Judges as Guardians of the Constitution: "Strict" or "Liberal" Interpretation?

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Aspects of Guardianship

Judicial guardianship of the constitution involves several aspects. First, are constitutional judges the sole guardians of the constitution? Next, if they are not, what is it that distinguishes them from other guardians? Finally, it must be agreed on what it is that is guarded, and we must see whether this judicial guardianship has any effect on its object. Here, the assumption is that it does.

Apparently, constitutional judges are guardians of the constitution by virtue of their very designation. Otherwise they would not accomplish the principal function they are assigned to: the elimination of unconstitutional norms from the legal system. Then, speaking of judges as guardians of the constitution presumes that there may also be other varieties of guardianship that can be juxtaposed with the judicial one. Indeed constitutional judges *are* guardians but not *the* guardians of the constitution. Other institutions may contribute to safeguarding the latter, too.

In the political discourse, the description of the role of the head of state often includes the role of "guarantor of the Constitution" (or of certain fundamental principles such as national sovereignty and integrity). Ordinary courts and other specialized courts may have the power to invalidate unconstitutional pieces of sub-statutory legislation.[1] Even the Cabinet is sometimes spoken of as sort of guardian, and the Constitutional Court of Lithuania found no error in that.[2] Also various executive and law enforcement institutions, even security agencies, can be labelled as guardians of the constitution.[3]

Relying solely on the guardianship performed by constitutional judges may lead into situations where the constitution is left with no guardians at all. "How many divisions has the Pope?", Stalin is reported to have said. True guardianship is effective guardianship. In some situations the constitutional order is best defended by free media, public opinion or even

through civil disobedience. Latvia presents an example of how constitutional judges themselves were guarded by public opinion against the political establishment's attempting to abolish the Constitutional Court in a poorly disguised revenge for two of the Court's decisions.[4]

There might also be areas where judicial guardianship is not welcome. The scope of judicial guardianship is not necessarily all-encompassing. For instance, declaring a state of emergency in the face of external aggression or internal destabilization would be, by all means, one of the most invaluable measures in defence of the constitutional order. But the balanced and relatively slow judicial procedure in such cases would be suicidal. And, as we know, "the Constitution is not a suicide pact".[5]

If we assume that the constitution needs to be guarded, the next questions would be: guarded on the initiative of whom, and how? In everyday life, there are two kinds of guardians. One is the man on duty waiting by the phone for an emergency call. Another is a patrolman, roaming with his jeep, and gun, and equipment, and dogs, along the frontier trying himself to find out where there might be holes (if any) through which intruders may get in, and fixing them to prevent the intrusion.

Along such lines, we have to ask if those "on the other side" should be checked only when their actions allegedly violate the constitution or should supervision over whatever may threaten the constitution be permanent? In the first case, we have ad hoc constitutional control; in the second, continuous surveillance over a range of political and social phenomena. The latter implies bringing the constitution into political and social processes that would otherwise proceed on their own. The first means that the constitution, figuratively speaking, rests on the bookshelf until someone claims that it has been ignored beyond permissible limits and, thus, induces judges to intervene. In the case of ad hoc control judges are called to be passive, in the case of continuous surveillance they may resemble "constitutional missionaries", agents who recall the rules of the constitution in situations where, in their own view, an issue of constitutionality may arise. In a sense judges perceiving themselves as active guardians may find themselves preaching the constitution.

It may appear that judges take it upon themselves to remind us of the constitution even in cases where they are not asked to do so, where politics and social life naturally find their way without being prevented from so doing by hypothetical violations of the constitution. Here, judges act on the basis of a notion that violation may occur if they do not intervene, and this assumption is never checked or proved exactly because they do intervene. Guardianship of the constitution turns into constitutional policy-making.

Adherents of judicial self-restraint par excellence consider that to be excessive and would like to remain passive. However, passivity may itself be detrimental to the constitutional order when active involvement is needed in order to avoid the constitution's being violated.

Judicial Interpretation versus Authentic and Legislative Interpretation

All kinds of guardianship are confrontations with alleged – actual or potential – violations of the constitution. The very essence of judicial guardianship, distinguishing it from other kinds, is the elimination of unconstitutional statutory and sub-statutory provisions from the legal system. For this purpose, the constitution must be interpreted.

Interpretation is a prerequisite for adequate application of the constitution. Supervision of the constitutionality of statutes presupposes interpretation of the initial document or of the text as later amended. If the constitution lasts long, the interpretation cannot be handled by the framers.

It is often overlooked that the introduction of judicial interpretation of the constitution in Estonia, Latvia and Lithuania marks a radical change of the tradition. None of these constitutions explicitly mentions constitutional interpretation *per se* as a function entrusted to the court of constitutional jurisdiction (or to courts in general). They do not even oblige the courts to expand on the motivation for their constitutionality decisions.[6] Like the US Supreme Court in *Marbury v. Madison*,[7] the Constitutional Courts of Latvia and Lithuania and the Supreme Court of Estonia[8] have self-assumed the function of constitutional interpretation, not only using roundabout phrasing but sometimes openly stating that it is for the court to interpret the constitution.

This development is especially remarkable because the prevailing legal theory (inherited from the Soviet period) tended to treat "authentic" and/or legislative interpretation as the supreme form of legal interpretation. On this path, the parliaments of the Baltic States in 1990–1992 produced several "authentic" ex post-interpretations of statutes previously adopted. The Implementation of the Constitution of the Republic of Estonia Act[9] even contains interpretations of certain terms used in the Constitution.[10]

But the judiciary differs from other branches of power first of all in that it is formed on a professional and not a political basis.[11] Therefore, making clear that from now on the interpretation of legal provisions is solely the domain of judges and not of legislators, in fact amounted to intrusion into what until then was "obviously" a part of the exclusive competence of legislators although exercised only by way of exception. One may want to call this attitude of the constitutional judge a usurpation of competence. In any case, the function of constitutional interpretation – that by then had in fact been abandoned by the legislator – changed its master.

