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**The State Court of the Principality of Liechtenstein
Staatsgerichtshof des Fürstentums Liechtenstein**

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Current Situation and Perspectives

National Report by the State Court of the Principality of Liechtenstein

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In the following text, the questions asked are answered from the point of view of the State Court of the Principality of Liechtenstein.

I. Constitutional courts between constitutional law and European law¹

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

Such an obligation exists in various ways, namely as a result of Liechtenstein's membership to the EEA, to the Schengen Area, its association in the field of application of the Dublin Regulation, and Liechtenstein's membership to the ECHR. It is important to note that as a result of the uncontested monistic understanding of international law in Liechtenstein, international law applies directly², which is of particular importance for the EEA (see right below).

EEA Agreement

The Agreement on the EEA (EEAA) leads to an obligation of Member States to apply EEA law, which among other things includes the obligation to transpose Directives into national law and to apply regulations directly. The State Court has ruled very early that "EEA law –

¹ In the present context, "European law" is understood to mean the law of the European Union, the law of the European Economic Area (EEA), the Schengen/Dublin acquis, and the law of the Council of Europe, in particular the European Convention on Human Rights.

² To this effect StGH 1995/14, cons. 1.4 = LES 1996, p. 119 – 124 (p. 122); see also Daniel Thürer, Liechtenstein und die Völkerrechtsordnung, Archiv des Völkerrechts vol. 36 issue 2 1998, p. 98 – 127 (p. 109); Peter Bussjäger, Rechtsfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein, Liechtensteinische Juristen-Zeitung 2006, p. 140 – 146 (p. 140 et seq.).



just like international law in general – has direct effect in the Principality of Liechtenstein. i.e. it is effective as international law on a national level from the time of taking effect without any special national act of transformation." ³

Apart from this obligation directly resulting from international law, Art. 3 EEAA states that the Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement.

One must also mention Protocol 35 on the implementation of EEA rules, according to which the EFTA countries are obliged to introduce, if necessary, a legal provision stating that EEA law prevails in cases where there is a conflict between implemented EEA rules and other legal rules. However, there was no need to introduce such an explicit legal rule in Liechtenstein, since it is the practice of the State Court that EEA law prevails over any Liechtenstein law contradicting it⁴, unless "fundamental principles and core elements of the fundamental rights laid down in the Liechtenstein Constitution" are violated.⁵ However, it is the opinion of the State Court that such a constellation is conceivable only in stark exceptional cases, so that the constitutionality of a decision of the EFTA Court or of an EEA rule need not be examined in practice.⁶

In addition, the obligation to apply EEA law is not limited to the EEAA itself but in particular also extends to its Annexes, which are adapted to the development of the European Union's body of law by resolutions of the EEA Joint Committee as far as is relevant for the EEA.⁷

³ StGH 1995/14, cons. 1.4 = LES 1996, p. 119 (122).

⁴ StGH 1995/14, cons. 1.4 = LES 1996, p. 119 (122); cf. also Herbert Wille, Das Abkommen über den Europäischen Wirtschaftsraum und seine Auswirkungen auf das liechtensteinische Verfassungs- und Verwaltungsrecht, in: Bruha/Pallinger/Quaderer (ed.), Liechtenstein – 10 Jahre im EWR. Bilanz, Herausforderungen, Perspektiven, LPS 40 (2005), p. 108 – 148 (114).

⁵ StGH 1998/61, cons. 3.1. = LES 2001, p. 126 et sqq. (p. 130). The State Court (StGH) has confirmed this practice in many other decisions since then (recently e.g. StGH 2011/200, www.gerichtsentscheide.li, cons. 3.2 with reference to StGH 2008/36, cons. 2.1). See also Bussjäger, Rechtsfragen, p. 141.

⁶ See the considerations of the State Court in StGH 1998/61, cons. 6.1 = LES 2001, p. 130.

⁷ Wille, Abkommen, p. 115.



Schengen acquis

Liechtenstein is part of the Schengen Area. The Protocol⁸ to the Swiss Association Agreement⁹, - which was entered into for Liechtenstein's accession to the Schengen Treaty and entered into force on 7 April 2011 - is an international treaty, which just like the EEAA applies directly in Liechtenstein as an agreement under international law. Pursuant to that Protocol's Art. 2, the provisions of the Schengen acquis listed in Annex A and Annex B to the Association Agreement as they apply to the Member States of the European Union shall be implemented and applied by Liechtenstein under the conditions envisaged in these Annexes. Furthermore, new acts or measures of the Union must be implemented subject to Art. 5.

Dublin acquis

The Dublin/Eurodac acquis entered into force in Liechtenstein on 1 April 2011.¹⁰ Pursuant to Art. 2 of the respective Protocol, the provisions of the Dublin Regulation and the Eurodac Regulation including their implementing Regulations shall be implemented by Liechtenstein and applied in its relations with the Member States of the European Union. Furthermore, acts or measures amending or building upon that provision shall be applied too (Art. 5).

ECHR

The ECHR entered into force in Liechtenstein on 8 September 1982.¹¹ Pursuant to Art. 15 (1) of the *Gesetz über den Staatsgerichtshof* (StGHG, State Court Act), the State Court decides on complaints as far as the complaining party asserts that a right of such party guaranteed by the Constitution or by international agreements has been violated. These international agreements¹² first and foremost include the ECHR (lit. a).¹³

⁸ See in this context: the Protocol between the European Union, the European Community, the Swiss Confederation, and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community, and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, LGBL 2011 no. 131 (German text).

⁹ See also in this context: Astrid Epiney/Andrea Egbuna-Joss, Rechtsfragen der Mitwirkung Liechtensteins am Schengen-System und an der europäischen Asylpolitik, LJZ 2007, p. 52 – 69 (p. 54).

¹⁰ Protocol between the Swiss Confederation, the European Community and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the Swiss Confederation and the European Community on the criteria and procedure for determining the State responsible for examining an application for asylum lodged in a member state or in Switzerland, LGBL 2011 no. 132 (German text).

¹¹ In detail: Wolfram Höfling, Liechtenstein und die Europäische Menschenrechtskonvention, in: Archiv des Völkerrechts 1998/2, p. 141 et seq.

¹² The other international agreements included in Art. 15 (2) StGHG are:

- the International Covenant of 16 December 1966 on Economic, Social, and Cultural Rights (lit. b),
- the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination (lit. c),



2. Are there examples of references to international sources of law, such as

a) the European Convention on Human Rights,

Basic comments:

As has been explained above, the ECHR provides individual rights as a result of the rule of Art. 15 (2)(a) StGHG which a complaining party may call upon before the State Court just like in the case of a violation of a constitutional fundamental right.¹⁴

The practice of the State Court - and literature¹⁵ already before that - has for a long time granted "de facto constitutional status" to the ECHR¹⁶, which Liechtenstein joined in 1982, although no constitutional ranking was assumed when the ECHR was ratified.¹⁷ It certainly was of major importance for practice and literature that Switzerland, too, considers the ECHR to have "supra-legal status".¹⁸

The question raised in literature whether the ECHR might have "supra-legal status"¹⁹ has been expressly left open by the State Court in this decision²⁰, and the State Court has not returned to it since then.

The de facto constitutional status of the ECHR was not changed by the revision of the Constitution of 2003²¹, either; since that revision, it has been possible to examine even

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- the Convention of 18 December 1979 on the Elimination of all Forms of Discrimination against Women (lit. d), and
 - the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (lit. e).

