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Separate opinions in the constitutional jurisdictions of the Baltic States: Applicants and politicization of judgments

Research Article

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Abstract: Politicization of courts is a hot topic in public discourse and research. However, to date, we know little about the factors that lead to politicized judgments and dissent within courts, although the politicization of courts is generally seen as something negative. To contribute to existing hypotheses and findings, the applicants' political intentions and their access to the court are used as variables to measure levels of politicization. To measure differences, separate opinions in the constitutional jurisdictions of the Baltic states are analyzed. Results show that, in Estonia and Latvia, cases initiated by applicants with wide-ranging court access exhibit higher levels of politicization, confirming existing theories. However, the case of Lithuania and other potential causes of politicization require further research. The results provide for a deeper understanding of the relationship between law and politics.

Keywords: *Separate opinions • Constitutional jurisdictions • Baltic states • Politicization • Constitutional applicants*

1. Introduction

Not only in the Baltic states but worldwide, the public as well as political scientists and legal scholars discuss the issue of the politicization of constitutional courts. The discussion revolves around whether constitutional courts act as neutral guardians of the constitution or as political actors (Aydin-Cakir 2023; Popova, Rothmayr Allison 2023). The researchers often use objective conditions such as the election and terms of office of judges to find a tendency toward a politicized court. However, additional tools that focus on the output of courts can be used as well, namely the judgments and their dissent within. This dissent can be measured using separate opinions that judges may issue when they disagree with a ruling or its reasoning. Scholars often used dissent as a measurement of politicization levels to the variation of types of proceedings, but never to the origin of these proceedings, the applicants. This study thus addresses the following research question:

Do proceedings initiated by applicants with political ambitions and extensive court access lead to a higher rate of separate opinions in the rulings of constitutional jurisdictions?

The initiators of constitutional court proceedings have different political interests and varying possibilities to bring cases before the court according to the constitution and procedural laws. These variations are assumed to lead to different levels of politicization in the rulings of the constitutional courts. Specifically, the assumption is that applicants with the possibility to weaken political opponents through a ruling will use this opportunity as often as possible. Since the court thus assumes a referee role between the applicant and the respondent, the likelihood of politicization should be higher in such cases. The same applies when applicants do not have to prove to the court that they are directly affected by the contested law they want to be reviewed. This gives the applicants significantly more opportunities to initiate proceedings and provides the deciding judges with a large decision-making scope, which should increase politicization. The study builds its theoretical argument on the seminal studies by Hein 2012;

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Ewert, Hein 2016; Ginsburg, Garoupa 2011; Bricker 2017, which are key works that address factors of politicization.

To date, comparative political science has primarily studied courts that are already considered particularly politicized (e.g., Bulgaria: Belov, Tsekov 2020; Hanretty 2014; Hein 2012; USA: Bartels, Johnston 2012; Epstein et al. 2001). Therefore, an investigation into the relatively unexplored constitutional jurisdictions of the Baltic states represents a research gap. According to studies in comparative political science, constitutional courts tend to decide more consensually and unanimously in the early years after their establishment, becoming more polarized and open to dissent over time (Ginsburg, Garoupa 2011: 543). Therefore, examining the politicization of the Baltic constitutional jurisdictions three decades after their establishment is timely and highly relevant.

In this article, I will first introduce recent academic perspectives on the politicization of courts and theories on separate opinions. I will then set out the theory on which the expected causal mechanisms between applicants, separate opinions, and politicization are based. For the analysis, I have collected all rulings from the constitutional jurisdictions of Estonia, Latvia, and Lithuania until May 2022 where the publication of separate opinions was allowed, which is 1,253 judgments in total. This results in different collection periods: the analysis begins in 1993 for Estonia, 1997 for Latvia, and 2008 for Lithuania. Due to the short timeframe, the results for Lithuania are not very conclusive. However, the cases of Estonia and Latvia confirm a correlation between the variation of applicants and the level of politicization. Proceedings initiated by applicants with far-reaching judicial access routes lead to a higher rate of separate opinions in the judgements of the constitutional jurisdictions. The study contributes to existing findings in the research on courts and gives an insight into how they work from the inside. From the results, we can conclude that constitutional courts indeed are political institutions and not an impartial well of wisdom. Constitutional Courts only make judgments because another person or institution has decided to appeal to the Court, which shows the prominent and underestimated role the applicants have. This article not only reveals the politicization in the constitutional jurisdictions of the Baltic States but also sets new starting points for further research on applicants and separate opinions for the future.

2. Academic perspectives on the politicization of courts

Political science has increasingly focused on the judiciary in recent decades, revealing both judicialization of politics and politicization of the judiciary (Hirschl 2018: 23). This topic, once the domain of constitutional law scholars, gained prominence in political science in the late 1990s (Glatzmeier 2017: 33 ff.; Hönnige 2006: 190). A division of labor between the two disciplines is sensible because there are significant overlaps: Law is nothing other than politics made into binding standards by majority decision (Glatzmeier 2017: 34). Constitutional court decisions are inevitably political in nature due to the high interpretive openness of constitutional law, leading to political consequences and requiring a balance of different policy contents (Bricker 2017: 177; Ewert, Hein 2016: 53; Ginsburg, Garoupa 2011: 541). This “decision element” (Kelsen 2019: 67) grants judges a power similar to that held by the legislature (Annus 2007: 24; Bornemann 2007: 84 f.; Kelsen 2019: 67). Therefore, constitutional adjudication can be seen as the interface between law and politics (Ewert, Hein 2016: 53; Kranenpohl 2010: 40).

The question of whether constitutional adjudication is a political actor is answered differently by the two sciences. Since legal science fundamentally prioritizes the legal theory and dogmatics of judgments (Hirschl 2018: 16; Kneip 2016: 361 f.), it is subject to certain legal positivism, which political scientists consider naive (Hein, Ewert 2014: 35). They unanimously agree that at least political aspects, such as the appointment of judges, play a role in constitutional adjudication; the majority also consider them fundamentally political institutions (Grimm 2019: 87; Hanretty 2014: 543). Therefore, comparative political science in constitutional court research focuses on institutional perspectives, examining them as policy actors (Wrase 2013: 23). The research clearly indicates that the subject matter of constitutional adjudication and the impact of constitutional court judgments contain political elements. This has recently been acknowledged by legal scholars like the Latvian constitutional judge Anita Rodiņa and Spale (2020) in a contribution to the Latvian Constitutional Court, where they examine the extent to which the court acts as a legislator.

