, some studies in the US have suggested that the tendency of the US Supreme Court to cite some sources more than others might be attributable to the fact that law clerks prefer to cite scholars or periodicals that are connected to the university where they graduated from. [160]

Scientific studies, especially from social science, have also found their way into *common law* rulings.[161] Especially the US Supreme Court is known to cite this type of authorities. [162] This is said to

[156] Preliminary results from 2016 (citation to advice of the Council of State in 1 of 13 cases) suggest that it may not be a significant trend.
[157] E.g. CC 29 January 2014, 20/2014, B.10; CC 22 January, no. 1/2015, B.6.3.; CC 14 January 2016, no. 2/2016, B.2.2.
[158] E.g. L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 814; V. BLACK AND N. RICHTER (1993); R. SMYTH (1999); D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007); J. J. HASKO (2002).
[159] For example, some judges have argued that the Canadian Supreme Court is not sufficiently selective in weighing up academic authorities to decide which are worth citing and that academic citations might reduce the authority of the judge. D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007), 743, see also R. SMYTH (1999), 56-57.
[160] E.g. W. DANIELS (1983).
[161] E.g. during the period 1985-1990, the Supreme Court of Canada has cited academic scholarship in an average of 40% in its decisions. V. BLACK AND N. RICHTER (1993), 382.
[162] In 1981, social science, economic or technical studies were cited in only 0,6% van de cases. It was suggested that judges of the US Supreme Court felt that only "legal" authorities were legitimate. A famous case in which the US Supreme Court cited (in a footnote) a number of social science studies was *Brown v. Board of Education* (1954). In this case, the Court used psychological evidence to establish that the racial segregation of schools

be partially due to the large amount of public interest litigation and amicus curiae involvement in US cases.[163] This kind of litigation would involve either parties or issues (or both) that are much more likely to place secondary material before the courts.[164] In constitutional adjudication in Continental Europe, social science approaches play only a marginal role. NIELS PETERSEN, who studied the role social sciences in constitutional adjudication, has suggested that lawyers, who are mainly concerned with normative questions, fear intrusion of consequentialist approaches. However, normative arguments are often based on empirical assumptions that need clarification and social science studies might provide more insight than legislative history can.[165] This is especially so when executing the above-mentioned justification test (4.1.4.), when the Court has to weigh costs and benefits of the rules through which the policy rationale is implemented.[166] However, lawyers, especially in Continental Europe[167], are usually not trained to interpret social science research. As PETERSEN argues, there are several strategies for judges to deal with empirical questions[168], but none is wholly satisfactory. Hence, courts may be reluctant to cite scientific studies until an effective standard of control is established.[169]

4.2. Citation density: regression analysis



While this article up till now has concentrated on *which* authorities have been cited over the years, in this section, I strive to explain the variation in citation density. As illustrated by figure 1H, the BeCC regularly cites one sole authority, usually parliamentary documents[170]. In 10% of the cases, the BeCC even chose not to cite any authority. At the other end of the spectrum, only 1% of the cases was documented more extensively with 5 or more cited authorities.

Previously, in section 2.2.2., I hypothesized that some decisions require more display of authorities than others. More specifically, I argued that two case-specific features might push citation levels upward. First, rulings that relate to highly salient issues may exhibit greater reliance on authorities. Three variables were put forward as *proxies* for salience: the media-coverage of the case, whether the court deliberated in full session or not and the quantity of various participants. Next, I argued that the BeCC will embed its rulings more strongly when the challenged legislation has been invalidated or modulated, in order to anticipate pushback from the legislator. To test these hypotheses, I estimate a

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caused psychological harm to black students and thus violated the equal protection of the Fourteenth Amendment. N. PETERSEN (2013), 295.
L. M. FRIEDMAN, R. A. KAGAN, B. CARTWRIGHT AND S. WHEELER (1981), 817.

[163] Another reason is the propensity the US Supreme Court to cite social science evidence in capital punishment cases and case relating to the Bill of Rights. R. SMYTH (1999), 67.

[164] D. FAUSTEN, I. NIELSEN EN R. SMYTH (2007),761.

[165] C. FLANDERS (2009),69.

[166] See above, footnote 161. Another example: the South-African CC found that there is no evidence that the death penalty is a greater deterrent of crime than imprisonment, and therefore that the death sentence was unconstitutional. CC South Africa, 6 June 1995, S v Makwanyane and Another (CCT3/94).