¹³ See in this context also: Peter Bussjäger, Die Beschwerde an den Staatsgerichtshof, in: Kley/Vallender (ed.), Grundrechtspraxis in Liechtenstein, LPS 52 (2012), p. 867; Tobias Michael Wille, Liechtensteinisches Verfassungsprozessrecht, LPS 43 (2007), p. 67 and p. 260 et sqq.

¹⁴ Insofar, the State Court Act of 27 November 2003 did not bring any new innovation as compared to the legal situation before (cf. Tobias Michael Wille, Verfassungsprozessrecht, p. 261).

¹⁵ Herbert Wille/ Marzell Beck, Liechtenstein und die Europäische Menschenrechtskonvention, in: Verlag der Liechtensteinischen Akademischen Gesellschaft (ed.), Liechtenstein in Europa, LPS 10 (Vaduz 1984), p. 248, used the term "*Übergesetzesrang*" (supra-legal status).

¹⁶ Cf. StGH 1995/21, cons. 6.1 = LES 1997, p. 18 (p. 28); see also: Wille, Verfassungsprozessrecht, p. 261.

¹⁷ Cf. Wolfram Höfling, Menschenrechtskonvention, p. 144.

¹⁸ Cf. Luzius Wildhaber, Erfahrungen mit der Europäischen Menschenrechtskonvention, ZSR 98 II (1979), p. 329 et sqq., who is for example also referred to by Wille/Beck, Menschenrechtskonvention, p. 248.

¹⁹ Martin Batliner, Die politischen Volksrechte im Fürstentum Liechtenstein, Fribourg 1993, p. 162; Hilmar Hoch, Verfassung- und Gesetzgebung, in: Batliner (ed.), Die liechtensteinische Verfassung 1921. Elemente der staatlichen Organisation, LPS 21 (1994), p. 208 et seq.).

²⁰ StGH 1995/21, cons. 6.1 = LES 1997, p. 18 (p. 28).

²¹ LGBl. 2003 no. 186.



international treaties for conformity with the Constitution²². The State Court emphasises in its practice that it was obviously not the objective of the revision of the Constitution to weaken the protection of the fundamental freedoms of individuals. In addition, the State Court has also ruled that the catalogue of international treaties that are subject to individual complaints before the State Court has been extended through the STGHG.²³

It must be emphasised that as a result of the de facto constitutional status of the ECHR, any persons concerned may not just call upon the guarantees of the ECHR with regard to acts of the executive branch pursuant to Art. 15 (2)(a) StGHG; rather, these guarantees form a standard of review for legal rules, regardless of the fundamental rights directly granted by the Constitution.

The following examples from the practice of the State Court serve to clarify what has been said above; they certainly do not constitute a full catalogue of references to the ECHR in the State Court's practice:

ECHR as a standard of review for laws:

In the application for the review of rules with the file no. StGH 2012/198, the Liechtenstein Administrative Court of Justice (the supreme instance in administrative proceedings) pleaded that the rule subject to review of Art. 88 Abs. 4 ALVG²⁴ was not conformal with the review of the facts by the "tribunal" demanded by Art. 6 ECHR.

The challenged rule translated as follows:

"Complaints to the Administrative Court of Justice may only be directed against unlawful handling and execution or against findings of fact that are contrary to the record or incomplete."

The State Court reviewed the challenged rule not only on the basis of the practice of the ECtHR concerning Art. 6 ECHR and the demanded cognisance and review but also on the basis of the right of complaint (Art. 43 LV) granted by the Liechtenstein Constitution

²² Cf. Art. 104 (2) LV. See also in this context: Günther Winkler, Die Verfassungsreform in Liechtenstein (2003), p. 322 et sqq.

²³ StGH 2004/45, cons. 2.1; StGH 2005/89, www.gerichtsentseide.li, cons. 4.

²⁴ *Gesetz über die Arbeitslosenversicherung und die Insolvenzentschädigung* (Act on Unemployment Insurance and Insolvency Compensation), LGBl. 2010 no. 452.



(*Landesverfassung*, LV). The StGH noted with reference to earlier practice²⁵ that both Art. 43 LV and Art. 6 ECHR required full power of review of the courts both as a factual and a legal instance.²⁶

It should be noted in this context that where the substantive content of the right to complain of Art. 43 LV obviously converges with the interpretation of Art. 6 ECHR oriented at the practice of the ECtHR, the former provides the wider-ranging claim because this fundamental right is not limited to "civil rights and obligations" and "criminal charges" in terms of Art. 6 (1) ECHR.

Art. 8 ECHR and house searches:

Pursuant to Art. 32 (1) of the LV, the Constitution guarantees personal freedom, domestic authority, and privacy protection as regards correspondence and written communications. Pursuant to Para. (2) of that provision, nobody may be arrested or kept in detainment, no house searches or searches of individuals, letters, or written documents be carried out, nor may letters or documents be seized except for the cases laid down in the law.

Art. 8 ECHR on the other hand formulates everyone's right to respect for his private and family life, his home, and his correspondence. In addition, para. 2 of this provision formulates the reservation that public authorities may only interfere with the exercise of this right as far as such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is the practice of the State Court to interpret Art. 32 LV in the light of Art. 8 ECHR because the State Court considers the protective purposes of the provisions to be identical.²⁷ Art. 32 (1) LV is therefore equivalent to Art. 8 ECHR as far as the amount of its protection of domestic authority is concerned.²⁸ There is also a convergence of these two guarantees of

²⁵ StGH 2010/145, cons. 2.2; StGH 2009/93, www.gerichtsentseide.li, cons. 7.1; see also Tobias Michael Wille, *Beschwerderecht*, in: Andreas Kley/Klaus A. Vallender (ed.), *Grundrechtspraxis in Liechtenstein*, LPS 52 (2012), p. 518 et seq. with further references to decisions.

²⁶ StGH 2012/198, cons. 3.1.

²⁷ Cf. Marzell Beck/Andreas Kley, *Freiheit der Person, Hausrecht sowie Brief- und Schriftengeheimnis*, in: Andreas Kley/Klaus Vallender (ed.), *Grundrechtspraxis in Liechtenstein*, LPS 52 (2012), p. 133.

²⁸ Beck/Kley, *Freiheit*, p. 133.



fundamental rights concerning the question whether legal entities can be holders of fundamental rights in this regard, a question that both the State Court and the ECtHR have answered in the affirmative.²⁹

Convergence also happens in the interpretation of the respective reservations of the laws: the legal reservation of Art. 32 (2) LV is relatively wide, since if one interpreted it literally, any legal rule would be admissible as a limitation of the guarantee of para. 1. The State Court, however, rules that although a limitation of the constitutional guarantees is possible in general, it may only happen provided that the infringement of fundamental rights is lawful, in the public interest, and proportionate, and that the core content guarantee is complied with.³⁰ For the assessment of this question, the State Court has also pointed out the much more differentiated legal reservation in Art. 8 (2) ECHR and has used it to assess the conformity of an infringement with fundamental rights.³¹

The right to the reasonable duration of proceedings:

The State Court considers the right laid down in Art. 6 (1) ECHR to a decision within a reasonable period of time to be a component of the prohibition of delayed justice, which principle is deduced from the general principle of equality pursuant to Art. 31 LV.³² This has the advantage for legal subjects that the guarantee of Art. 31 LV is wider than "merely" the civil and criminal law matters included in Art. 6 (1) ECHR.³³ Thus, the prohibition of delayed justice does apply to legal assistance proceedings, while Art. 6 (1) ECHR does not.³⁴

The State Court uses the criteria of the ECtHR in assessing the question of violations of the rule of the reasonable duration of proceedings³⁵, i.e. in the light of the importance of the matter for the complaining party, the complaining party's conduct, the complexity of the case, and the handling of the case by the public authorities³⁶.