This process went more or less smoothly. The Constitutional Court of Latvia took the first step in its very first case by stating how Art. 81 of the Constitution shall be interpreted.[12] In its second constitutional case the Supreme Court of Estonia stated how it interpreted the constitutional term "popular vote".[13] In its third ruling the Constitutional Court of Lithuania explicitly interpreted the meaning of the term "person" as used in the Constitution.[14] Later on, this Court has pronounced some of the most outspoken statements to the effect that constitutional interpretation is the function of the Court itself and no one else.[15]

Judicial interpretations are sometimes criticized, but only few have seriously challenged the very right of the courts to be the sole interpreter of the constitution.[16] In general, this explicit taking over did not give rise to hostile reactions from the political branches, in particular the legislature. On the contrary, the latter increasingly tends to treat constitutional courts as umpires in its political disputes.[17]

It would be premature to say that the issue is settled once and for all. Even some constitutional judges are apt to treat constitutional interpretation as a supplementary function of the Constitutional Court, subordinate to the resolution of constitutionality disputes.[18] In a number of decisions, concepts are defined first and foremost according to their definition in statutes.

Nevertheless, as the courts of constitutional jurisdiction accumulate more jurisprudence the perception of constitutional interpretation as an exclusively judicial function is becoming more consolidated.

The Constitutional Doctrine

Accumulated in the jurisprudence of the court of constitutional jurisdiction, interpretations of constitutional provisions form a specific body that cannot reasonably be separated from the basic constitutional text. With the advent of judicial interpretation, the constitution includes not only the initial document but court-generated constitutional doctrine. The US Constitution, composed of seven articles and twenty-seven amendments (including amendments of amendments), in fact, includes hundreds of volumes of the Supreme Court's case-law. If one argues that all this jurisprudence is not the Constitution *per se* but only interpretation(s) thereof "supplementing" the initial text, one must be aware of the fact that without these interpretations political and social actors would have fewer guidelines for their actions, and in certain cases they would probably have no clear guidance at all.

Formalistic, framers-oriented understanding of the constitution as a basic document should not exclude its wider treatment as a "sum" of both the basic document and the court-formulated constitutional doctrine. On the contrary, these two approaches have to be – and can be – reconciled.

Some constitutional provisions seem as clear as they read. According to Art. 140 of the Estonian Constitution the Legal Chancellor is appointed for seven years by Parliament (Riigikogu) on the advice of the President of the Republic. No one save the President can nominate the candidate. No one save the Riigikogu can appoint the Legal Chancellor. And seven years is seven years, not six or seven and a half.

Yet, even self-evident provisions may assume quite unexpected turns, especially in the view that they are part of the broader normative construct, and constitutions are normally integral Acts. For instance, the provision of Art. 129 of the Lithuanian Constitution that the budget year shall begin on 1 January and shall end on 31 December was interpreted (in a broader constitutional context) as making it legally impossible to pass statutes providing that every year not less than a certain portion of the national budget funds must be allocated to the particular sector.[19]

Moreover, most "magniloquent phrases of a constitution" (to use H. L. A. Hart's expression) are less certain. It is a commonplace statement that its principles are vague, diffuse, wide and therefore *call for interpretation*. One cannot tell precisely what is their content at a glance. Part 3, Art. 41 of the Constitution of Lithuania reads that everyone shall have access to

higher education on the basis of his abilities and that citizens who study well shall be guaranteed education at state schools of higher education free of charge.[20] The reader is totally puzzled. What is "accessibility to every man according to abilities"? And what is "studying well"? The initial text does not provide any clear-cut criteria. How can one be mono-semantic about such wording? Can there be one "strict" interpretation of the said provision?

Even technical legal terms may be understood differently. For instance, the majority of the Supreme Court of Estonia interpreted the term "legislation of general application" used in Chapter XII of the Estonian Constitution[21] as also embracing "laws which contains both legal rules and regulations of single application".[22] However as many as eight (out of seventeen) judges – including Chief Justice Uno Lõhmus – filed their own dissenting or concurring opinions concerning the meaning of the term.

Comparative law shows that even identical constitutional formulae may be interpreted in opposite ways. For instance, Art. 1 of the Constitution in both Latvia and Lithuania says that the respective countries shall be independent and democratic republics. The Latvian Court tends to rule that violation of the constitutional separation of powers principle also encompasses violation of Art. 1 (the principle of democracy).[23] By contrast, the Lithuanian Court finds no violation of Art. 1 even in cases where legislation is invalidated as contradicting constitutional principles of the rule of law, equality before the law and protection of property rights.[24]

Contradictory and inconsistent as it may be, constitutional doctrine is an essential part of the "living", evolving constitution. It would probably be an exaggeration to say that there is as much of the constitution as there have been interpretations of it.[25] Nevertheless, this description is not totally false. And as to what has not been interpreted yet, *quod pendet, non est pro eo, quasi sit.*

Thus, introduction of judicial interpretation has a potential to help to "expand" the very notion of the constitution and to transform the perception of the sources of constitutional law. Traditionally, constitutional jurisprudence was not seen as a source of constitutional law. Now, the situation has radically changed, as sub-constitutional legislation is less seen as a source of constitutional law than decisions by the courts of constitutional jurisdiction. For instance, in Lithuania, constitutional lawyers increasingly tend to treat the latter as having the force of the initial document itself because the legislator has no right to overrule them by statute.[26]

"Liberalism", "Strictness", and the Scope of Interpretation

Due to the legal force of their decisions, courts of constitutional jurisdiction, themselves not a political power, are politically increasingly more powerful. This puts the scope of interpretation at the forefront. Every interpretation is subject to the rule *interpretatio cessat in claris.*[27] The difficult part is to agree on *claris*. Here lies the division between "strictness" and "liberalism" in constitutional interpretation.