2.1 Scientific treatment of separate opinions

Separate opinions (also known as minority opinions) can be used by judges when they disagree with the court’s judgment or its reasoning. Generally, a distinction is made between dissenting opinions and concurring opinions, which only target the reasoning. Not all constitutional courts allow the publication of separate opinions, and even when publication is permitted, there are various methods and rules for judges. Separate opinions are researched by both legal and political sciences, albeit with different research questions and approaches. In the

legal debate, the focus is often on how separate opinions can contribute to the development of law (Apse n.d.; Bader Ginsburg 1990; Bricker 2017: 171 f.; Goździ-Roszkowski 2020; Kelemen 2010: 131 ff.; Roellecke 2001: 367 ff.; Stojadinovic 2019: 73 f.). The question of how the publication of separate opinions contributes to the legitimacy of the court is always implicit. Laffranque (2003) questioned the judicial independence in Estonia and whether dissenting opinions stood in tension with it. She ultimately concluded that dissenting opinions were important for the young constitution and its legal culture, as they allowed certain legal theories and interpretations to be trained and established (Kelemen 2010: 125; Laffranque 2003: 172). However, there are also critical voices in constitutional law regarding separate opinions, as the publication of dissent shows the public that there is not just one correct answer to constitutional issues, but rather certain interests and rights must be balanced. This practically admits that political factors play a role in judicial decision-making. Accordingly, consensus "expresses 'legal' decision-making rather than 'political' decision-making" (Ginsburg, Garoupa 2011: 547).

Separate opinions can thus influence the legitimacy both socially and legally, as they promote follow-up procedures and increase the risk of overturning a decision by highlighting alternative interpretations of legal norms (Goździ-Roszkowski 2020: 381 ff.; Hermann 2010: 409). To make use of the fact that separate opinions can indicate a politicization, political scientists use separate opinions primarily to make visible the role of judges in policy-making and their ideological and strategic goals on an individual level (Kelemen 2013: 1345 f.). They also examine the influence of dissenting opinions on the decision-making of constitutional courts and use them to ascertain polarization (Glavina 2024). However, so far, the focus has mainly been on US courts (Brace, Hall 1997; Epstein et al. 2001; Hettinger et al. 2004; exception: Andrade 2020). In recent years, political science research has been added, using separate opinions as an indicator for determining the politicization of different types of proceedings or applicants. These research methods are particularly used by the works presented in the next section and are important for the theoretical foundation of this work.

2.2 Considerations of constitutional applicants and politicization levels

The applicants and access possibilities to constitutional courts are of central importance because the courts can only be activated and become relevant political actors if they are assigned cases or if cases are brought before them (Annus 2007: 27; Kneip 2008: 645; Stone Sweet 2000: 197 f.). Regarding the applicants, German constitutional court research has primarily examined the relationship between the parliamentary opposition and the Federal Constitutional Court (Hönnige 2007; Stüwe 1997; Stüwe 2001). Otherwise, applicants to constitutional courts and the associated levels of politicization have so far mainly been analyzed in connection with the types of procedures (Ginsburg, Garoupa 2011). They distinguish between abstract and concrete judicial review as a factor for dissent, since these theoretically exhibit different levels of politicization due to the different applicants involved. Hein (2012) examines the configuration of procedure types at the Bulgarian Constitutional Court with the associated differences in politicization, also distinguishing between different applicants.

However, a concrete theory on the influence of applicants on politicization is not yet established here. The same applies to the work of Ewert, Hein (2016), which again examines the influence of procedure types on the politicization of constitutional courts. The subjects of investigation here are Germany, Bulgaria, and Portugal. Although both Hein (2012) and Ewert, Hein (2016) explicitly mention the role of applicants in the theoretical part and hypotheses of their work, the focus in the analysis part is solely on the procedure types. This leads to the inability to differentiate between the various interests that, for example, the different applicants of an abstract judicial review might have. Bricker (2017), on the other hand, varies the applicants in his analysis and finds that cases brought by members of parliament have a significantly higher likelihood of dissent among the judges.

The role of other applicants in the politicization or dissent in constitutional courts has already been addressed in some theoretical works. Simon (1994) and Wrase (2013) focus on the German Federal Constitutional Court's established authority and its role as a check on government power, while Uitz (2007) explores the heightened politicization in Central and Eastern European constitutional courts, where dissent among judges is more common, and the role of applicants is often politically charged, as these courts navigate pressures from political actors and contend with issues of legitimacy. However, empirical analyses often isolate only individual applicants and compare them to all other rulings of a court. This represents a research gap as the theoretical foundations for an analysis of the applicants already exist, but there is still no comparative analysis, especially not for the Baltic states. Therefore, in this work, I attempt to transfer the theoretical considerations on procedure types by Hein (2012) and Ewert, Hein (2016) to the applicants.

3. Applicants, politicization, and separate opinions: Causal mechanisms

There is currently little research analyzing separate opinions in relation to the applicants or types of proceedings. Therefore, this part of the work aims to clarify the connections between applicants, politicization, and separate opinions and the question of why we should see a correlation between applicants and separate opinion quotas.

3.1 Relationship between types of proceedings, applicants, and politicization

Previous political science research rarely differentiates between the variables "types of proceedings" and "applicants" in their analyses. This is unfavorable because, especially in the procedure of abstract judicial review, very different applicants can be involved, who have various interests and strategies. Differentiating not only between applicants but also between types of proceedings in investigations is still necessary because constitutions and court laws prescribe different prerequisites and conditions for the initiators of applications for constitutional review depending on the type of proceeding. Therefore, both the type of proceeding and the interests of the applicant must be included in a comparative analysis of the politicization of judgments. The dependency of the two variables "types of proceedings" and "applicants" on the potential politicization of constitutional court decisions arises from the fact that courts rely on activation by actors whose motives follow not only legal but also political intentions (Kneip 2009: 207 ff.; Wrase 2013: 29).

Consequently, the resulting judgments are also not solely legally justified but are influenced – more or less – by the political, ideological, and strategic preferences of the judges. "Judges are, stating it in rational choice terminology, policy-seekers. This motive cannot be suppressed by institutional rules demanding high professional qualification and experience" (Hönnige 2009: 980). Even judges, despite their independence, are politically thinking individuals whose personal opinions can still influence them even after they have put on their robes. Politicization, therefore, means that judges, in seeking the best legal solution for a given constitutional case, are influenced by their considerations of political appropriateness or personal preferences, or even decide a matter based on political criteria (Hein, Ewert 2014: 41; Navarette, Castillo-Ortiz 2020: 133).