²⁹ Beck/Kley, Freiheit, p. 141.

³⁰ Beck/Kley, Freiheit, p. 142 with further references.

³¹ StGH 1997/1 = LES 1998, p. 201 (205), cons. 4; cf. also Beck/Kley, Freiheit, p. 143.

³² StGH 2011/32, www.gerichtsentscheide.li, cons. 6; StGH 2004/25, cons. 2.1.

³³ Cf. StGH 2008/152.

³⁴ StGH 2008/152.

³⁵ In Liechtenstein practice on fundamental rights, the reasonable duration of proceedings is also considered to be a part of the "prohibition of delayed justice", which is not expressly formulated in the Constitution but has been deduced from the constitutional principle of equality, which is subject to complaint before the State Court (cf. Vogt, Rechtsverweigerung, p. 605).

³⁶ StGH 2004/25, cons. 2.2 with reference to Mark E. Villiger, EMRK-Kommentar, 2nd ed., Zurich 1999, 290, margin no. 459; cf. also StGH 2004/58, www.gerichtsentscheide.li, cons. 7.2 und StGH 2005/43, cons. 9.2). See



However, the State Court has also ruled that these four criteria³⁷ only constitute aspects "which the ECtHR applies to assess the duration of proceedings in the individual case. They do not constitute a standard of their own, since it is always the concrete constellation of the individual case that determines the adequacy of the duration of proceedings."³⁸

Taking the case law of the ECtHR and the literature published in that context as an assessment standard, the State Court has for example considered a duration of proceedings which "divided by the number of instances results in between eighteen and twenty-four months" to be still acceptable.³⁹

However, if an infringement of fundamental rights is found, the State Court is confronted with the problem that annulling the challenged decision will only extend the infringement if the factual decision as such is not modified. In these cases, the State Court (and incidentally, also the Austrian Constitutional Court)⁴⁰ declares that the challenged decision "has violated the complaining party's right guaranteed by the Constitution and by the ECHR to a decision within a reasonable term pursuant to Art. 31 (1) LV und Art. 6 (1) ECHR."⁴¹ So far, the State Court has never found grounds to partly annul the challenged decision (as the Austrian Constitutional Court does)⁴², for example because in criminal proceedings the violation of the reasonable duration of proceedings would have to be taken into account in assessing the amount of the sentence.

also Hugo Vogt, *Rechtsverweigerung, Rechtsverzögerung, überspitzter Formalismus*, in: Kley/Vallender (ed.), *Grundrechtspraxis in Liechtenstein*, LPS 52 (2012), p. 593 – 618 (p. 607 et seq.).

³⁷ As to the content of these four criteria in detail, see Christoph Grabenwarter/Katharina Pabel, *Europäische Menschenrechtskonvention*, 5th ed. (2012), p. 428 et sqq. margin no. 70.

³⁸ StGH 2005/52.

³⁹ StGH 2010/29, www.gerichtsentscheide.li, cons. 6 with reference to Wolfgang Peukert, in: Jochen Abr. Frowein/Wolfgang Peukert (ed.), *Menschenrechtskonvention*, 3rd ed. (2009), margin no. 249.

⁴⁰ Cf. e.g. VfSlg 16.747/2002; VfSlg 17.339/2004; VfSlg 18.012/2006.

⁴¹ Cf. StGH 2011/32, www.gerichtsentscheide.li.

⁴² Cf. VfSlg 17.339/2004: "Only the verdict on the sentence in the challenged order had to be annulled, given that the declared infringement of rights does not affect the verdict on guilt, and a modification can only be taken into account within the framework of sentencing pursuant to § 16 (6) DSt 1990 (Austrian Disciplinary Statute for Lawyers and Trainee Lawyers) (arg. 'in particular'), in particular by constitutional consideration of the overly long duration of proceedings as a mitigating factor in mutatis mutandis application of § 34 (2) StGB (Penal Code) (cf. VfSlg 16385/2001)." To the same effect also Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, p. 431 margin no. 72.



Under the Liechtenstein laws, such a declaration does not have any additional legal implications, such as the assessment of compensation.⁴³ It is the opinion of the State Court that the system of "just satisfaction" laid down in Art. 41 ECHR is reserved for the ECtHR and cannot be applied to the proceedings before the State Court.⁴⁴

However, the State Court will remit the procedural costs for the complaining party as a procedure to "fill a gap".⁴⁵ It has also stated that "the state is obliged to remedy within the limits of its legal options and is shall compensate the disadvantages suffered by the party concerned as a result of the overly long duration of the proceedings."⁴⁶

The State Court has also ruled that inactivity of the State Court itself may infringe the right if it has not decided within an unreasonably long period of time. In such a case, the fundamental right was infringed not by the challenged decision, and therefore the State Court will declare in its judgment that the State Court itself has infringed a fundamental right.⁴⁷

Rights of defence:

Art. 33 (3) LV grants the right of defence to the accused. This right, which is formulated very vaguely, is interpreted by the State Court in the light of the more detailed provisions of Art. 6 ECHR, in particular its para. 3.⁴⁸

In its latest practice, the State Court has for example oriented itself at the practice of the ECtHR with regard to the providing of an interpreter in criminal proceedings and the translation of documents from the court file.⁴⁹

The right to legal aid and to a defence counsel appointed by the court in criminal proceedings is based on Art. 33 (3) LV, and this claim is assessed in the light of the guarantees of Art. 6

⁴³ However, one might assert official liability pursuant to the provisions of the Act on Official Liability (as to the obligation of a Member State to provide damages for violations of the Convention, see: Grabenwarter/Pabel, Europäische Menschenrechtskonvention, p. 491 margin no. 181).

⁴⁴ Cf. 1997/30, cons. 6 = LES 2002, p. 124 (p. 127 et seq.); cf. also the practice of the ECtHR at Jens Meyer-Ladewig, EMRK (2003), p. 286 f. margin no. 13.

⁴⁵ Cf. StGH 2011/32, www.gerichtsentseide.li, cons. 9.

⁴⁶ StGH 1997/30, cons. 6 = LES 2002, p. 124 (127 et seq.).

⁴⁷ StGH 2005/52; StGH 2005/7; StGH 2005/13, www.gerichtsentseide.li; StGH 2005/43; StGH 2004/58, www.gerichtsentseide.li.

⁴⁸ StGH 2010/116; more detailed Tobias Michael Wille, Recht auf wirksame Verteidigung, in: Andreas Kley/Klaus Vallender (ed.), Grundrechtspraxis in Liechtenstein, LPS 52 (2012), p. 438 with further references.

⁴⁹ StGH 2010/116; StGH 2010/161, www.gerichtsentseide.li.