For the purpose at hand, "liberalism" and "strictness" are understood in their legal, and not political, senses. And even in the legal sense, one must distinguish formal and normative (conceptual) aspects of "liberalism" and "strictness". By "strict" interpretation in the *formal* sense we usually mean that judges adhere to their passive role and tend to refrain from interpreting the constitution more widely than the answer in an actual case requires. In this respect, "strictness" is a form of minimalism. On the other hand, "active guardianship" usually encompasses more extensive interpretation of constitutional provisions than the resolution of the case requires.

In this respect, the Lithuanian Court champions over its Latvian and Estonian counterparts. Lithuanian constitutional rulings are lengthier. They involve more extensive theoretical considerations of different aspects of systemic interpretation of constitutional provisions. In part, this is due to the contents of petitions to the Lithuanian Constitutional Court: quite often MPs' petitions involve requests to investigate the conformity of numerous sections (or parts thereof) of a statute with several (sometimes more than ten) articles (or parts thereof) of the Constitution. This entails so many provision-to-provision "comparisons" that elaboration of a wide theory becomes indispensable.[28] Such "activism" on the part of the Constitutional Court is provoked activism.

From a *normative*, or *conceptual*, point of view, "liberal" interpretation does not necessarily entail extensive theorizing, and "strict" interpretation does not necessarily entail compressed constitutional argumentation. In the context of guardianship of the constitution, the "strict–liberal" alternative balances between sticking as closely as possible to the *letter* of the initial text and more easily engaging in re-considering constitutional maxims, especially when the latter are broad or vague. "Liberal" interpretation leads to gradual development of the constitutional doctrine as an integral part of the "constitutional whole", without formally amending the basic document.

The same decision may be "strict" as seen from one angle, and "liberal", from another. E.g., the decision of 6 July 1999 by the Latvian Constitutional Court introduced the transparency principle not *expressis verbis* written in the Constitution; in this sense it may be seen as "liberal". On the other hand, the introduction of the said principle was "strict" in that it *adequately* represented the democratic spirit of the Western legal values inherent in the Constitution of Latvia: the freedom to receive information (see Art. 100) also included free access to information on the use of state budget funds. This meant transparency of public spending. Moreover, although the Court was in its full right to recognize the challenged regulations as contradicting the whole set of principles comprising the rule of law as an underlying constitutional principle, it abstained from doing so. Hence, the said decision was "strict" also in a formal sense.

The underlying principle invoked in numerous decisions by the Constitutional Court of Latvia is the principle of democracy or democratic statehood (Art. 1). Dated 1922, the Constitution does not mention either the rule of law, or the separation of powers. The principle of democratic statehood, read in the context of other constitutional provisions, often serves as a basis for promoting ideas about the rule of law and separation of powers.

In the context of the separation of powers principle, the Constitution of Latvia is extremely peculiar. According to Art. 58, state administrative institutions shall be subordinated to the Cabinet. The Constitutional Court (it seems) tried hard in attempting to prove that the State Housing Agency, established as a public law institution and performing activities of a civil character, was part of the united system of the executive branch.[29] Otherwise, the Court would have found it difficult to investigate the conformity of regulations of this and (in potential forthcoming cases) other autonomous agencies with the Constitution and statutes. Such interpretation of Art. 58 could be seen as extremely "liberal" in the sense that, according to the Court's line of reasoning, even in the absence of formal (statutory) subordination to the Cabinet, agencies should be considered *as being* legally subordinated because the Constitution does not foresee exceptions. But as this kind of "liberalism" lays the basis for review of the constitutionality and legality of the acts of such agencies, it definitely does not amount to distortion of the spirit of the Constitution of a democratic state.

In developing its constitutional doctrine, the Supreme Court of Estonia has elaborated on the principles of proportionality,[30] legal certainty and legitimate expectations.[31] These principles are also not explicitly formulated in the Constitution, however they logically stem from, respectively, the limitations on the restrictions of human rights and liberties (Art. 11) and the notion of the rule of law (Art. 10). Similarly, the statement by the Estonian Court that state tax rates shall be provided for by law is not a new norm but just an elaboration of a "more general" constitutional principle that state taxes shall be provided for by law (Art. 113).[32]

Compared to its Latvian and Estonian counterparts, the Lithuanian Constitutional Court may be seen as a true citadel of interpretative "liberalism". A whole set of constitutional principles not explicitly formulated in the text of the Constitution *do* appear in the constitutional jurisprudence. To mention just a few: "Lithuania is a secular state";[33] "ownership obligates";[34] and "law may not be non-public"[35] etc. However, they may also be seen as expressions of the *spirit* of the Constitution and, in this sense, as "strict" adherence to basic constitutional values.

Recently, the Lithuanian Court went much further in declaring that legislation may be invalidated when the regulation therein contradicts constitutional principles alone, with no indication of specific articles of the Constitution. By way of comparison, even if the Latvian Court often states that challenged legal provisions are not in accordance with certain constitutional principles (e.g. democratic statehood, or the separation of power), in the resolution part it always indicates specific articles of the Constitution.

On two occasions, the Lithuanian Constitutional Court has invalidated pieces of statute law on the grounds that they contradicted the principle of proportionality, as a derivative of the principle of the state under the rule of law.[36] Clearly, this kind of "liberalism" serves the supremacy of the Constitution and the rule of law.