3.2 Operationalization of politicization through separate opinions

The operationalization of politicization is most effectively achieved by measuring the voting behavior of judges. Where decisions are particularly divided, a high level of politicization can be assumed, as ideally, the law should be so precise and clear that differing opinions are not possible (Hönnige 2007: 50). Therefore, dissent can only arise from ideological or strategic differences between judges. However, the issue is that voting behavior is not published in most countries. A comparable measurement can only be done with dissenting or separate opinions. Similar to measuring voting behavior, it is assumed that politicized judgments lead to a high number of dissenting opinions because differences in judges' opinions can only be explained by ideological or strategic aspects. However, when measuring politicization through dissenting opinions, some limitations should be considered:

1. *Not every dissent is published.* Compromise-seeking, strategic positioning, and the art of persuasion regularly occur even during judgment formation. Thus, differing opinions might already be incorporated into the judgment's reasoning before its publication, complicating the subsequent documentation of these opinions (Annus 2007: 25). When referring to dissenting opinions, it only includes those that are published, as judges may decide to keep their opinion private (Hönnige 2006: 208; Kelemen 2013: 1364; Lietzmann 2006: 269; Pócza et al. 2019: 240). The absence of dissenting opinions cannot be taken as evidence of unanimity (Grimm 2019: 91). The existence of dissenting opinions on the other hand clearly indicates an intra-judicial lack of uniformity.
2. *Not every dissenting opinion indicates politicization.* The assumption that the law is so clear and unambiguous that dissenting opinions are only explained by political differences among judges is an oversimplification. Every judge is mandated to decide correctly according to the law. Hence, a judge arriving at a different conclusion than the majority of the court does not necessarily prove that the decision was unlegal or politically motivated (Grimm 2019: 96 f.). However, for quantitative analyses over a long period of time, a high number of dissenting opinions may indicate a systematic unanimity.
3. *Dissenting opinions are not suitable for measuring individual cases.* From limitations 1 and 2, it follows that separate opinions only reflect differences in politicization levels over a long period and cannot indicate politicization in a single case (Ewert, Hein 2016: 62). If the study period is long enough, dissenting opinions can

document politicization and intra-court opposition (Lietzmann 2006: 269). This requires that the court's caseload is low enough for dissenting judges to have the capacity to write and publish their opinions (Hein 2012: 59 f.).

Operationalizing politicization through dissenting opinions is common in research (Ewert, Hein 2016; Ginsburg, Garoupa 2011; Kelemen 2018; Wittig 2016). However, there are significant differences in whether analyses focus solely on dissenting opinions or consider all separate opinions.

Focusing exclusively on dissenting opinions and not on concurring opinions is not advisable as concurring opinions are as important for measuring politicization as dissenting opinions. While dissenting opinions are generally given more significance and impact, because they criticize the judgment itself and not only its reasoning, this distinction practically blurs because every separate opinion requires a rationale that critically addresses the judgment and its motives (Goźdź-Roszkowski 2020: 384; Kelemen 2013: 1366). Therefore, this study includes both dissenting and concurring opinions.

3.3 Who are the applicants and what interests do they pursue?

The potential applicants at constitutional courts are quite varied, ranging from political institutions like parliaments or local governments to private individuals or courts. Each applicant is legally affected by a subject matter in some way and pursues political or strategic goals to varying degrees. This leads to implications for the politicization potentials of decisions depending on the applicant. The thesis that serves as the starting point for the further argumentation of this work is *Different applicants bring varying politicization potentials to constitutional court decisions* (Hein 2012: 57). The theoretical foundations and hypotheses of this section are mainly derived from the work of Ewert, Hein (2016).

3.3.1 Political dimension

The first hypothesis relates to the political possibilities available to the applicants. Constitutional judges can have a significant impact on the political system and policy content of a country and, with their power of nullification as a negative legislator (Kelsen 2019), possess power similar to that of the parliament. Applicants can exploit this power by initiating proceedings contrary to the actual purpose of constitutional jurisprudence to achieve political goals (Ewert, Hein 2016: 57). Since a petition for constitutional review always refers to a specific adversary, the political goals are directed at depriving the adversary of competencies and rights or even completely eliminating them. The political content is particularly evident in proceedings such as abstract judicial review, where political institutions are the applicants. The literature often criticizes petitions from a certain number of parliament members because the "political referee role" (von Steinsdorff 2010: 496) is not the constitutional mandate of the constitutional judiciary. This type of constitutional review often concerns politically highly contested laws and forces the court to a comprehensive review abstracted from concrete legal application (Simon 1994: 1651). Carl Schmitt already criticized this type of norm control, arguing that constitutional jurisprudence crosses the boundary of non-intervention in the political sphere (Schmitt 1929: 173). Therefore, it is to be expected that proceedings initiated by the parliament or the government exhibit a high degree of politicization.

However, not all applicants who can initiate abstract norm control have the same political possibilities. Institutions like an ombudsman or a chancellor of justice, for example, do not have a political agenda. They are merely there to oversee legal compliance and report injustices, such as violations of fundamental rights, to the constitutional court. Although the specific dispute may have political elements, it is not brought for that reason. The same applies to private individuals who file constitutional complaints or courts that request a review of a law in the context of a specific legal dispute (concrete judicial review). They typically do not pursue political intentions but legal goals, such as confirming that a law is unconstitutional and invalid.

The first hypothesis is therefore:

H1: *In proceedings where the applicant can weaken political opponents through the judgment or its consequences, a higher rate of separate opinions is to be expected than in all other cases.*

3.3.2 Legal dimension

The second hypothesis deals with the nature of the applicants' legal concern. Constitutions and constitutional court laws prescribe different prerequisites in the respective types of proceedings for the actors when they want to submit a petition. If a quorum from the parliament initiates an abstract judicial review, the group of members of parliament (MP) does not need to prove that the challenged subject affects their rights or competencies. It is sufficient to claim that a certain action or law is unconstitutional. This is different, for example, in constitutional complaints or organizational disputes. Here, the applicant must credibly demonstrate to the court that the subject

matter endangers or violates their own constitutional rights. This requirement severely restricts the applicants and sets very narrow limits for pursuing political goals. Consequently, it also results in a narrower legal framework and limited room for maneuvering for judges in their decisions because they have to decide based on a specific case, which is similar to procedures in the ordinary judiciary. The possibility for judges to pursue an ideological agenda through proceedings like a concrete judicial review or constitutional complaints is therefore not completely excluded but significantly limited compared to other types of proceedings with other applicants (Ginsburg, Garoupa 2011: 550; Hein 2012: 66). Hence, these types of proceedings initiated by courts or natural and legal persons fall into a genuinely legal sphere (Ewert, Hein 2016: 56). They are not specific applicants or types of proceedings for constitutional courts, which is why a low level of politicization and a low rate of dissenting opinions are to be expected in these cases. Consequently, the second hypothesis is:

H2: *In proceedings where the applicant does not have to prove that their constitutional rights are affected, a higher rate of separate opinions is to be expected than in all other cases.*

3.3.3 Expected levels of politicization by applicants

From these two hypotheses, a four-field matrix can be created in which all relevant applicants before the constitutional courts of the Baltic states are classified (Table 1). The procedures with applicants from group (*a*), where there is no need to prove own legal concern and political opponents can be directly weakened by the judgment, are expected to show the highest degree of politicization. Group (*d*) fulfills none of these conditions, which is why the lowest level of politicization should occur here. Groups (*b*) and (*c*) fulfill only one of the conditions and therefore fall at a medium level. Hypothesis 2 should have a stronger causal relationship than Hypothesis 1, as the category "(not) weaken political opponents" allows only a relative distinction, while the category "individual rights or competencies (not) affected" represents an absolute difference. Rights are either affected or not; the possible direct weakening of political opponents is a matter of interpretation. Although, for example, parliament members in abstract judicial review proceedings in group (*a*) have many opportunities to directly weaken political opponents like the government or the president through a proceeding, this does not have to be the applicant's goal. They can just as well raise serious legal concerns against an action or law before the court without aiming to weaken the opponent. Conversely, individuals submitting a constitutional petition may act not only in a legal but also in a political interest. Therefore, the boundaries of this category are fluid, which is why the causal relationship of Hypothesis 1 is considered weaker (Ewert/Hein: 57 f.).