(3)(c) ECHR. Therefore, the right (only) goes as far as is necessary in the interests of the administration of justice and the accused or defendant is unable to pay for a defence counsel from his own pocket.⁵⁰

Another example of the State Court referring to the ECHR and to its interpretation by the ECtHR can be found in the State Court's practice that the right to defence applies in criminal proceedings but not in proceedings for mutual legal assistance in criminal matters.⁵¹ In StGH 2008/37, the State Court makes reference to "the Strasbourg practice" in this context".⁵² In fact, this practice refers to an extradition case⁵³, on the basis of which one can argue *a fortiori* that if there is no right of defence even in the case of extradition, there is no right of defence even less in other measures of mutual legal assistance that come with much less interference with personal rights. In view of the dynamic development of proceedings for official and legal assistance in Europe and of the necessity to observe the fairness of criminal proceedings "as a whole"⁵⁴, this example in particular leads to the question to what extent this practice will be subject to change sooner or later, be it either by the ECtHR or the State Court.⁵⁵

Summary:

The examples presented are to illustrate the influence of the ECHR on Liechtenstein doctrine on fundamental rights: as a result of ECHR-friendly practice of the State Court, the Liechtenstein fundamental rights are interpreted in the light of the comparable rules of the ECHR. The extensive limits contained in the fundamental rights laid down in the Liechtenstein Constitution are substantially restricted by interpretation oriented at the practice of the ECtHR.

On the other hand, the more extensive guarantees of the Liechtenstein charter of fundamental rights are not given up; rather, the ECHR forms a minimum standard for the protection of

⁵⁰ StGH 2010/23.

⁵¹ More detailed: Wille, *Verteidigung*, p. 442 with further references.

⁵² StGH 2008/37, www.gerichtssentscheide.li, cons. 4.1. Also see in this context: StGH 2006/95, cons. 2.1, which decision is referred to in StGH 2008/37.

⁵³ Cf. Villiger, *Menschenrechtskonvention*, p. 255 margin no. 401, which is referred to in StGH 2006/61, cons. 2.1. Cf. also Wille, *Verteidigung*, p. 443; Theo Vogler, Art. 6 EMRK, in: Katharina Pabel/Stefanie Schmahl (ed.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (1986), margin no. 247.

⁵⁴ The term "as a whole" is based on constant practice (cf. Hans-Heiner Kühne, Art. 6 EMRK, in: Katharina Pabel/Stefanie Schmahl (ed.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2009), margin no. 361 with further references).

⁵⁵ Cf. also Wille, *Verteidigung*, p. 443 f.



fundamental rights, which is in many cases exceeded by the Liechtenstein charter of fundamental rights.⁵⁶

There is therefore a dialogue of levels of fundamental rights, which leads to a convergence of the protection of fundamental rights without giving up the standards reached so far.

b) the Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union only applies within the European Union and does not have direct legal effect in the EEA.⁵⁷ Accordingly, the State Court has already ruled that "the mere fact that the complaining party does have a branch in a member state of the European Union, too, cannot suffice to cause the direct applicability of the European Charter of Fundamental Rights also in the EEA."⁵⁸

Regardless thereof, the Charter of Fundamental Rights could also "radiate" – in the sense of a term used time and again by the State Court⁵⁹ – to the State Court's practice.⁶⁰ The practice of the EFTA Court will also play a role in this.

c) other instruments of international law at European level

Being the national constitutional court of an EEA Member State, the Liechtenstein State Court's orientation is not at all bound to the practice of the ECtHR. The practice of the EFTA Court is another major source of law.

⁵⁶ Pursuant to Art. 53 ECHR, the Convention must not be interpreted to limit or inhibit human rights and fundamental freedoms that are recognised in the laws of a Member State or in another treaty to which it is a party. This rule provides the constitutions of Member States with room to guarantee a higher level of protection than that of the ECHR (cf. Christoph Grabenwarter/Katharina Pabel, Europäische Menschenrechtskonvention, p. 13 margin no. 14).

⁵⁷ Pursuant to Art. 6 (1) of the Treaty on European Union, the provisions of the Charter does not at all extend the competences of the Union laid down in the Treaties. A provision with the same content is Art. 51 (2) of the Charter of Fundamental Rights of the EU.

⁵⁸ StGH 2012/157, cons. 2.

⁵⁹ The State Court uses this term in connection with the effect of the guarantees of the ECHR to the reservations made by Liechtenstein on the occasion of its accession to the ECHR (cf. StGH 2004/60, www.gerichtentscheide.li, cons. 6).

⁶⁰ Cf. also: Bussjäger, Beschwerde, p. 867.



Prevalence of EEA law is constant practice of the State Court.⁶¹ This includes not only positive statutory EEA law but also its interpretation by the EFTA Court.⁶² However, it is the opinion of the State Court that the prevalence of EEA law reaches only as far as it does not "violate fundamental principles and core elements of the fundamental rights of the Liechtenstein Constitution".⁶³ However, such a constellation is conceivable only in stark exceptional cases, so that the constitutionality of a decision of the EFTA Court or of an EEA rule need not be examined in practice.⁶⁴

The State Court recognises the fundamental freedoms of the EEA as constitutionally guaranteed rights.⁶⁵ Therefore, the State Court has oriented its practice - as has been mentioned - also at the EFTA Court; this has become particularly evident in a series of decisions⁶⁶ in which the EEA-conformity of the (new)⁶⁷ rules of the Liechtenstein *Zivilprozessordnung* (ZPO, Code of Civil Procedure) was confirmed with regard to security deposits for legal costs (in particular § 57), making reference to decisions of the EFTA Court⁶⁸. As far as that practice is clear and/or the EEA law to be applied does not leave room for doubts, the State Court has refrained from submitting the case to the EFTA Court⁶⁹ to obtain an opinion.⁷⁰

⁶¹ Cf. StGH 1996/34 = LES 1998, p. 74 (80); StGH 2004/45, cons. 2.1.

⁶² StGH 2011/200, www.gerichtsentscheide.li, cons. 3.2; same content: StGH 2011/177, 2011/175, 2011/174, 2011/173, 2011/172, 2011/170, 2011/169, 2011/147, 2011/132, 2011/104, in all of them cons. 3.2.

⁶³ StGH 2008/36, cons. 2.1.

⁶⁴ See the above comments under I. 1..

⁶⁵ StGH 2004/45, cons. 2.1; StGH 2007/98, cons. 6.1;

⁶⁶ Cf. StGH 2011/200, www.gerichtsentscheide.li, cons. 3.2

⁶⁷ An earlier decision had been annulled by the State Court for non-compliance with the EEA (cf. StGH 2006/94, www.gerichtsentscheide.li, cons. 3).

⁶⁸ Decision of the EFTA Court of 17 December 2010, case E-5/10 = LES 2010, p. 5 with commentary from Manfred Walser; see also Philipp Lennert/Daniel Heilmann, Die Auslegung der aktorischen Kautio im Lichte des Allgemeinen Europäischen Diskriminierungsverbotes in Art. 4 des Abkommens zum Europäischen Wirtschaftsraum: Besprechung Urteil des EFTA-Gerichtshofes vom 17. Dezember 2010, *Rechtssache E-5/10*, LJZ 2011, 25 – 28; Christian Kohler, Liechtenstein, cautio iudicatum solvi und Lugano-Übereinkommen: No End of a Lesson?, *Jus & News* 2/2011, 153 et sqq.

⁶⁹ The Liechtenstein courts (only) have the power to ask the EFTA Court for an opinion if there are doubts on the interpretation of EEA law (cf. Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, LGBl. 1995 no. 72).