Originalism, Interpretivism, and the Stability of the Constitution

Apparently, there are no *a priori* arguments that the borderline between guarding the constitution and changing it by means of interpretation lies along the normative aspect of the "strictness–liberalism" dichotomy. For it has yet to be agreed what it means to guard the constitution.

To put it simply, guarding the constitution is ensuring its efficiency and stability. Or, to use another expression, it is helping to bring constitutional

realia as close to constitutional *formalia* as possible. This roundabout definition, however, may itself be interpreted differently. For it is not *ex ante* posited that bringing *realia* and *formalia* together necessarily means sacrificing the former in the name of the latter. Some *realia* may be so inexorable that, in order to minimize the gap, certain *formalia* have to be changed. And insofar as the constitutional text is amended it is no longer stable.

This raises the question of whether constitutional provisions cannot be re-interpreted and, thus, reconciled with *realia* that the framers did not or could not foresee. How much freedom do judges have in interpreting the constitution?

By "strict" interpretation of the constitution in the normative sense is usually meant strict adherence to its initial text, to the so-called *original intent* of the framers. As Chester James Antieau once put it pointing to US Supreme Court Justices, "the first principle of constitutional construction is to ascertain and honor the intent of the people responsible for the provision".[37] Edwin Meese III has put an equals sign between "a jurisprudence of original intention" and "a jurisprudence that seeks to be faithful to our Constitution".[38]

Ideology aside, Justice Antonin Scalia, one of the most outspoken advocates of "strictness", praises originalism, or textualism, for its formalism:

> Of all the criticisms levelled against textualism, the most mindless is that it is 'formalistic'. The answer to that is, *of course it's formalistic*! The rule of law is *about* form. ... Long live formalism. It is what makes a government a government of laws and not of men.[39]

Originalism is based on the belief that constitutions, as written texts, should not be considered as things which change their meanings as soon as the moods of the people change. They are what they are, and not what someone (even an absolute majority) would like them to be. This does not mean that constitutions should not be changed when they are perceived as obsolete or when unsolvable internal contradictions are discovered in their texts. But there are means to do this, and these means are the rules of amendment provided for in the constitutions themselves. Courts are not a proper instrument for this purpose. First, they are not popularly elected and not responsible to any of the political branches, therefore, they are sometimes blamed for not having the necessary legitimacy; instead, they are looked on as an "oligarchy of the black robe". Second, engaging in

constitutional reconstruction would undermine the courts' character of professional rather than political authority. Third, introduction of constitutional novelties by means of constitutional interpretation may cause political instability, and this instability is likely to be even greater as the composition of the courts changes with every new rotation. Most important is the fact that the meaning of the constitution, as a fundamental agreement constituting the legal community, is distorted. It is no longer a guideline for action nor a basis for settling disputes – it is fully at the mercy of those who would prefer not to live by constitutional standards set by the framers. Thus, the constitution loses its sense. It becomes a tool for justification of policy, not controlling it. Policy considerations prevail over the constitution. Or, as Justice Scalia has put it:

> if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in the light of the 'evolving standards of decency that mark the progress of a maturing society' – well, then they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.[40]

In Lithuania, defenders of originalism are usually not so eloquent. Still, warnings are expressed against interpreters' going beyond the limits of the Constitution in a way amounting to violating the Constitution itself and even usurping the prerogative of the People.[41]

These are all statements and re-statements of the originalist mantra. The problem is that these arguments may be used equally both by those who, in a specific case, favour the "stricter" interpretation, and those who advocate a more "liberal" one. The conflict lies *within* the originalist paradigm.

Originalism does not at all mean that there is *one and only one* true uncontested original meaning of the constitutional provisions. Two or more genuine originalists may sincerely disagree between themselves, and still agree on the necessity of the originalist approach. To quote Justice Scalia:

> I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what the original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text.[42]

So, the originalists claim to "know". The one crucial thing upon which they may fundamentally disagree is not *that* original meaning should be found but *what* is this original meaning. And this, paradoxically, means that every single originalist "knows" it for sure, but together they don't.

In contradistinction to the originalist paradigm, by an interpretivist approach we usually mean one that does not confine the interpreter to the original meaning of the text, especially when life has developed so dramatically that constitutional *formalia* themselves have to be reconciled with their social and political environment, or when constitutional provisions are so vague and ambiguous that no original meaning may be found at all. To paraphrase Hans-Georg Gadamer, this approach amounts to *putting* a meaning into the text rather than *discovering* its meaning.

On the surface, the interpretivist approach (at least in its absolutist version) seems to be a sure way to neglecting the constitution and, thus, to undermining the stability of the constitutional order. True, if the constitution has vested certain judges with the right to interpret the constitution, it would be a shocking abuse to use this right for exactly contrary purposes. If the constitution, for example, states that property shall be inviolable, or that there shall not be censorship of the press, or that privacy shall be safeguarded, the court would not serve the constitution by interpreting such provisions as, say, allowing for uncompensated expropriation, or for unconditioned prior restraint, or for entering the private dwelling of a person without his or her consent or in the absence of a court order issued on the grounds and according to the procedure provided for by law. The constitutional order would not be served if the court, say, stated that according to the formally non-amended constitution, what was permitted yesterday is prohibited today.

However, just as originalism should not be reduced to its extreme version – sometimes called strict constructionism, in Justice Scalia's words, a degraded form of textualism – equally so interpretivism should not be reduced to its oversimplification, to its crudest and most cynical form, that is, to arbitrary reconstruction of constitutional provisions. Just as originalism "in good standing" acknowledges that the broader social purposes of the constitution are to be taken into account, equally so interpretivism "in good standing" recognizes the need to base interpretation of the constitution on nothing else than the provisions of the constitution, however, to interpret them in such a way that these broader purposes are not neglected.