[167] In contrast, several US Law Faculties have programs and research centres that focus on empirical legal work.

[168] Judges can interpret social facts on their own, they can afford a margin of appreciation to the legislature or they can defer the question to social science experts. N. PETERSEN (2013), 306-317.

[169] N. PETERSEN (2013), 317.

[170] In 91,7% of these cases, the BeCC referred to parliamentary documents; in 5,6% to precedents.

poisson model[171] that includes each of these independent variables, as well as two control variables: the amount of pleas that were raised by the litigants and the type of procedure. The amount of pleas may affect the Court's citation practice because the BeCC is, in principle, inclined to respond to each point of criticism raised by the litigants. Studies on Anglo-American Courts have also suggested a reasonably close relationship between the average length of cases and the average citations per case.[172] In order to evaluate how these control variables affects the parameter estimates of the other independent variables, I estimated a second model in which the control variables are excluded.

	MODEL 1		**MODEL 2**	
	Parameter estimates (B) (standard error)	**Exp (B)**	**Parameter estimates (B) (standard error)**	**Exp (B)**
Independent variables				
Intercept	0,194*** (0,0319)	1,214	0,197*** (0,0320)	1,217
Violation found (REF=0)	0,042 (0,0319)	1,043	0,069* (0,0316)	1,072
Media attention > 10	0,157 * (0,0786)	1,169	0,248** (0,0763)	1,281
Media attention 1-10	-0,017 (0,0362)	0,983	0,10 (0,0347)	1,011
Media attention = 0 (REF)	/	/	/	/
Deliberation in full session (REF=0)	0,290 *** (0,0306)	1,336	0,315 *** (0,0303)	1,370
Participation rate	0,013 (0,0178)	1,013	0,039* (0,0171)	1,040
Control variables				
Amount of pleas	0,029 *** (0,0032)	1,030	/	/
Type of procedure (REF= preliminary proc)	0,005 (0,0345)	-0,062	/	/
Goodness of fit				
Deviance	0,594		0,616	
Pearson Chi-square	0,522		0,548	
Likelihood ratio-square	239,931***		169,555***	

Table 1 – Model effects (= p< 0,001; **=p<0,01; *= p< 0,05)***

The goodness of fit demonstrates that both models accurately estimate the effects of the independent and control variables, but that the full model 1 (including the control variables) fits the data better. In principle, the intercept equals the citation density when all other variables in the model are evaluated at zero. However, in both models, there are no cases that meet that condition and, therefore, the intercept loses it practical meaning. The other parameter estimates show the effect size of the independent variables on citation density, when all other variables are held constant. The first column shows the logs of the expected increase. However, to facilitate the interpretation of the estimates, as

[171] Poisson regression is an accurate model when the dependent variable is a count variable (in this article, the amount of cited authorities). However, an additional model will be tested that includes a control for the year-fixed effects.

[172] I. NIELSEN AND R. SMYTH (2008), 199. However, the average length of the case was not coded (and could not easily be coded) for the BeCC's case law. The amount of pleas, however, serves as a adequate *proxie*

second column with exponential estimates was added. These numbers indicate the multiplication of citation density when a certain independent variable is present rather than absent.

A first observation on table 1 is that the amount of pleas raised by the litigants significantly pushes the citation density upwards. With each additional plea that is raised, the citations density increases with 3%. On the other hand, the type of procedure does not seem to affect the citation practices of the Court. The results show that the BeCC generally cites as many authorities in annulment procedures as in preliminary procedures.

The first hypothesis is strongly supported by the data, since both models show that the variables relating to case salience significantly push citation density upwards. When the Court deliberates in full session, which indicates that the case is more complex or sensitive than others, the ruling is documented with 34% more citations to authorities. The independent variable remains positively and significantly correlated with citation practices, even with the introduction of the control variable, meaning it influences citation rates independently of this consideration. [173] It appears that media-attention is also a reasonably good indicator of case salience. While little media attention (1-10 journal articles) does not seem to affect citation practices, this does seems to play a role when a case has been intensively covered by Belgian journals (>10). [174] In the model without the control variable, the significance of this estimate increases. This result suggests that litigants will try to challenge legislation on more grounds, hence increasing the amount of pleas, when the issue is more salient. Nonetheless, model 1 suggests that citation density is additionally pushed upward when more and more media report on the issue. In particular, when comparing this highly salient cases to cases that did not receive any media-attention, the citation density increases with 17%.[175] Finally, the findings in model 1 suggest that the participation rate does not affect the citation practices of the Court. At first sight, this seems surprising because one would expect that salient case attract more litigants. However, this should be interpreted with respect to the estimates from model 2. These results indicate that the participation of a variety of litigants has an indirect effect on citation density. More specifically, more participation will result in a higher amount of pleas (Phi 0,214***) which, in turn, increases citation density. In contrast with the deliberation in full session and, to a lesser extent, the media-coverage of the case, the participation rate is not positively associated with citation density independently from the amount of pleas.