⁷⁰ Cf. for example StGH 2006/76, cons. 5; StGH 2011/123, cons. 3.1; StGH 2011/177, cons. 5.



d) other instruments of international law at international level?

As has been mentioned, it is stated in Art. 15 (2) StGHG that rights that are quasi equivalent to those granted by the Constitution⁷¹ are also granted by treaties such as

- the International Covenant of 16 December 1966 on Economic, Social, and Cultural Rights (lit. b),
- the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination (lit. c),
- the Convention of 18 December 1979 on the Elimination of all Forms of Discrimination against Women (lit. d), and
- the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (lit. e).

There is only occasional practice of the State Court as to these treaties, namely concerning the ICERD and concerning the ICCPR.⁷²

3. Are there any provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

There is no explicit obligation. One should however mention Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice⁷³, according to which the EFTA Court will prepare opinions on the interpretation of the EEA Agreement. If such a question is submitted to a court of an EFTA state and if that court considers a decision on that question to be crucial for rendering its judgment, it may submit that question to the EFTA Court to prepare such an opinion. The fact alone that this is an "opinion" already shows that there is no mandatory obligation to take it into account,

⁷¹ In more detail: Peter Bussjäger, *Beschwerde*, p. 867.

⁷² Concerning the ICERD, see StGH 2005/89 = LES 2007, 411 (412); StGH 2008/67; StGH 2011/203, www.gerichtsentscheide.li. Concerning the ICCPR, see for example StGH 2009/79 + 80; StGH 2011/32, www.gerichtsentscheide.li; StGH 2011/80, www.gerichtsentscheide.li; StGH 2011/81, www.gerichtsentscheide.li; StGH 2012/21; StGH 2012/100, www.gerichtsentscheide.li; StGH 2012/130 and StGH 2013/11, www.gerichtsentscheide.li.

⁷³ LGBl. 1995 Nr. 72.



although the practice of the Liechtenstein courts adheres to the interpretation of EEA law by the EFTA Court.⁷⁴

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

As has been explained (2. a), the guarantees of the ECHR are interpreted in the light of the jurisprudence of the ECtHR. In addition to this, the Liechtenstein fundamental rights are applied in orientation at comparable rules of the ECHR and its interpretation by the ECtHR. On the other hand, however, any more extensive guarantees of the Liechtenstein charter of fundamental rights are not given up; rather, the ECHR forms a minimum standard for the protection of fundamental rights that is in many cases exceeded by the Liechtenstein charter of fundamental rights.⁷⁵

As far as the practice of the ECJ and the ECtHR mutually influence each other⁷⁶, this also affects the jurisprudence of the State Court through the interpretation of the ECHR.

As has been mentioned, the practice of the EFTA Court also plays a role. In terms of constitutional law it is less the interpretation of secondary EEA⁷⁷ law by the EFTA Court that is relevant but rather the latter's interpretation of the fundamental freedoms laid down in the EEA.⁷⁸

The Charter of Fundamental Rights of the European Union might also influence EEA law through the practice of the EFTA Court. Such developments would also be relevant for the State Court where it has to apply EEA law directly or in the implementation of EEA law.

⁷⁴ See also Herbert Wille, EWR-Abkommen, p. 129 et seq.

⁷⁵ Pursuant to Art. 53 ECHR, the Convention must not be interpreted to limit or inhibit human rights and fundamental freedoms that are recognised in the laws of a Member State or in another treaty to which it is a party. This rule provides the constitutions of Member States with room to guarantee a higher level of protection than that of the ECHR (cf. Christoph Grabenwarter/Katharina Pabel, Europäische Menschenrechtskonvention, p. 13 margin no. 14).

⁷⁶ Cf. in this context e.g.: Walter Berka, Grundrechtsschutz durch EuGH und EGMR – Konkurrenz oder Kooperation?, ÖJZ 2006, p. 876 et sqq.; illustrative also: Theo Öhlinger, Perspektiven des Grundrechtsschutzes in Europa: Das Zusammenspiel von EGMR, EuGH und VfGH im Lichte des Verfassungsentwurfs der Europäischen Union, in: Wolfram Karl (ed.), Internationale Gerichtshöfe und nationale Rechtsordnung (2005), p. 123 et sqq.

⁷⁷ The primary EEA law is the law contained in the main Agreement and in the corresponding Protocols. The secondary EEA law essentially consists in the regulations, directives, and other acts of the EU, which have been declared in the Annexes to be part of the EEAA (Art. 119 EEAA). Add to this the acts accepted into the EEA after the EEAA entered into force (cf. Wille, EWR-Abkommen, p. 112).

⁷⁸ In this context also: Carl Baudenbacher, Grundfreiheiten und Grundrechte im EWR-Recht, in: Kley/Vallender (ed.), Grundrechtspraxis in Liechtenstein, LPS 52 (2012), p. 775 – 853.



Just like to the Austrian Constitutional Court⁷⁹, the State Court opens itself to the practice of the ECtHR and quotes its decisions. In particular, the provisions of the ECHR and their interpretation by the ECtHR substantiate the fundamental rights of the Liechtenstein Constitution, which point in the same direction but came into being in another period of time and frequently with quite open limits.

5. *Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?*

Although Liechtenstein is not a member of the EU, the State Court time and again does refer to judgments of the Court of Justice of the European Union, namely in connection with the interpretation of EEA law⁸⁰ or Schengen law.⁸¹ There is a certain emphasis on the ECJ's practice in the field of fundamental freedoms, in particular the freedom of movement of goods and persons and the freedom of settlement⁸², which are matters of special relevance in the EEA. This also includes jurisprudence on the prohibition of discrimination, which also refers to the practice of the ECJ.⁸³

As far as the ECtHR is concerned, reference can be made to the examples listed above under 2.a). As a result of the described legal situation, which allows complaining parties to call upon the ECHR just like upon the rights granted by the Liechtenstein Constitution, the jurisprudence of the ECtHR is regularly referred to.

This happens particularly frequently in the field of procedural safeguards. As has been explained above, the State Court expressly orients itself at the criteria developed by the

⁷⁹ Grabenwarter, Grundrechte, p. 299.

⁸⁰ As in StGH 2011/155, www.gerichtsentscheide.li, cons. 3.3 with reference to the Akrich judgment of the ECJ.

⁸¹ See StGH 2010/137, where the State Court discusses the question whether the State Court should wait for a decision of the ECJ concerning the question of the applicability of Art. 54 of the Schengen Implementing Convention. StGH 2009/187, cons. 5.6 with reference to various judgments with criteria regulating the exercise of the lawyer profession in the host Member State. See also StGH 2009/145. In contrast to this, the State Court has not yet felt compelled to refer to judgments of the ECJ concerning the right of asylum, which has entered the European level with the Dublin Regulation.

⁸² StGH 2009/179, cons. 3.3 (Lidl Belgium); StGH 2008/141, www.gerichtsentscheide.li, cons. 2.2; StGH 2008/36, cons. 2.4; StGH 2006/94, www.gerichtsentscheide.li, cons. 2.2; StGH 2006/66, cons. 2.2; StGH 2006/5, www.gerichtsentscheide.li, cons. 3.b.

⁸³ StGH 2002/37, www.gerichtsentscheide.li, cons. 4.1.