Below, I justify the grouping of possible applicants.

3.3.3.1 Individual rights or competencies not affected/ weaken political opponents

The first group with the highest expected level of politicization includes parliament members and the government

	Pol. dimension: Possibilities of the applicant (H1)	
	Weaken political opponents	Not weaken political opponents
Legal dimension: Affection of the applicant (H2)	**(a) High**	**(b) Medium-high**
Individual rights or competencies not affected	• (Members of) Parliament [abstract judicial review] • (Members of) Government [abstract judicial review]	• President [abstract judicial review] • Chancellor of Justice / Ombudsperson [abstract judicial review] • Audit Office, Attorney General, Justice Council [abstract judicial review]
Individual rights or competencies affected	**(c) Medium-low** • Municipal Council [Competence complaint]	**(d) Low** • Court [concrete judicial review] • Anyone: natural and legal persons [(kind of) Constitutional complaint, Election review]

Table 1. Expected levels of politicization by applicants.
Source: Own compilation based on the presentation and hypotheses of Ewert, Hein (2016: 58). The types of procedures are shown in square brackets.

or its members. These applicants can initiate proceedings before the constitutional court without their own rights or competencies being violated or restricted by the challenged law or action. They often use judicial review to pursue their own political goals or to limit the goals of political competitors. These differences may also be reflected in the court's decision-making.

3.3.3.2 Individual rights or competencies not affected/ not weaken political opponents

A medium-high expectation of politicization exists for those institutions that do not have their own political agenda but also do not have to prove their own legal interest to the court when filing an application. An example of this is the ombudsperson, who, on behalf of or instead of a person affected by a law or action, requests the review of constitutionality. Similarly, the state presidents fall into this group because they have comparatively little political ambition in the Baltic states. Although they have numerous competencies and tasks, especially in the field of foreign policy, they generally do not have a partisan agenda; they perform representative tasks. For instance, most Lithuanian presidents since 1993 have been non-partisan and must, by law, suspend all activities in political parties during their term of office (Jastramskis 2020: 194; Vaičaitis 2012: 162 ff.). In Estonia, power is also limited (Köker 2017: 93, 111), although presidents have gained informal power in recent years as they are perceived as moral authorities (Köker 2019: 241). Other applicants are the Attorney General, the Audit Office, and the Judicial Council in Latvia.

3.3.3.3 Individual rights or competencies affected/ weaken political opponents

Only the municipal councils fall into group (*c*) as potential applicants. They can weaken political opponents, for example, if the ruling party of a municipal council initiates the review of a law drafted by the rival ruling party at the federal level (Hein 2012: 59). Additionally, the question of how competencies and power are distributed at the vertical level is overall a political one. However, municipal councils can only file a constitutional complaint if they have been restricted in their competencies or their right to local self-government, which is why the expected level of politicization here is medium-low.

3.3.3.4 Individual rights or competencies affected/did not weaken political opponents

Group (*d*) is expected to have the lowest level of politicization. Individuals or courts generally do not have a political agenda that they want to enforce with the court's decision when filing a constitutional complaint or a specific judicial review. Instead, they want to clarify the legal question of whether they have been treated or acted constitutionally (Stüwe 1997: 197). Due to this focus on a specific case, the court must decide within a narrow legal framework, which most closely corresponds to the function of a court (Simon 1994: 1651). Therefore, the rate of separate opinions in procedures initiated by these applicants should be particularly low (Ewert, Hein 2016: 59 ff.; Hein 2012: 66).

4. Research design

For the research design, I will first introduce the jurisdictions to be analyzed and address the case selection, whereupon I will explain the methods of this study.

4.1 Constitutional jurisdictions of the Baltic states

The constitutional courts of the Baltic states share the crucial commonality that the publication of separate opinions is permitted and customary in all systems (Raffaelli 2012: 24 ff.; Venice Commission 2018: 21 ff.). Nevertheless, there are differences regarding the manner of publication and the general rules for the judiciary concerning separate opinions. According to Kelemen (2018: 125), the three Baltic states represented "three degrees of openness" until 2008: Lithuania did not allow the publication of separate opinions at all, and in Latvia, only constitutional judges could file separate opinions, but they were published not with the majority opinion but in an annual report. The most open system, Estonia, allowed the publication of separate opinions as supplementary material to the rulings for almost the entire judiciary of the country (Kelemen 2013: 1351). Since the end of 2008, separate opinions have also been permissible in Lithuania, making a comparative analysis of the Baltic constitutional courts possible.

It should be noted that the Baltic constitutional courts do not have a precise distinction between types of procedures. The constitutional court laws merely list the admissibility requirements of the applicants, the acts subject to review, and the standards of review (Schmitz 2003: 563). Therefore, the categorization of procedures into types is based on political science research on constitutional courts and not on a designation in the courts' rulings. Furthermore, only the types of procedures that occurred during the study period are listed in the following section.

4.1.1 Riigikohus: The supreme court of Estonia and its constitutional review chamber

Estonia has a hybrid model between a specialized and a diffuse constitutional jurisdiction, making it an exception in (Eastern) Europe (Brunner 1993: 834; Hönnige 2008: 525; Navarette, Castillo-Ortiz 2020: 132). Nevertheless, the judiciary is usually classified as specialized (Kneip 2008: 634). The Supreme Court (*Riigikohus*) consists of 19 judges and four chambers. Each judge is a member of one of the three cassation or revision chambers, responsible for civil, criminal, and administrative law. Additionally, there is the Constitutional Review Chamber (*põhiseaduslikkuse järelevalve kolleegium*), comprising nine judges, whose president is the Chief Justice, and it can make decisions with three judges present. The General Assembly of the Court (*Riigikohtu üldkogu*), consisting of all 19 judges, is the highest body of the court and can make decisions with 11 judges present. Constitutional review cases can be handled by either the Constitutional Chamber or the General Assembly of all 19 judges. A case can be referred to the General Assembly, for example, if a chamber decides to refer it or if previous interpretations need to be changed (Supreme Court of Estonia 2019: 7).