In contrast with the effect of salience, the fact that the BeCC has (partially) invalidated or modulate the challenged legislation only has a moderate influence on citation density. Adding the control variables to the model causes an alteration in effect of finding a violation. More specifically, the effect is only slightly significant when these variables are excluded from the model. In that case, citation levels increase with 7% when a violation is found.[176] However, the results from model 1 suggest the amount of pleas correlates to the finding of a violation. More specifically, the more pleas are raised, the more chance at least one violation will be found (Phi 0,173***). When the amount of please are held constant (model 1), the finding of a violation does not significantly affect citation density. This

[173] When the BeCC deliberates in full session, this pushes the average citation density to 1,88, while in other cases this drops to 1,41.

[174] Many cases with five or more cited authorities were covered in more than ten journal articles: E.g. CC 6 October 2005, no. 157/2004 (anti-discrimination legislation); CC 19 July 2007, no. 105/2007 (special investigation methods); CC 31 May 2011, no. 89/2011 (higher education, limitations for foreign students); CC 17 September, no. 114/2015 (nuclear tax).

[175] A case that was covered in more than 10 journal articles has an average citation density of 1,82, while no media-coverage will decrease this number to 1,55.

[176] An average of 1,76 citations appear in cases where a violation was found, while this drops to 1,64 when the challenged legislation is found completely constitutional.

conclusion deviates from the initial hypothesis that the BeCC would want to document these rulings more intensively, in order the prevent pushback from politicians. However, as previously mentioned, a similar study on the ECtHR has equally demonstrated that the finding of a violation only has a modest effect on citation practices.

5. Conclusion

This aim of this article was to describe and analyze the citation practice of the Belgian Constitutional Court over the course of period from 1985-2015. This study is amongst the most comprehensive analyses of judicial citations by any European constitutional court. However, it is important to reiterate the limitations of the analysis. More specifically, by only registering explicit citations to authority, some significant features of the BeCC's reasoning might be missed. The extent to which the Court relies on certain types of authority may be greater than the data suggests. Nonetheless, while the study is but a beginning, it contains some profound findings.

First, although many cases did not contain any citation to authority (9,4%), the results suggest that overall there has been a trend towards citing more authorities. In terms of which authorities get cited, the BeCC takes a prudent approach. Often, rulings are documented with only one *routine* citation to parliamentary documents (44,1%). Hence, less than half of the Court's rulings contain references to other external authorities than parliamentary documents. However, citation patterns have broadened considerably. In 2015, the proportion of cases that were documented with either no citations or with merely one *routine* citation dropped to 27,5%. Further, the BeCC has a (increasingly) strong preference for citation to judicial decisions, whether they are their own or from other (inter)national courts. This is consistent with studies on Anglo-American Courts, which show that they preferably cite decisions from other judges who speak the same judicial language. This study also confirms the (increasingly) Europe-friendly reputation of the BeCC. In 2015, the proportion of cases with citation to either the ECJ or ECtHR climbed up to 38%. However, the BeCC does not follow the global trend to cite decisions of foreign national courts. It has been noticed that this is not uncommon for European Courts that already give European (case) law an important role.[177] Another contrast with *common law* courts is that the BeCC rarely looks outside the law for authority. Citations to information coming from other sources, such as scientific studies, academic work or advices from expert organizations, are very scarce. The proportion of cases citing these authorities also hardly grew over the years. Old habits of citation persist, no doubt, because judges still feel that only legal authorities are legitimate or because they want to avoid criticism.