ECtHR when assessing the adequacy of the duration of proceedings, these criteria being the importance of the proceedings for the complaining party, the complexity of the case, the conduct of the complaining party, and the handling by the relevant authorities.⁸⁴ The same applies *mutatis mutandis* to the aspect of due process of law, where the State Court demands that as a matter of principle, the parties must be notified of every single written submission from a participant in the proceedings, no matter whether or not the court considers the submission to be relevant for the proceedings.⁸⁵

As another example, one might mention that in its interpretation of the prohibition of "ne bis in idem" pursuant to Art. 4 of Protocol No. 7 to the ECHR, the State Court used the jurisprudence of the ECtHR in "Müller v. Austria"⁸⁶ as orientation for its own decision.⁸⁷ The State Court also considers the jurisprudence of the ECtHR in the application of Art. 8 ECHR in the field of migration law⁸⁸ or family law.⁸⁹

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

No substantial divergences weakening the protection of fundamental rights could be found. However, sometimes there is a dialogue between various court levels, as will be illustrated in the examples below:

Application of the favourability principle

By applying the favourability principle laid down in Art. 53 ECHR, the total standard of protection is increased where a national constitutional court applies stricter standards than the ECHR or the ECtHR.

In the above-mentioned judgment StGH 2012/198 (see above under 2.a), the State Court reviewed the challenged rule not just on the basis of the practice of the ECtHR on Art. 6 ECHR and the demanded cognisance and power of review but also on the basis of the right of

⁸⁴ Cf. StGH 2012/24, cons. 4.1.

⁸⁵ Cf. StGH 2012/33, cons. 4.1 with reference to StGH 2003/90, cons. 2.3 und Hugo Vogt, Anspruch auf rechtliches Gehör, in: Kley/Vallender (ed.), Grundrechtspraxis in Liechtenstein, LPS 52 (2012), p. 583 et seq.

⁸⁶ ECtHR, 18 September 2008, no. 28034/04.

⁸⁷ StGH 2012/100, www.gerichtsentscheide.li, cons. 4.1.

⁸⁸ Cf. StGH 2012/190, cons. 3.1; StGH 2012/176, www.gerichtsentscheide.li, cons. 3.3 to 4.2.

⁸⁹ Cf. StGH 2012/163, www.gerichtsentscheide.li, cons. 3.2 to 3.4 with reference to "Sporer v. Austria" Application no. 35637/03 and "Zaunegger vs. Germany", Application no. 22028/04.



complaint (Art. 43 LV). The StGH noted with reference to earlier practice⁹⁰ that both Art. 43 LV and Art. 6 ECHR required full power of review of the courts both as a factual and a legal instance⁹¹. Despite this obvious convergence of the substantive content of the right of complaint pursuant to Art. 43 LV with Art. 6 ECHR, the former provides the more extensive claim, since it is not limited to "civil rights and obligations" and "criminal charges" in terms of Art. 6 (1) ECHR.

Confiscatory measures as punishment?

Assessing the question whether a forfeiture rule pursuant to § 20b (2) *Strafgesetzbuch* (StGB, Penal Code) qualifies as a sentencing rule and therefore makes the fundamental right "nulla poene sine lege" (Art. 7 (1) ECHR) applicable, the State Court applied the criteria developed by the ECtHR and came to a different result than the latter concerning the UK forfeiture clauses that applied in the leading case *Welch v. United Kingdom*⁹²; the State Court considered this guarantee of the ECHR not to apply. The State Court considered the pivotal difference to lie in the fact that in the UK forfeiture proceedings, the court had discretion in assessing the amount subject to forfeiture depending on the type and extent of the defendant's fault, and that the court had the option of imposing imprisonment as an alternative where the person obliged to pay refused to do so.⁹³ The correctness of this decision, which deviated from the original practice of the ECtHR, was then confirmed by the ECtHR in the decision "*Dassa v. Liechtenstein*".⁹⁴

Dialogue EFTA Court / State Court in the question of security deposits for legal costs

A dialogue of jurisprudence also took place between the State Court and the EFTA Court in a case that was about the payment of a security deposit for legal costs pursuant to § 57 of the Liechtenstein *Zivilprozessordnung* (ZPO, Code of Civil Procedure) to be paid by plaintiffs with a place of residence abroad.

⁹⁰ StGH 2010/145, cons. 2.2; StGH 2009/93, www.gerichtentscheide.li, cons. 7.1; see also Tobias Michael Wille, *Beschwerderecht*, in: Andreas Kley/Klaus A. Vallender (ed.), *Grundrechtspraxis in Liechtenstein*, LPS 52 (2012), p. 518 et seq. with references to other decisions.

⁹¹ StGH 2012/198, cons. 3.1.

⁹² ECtHR 09.02.1995, Application no. 17440/90; cf. also Jochen Abr. Frowein/Wolfgang Peukert, *EMRK-Kommentar*, 2nd ed. (1995), p. 325 margin no. 4.

⁹³ StGH 2003/44, www.stgh.li.

⁹⁴ ECtHR of 10 Jul 2007, Application no. 696/05; cf. in this context also StGH 2012/126, www.gerichtentscheide.li, cons. 2.3.



At first, the State Court ruled in its decisions in StGH 1997/31, StGH 2002/37⁹⁵, and StGH 2002/52 that the rules that were in place at that time on security deposits for legal costs were EEA compliant.⁹⁶ However, in the opinion of 01 Jul 2005, E-10/04, the EFTA Court considered a different provision of the ZPO (§ 56) - according to which all types of performance not coming from Liechtenstein were excluded as a security deposit for legal costs - not to be EEA compliant. This allowed the conclusion that the EFTA Court would consider the rule of § 57 ZPO to be EEA-incompatible, too.

The State Court finally deviated from its original point of view in its decision in StGH 2006/94 and annulled the then provision of the ZPO as EEA-incompatible and therefore contrary to the Constitution. The State Court argued that the then rule of §§ 56 et sqq. of the old ZPO constituted an indirect discrimination of foreigners, which certainly could not be justified by a lack of international enforcement treaties.⁹⁷

Subsequently, the legislator⁹⁸ created new rules for security deposits for legal costs, which still used the plaintiff's residence in Liechtenstein as a criterion, but did not provide for an obligation to pay a security deposit if (among other things) the decision as to legal costs can be enforced in the plaintiff's/appellant's country of residence. Pursuant to Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, this rule was submitted by a court to the EFTA Court for review.

In its decision of 17 December 2010, E-5/10⁹⁹, the EFTA Court considered the new Liechtenstein provisions concerning the payment of a security deposit for legal costs pursuant to §§ 57 et sqq. ZPO to be basically consistent with EEA law. It stated in particular that a national procedural rule stating that plaintiffs not resident on the territory had to pay a security deposit for legal costs in civil proceedings while plaintiffs resident on the territory were not was justified on the grounds of public interest if this was necessary as well as proportionate.

⁹⁵ LES 2005, p. 145.

⁹⁶ See the criticism by Anton Schäfer, Die Prozesskostensicherheit – eine Diskriminierung, LJZ 2006/1, p. 17 – 32.

⁹⁷ StGH 2006/94, www.gerichtsentscheide.li, cons. 2.4.

⁹⁸ LGBl. 2009 no. 206.

⁹⁹ LES 2010, p. 5 with a commentary by Manfred Walser; see also Philipp Lennert/Daniel Heilmann, Die Auslegung der aktorischen Kautio im Lichte des Allgemeinen Europäischen Diskriminierungsverbotes in Art. 4 des Abkommens zum Europäischen Wirtschaftsraum: Besprechung Urteil des EFTA-Gerichtshofes vom 17. Dezember 2010, Rechtssache E-5/10, LJZ 2011, p. 25 – 28; Christian Kohler, Liechtenstein, cautio iudicatum solvi und Lugano-Übereinkommen: No End of a Lesson?, Jus & News 2/2011, p. 153 et sqq.