Constitutional interpretation does not take place on an isolated island,

it is not a goal in itself, and it is not interpretation for the sake of the fun of interpretation. On the contrary, it has to serve the community, in the sense that people should be able to settle their daily problems *according to the constitution in a way* that the framers (unfortunately?) did not foresee. Interpretivism is grounded on the assumption that there are issues within the sphere of constitutionalism not explicitly addressed in the basic constitutional text. These issues are raised by our daily experience and need constitution-based solutions. And who else is in a position to suggest these solutions, if not judges as the official interpreters of the constitution? It is their function not only to preserve the inviolability of the constitution but to maintain its vitality, its capability to address the most pressing issues of the day.

Extremes usually meet. Both originalism and interpretivism recognize the fundamental need for protecting the stability of the constitution. In this sense, *both are means of guardianship of the constitution in their own right.*

For originalists, stability of the constitution means, first of all, unaltered meaning of the initial text of the constitution. Even acknowledging the broader social purposes of the constitution, they campaign for judicial self-restraint to the extent that judges keep fully away from pursuing these broader purposes on their own initiative. If the constitution is silent on a specific issue, then, for originalists, the issue falls within the policy domain. For them, altering the constitution amounts to altering the text of the constitution, amending the basic document, and judges must keep away from this process. They should interpret the text, and not alter it. This is not to say that originalists favour constitutional amendments; they simply consider them to be not the business of judges.

For interpretivists, stability of the constitution means, first of all, stability of the text of the constitution. Stability of the text is a value *per se*: if the constitution is treated as a fundamental Act and, therefore, as a basis for all further legislation, it should be kept intact as long as conditions permit. But conditions ("evolving standards") change, and there are no guarantees that these changes are adequately perceived in the political process. Allowing too many amendments to the constitution would mean having little, if any, constitution in its true meaning. What substitutes for it would be, in fact, dynamic legislation, as an expression of policy decisions. There may not be true constitutionalism without true constitutions. Therefore, gradual re-interpretation of unaltered basic principles along the lines of

"the needs of the time" is what safeguards the stability of the constitution.

Interpretivism is sometimes mistaken for the opposite of judicial self-restraint. However, self-restraint may apply both to originalism and to interpretivism. Self-restraint, put plainly, is the absence of excessive, ungrounded activism, and, therefore, cannot be monopolized by originalism alone. To an interpretivist "in good standing", excessive activism is as unacceptable as to a genuine originalist: re-interpretation of the constitution requires that the "needs of the time" must be pressing, and the constitutional provisions must be formulated so as to allow "evolving meaning". Otherwise, re-interpretation would be arbitrary. Of course, it is difficult to agree on the "needs of the time", but, as we have seen, it is hardly easier to agree on the original meaning.

So, both originalism and interpretivism have their advantages and disadvantages. To stick to just one of the said paradigms would amount to accepting not only its advantages, but also its disadvantages in full. My conclusion is that in the jurisprudence of all three courts of constitutional jurisdiction in Lithuania, Latvia and Estonia the balance between originalism and interpretivism, and, thus, between "strictness" and "liberalism" in the normative sense, is more or less achieved.

The Background of Judges and the Search for Original Meaning

It is often said that the professional background and previous experience of constitutional judges highly influence the doctrine generated by them. Normally, constitutional judges are not (or not only) legal practitioners but legal scholars. Hans Kelsen even thought it to be one of the advantages of constitutional courts.

Currently (2003), no members of the Lithuanian Court are former judges; all of them are simultaneously university professors. In Latvia, most judges also have university experience. In Estonia, though, where constitutional jurisdiction is reserved to the Supreme Court, many judges are career judges and former practitioners.

Most important is the fact that the drafting of constitutions in these states is a very recent experience,[43] in which quite a number of the current constitutional judges were personally involved.[44] Also, some judges have been previously active in politics.

Constitutions, at least democratic constitutions of pluralist polities, are always based on compromises. This fully applies to the Constitutions of Lithuania, Latvia and Estonia. Some constitutional provisions were even formulated so as to allow a certain flexibility in the future interpretation and application. In the case of Lithuania, several articles of the Constitution were even granted an easier amendment procedure for a period of one year, a possibility which no political force succeeded in making use of.

The search for "the one and only" meaning of certain constitutional provisions may sometimes be grounded on positions defended by respective judges in the previous process of constitution-drafting. Naturally, each individual "one and only" represents only one group of political actors who together have achieved the compromise on which the constitution is based. It is doubtful that it would be a great advantage for constitutional jurisprudence to have *too many* drafters of the constitution in the constitutional courts. There is always a chance that the subjective "liberal" interpretation may serve as a substitute for the supposed original meaning.

In this respect, originalism may prove to be self-deceptive. It pretends to guard the constitution from distortion, maintaining, at the same time, that there may be disagreements as to the contents of the original intent. Most important is the fact that, at least with respect to certain constitutional provisions, *there is no such thing as the one and only original intent of the framers.*

Concurrence and Dissent

Constitutional judges decide cases in chambers, each of which may comprise a certain combination of adherents to "strict" or "liberal" interpretation (both in the formal and in the normative sense). As even the same decisions (and the doctrines formulated therein) may be considered "strict" or "liberal" depending on the "angle of observation", it appears that very few courts can be labelled as "strict" or "liberal" par excellence.

Surely, there are degrees of "strictness" and "liberalism". This applies to every single judge, and, therefore, to the decisions they collectively produce. In an overall perspective, none of the three courts of constitutional jurisdiction in Estonia, Latvia and Lithuania can be described as going only one way.