With regard to variety in citation density, it is apparent that salient cases are documented with more authorities than non-controversial cases. To begin with, extended media coverage and the fact that the Court deliberated in full session additionally increase the citation density, independently of the amount of pleas and the type of procedure. These findings imply that courts do respond to external incentives and that citations serve the purpose of legitimating decisions to a public audience. The participation rate only has an indirect effect on citations. More participation increases the amount of pleas that the BeCC has to respond to, and this control variable clearly significantly pushes citation density upwards. In addition, the results suggest that the BeCC does not feel the need to cite more authorities when it invalidates or modulates legislation. This would serve the purpose of convincing the legislator to repair the established unconstitutionality. Combining the results from both models, only an indirect

[177] M. BOBEK (2013), 195. Bobek states that there is an inverse correlation between the amount of mandatory foreign sources (such as the ECJ and ECtHR) and non-mandatory foreign inspiration

effect can be found. The more pleas are raised, the more likely a violation will be found. However, when comparing citation density within groups of cases with the same amount of pleas, the alleged effect of finding a violation disappears. Hence, the results demonstrate that the BeCC embeds its ruling more strongly when a case is politically salient, irrespective of the outcome of this case.

Although this study relates to a single court, one can argue that the implications of this analysis extend beyond Belgium. Constitutional courts of other European countries share many of the same institutional characteristics as the BeCC as well as the requirement to give reasons. Hence, these results may of interest for scholars from other European countries. Also, in this article, I have emphasized certain similarities and differences with regard to citation practices in European and Anglo-American courts. Finally, this article provides a base from which a great deal of further research may proceed. It would be, for example, enlightening to test whether the thoroughness of the BeCC's justification effectively stimulates compliance with its decisions. An extended empirical study might include an actual citation count for each separate category of authorities or a network analysis between these authorities. [178] Another surplus would be to add a qualitative approach that is capable of probing more deeply, such as interviews with court personnel.[179]

[178] E.g. J. STABEN (2015). This method focuses on the connection of entities and looks for conclusions regarding the nature of certain networks and potential relations within. The pictured overall network is created by the decisions depicted as dots and the references as lines connecting the dots.
[179] D. S LAW AND W.-C. CHANG (2011), 527.

6. References

A. ALEMANNO A. (2013), "The Emergence of the Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review.", in *The Theory and Practice of Legislation* 1(2), 1-16.
ALEXANDER L. (1998). "The Banality of Legal Reasoning." In *Notre Dame Law Review*, 73(3) (517-533), 519.

B. BARBIER DE LA SERRE E. AND SIBONY A.-L. (2008), "Expert Evidence before the EC Courts." in *Common Market Law Review,* 45, 941-985
BENTELE U. (2009). "Mining for Gold: The Constitutional Court of South Africa's experience with comparative constitutional law." *Georgia Journal of International and Comparative Law* 37(1): 221-265.
BLACK V., RICHTER N. (1993). "Did she Mention My Name?: Citation of academic Authority by the Supreme Court of Canada." *Dalhousie Law Journal*, 377-394.
BOBEK M. (2013), *Comparative reasoning in European Supreme Courts*, Oxford, Oxford University Press, 310p.
BREMS E. AND LAVRYSEN L. (2013), "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights" in *Human Rights Quarterly* 2013, vol. 35 (1), 176 -200.
BROUARD S., (2009). "The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition." *West European Politics* 32(2): 384-403;
BUSTAMATE T. (2015), "The Ongoing Search for Legitimacy: Can a 'Pragmatic yes Principled' Deliberative Model Justify the Authority of Constitutional Courts?", *The Modern Law Review*, 78(2): 372-393.

C. COMELLA V. F. (2009), *Constitutional courts and democratic values*, London, Yale University Press, 238p.
COLLINS T. A. AND COOPER C. A. (2012). "Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure." *Political Research Quartely* 65(2): 396-407.
CLAES M., DE VISSER M., POPELIER P. AND VAN DE HEYNING C. (2012), "Introduction: on constitutional conversations" (1-10) in M. CLAES, M. DE VISSER, P. POPELIER AND C. VAN DE HEYNING (eds.), *Constitutional Conversations in Europe - Actors, Topics and Procedures*, Antwerp, Intersentia, 399p.
CLARK T. S. ET AL. (2015). "Measuring the Political Salience of Supreme Court Cases." *Journal of Law and Courts* 3(1): 37-65.
CROSS F.B., SPRIGGS J.F., JOHNSON T.R., WAHLBECK P.J. (2010), "Citations in the U.S. Supreme Court: an empirical study of their use and significance." In University of Illinois Law Review 2 (489-575), 531-533

D. DANIELS W. (1983). "Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Opinions October Terms 1900,1940 and 1978." *Law Library Journal* 76(1): 1-47
DWORKIN R. (1996), *Freedom's Law: The Moral Reading of the American Constitution*, Oxford, Oxford University Press, 427p.
DYEVRE A. (2010), "Unifying the Field of Comparative Judicial Politics: Towards a General Theory on Judicial Behaviour." *European Political Science review* 2(2), 297-327.