The EFTA Court stated that it was up to the national court to find in the individual case whether the requirements for justifying discrimination were met.

Subsequently, the State Court - referring to the decision E-5/10 of the EFTA Court - considered the new provisions of the ZPO concerning security deposits for legal costs and in particular also § 57 ZPO to be EEA compliant.¹⁰⁰

Thus, the legal positions adopted by the EFTA Court and the State Court are now conformal.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

That jurisprudence is taken into consideration in that the courts base their interpretation of provisions of the ECHR or of fundamental rights in the Constitution on the practice of the State Court, which in turn orients itself at the European courts in the way described above.

One example of this is the order of the Supreme Court of 05 Apr 2013, 11 UR.2011.364, in which it dismissed an application for the granting of legal aid with reference to a judgment of the State Court¹⁰¹ on the question of the constitutionality of excluding private parties from legal aid of in criminal proceedings, which judgement was in turn based on the practice of the ECtHR.¹⁰²

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

We assume that the practice of the constitutional courts in contested questions such as the retention of data also influences the practice of the European courts. This has been shown by the case "Dassa v. Liechtenstein"¹⁰³ (see above 6.), in which the ECtHR considered the practice of the State Court, which denied the applicability of the then ECtHR practice on the

¹⁰⁰ StGH 2010/20, www.gerichtsentscheide.li, cons. 2.3.1 f.; cf. also Wilhelm Ungerank, Entsprechen die nunmehrigen Bestimmungen der ZPO betreffend die Sicherheitsleistung für Prozesskosten dem EWR-Recht?, LJZ 2010, p. 32 et sqq. In the decision in StGH 2010/63, cons. 3.1 et seq., the State Court also qualified the rules on security deposits concerning legal entities pursuant to § 57a ZPO to be conformal with EEA law, also based on the mentioned decision of the EFTA Court.

¹⁰¹ StGH 2012/128.

¹⁰² Similar also the Supreme Court's order of 08 Mar 2013, DO.2012.7, concerning the applicability of Art. 6 ECHR to disciplinary matters, with reference to the ECtHR and to the State Court.

¹⁰³ ECtHR 10 Jul 2007, Application No. 696/05.



case in question because the forfeiture provisions of the Liechtenstein Code of Penal Procedure differed from those in the case referred to.

It is the opinion of the State Court that the increasingly differentiated view of the ECtHR concerning the control of discretionary powers of administrative authorities is an example of the consideration (if not explicitly declared) of the practice of national constitutional courts. While the ECtHR considered the non-existence of cognisance of the Austrian Administrative Court of Justice with regard to discretionary powers of administrative authorities to be a violation of Art. 6 ECHR¹⁰⁴, it later moved to a much more differentiated view.¹⁰⁵ The ECtHR now points out that the judicial control of administrative decisions is limited in many Member States of the Council of Europe and uses a number of criteria that must apply to speak of sufficient cognisance.¹⁰⁶

II. Interactions between constitutional courts

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Such reference happens very frequently¹⁰⁷, but one must take into account the special constellation of Liechtenstein: for example, part of the Act Concerning the State Court (*Staatsgerichtshofgesetz*, StGHG) is based on the Austrian *Verfassungsgerichtshofgesetz* (Act Concerning the Constitutional Court). The question of the review of rules is regulated in a similar way to Austria, too.

For this reason, the State Court orients itself also at the jurisprudence of the Austrian Constitutional Court, for example in questions of the precedent character of a rule¹⁰⁸ and the admissibility of an individual application for the review of rules¹⁰⁹.

¹⁰⁴ 28 Jun 1990, 6/1989/166/222. Cf. also the comments of Mark Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, 2nd ed., (1999), p. 271, margin no. 427.

¹⁰⁵ See for example the case *Sigma Radio Television v. Cyprus* of 21 Jul 2011, 32181/04 and others; in this context also Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, p. 400, margin no. 29. Also confirming, Siegbert Morscher, *Art. 6 MRK voll implementiert*, *Juristische Blätter* 2012/11, p. 681 et sqq. (p. 682).

¹⁰⁶ ECtHR *Sigma Radio Television v. Cyprus*, 21 Jul 2011, 32181/04.

¹⁰⁷ See also Bussjäger, *Beschwerde*, p. 860.

¹⁰⁸ Cf. StGH 2012/75, www.gerichtsentscheide.li, cons. 4.1.

¹⁰⁹ Cf. StGH 2009/71, cons. 1.



In addition, numerous bodies of law of the Liechtenstein legal system have been adopted from Austria and from Switzerland. Therefore, the practice of the Austrian Constitutional Court on the constitutionality of rules that also apply in Liechtenstein is taken into consideration¹¹⁰, although this need not mean that the assessment of the Austrian Constitutional Court is taken over by the State Court as well.

As an example, we refer to StGH 2010/80¹¹¹, where the State Court had to review the constitutionality of the rule of § 57 (3) of the Liechtenstein ZPO, according to which a court had to obtain a statement from the government (which statement was then binding for the court) where there were doubts concerning the applicability of an international treaty or concerning the enforceability of a decision on legal costs. The Austrian Constitutional Court had annulled the identical provision of the Austrian ZPO as unconstitutional on the grounds of a violation of the separation of powers.¹¹² The State Court dismissed this view, referring to different understandings of the principle of the separation of powers in Liechtenstein and in Austria. However, it still annulled the provision as unconstitutional because it did not permit the person concerned to provide evidence to the contrary.

Furthermore, the State Court regularly considers the judgments of the Swiss Federal Court of Justice (*Bundesgericht*) concerning questions of fundamental rights¹¹³ and concerning the interpretation of legal provisions adopted from Switzerland, such as in the field of social insurance law.¹¹⁴

¹¹⁰ In StGH 2005/87, www.gerichtsentscheide.li, the State Court considered the provision of Art. 38 *Konkursordnung* (KO, Bankruptcy Act), which Liechtenstein had adopted from Austria, to be unconstitutional with reference to the decision of the Austrian Constitutional Court in VfSlg 13.498/1993 on the then provision of § 25 of the Austrian Bankruptcy Act because there was no objective justification for refusing damages for the premature termination of employment by the receiver (cons. 5.4).

In StGH 2012/163, www.gerichtsentscheide.li, the State Court annulled a passage in § 167 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB, General Civil Code) that concerned the right of custody as unconstitutional, orienting itself also at the jurisprudence of the Austrian Constitutional Court concerning a similar provision of Austrian law (VfSlg 19.653/2012).

In StGH 2007/122, www.gerichtsentscheide.li, the State Court also followed the view of the Austrian Constitutional Court (VfSlg 13.581/1993) concerning the Austrian provision adopted in Liechtenstein as § 219 (2) ZPO, pursuant to which view there is no objective reason to entrust the decision on an application to inspect the files to another authority than the judge competent in the pending civil case.

¹¹¹ See StGH 2010/80, www.gerichtsentscheide.li, cons. 2.1 – 2.3.

¹¹² VfSlg 9560/1982.

¹¹³ In this context, reference can be made to the practice of the State Court in matters of official and legal assistance, cf. StGH 2008/37, www.gerichtsentscheide.li und 2008/55, both cons. 5.5; StGH 2012/49, cons. 4 and many more.