Regarding access to the court, Kneip (2008: 646) classifies Estonian constitutional jurisdiction as restricted and its competence as limited. This is particularly evident in the very limited access routes for the Estonian Parliament. Since Estonia's EU accession in 2004, it can review the compatibility of EU law with national constitutional law. The parliament also elects the Chancellor of Justice (*Õiguskantsler*), who holds classic ombudsman competencies and can also be tasked by members of parliament to initiate norm control (Schmitz 2003: 566). He is independent and is responsible for reviewing the legality of executive, legislative, and municipal norm-setting. His competencies are extensive, including the right to initiate criminal proceedings against the President, members of parliament, and government members (Hanretty 2015: 973 f.; Solska 2016: 392; Vaičaitis 2012: 169). The Estonian President is another potential applicant before the Constitutional Chamber. He has the right to formally and materially review laws and can refuse to promulgate a law and refer it back to parliament. If the parliament passes the law unchanged, the president can initiate a preventive judicial review.

In concrete judicial review, the influence of the diffuse constitutional court system is evident. The specialized courts declare a law unconstitutional in a case and do not apply it. The court then forwards this decision to the Supreme Court, which can declare the law generally null and void. Since 2002, municipal councils can also request constitutional review of laws if the contested law contradicts local self-government. Natural and legal persons can appeal to the Supreme Court through the ordinary instance procedure; in certain cases, individual constitutional complaints are also accepted, even though they are not legally enshrined. Additionally, they can appeal against the actions of election organizers or decisions of the National Election Committee (Aaviksoo 2007: 65; Brunner 2001: 54; Schmitz 2003: 566 ff.).

4.1.2 Satversmes tiesa: The Latvian Constitutional Court

In contrast to its northern neighbor Estonia, Latvia opted for the establishment of an independent Constitutional Court. In the initial years following its establishment, the number of cases handled by the court was extremely limited. The circle of persons entitled to submit a request for constitutional review was very small, and only abstract judicial reviews were conducted. Following an amendment to the Constitutional Court Law in 2001, the Court's competencies and access routes were significantly expanded (Endziņš, Sinkevičius 2017: 171). Unlike Estonia and Lithuania, access to the Court is therefore classified as open (Kneip 2008: 646). This openness is particularly evident in the procedural pathway of abstract judicial review: eligible applicants include the President of the State, Parliament (or a group of at least 20 deputies, i.e., one-fifth), the Cabinet, the Prosecutor General, the Judicial Council, the State Audit Office, and the Ombudsman institution, which emerged from the State Human Rights Office in 2007. If a court finds a law relevant to its judgment to be unconstitutional, the proceedings are suspended, and the Constitutional Court is invoked. This type of concrete judicial review on judicial referral is found in most European legal systems, similar to German and Lithuanian law (Schmitz 2003: 567). Like in Estonia, municipal councils in Latvia can initiate a municipal constitutional complaint if a law violates their local self-government rights.

The listing of access routes completes what is known as the "kind of constitutional complaint." Since the reform of the Constitutional Court Law in 2001, any person who feels their fundamental rights have been violated by the application of a law can request a review of that law after exhausting legal avenues. This individual application is considered "kind of" because it does not directly protest alleged violations of fundamental rights but rather challenges the legal norms underlying individual acts. It is essentially a form of concrete judicial review, although introduced in 2001 under the name of constitutional complaint and typically classified as such (Brunner 2001: 26 f.;

Hönnige 2008: 544; Kneip 2008: 644; Schmitz 2003: 569). The Court consists of seven judges.

4.1.3 Konstitucinis Teismas: The Lithuanian Constitutional Court

Lithuania's Constitutional Court, like Latvia's, is an independent, specialized constitutional court and consists of nine judges. It began its operations in 1997 and offers, according to Kneip (2008: 646), only limited access to applicants. However, it possesses extensive supervisory powers: Abstract judicial review can be initiated by a quorum of 29 members (one-fifth) of the Parliament, the Parliament itself as an organ, the President of the Republic, and the Government. Concrete judicial review on referral by judges exists as in Latvia and is often used by the courts (Bricker 2017: 176, Constitutional Court of the Republic of Lithuania 2020; Kneip 2008: 646). Municipal constitutional complaints are not recognized under Lithuanian law, and it was only in 2019 that there was an institutionalized constitutional complaint for everyone (Daneliene 2021; Limantė 2019).

For Lithuania, only abstract judicial review initiated by the Parliament or at least one fifth of its members, and concrete judicial review can be considered in the analysis. The other types of procedures and applicants have too few cases to provide meaningful results. The procedures of the newly introduced constitutional complaint are also excluded from consideration because the publication of separate opinions in these cases is evidently not allowed or customary. While I could not find a specific regulation on this, it is evident from the data on the court's separate opinions (Constitutional Court of the Republic of Lithuania 2021: 125). Lithuania only allowed the publication of separate opinions at the end of 2008. The introduction was intended to enhance the development of constitutional doctrine and legal science, encourage justices to engage more deeply with case deliberations, and promote transparency in judicial decision-making (Pūraitė-Andrikienė 2023). Since the Constitutional Court issues a relatively high number of judgments per year, an examination of separate opinion rates from November 11, 2008 is feasible.

4.2 Method

The variation of applicants is used as the explanation for the differing levels of politicization in the rulings as the commonality among the cases of Estonia, Latvia, and Lithuania. Other explanations for the differences (such as judge appointments, terms of office, and complexity of laws) must therefore be excluded. For the quantitative analysis, all 1,253 cases from the three courts where the publication of separate opinions was allowed are used (Table 2).

For each ruling, I determined the type of procedure and the applicant, as well as the number of judges with separate opinions and the total number of judges involved in the decision. This allows a specific *separate opinion quota* to be calculated for each case. Including the number of judges prevents distortions caused by the absence of judges or different panel sizes (Hein 2012: 60). If no separate opinions were issued, the rate is 0; if all judges issue a separate opinion, it is 1. However, it very rarely exceeds 0.5, and only when there are many concurring opinions. To analyze the relationship between the independent variable "applicant" and the dependent variable "politicization," the mean values of the individual *separate opinion quotas* per applicant are calculated and compared. An indication of a systematic relationship between the variables could be given if, for example, cases such as concrete judicial review show a significantly lower separate opinion quota in all studied countries than abstract judicial review (Ewert, Hein 2016: 63).

Only the variations of the applicants within the courts are compared; a comparison between the judiciaries of the three states is excluded for two reasons. First, the aim of this work is to investigate the influence of the applicants on politicization, not to compare the politicization of the Baltic constitutional courts. Second, such a comparison would not be possible using separate opinions as a measure because the number of separate opinions depends not only on politicization but also on other factors, such as the caseload of the courts or the fundamental legal or political culture of the country. Therefore, any differences in the separate opinion rate cannot simply be interpreted as different levels of politicization of the constitutional courts (Ewert, Hein 2016: 63; Hein 2012: 75, Laffranque 2003: 167).

5. Influence of applicants on the politicization of judgments in the Baltic states

The results of the analysis show a correlation between applicants and the separate opinion quotas. Although they differ in important respects from country to country, they can still confirm one of the two hypotheses. This is illustrated in a cross-country presentation.