A single judge, however "liberal" (or "strict") he is, may not influence the decision if the majority tends to be "strict" (or, respectively, "liberal").

Also, the same judge may be very "liberal", say, with respect to human rights provisions, and extremely "strict" in relation to the separation of powers. This makes categorization of his or her position rather uncertain. Such categorization is totally uncertain if individual judges' positions are not known to the analyst at all.

Concurring and dissenting opinions by individual judges may serve as a source of such knowledge. In Estonia, judges quite often file concurring and dissenting opinions. It is also foreseen in the Latvian legislation; but this possibility has been employed only once, and the public announcement of concurring and dissenting opinions is postponed for one year.

Lithuania is a special case: By statute, not only concurring or dissenting opinions are not allowed, but also announcement of the voting results is prohibited by statute. This is especially remarkable, as dissenting and concurring opinions are a commonplace practice not only in most constitutional courts of the world,[45] but they are admitted in ordinary courts in Lithuania. It would be worthwhile examining if such statutory regulation cannot be considered an infringement of the independence of the constitutional judge (Part 1, Art. 104 of the Constitution of Lithuania).

The theory behind this prohibition is that politicians should be precluded from dividing judges into "good" or "bad", i.e. politically "acceptable" and "unacceptable". True, such a risk always exists. However, this argument is not fully convincing. For judges may still be divided into "good" or "bad" according to their decisions, and no one will preclude politicians from speculating about who made what impact on the decision. Judges are publicly known figures, and in most cases their background, attitudes and activities prior to entering the court are no secret, so anyone is free to make his own (wrong) conclusions. Also, the risk of political revenge can be minimized by securing social guarantees for judges while they are in office and after they finish their term.

Statutory prohibition of concurring and dissenting opinions in Lithuania also has a direct impact on the content of constitutional interpretation. In specific cases judges are in such need of compromising that virtually each one of them has to sacrifice something in order to resolve the issue. In the course of the debate certain (hopefully) valuable constitutional ideas supported only by individual judges are ventilated but will simply not appear in the rulings of the Constitutional Court. In this way, the absence of the possibility for the judge to file a concurring (dissenting) opinion increases the risk that certain arguments that would otherwise have

been taken into consideration may simply be ignored. Does this benefit the quality of interpretation? I doubt it.

Substantive and Jurisdictional "Liberalism"

So far I have been concerned with *substantive* "liberalism", i.e. interpretations of constitutional provisions in the result of which the constitutional doctrine deviates from the supposed original intent to the extent that the understanding of the legal content of the constitutional provisions changes. Sometimes this change may amount to distortion. In such cases one may speak of excessive "liberalism".

Still, there may be doctrines that some lawyers may disagree with, and there are doctrines that appear to be misinterpretations (or mistakes). But misinterpretations *per se* are not necessarily caused by excessive activism in interpretations. For instance, one could probably disagree with the reasoning of the Latvian Constitutional Court that to declare an Act null and void due to a violation of parliamentary procedure, one should have a well-founded doubt that the Saeima would have adopted a different resolution had the procedure been observed.[46] One could also disagree with the Lithuanian Court when it states that according to the Constitution, the highly centralized prosecutors' system is part of the judicial branch.[47] However, these disagreements have nothing to do with "liberalism" *per se*. Differences of opinion may not alone serve as a basis for qualifying certain doctrines as "liberal" in the normative sense.

Substantive "liberalism" would amount to developing the constitutional doctrine by formulating new *norms* (and not only principles). In other words, it leads to changing the substantive norms of the constitution, providing them with a new content. Up to this limit there are no reliable criteria on the basis of which courts could be categorized into "liberal" or "strict", as both interpretivism and originalism admit a certain degree of creativity in interpreting constitutional provisions.

There is also another form of "liberalism" in constitutional interpretation, which I would call *jurisdictional* liberalism. It is the exercise of judicial discretion in relation to the scope of the court's jurisdiction. In this respect, the Lithuanian Constitutional Court in the last two or three years has undergone an interesting evolution expanding its jurisdiction even to issues where it previously strictly did not interfere.

Thus, in 1994, the Constitutional Court formulated a doctrine that it

was not in a position to fill in the gaps in law, which is the "prerogative" of the legislator, and that omission in statutory regulation did not constitute grounds for declaring legal acts unconstitutional. While formulating this doctrine, in one case, the Court dismissed the case[48], and in the other, assessed the gap as a precondition for upholding the challenged statute as constitutional.[49] Now, its position has radically changed. For instance, the Court has recognized that Art. 259 of the Statute of the Seimas (Parliament) contradicted the Constitution "in the scope whereby the right of the convicted person to take part in the impeachment proceedings as the impeached subject and his right to defence are restricted".[50] On another occasion, the Court invalidated the 2001 State Budget Act as contradicting the constitutionally guaranteed autonomy of establishments of higher education, *inter alia* to the extent that there was no direct indication of budgetary appropriations for each of these establishments.[51]

Another indication of "jurisdictional expansion" is investigation of Acts that the legislative or executive branch has abolished prior to the court hearings. Earlier it was typical to terminate such cases on the formal ground that the Constitutional Court investigated only valid legal acts. With very few exceptions,[52] this has changed, too. In one such case the Court investigated a governmental resolution that was not officially published because it included information considered a state secret.[53] In other cases the Court investigated the constitutionality of both the earlier and (on its own initiative) the new versions of the statute, the latter being adopted while the case was pending before the court but containing identical regulations.[54]