¹¹⁴ Cf. StGH 2012/132, www.gerichtsentscheide.li, cons. 4.1; StGH 2011/136, www.gerichtsentscheide.li, cons. 3.1 and many more.



Reference to the German Federal Constitutional Court (*Bundesverfassungsgericht*) is made just as frequently. This may happen in particularly exposed questions concerning fundamental rights¹¹⁵ or where the legal situation is comparable in Germany in cases with special constellations.¹¹⁶

Occasionally, the State Court's dogmas in terms of fundamental rights show the influence of several constitutional courts: its practice on the principle of equality contains elements of the jurisprudence of the Austrian Constitutional Court ("treat equal things equally and unequal things unequally"), of the Swiss Federal Court (among other things: "requirement of serious objective grounds"), and of the German Federal Constitutional Court ("the principle of equality has been violated among other things where a group of legal subjects is treated differently as compared with other legal subjects, although there are no differences of such weight and manner that they would justify the unequal treatment").¹¹⁷

However, where reference is made to the practice of these supreme or constitutional courts, it sometimes happens that an opinion differing from that practice is accentuated.¹¹⁸ For example, it is pointed out in StGH 2011/197, cons. 4¹¹⁹, that the fundamental right of personal freedom in terms of Art. 32 (1) LV protects both the physical and the mental integrity of the human personality as well as their elementary options for development "in accordance with the practice of the Swiss Federal Court, but contrary to that of the German Federal

¹¹⁵ Such as in StGH 2012/163, www.gerichtsentscheide.li, cons. 3.5 in connection with a review of rules concerning questions of custody, in which the State Court refers to the order of the Federal Constitutional Court of 21 Jul 2010, 1 BvR = NJW 2010/41, p. 3008 et sqq., concerning the transfer of parental custody for illegitimate children to fathers, in which the latter court had in turn referred to the judgment of the ECtHR concerning "Zaunegger v. Germany" (Application no. 22028/04).

¹¹⁶ Cf. for example the note in StGH 2011/144, www.gerichtsentscheide.li, cons. 3.4, to BVerfGE 99, 100 (120 et seq.) concerning the guarantee of ecclesiastical property in Art. 138 (2) of the Weimar Constitution.

¹¹⁷ Cf. Bussjäger, *Beschwerde*, p. 861; Hugo Vogt, *Das Willkürverbot und der Gleichheitsgrundsatz in der Rechtsprechung des liechtensteinischen Staatsgerichtshofes*, LPS 44 (2008), p. 82 et sqq.

¹¹⁸ In StGH 2010/63 the state court referred to the ruling of the Austrian Constitutional Court to consider the exclusion of legal entities from receiving legal aid to be unconstitutional (VfSlg 19.522/2011) but did not apply this practice to the case pending at the State Court, which was about the question whether a security deposit for legal costs could be imposed on a legal entity. It noted that selective equal treatment of individuals and legal entities in Liechtenstein could also be achieved by interpretation in accordance with the Constitution (cons. 4.4).

¹¹⁹ Equally: StGH 2011/20, www.gerichtsentscheide.li, cons. 2.1; StGH 2011/21, www.gerichtsentscheide.li, cons. 2.1.



Constitutional Court, which interprets personal freedom very widely in the sense of general freedom of action".¹²⁰

Another example is the State Court's practice on the prohibition of arbitrariness, which has been declared to be a general, subsidiary catch-all fundamental right, which is not explicitly laid down in the Constitution but forms its basis. Here, part of the practice of the State Court has detached itself from the Swiss model.¹²¹

It is not unusual for judgments of the State Court to refer to a number of foreign supreme or constitutional courts. In its judgement StGH 2009/202 for example, the State Court referred to practice of the Swiss Federal Administrative Court and the German Federal Constitutional Court in assessing the question whether a complaint against a refusal to go into an application for asylum does or does not have suspensive effect.¹²²

The strong orientation at the practice of these states can be explained not only by the equally strong adoption of foreign law but also by the fact that in view of the comparatively small number of cases handled, the practice of these courts is of substantial assistance to the State Court in its own judgments.¹²³

As far as this can be assessed, it has not been possible to find references to decisions of constitutional courts from other countries than Germany, Austria, and Switzerland.

2. If so, does the constitutional court tend to primarily refer to jurisprudence from the same language area?

As is evident from the answer to the previous question, this is the case.

¹²⁰ Similar also StGH 2011/11, www.gerichtsentscheide.li, cons. 2.1, on the practice of the German Federal Constitutional Court on post-mortem protection of privacy, which was not adopted by the State Court. See also Bussjäger, Beschwerde, p. 860.

¹²¹ Bussjäger, Beschwerde, p. 862.

¹²² Bussjäger, Beschwerde, p. 861.

¹²³ Bussjäger, Beschwerde, p. 861 f.



3. *In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?*

Once again, the special constellation of Liechtenstein should be pointed out. Due to the large number of laws adopted from other countries, there is no special emphasis. In other words, the practice of the Austrian Constitutional Court and the Swiss Federal Court takes is taken into consideration in civil law (ABGB with the exception of property law and ZPO were adopted from Austria), criminal law (StGB and Code of Penal Procedure were adopted from Austria), and in matters of social insurance law and law on aliens, which were mostly adopted from Switzerland.

4. *Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?*

It should be taken into account that direct interest in Liechtenstein jurisprudence is limited to a comparably small number of persons. In such a constellation, the decisions of the State Court cannot draw special attention, with the exception of spectacular exceptions.

However, the State Court takes part in exchanges of information and conferences with other constitutional courts (in particular the so-called "Meeting of Six" between the ECJ, the ECtHR, the German Federal Constitutional Court, the Austrian Constitutional Court, the Swiss Federal Court, and the State Court) and is therefore able to get involved with the international discourse.

5. *Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?*

As has been mentioned above, the State Court takes part in exchanges of information with other constitutional courts and in addition to that maintains bilateral contacts, particularly with the Austrian Constitutional Court and the Swiss Federal Court. In addition to that, members of the State Court also take part in relevant information events organised e.g. by the EFTA Court.



III. Interactions between European courts in the jurisprudence of constitutional courts

1. *Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human rights have an impact on the jurisprudence of the constitutional court?*

As has been explained above (see the examples given above under I. 2.a), the State Court orients its fundamental rights practice also at the practice of the ECtHR. Insofar, references to the law of the European Union may also have some influence on the practice of the State Court. This could happen for example with the interpretation of the constitutional guarantees of Art. 6 and Art. 47 of the Charter of Fundamental Rights of the European Union, which are quite similar.

However, there are no current examples for this, all the more since Liechtenstein is a member of the EEA but not of the EU.

2. *How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human rights and the Court of Justice of the European Union?*

In the State Court's view, one can speak of a general convergence of fundamental rights protection in Europe. Also due to numerous mutual contacts, a process of cross-fertilisation of jurisprudence can be found. The tendency of this process is towards a harmonisation of jurisprudence in pivotal questions on fundamental.

3. *Do differences between the jurisprudence of the European Court of Human Rights on the one hand and the Court of Justice of the European Union on the other hand have an impact on the jurisprudence of the constitutional court?*

We are not currently aware of any case where such issues might have played a role before the State Court. However, the State Court would doubtlessly address such a discrepancy if it occurred in a case to be decided.