5.1 Estonia

When looking at the separate opinions in the Constitutional Review Chamber of Estonia (Figure 1), it becomes apparent that abstract judicial review cases have the highest average separate opinion rates. Among these, cases initiated by the President of the State show slightly higher levels of politicization compared to cases initiated by the Chancellor of Justice. Additionally, it is evident that the rate of separate opinions in cases initiated by courts in concrete judicial review is significantly higher than those initiated by natural and legal persons. Particularly notable is the very low separate opinion rate of 0.0003 in election control procedures, where out of a total of 201 cases, only one separate opinion was recorded. Another surprise is the low rate of municipal constitutional complaints, which cannot be explained by the hypotheses put forward.

5.2 Latvia

The separate opinion quotas allocated to each applicant for the Constitutional Court of Latvia (Figure 2) only partially correspond to expectations. First, it must be noted that due to low case numbers (1–3 cases per applicant), applications from the Cabinet, State Audit Office, Prosecutor General, President of the State, and Judicial Council could not be included in the analysis. Similar to Estonia, the quota for competence complaints from municipal governments is very low. The separate opinion quotas for the remaining applicants range between 0.0646 and 0.0441, indicating close proximity and making interpretation of the results challenging. Although politicization is highest in procedures with members of parliament as applicants (Group (*a*) in Table 1) and lowest in the kind of constitutional complaints (Group (*d*) in Table 1), the numbers are very close. A significant difference, surprisingly

Type of procedure	Applicant	Estonia	Latvia	Lithuania
Abstract Judicial	Quorum		49	67.167[1]
Review	Parliament (MP)			
	Parliament			16.333
	President	15	1	5.5
	Cabinet/Minister		2	5
	Justice Chancellor/	43	30.5	
	Ombudsperson			
	Attorney General		3	
	Audit Office		3	
	Judicial Council		1	
Concrete Judicial	Court	243	61	154
Review				
Constitutional	Anyone	57	220.5	
Complaint				
Election Review	Anyone	201		
Competence	Municipal Council	35	14	
Complaint				
Not Assignable[2]		6		20
Total		600	385	268

Table 2. Number of cases by type of procedure and applicant in Estonia (since 1993), Latvia (since 1997), and Lithuania (since 2008). Source: Own Survey.

[1]The decimal numbers in the count of cases in Latvia and Lithuania occur because, in a few instances, multiple types of applicants initiated a single case (see Supplementary material). In cases with two (or three) different applicants, one of the applicants is therefore counted only as 0.5 (or 0.333) instead of 1. The same applies to the number of separate opinions, which are divided among the applicants.

[2]A clear assignment is impossible when no data on the applicant or type of procedure are available, or if the cases involve extraordinary instances that cannot be clearly categorized.

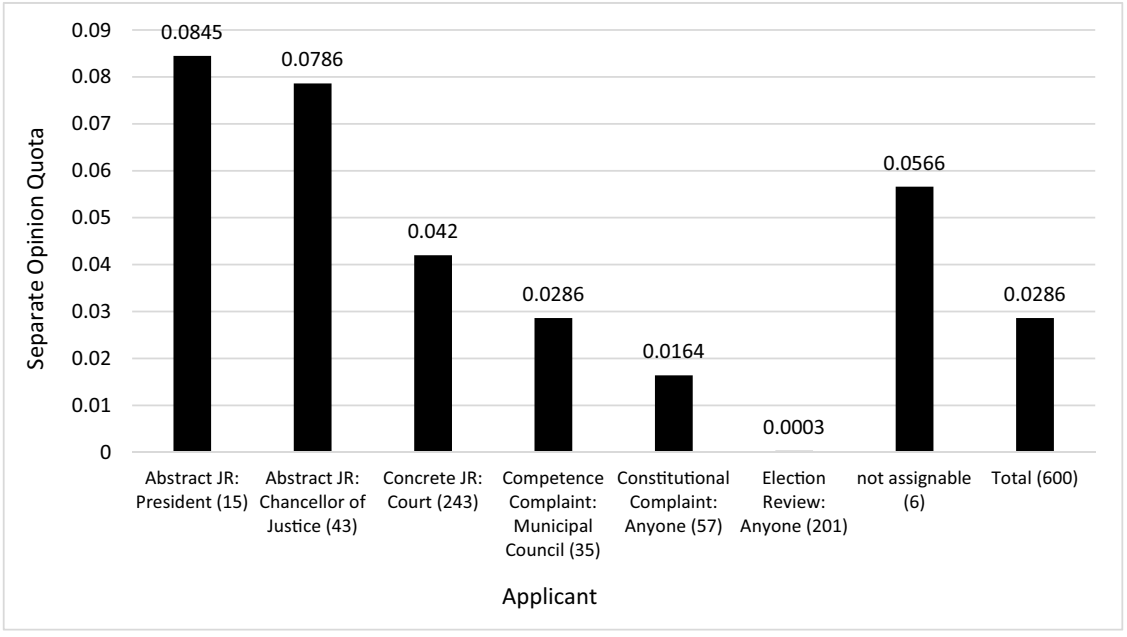

Figure 1. Estonia 1993–2022: Aggregated Separate Opinion Quota by Applicant.
Source: Own Survey. The number of cases in the survey period is in parentheses and the rates are rounded to four decimal places.