E. ELSTER J. ET AL. (1998), *Deliberative Democracy*, Cambridge, Cambridge University, 282p.
EPSTEIN L. AND SEGAL J. A. (2000). "Measuring Issue Salience." *Amercian Journal of Political Science* 44(1): 66-83

F. FAUSTEN D., NIELSEN I. EN SMYTH R. (2007), "A century of citation practice on the Supreme Court of Victoria." In *Melbourne University Law Review*, 31 (733-804), 734.
FEARON J. D. (1998), 44-68, "Deliberation as Discussion", 44-68, in J. Elster, *Deliberative Democracy*, Cambridge, Cambridge University Press**,** 282p.
FEREJOHN J. AND PASQUINO P. (2010), "The countermajoritarian opportunity." in *Journal of Constitutional Law*, 13(2), 353-396
FISS O. (2003), *The Law as it could be*, New York, New York University Press, 291p.
FLANDERS C. (2009). "Towards a Theory of Persuasive Authority." *Oklamhoma Law Review* 62, 55-88
FLANDERS C. (2009), "Towards a Theory of Persuasive Authority.", *Oklamhoma Law Review*, 55-88.
FRIEDMAN L.M., RKAGAN. A., CARTWRIGHT B. AND WHEELER S. (1981). "State Supreme Courts: A century of citation." in *Stanford Law Review*, 33 (773-818), 773.
FRIEDMAN B. (2006), "Taking Law seriously." in *Perspectives on Politics* 4(2) (261-276), 262.

G. GARGARELLA R. (1998), "Full Representation, Deliberation and Impartiality", 260-280, in J. ELSTER, *Deliberative Democracy*, Cambridge, Cambridge University Press, 282p.
GAROUPA, N., ET AL. (2013). "Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court." *Journal of Law, Economics, and Organization* 29(3): 1-22
GLENN H. P. (1987). "Persuasive Authority." *McGill Law Journal* 32(2), 261-298
GREMBI, V. AND N. GAROUPA (2015) "Judicial Review and Political Partisanship: Moving from Consensual to Majoritarian Democracy." *International Review of Law and* Economics 43: 1-40.
GRIMMELIKHUIJSEN S. G., MEIJER A. J. (2012). "The Effects of Transparency on the Perceived Trustworthiness of a Government Organization: Evidence from an Online Experiment." *Journal of Public Administration Research and Theory Advance Acces*, 1-21
GROPPI T. AND PONTHOREAU M.-C. (2013), "Introduction. The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?" (1-10) In T. GROPPI AND M.-C. PONTHOREAU (EDS.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart Publishing, 2-3.
GUARNIERE, C. AND PEDERZOLI, P. (2003), *The Power of Judges: a Comparative Study of Courts and Democracy*, New York, Oxford University Press, 235p.
GUTTMAN A. AND THOMPSON D. (2002), "Deliberative democracy beyond process." In *The Journal of Political Philosophy* 10(2): 153-174

H. HASKO J. J. (2002), Persuasion in the Court: nonlegal materials in U.S. Supreme Court opinions, *Law Library Journal* 94(3), 427-457.
HEISE M. (2002), "The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism.", *University of Illinois Law Review* (4) (819-850), 826.
HÖNNIGE C. (2011), "Beyond judicialization: why we need more comparative research about constitutional courts." *European Political Science*, 10, 346-358.