One more indication of expansion of jurisdiction is cases investigating the conformity of Seimas resolutions and procedural decisions with statutes. The Constitution does not explicitly mention that Seimas resolutions and procedural decisions can be investigated from the point of view of their conformity with statutes (although not the Constitution). The Court nevertheless maintained that the constitutionally established hierarchy of legal acts had to be safeguarded, and this entailed its right to investigate these issues.[55]

A similar expansion was undertaken with respect to so-called constitutional laws. The Constitution foresees a special procedure for their adoption but keeps silent on their legal force. The Court found that they enjoy a higher legal force than ordinary statutes but are not a part of the Constitution and therefore have themselves to conform to it. Hence to investigate

their conformity with the Constitution and the conformity of regular statutes with constitutional laws is within the competence of the Constitutional Court.[56]

In yet another case, the Court expanded its jurisdiction to generate a doctrine according to which it was within its competence not only to investigate the conformity of the challenged legal acts with the constitutional provisions indicated by the petitioner, but also to declare these acts unconstitutional if they contradicted other constitutional provisions, viz. provisions not mentioned by the petitioner. The basis for this doctrine is that the Constitutional Court, in the resolution part of the ruling, has to indicate, if it finds so, that the challenged legal act does not contradict the Constitution as a whole, and if it finds that there is nonconformity omitted by the petitioner, it has not only the right, but a constitutional obligation to resolve this issue.[57]

The latter doctrine, however, was only the first step to an even wider expansion of the Constitutional Court's jurisdiction. Investigating the constitutionality of one statute, the Court may find that another statute interrelated with the first one but not challenged before the Court, contradicts the Constitution. The Court has stated that it has the constitutional right and, at the same time, the duty to rule on the constitutionality of this unchallenged statute.[58]

By Way of Conclusion

May the courts of constitutional jurisdiction re-formulate their doctrines? Theoretically, they should not. In practice, they occasionally do.[59] This significantly influences the perception of the constitution as a dynamic, "evolving" whole including both the basic initial text and the growing volume of constitutional doctrine.

Does this undermine the legitimacy of the decisions of constitutional courts? At least in a formal sense, no. But the issue remains open. It can be speculated that re-formulation of doctrines testifies to the "liberalist" trend. Whether the courts should follow it, and if so, to what extent, is a normative question which, so far, has received no unanimous answer.

Footnotes

1 In Lithuania, district administrative courts exercise constitutional control over municipal acts.

2 See, e.g., Ruling of the Constitutional Court of Lithuania of 23 November 1999, where the legislative provision that the Government shall protect the constitutional order was found in compliance with the Constitution. (All decisions and rulings are cited from their English translations provided by the Constitutional Courts of Lithuania and Latvia, and the Supreme Court of Estonia, as appear on their official websites (respectively, www.lrkt.lt; www.satv.tiesa.gov.lv; www.nc.ee).

3 Like e.g. in Latvia, where the respective agency is named the Constitution Protection Bureau.

4 The decision of 6 July, 1999 killed the Cabinet's regulation providing for confidentiality of agreements concerning "additional remuneration" of state officials. By the decision of July 1999, the Court invalidated the State Housing Agency's regulation providing for renting apartments to those considered "wealthy" and "important persons" (see 'Constitution Watch', in *East European Constitutional Review*, 1999, Vol. 8, No. 4, p. 25; Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law*, Uppsala: Iustus Förlag, 2001, p. 282–283).

5 Paraphrase of a dissent of Justice Robert Jackson in *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949), by Jon Elster, *Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact*, in East European Constitutional Review, 1994, Vol. 4, No. 3–4, p. 66.

6 Although statutes regulating court procedures do.

7 5 US (1 Cranch) 137 (1803).

8 The name of this institution is also translated into English as "State Court" or "National Court".

9 Adopted together with the Constitution by the referendum of 28 June 1992.

10 Concerning definition of simple and various qualified majorities.

11 Cf. rulings of the Constitutional Court of Lithuania of 21 December 1999 and 12 July 2001, where this doctrine is developed at length.

12 Decision of 7 May 1997.

13 Decision of 11 August 1993.

14 Ruling of 8 November 1993. The Court interpreted that the said term embraced only physical persons, therefore the constitutional principle of equality applied only to physical, however not juridical, persons. Subsequently the Court in numerous decisions gradually changed this interpretation to the opposite so as to include juridical persons, too.

15 Cf., e.g., ruling of 11 May 1999.

16 Of one such challenge in Lithuania, see: Vytautas Sinkevicius, 'The Impact of the Constitutional Court Rulings on the Process of Legislation', in *Constitutional Justice: The Present and the Future*, Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 1998, p. 470. At the time of publication, the author of the article was head of the Legal Department of the Seimas (currently he is a member of the Constitutional Court).

One of the MPs strongly warned the Constitutional Court that its considerations and interpretations cannot amend the text of the Constitution. That MP was just one out of many criticizing the said ruling (of 10 January 1998) in which the Court went far beyond the constitutional issue brought before it. The Court expanded on Lithuania's being categorized as a parliamentary state, and interpreted in such a way that, after the Presidential election the Government had to return its powers but that this did not amount to its resignation. Therefore the newly elected President had no right to propose another candidate than the acting one to the position of Prime Minister.

I myself (at that time not yet on the bench) have also extensively criticized this ruling as giving grounds for delegitimization of the Court's *dicta* (see: Egidijus Kuris, 'Politiniu klausimu jurisprudencija ir Konstitucinio Teismo *obiter dicta*: Lietuvos Respublikos Prezidento institucija pagal Konstitucinio Teismo 1998 m. sausio 10 d. nutarima', in *Politologija*, 1998, No. 1). Some went even further and considered this ruling to be illegal (cf. Aleksandras Stromas. 'Valdziu padalijimas Lietuvos konstitucineje teiseje bei praktikoje: zvilgsnis i musu demokratija ir jos itvirtinimo problemas', in *Akiraciai*, 1998, No. 9).