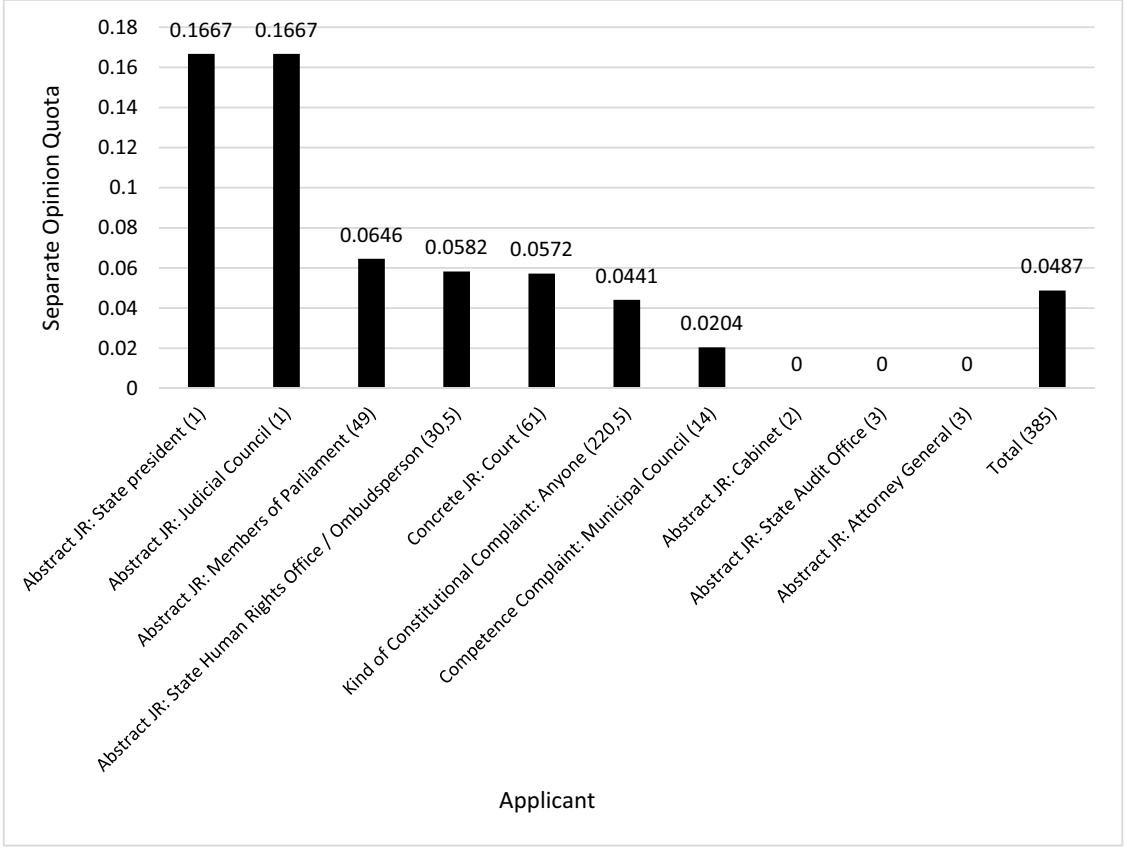

Figure 2. Latvia 1997–2022: Aggregated Separate Opinion Quota by Applicant.
Source: Own Survey. The number of cases in the survey period is in parentheses and the rates are rounded to four decimal places.

similar to Estonia, can be observed between procedures initiated by the "Court" and those initiated by "Anyone." Both types of procedures are legally concrete judicial reviews, but the difference in applicants apparently leads to varying degrees of politicization in judgments, with the Court being more likely to agree in kind of constitutional complaints.

5.3 Lithuania

The hypotheses for the case of the Constitutional Court of Lithuania are the least tenable. Despite expecting the highest level of politicization for cases initiated by a parliamentary quorum (Group (*a*) in Table 1), the separate opinion rate is lower at 0.0209 compared to 0.022 for cases initiated by courts (Group (*d*) in Table 1) in concrete judicial review. When combining the procedures of both applicants from Group (*a*), the separate opinion rate reaches 0.0240, only marginally higher than that for concrete judicial review. Therefore, it can be concluded that empirical expectations do not hold up, primarily due to a more limited dataset compared to the other two cases (Figure 3).

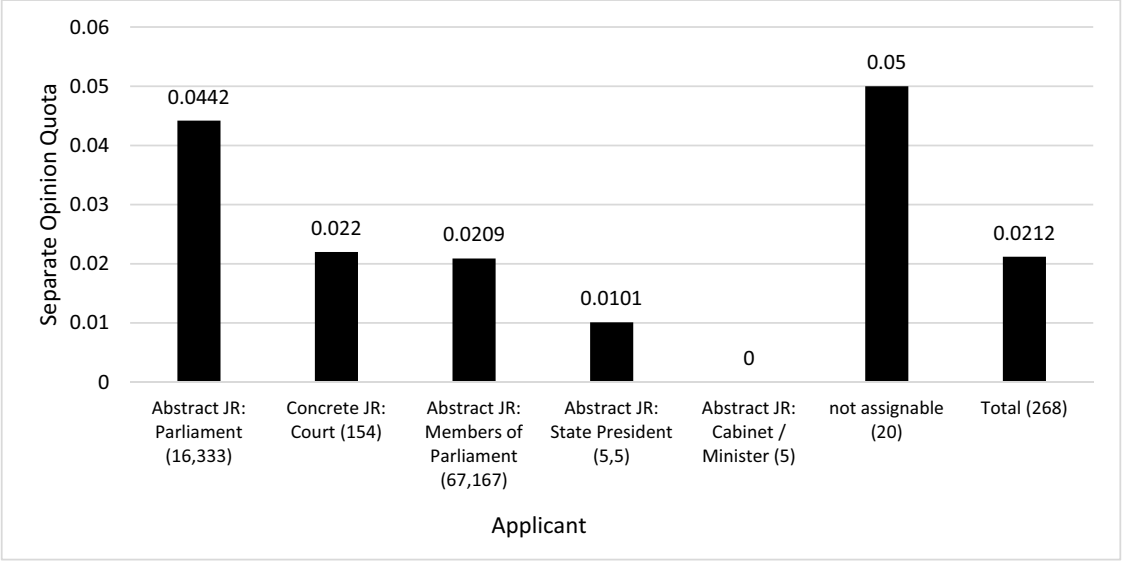

Figure 3. Lithuania 2008–2022: Aggregated Separate Opinion Quota by Applicant.
Source: Own Survey. The number of cases in the survey period is in parentheses and the rates are rounded to four decimal places.

	Estonia	Latvia	Lithuania
Group (a)	[0]	0.0621 [51] (0.1338)	0.0240 [88.5] (0.0501)
Individual rights or competencies not affected/weaken political opponents			
Group (b)	0.0801 [58] (0.1619)	0.0547 [38.5] (0.1278)	0.0101 [5] (0.0000)
Individual rights or competencies not affected/not weaken political opponents			
Group (c)	0.0286 [35] (0.1886)	0.0204 [14] (0.0000)	[0]
Individual rights or competencies affected/weaken political opponents			
Group (d)	0.0223 [501] (0.1123)	0.0469 [281.5] (0.1186)	0.0220 [154] (0.1117)
Individual rights or competencies affected/not weaken political opponents			

Table 3. Comparison of separate opinion quotas between applicant groups.
Source: Own survey. The table presents the average separate opinion rates of the groups, the number of cases per group in square brackets, and the standard deviation in parentheses.

5.4 Do proceedings initiated by applicants with political ambitions and extensive court access lead to a higher rate of separate opinions in the rulings of constitutional jurisdictions?

When comparing the results of the constitutional courts of the three countries, significant differences in the distribution of separate opinions become apparent depending on the variation of applicants. These differences are particularly pronounced in the case of Estonia, where a relatively high number of cases could be evaluated. For Latvia and Lithuania, the picture is less clear. In the Latvian Constitutional Court, the average separate opinion quotas per applicant are very close to each other, while in Lithuania, the difference between applicants of Group (*a*) and Group (*d*) is even smaller. Therefore, for Lithuania's Constitutional Court, it cannot be concluded that cases initiated by applicants with political intentions and without legal standing actually lead to higher separate opinion quotas in judgments.