I.
J.
K. KANTOROWICZ, J. AND GAROUPA N. (2015), "An empirical analysis of constitutional review voting in the polish constitutional tribunal, 2003–2014.", *Constitutional Political Economy* 27(1): 66-92

L. LAMBRECHT S. (2013), 'The attitude of four supreme courts towards the European Court of Human Rights: Strasbourg has spoken...', 301-326, in S. BESSON AND A. R. ZIEGLER, *Le juge en droit international et européen – The Judge in International and European Law*, Zürich, Schulthess, 343p.
LASSER M. (2004), *Judicial Deliberations; A comparative Analysis of Judical Transparancy and Legitimacy*, Oxford, Oxford University Press, 381p.
LAW D. S AND CHANG W.-C. (2011), "The Limits of Global Judicial Dialogue." In *Washington Law Review* 86 (523-578), 527.
LIJPHART, A. (2012), *Patterns of Democracy*, New Haven, Yale University Press, 438p.
LUPU Y. AND VOETEN E. (2012). "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights." *British Journal of Political Science* (1-43)
LUPU Y. AND FOWLER J. H. (2013), "Strategic Citations to Precedent on the U.S. Supreme Court." *Journal of Legal Studies* 42, 151-186.

M. MCCORMICK P. (1993), "Judical Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices." *Manitoba Law Journal*, 286-305
MCCORMICK P. (1995), "The Supreme Court cites the Supreme Court: follow-up citaion on the Supreme Court of Canada, 1989-1993.", *Osgoode Hall Law Journal*, 33(3): 453-305.
MENDES C. H. (2013), *Constitutional courts and deliberative democracy*, Oxford, Oxford university press, 249p.
MERRYMAN J. H. (1978), "Toward a Theory of Citations: an empirical study of the citation practice of the California Supreme Court in 1950, 1960 and 1970" in *Southern California Law Review*, 50 (381-428), 398.
MOON C. (2003). "Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?" in *Washington University Journal of Law & Policy*, 12(1) (229-247), 243.

N. NIELSEN I. AND SMYTH R. (2008), "One Hundred Years of Citation of Authority on the Supreme Court of New South Wales." In *University of New South Wales Law Journal* 31(1) (189-214), 194-195.

O.

P. PARKINSON J. (2006), *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy*, Oxford, Oxford University Press, 209p.
PETERS, G. (2006). "Consociationalism, corruption and chocolate: Belgian exceptionalism." *West European Politics* 29(5): 1079-1092
PETERSEN N. (2013). "Avoiding the common-wisdom fallacy: the role of social sciences in constitutional adjudication." *International Journal of Constitutional Law* 11(2), 294-318.

POPELIER P. (2012), “Judicial Conversations in Mulitlevel Constitutionalism. The Belgian Case” (73-99) in M. CLAES, M. DE VISSER, P. POPELIER AND C. VAN DE HEYNING (eds.), *Constitutional Conversations in Europe - Actors, Topics and Procedures*, Antwerp, Intersentia, 99.

Q.

R.

S. SHAPIRO M. (1992). "The Giving Reasons Requirement." *The University of Chicago Legal Forum* 179: 179-220.
SHAPIRO M. AND STONE SWEET A. (2002), *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 417p.
SMYTH R. (1999), "What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts.", *Adelaide Law Review*, 51, 51-79
SMYTH R. (2000), "Judicial Citations – an Empirical Study of Citation Practice in the New Zealand Court of Appeal." *Victoria University of Wellington Law Review*, 31(4), http://www.nzlii.org/nz/journals/VUWLawRw/2000/41.html
SMYTH R. (2009). "Trends in the Citation Practice of the Supreme Court of Queensland over the course of the twenthieth century." *The University of Queensland Review* 28(1), 39-80.
STABEN J., Colourful Case Law: Citation Analysis of the German Constitutional Court’s Jurisprudence, www.verfassungsblog.de (26 Januari 2015)
STONE SWEET A. AND MATHEWS J. (2008), "Proportionality Balancing and Global Constitutionalism" in *Colombia Journal of Transnational Law*, 47: 73-165

T. TWINING W. ET AL. (2003), “The Role of Academics in the Legal System”, 920-949 in P. CANE AND M. TUSHNET, *The Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 1071p.

U.

V. VANBERG, G. (2005), *The Politics of Constitutional Review in Germany*, Cambridge, Cambridge University Press, 208p.
VAN HOECKE M. (2013), “Constitutional courts and deliberative democracy”, 183-197, in A. MAZMANYAN, P. POPELIER AND W. VANDENBRUWAENE, *The Role of Constitutional Courts in Mulitlevel Governance*, Cambridge, Intersentia, 310p.