For a similar criticism of some decisions by the Latvian Constitutional Court, see: Zigurds L. Zile, 'Constitutional Adjudication in Latvia', in *Review of Central and East European Law*, 1999, No. 3.

17 See, e.g., Egidijus Jarasiunas, 'Konstitucine justicija ir politinis procesas: saveikos tendencijos ir doktrinos paieškos', in *Politologija*, 1999, No. 3; Andrius Kubilius, 'The Constitutional Court and the Political Process', in *Constitutional Justice: The Present and the Future* (*supra* note 16).

18 See, e.g., Kestutis Lapinskas, 'Legal Sources and Final Acts of Constitutional Supervision Institutions', in *Constitutional Justice: The Present and the Future*, p. 327 ff. (*supra* note 16).

19 Ruling of 14 January 2002 by the Constitutional Court.

20 The circulating semi-official translation is absolutely disastrous: "Everyone shall have an equal opportunity to attain higher education according to their individual abilities. Citizens who demonstrate suitable academic progress shall be guaranteed education at establishments of higher education free of charge."

21 I have not been able to find precisely this wording in the translations of the Estonian Constitution (The International Institute of Democracy. *The Rebirth of Democracy: 12 Constitutions of Central and Eastern Europe*, Strasbourg: Council of Europe Press, 1995; http://www.uniwuerzburg.de/law/en00000_.html etc., nor even in the translation provided by the Supreme Court), however it is used in the translation of the decision of 17 March 2000 provided by the Supreme Court on its official website, and also for the Venice Commission.

22 Decision of 17 March 2000.

23 Cf. decision of 1 October 1999.

24 Cf. ruling of 23 February 2000. – See further comments in Anita Usacka's paper.

25 Egidijus Kuris, 'Konstitucija ir jos aiskinimas', in *Politologija*, 1999, No. 2, p. 9; Egidijus Jarasiunas. 'Konstitucines justicijos studiju ivadas, arba; L. Favoreu "Konstituciniai teismai"', in Louis Favoreu, *Konstituciniai teismai*. Vilnius: Garnelis, 2001, p. 13.

26 Toma Birmontiene, Egidijus Jarasiunas, Egidijus Kuris, Mindaugas Maksimaitis et al. *Lietuvos konstitucine teise*. Vilnius: Lietuvos teises universitetas, 2001, p. 63, 227.

27 Vladas Pavilonis, 'Interpretation of Constitutional Norms in Rulings of the Constitutional Court', in *Constitutional Justice: The Present and the Future*, p. 413–414 (*supra* note 16).
28 See, e.g., the so-called Education case where the Court elaborated the extensive church and state relations doctrine (ruling of 13 June 2000). In this case, over 50 such "comparisons" were made.
29 Decision of 9 July 1999.
30 Decision of 30 September 1998.
31 Decisions of 5 February 1998, 17 March 1999, and 17 August 1998.
32 Decision of 23 March 1998.
33 Ruling of 13 June 2000.
34 Ruling of 21 December 2000.
35 Ruling of 29 November 2001.
36 Decisions of 6 December 2000, and 2 October 2001. In the decision of 6 December 2000, there was also found non-conformity with the constitutional principle of justice.
37 Chester James Antieau, *Constitutional Construction*, London, Rome & New York: Oceana Publications, 1982, p. 71.
38 Edwin Meese III, *Interpreting the Constitution*, in Jack N. Rakove (ed), *Interpreting the Constitution: The Debate over Original Intent*, Boston: Northeastern University Press, 1990, p. 17.
39 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws', in Amy Gutman (ed), *A Matter of Interpretation: Federal Courts and the Law. An Essay by Antonin Scalia, with Commentary by Amy Gutman, editor, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, Ronald Dworkin*. Princeton: Princeton University Press, 1997, p. 25. See also Id., 'The Rule of Law as a Law of Rules', in *Chicago Law Review*, 1989, Vol. 56, No. 4.
40 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws', p. 46–47 (*supra* note 39).
41 Vladas Pavilonis, Loc. cit.; Juozas Zilys, 'Constitutional Court and the Development of the Constitutional Law', in *Constitutional Justice: The Present and the Future*, p. 279 (*supra* note 16).
42 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws', p. 45 (*supra* note 39).
43 To Latvia this applies less, as its Constitution dates back to 1922, with substantial amendments made in 1998.
44 Cf. Caroline Taube, op. cit., p. 263–264 (*supra* note 4).
45 Other countries in Europe where dissenting and concurring opinions are not allowed are France, Italy and Andorra.
46 Decision of 13 July 1998.
47 Ruling of 14 February 1994.
48 Decision of 11 July 1994.
49 Ruling of 21 April 1994.
50 Ruling of 11 May 1999.
51 Ruling of 14 January 2002.

52 Cf. Ruling of 12 July 2001, and decision of 13 July 2001.
53 Ruling of 5 April 2000.
54 Rulings of 21 December 2000, and of 29 November 2001.
55 Rulings of 30 March 2000, and 18 October 2000.
56 Ruling of 2 April 2001.
57 Rulings of 13 June 2000, and 14 January 2002.
58 Rulings of 11 November 2001, and 14 January 2002.
59 Cf., e.g., Lithuanian Constitutional Court's rulings of 8 November 1993, and of 28 February 1996 (on the principle of equality of persons), or its rulings of 14 February 1994, of 1 October 1997, of 5 February 1999, and especially of 21 December 1999 (on the status of prosecutors and their relation to the judicial system).