In the case of the Estonian Constitutional Chamber, however, a clear gradation is evident (Table 3): Group (*b*) ranks higher in the rate than (*c*), and (*c*) ranks higher than (*d*). This gradation can also be observed for Latvia, although Group (*c*) proves to be an outlier, showing the lowest level of politicization contrary to expectations. The municipal councils, which are the sole actors in Group (*c*), also stand out remarkably close to Group (*d*) in the Estonian case, which according to the hypotheses, would expect the lowest level of politicization. Therefore, the consideration that municipal councils may partly consist of opposition parties and could thus harm political competitors at the federal level with constitutional complaints (Hein 2012: 59) needs to be reconsidered for Estonia and Latvia. Overall, however, it can be concluded that the variation in applicants influences the politicization of judgments in the Baltic States.

It is striking that both in Estonia and Latvia, applicants from Group (*d*) exhibit very different levels of politicization. The rate of separate opinions is clearly lower when an application is made by a private individual compared to when it is made by a court. This can possibly be explained by the lower quality of legal arguments and thus the complexity of the case being lower for unprofessional applicants such as private individuals. Courts, on the other hand, refer more complex cases to the Constitutional Court, supported by extensive legal arguments. Due to the greater quality and complexity of these cases, judges have more opportunities to devise alternative interpretations and issue separate opinions. Requests from ordinary individuals, such as constitutional complaints or election complaints, are mostly rejected, often because their justifications are not robust enough. The assessment of such cases is therefore more straightforward, making separate opinions less likely. These considerations, focusing on the complexity of the case and the quality of arguments, have already been theoretically developed and studied by Bricker (2017: 178). He finds that cases with greater constitutional complexity indeed have a higher probability of judicial dissent.

It is also clear that applications from MP have the highest levels of politicization. This correlation is also confirmed in Bricker's (2017) study, where he analyzes dissenting opinions in five European constitutional courts. Hein (2012) also verifies this dependency in his analysis of the Bulgarian Constitutional Court, although the rate of separate opinions there was moderate. However, Hypothesis 1 underlying this observation, which generally expects cases initiated by politically motivated applicants to have higher separate opinion rates, cannot be definitively confirmed. While higher average rates are observed for each of these procedures in all three countries (Table 4), the differences from other procedures are minimal. Hypothesis 2, on the other hand, is confirmed, at least for Estonia and Latvia. There is also a slight positive correlation for Lithuania's Constitutional Court, but it is too weak to be conclusive. This result is not surprising given that in the theoretical part, the causal link of Hypothesis 2 was assumed to be higher than that of Hypothesis 1. Another observation is a correlation between the panel size and the separate opinion quota, which has already been observed for the Czech Constitutional Court (Paulik, Vartazaryan

	Estonia	Latvia	Lithuania
Cat. 1: Weaken political opponents			
Possible	0.0286 [35]	0.0531 [65]	0.0240 [88.5]
Impossible	0.0283 [559]	0.0478 [320]	0.0216 [159.5]
Difference	+0.0003	+0.0053	+0.0024
Kat. 2: Legal affection			
Not existing	0.0801 [58]	0.0589 [89.5]	0.0232 [94]
Existing	0.0227 [536]	0.0456 [295.5]	0.022 [154]
Difference	+0.0574	+0.0133	+0.0012

Table 4. Comparison of separate opinion rates between categories.
Source: Own survey. Presented are the average special vote rates of the categories and the number of cases per category in square brackets.

2024: 238) and the US Supreme Court (Epstein et al. 2011: 117). The Estonian Constitutional Review Chamber is the only institution in this study with distinct panel sizes from 3 to 19. A Pearson correlation analysis for the Estonian case indicates a strong positive relationship between the number of judges and the number of separate opinions ($r = 0.71$). Whether there is an actual causality here remains to be seen, as proceedings with a higher number of judges are generally those that are expected to be more politicized anyway.

The data not only provide insights into the influence of the applicants but also reveal an interesting finding: the number of cases processed per court correlates with the level of their respective average separate opinion quotas. This assumption has been voiced by many authors (Hein 2012: 59; Laffranque 2003: 167). According to theory, judges in less burdened courts have the capacity to write separate opinions, whereas judges in heavily burdened courts only issue a separate opinion when they deem it particularly important and have the time capacity to do so. This can be illustrated particularly well with the Baltic States. Estonia's and Lithuania's constitutional courts handle approximately 20.6 cases per year each and exhibit average special vote rates of 0.0286 and 0.0212, respectively. In contrast, Latvia's constitutional court, which handles only about 11.4 cases per year, shows a significantly higher rate of 0.0487. These different circumstances for judges when issuing special votes confirm the approach of not comparing the rates between the three courts, as caseload and numerous other variables would distort the interpretation of the results.

6. Conclusion and outlook

This study has provided valuable insights into the influence of applicants on the politicization of judgments within the Baltic constitutional judiciaries. Although only one of the two hypotheses was confirmed, the research demonstrated that applicants with broader access to judicial proceedings tend to drive a higher incidence of separate opinions in constitutional judgments. Therefore, the research question can only be partially affirmed:

Cases initiated by applicants with broad access to judicial proceedings lead to a higher separate opinion quota in the judgments of the constitutional judiciaries.

This finding underscores the importance of the applicant's role in judicial processes, particularly in shaping the outcomes and nature of judicial decisions. The partial confirmation of the research question offers an understanding of how politicization manifests in judicial settings, specifically highlighting that while broad judicial access leads to higher politicization, the potential for applicants to weaken political opponents does not consistently result in a higher rate of separate opinions. This distinction between different applicant influences adds a new dimension to existing theories on judicial politicization. One of the study's significant contributions is the systematic categorization of applicants as a key variable in the study of judicial politicization, which has been relatively underexplored in political science research. Additionally, the comprehensive collection of separate opinions from the Baltic constitutional courts in 1,253 judgments is a valuable resource for future research, providing a dataset for comparative studies. Despite its contributions, the study's limitations must be acknowledged. While separate opinions serve as an effective proxy for measuring politicization, they are not without their constraints, particularly in cases where the number of judgments is small. This is shown by the example of the Lithuanian case. Nevertheless, this method remains the most viable approach when direct data on judicial voting behavior is unavailable.

This research opens several ways for further exploration. By applying similar research designs and previous findings on levels of politicization and their correlation with types of proceedings (Ewert, Hein 2016; Ginsburg, Garoupa 2011; Hein 2012), similar results should be obtained in many other constitutional judiciaries outside the Baltic region. Moreover, expanding the focus to include other factors influencing politicization, such as the political environment and the role of individual judges, could provide a more comprehensive understanding of this topic. Overall, research into other causes of politicized constitutional court rulings must be conducted independently of the applicants. For example, the laws under review could be divided into groups of norms and compared, and their influence on the politicization of judgments could be measured. It would also be possible to focus on other parties involved in the proceedings, such as the defendants. In conclusion, this study not only contributes to the academic discourse on judicial politicization but also underscores the critical role of applicants in shaping constitutional court decisions. As such, it serves as a foundation for future research, encouraging scholars to research deeper into the interplay between law and politics in constitutional adjudication.

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