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The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Report of
the State Court of Justice
of Principality of Liechtenstein

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I. The constitutional court judge, the other judicial organs and the verification of constitutionality

A. The judicial organization of the State

1. The judicial system[1]

Since Liechtenstein is organized as a unitary State[2], there is a simple organization for the areas of the ordinary jurisdiction (i.e., civil and penal law) which leads via the district court (in the form of individual judges or panels of judges) to the High Court of Appeal and in the last instance to the so-called Supreme Court of Justice[3].

For the area of administrative law, the system is more complicated[4]. For the administration of justice *within the administration*, it follows from Art. 78 Para. 2 LV that certain matters may be passed to individual offices and authorities for independent processing, the course of appeal to the Collegial Government being reserved. In such cases, the Government as the supreme administrative authority (Art. 78 Para. 1 LV) is the appellate instance.

For the administration of justice *outside the administration*, an instance *outside the administration* to which the appeal has been directed decides on the order or instruction of the administrative body. In Liechtenstein, the administrative appellate instance is the appellate instance with general competence in administrative disputes (Art. 97 LV and Art. 90 ff. LVG). In addition, the State Court of Justice has few competencies as an administrative court for special laws and acts in these special cases as an "administrative court of justice" (Art. 104 Para. 2 LV)[5]. The function of the administrative jurisdiction is therefore exercised by the administrative appellate instance in general and by the State Court of Justice in particular.

As regards the special commissions, such as the national real estate transaction commission, these are authorities "which are responsible for deciding appeals in lieu of the Collegial Government (Art. 78 Para.. 2 LV)"[6]. Decisions by a commission acting in lieu of the Government are likewise subject to the recourse to the administrative appellate instance provided for[7][8] in the Constitution or, in the exceptional cases of Art. 55 StGHG and Art. 104 LV, to the State Court of Justice as the administrative court[9]. This also applies for the national tax commission which judges appeals against the tax authority in lieu of the Government[10]. A recent change is that the decisions by this body can now be contested before the administrative

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[1] The layout of this National Report very largely follows that of the questionnaire for the XIIth Conference of the European Constitutional Courts of May in Brussels. Slight adjustments were nevertheless unavoidable. The National Report was prepared de constitutione lata and examines the proposals for the Constitution of the Prince Regnant only in exceptional cases.
[2] Cf. BATLINER, Verfassungsrecht p. 96.
[3] Cf. Art. 101 LV.
[4] Cf. in detail KLEY, Verwaltungsrecht p. 285 ff.
[5] Cf., for example, the judgments in citizenship matters, cf. Art. 55 lit. a StGHG and StGH 1996/36, judgment of 24.4.1997, LES 1997, 211 (215) or StGH 1997/10, judgment of 26.6.1997, LES 1997, 218 (220).
[6] StGH 1980/5, decision of 27.8.1980, LES 1981, 188 (189); StGH 1978/10, decision of 11.10.1978, LES 1981, 7 (9).
[7] Cf. StGH 1990/10, judgment of 22.11.1990, LES 1991, 40 (43), change in law practice.
[8] Pursuant to Art. 43 LV and 97 LV in conjunction with Art. 90 LVG.
[9] Cf. RITTER, P. 84 ff.
[10] Cf. Art. 5 Para. 4 and Art. 157 lit. c Law on national and communal taxes of 30.1.1961, LR 640.0 (SteG).

appellate instance[11]. The decisions of the last instance (the administrative appellate instance) are *final*, i.e., they can no longer be contested by ordinary rights of appeal[12].

If it is a question of constitutional matters, an appeal against decisions of the Supreme Court of Appeal, the administrative appellate instance and other courts and administrative authorities can be made within the time allowed to the State Court of Justice as the constitutional court on account of the violation of basic rights or as the court of jurisdictional conflict[13]. In the end, the judicial stages of appeal always lead to the State Court of Justice that decides in independent administrative appellate proceedings in relation to previous administrative, civil or penal proceedings[14].

Reference to the stages of appeal provided for by law must be made from the bottom to the top. A prescribed statutory appellate instance may not refuse a decision and may not pass the appeal to the next-higher instance[15].

By virtue of various treaties with Switzerland[16], there is provision for Liechtenstein judgments to be referred to Swiss courts and finally to the Swiss Supreme Court. To this extent, the Principality of Liechtenstein has ceded judiciary competencies to Switzerland[17].

2. The Constitutional Court Judge

Liechtenstein established a comprehensive constitutional jurisdiction at a relatively exceptionally early date and assigned jurisprudence in constitutional questions to the State Court of Justice[18]. The law on the State Court of Justice of 5.11.1925[19] has been amended a number of times; it was to be completely revised in 1992. The Liechtenstein Diet had approved the new law but the Prince Regnant refused to sanction it as required by Art. 9 LV[20]. The new law could not therefore come into force[21] and the previous law continues to be valid. Art. 8 StGHG – as also Art. 5 of the State Court of Justice law that did not come into force – guarantees judicial independence for the members of the State Court of Justice pursuant to Art. 106 LV:

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[11] Cf. Art. 25 aSteG and Art. 55 lit. b aStGHG and e.g., StGH 1996/30, judgment of 20.2.1997, LES 1997, 207 (209); in tax matters the State Court of Justice acted as the administrative court, the competence of which was correctly transferred to the administrative appellate instance, cf. VBI 2000/29, decision of 6.9.2000; LES 2000, 173.

[12] Cf. Art. 101 Para. 5 LVG and RITTER, P. 146 Note 28.

[13] Cf. Art. 23 StGHG and StGH 1995/28, judgment of 24.10.1996, LES 1998, 6 (11); RITTER, P. 132.

[14] Cf. WILLE, Verfassungsgerichtsbarkeit p. 38 and Para. I.B.1.b.

[15] Cf. VBI 1983/34, decision of 2.11.1983, LES 1985, 44.

[16] Cf. KLEY, Verwaltungsrecht p. 291 with notes

[17] Cf. RITTER, P. 158 f.

[18] Cf. on the origin of the State Court of Justice : WILLE, Verfassungsgerichtsbarkeit p. 9 ff.; cf. HÖFLING, Verfassungsbeschwerde p. 139 Note 4 with further notes

[19] Cf. LR No. 173.10.

[20] The refusal of the sanction pursuant to Art. 9 LV infringes Art. 3 of the Ist Supplementary Protocol to the EMRK since, for any reasons whatever, it is also the refusal of the implementation of an act of Parliament, cf. FROWEIN/PEUKERT N. 2 to Art. 3 ZP I EMRK, p. 836; BATLINER GERARD, Die Sanktion der Gesetze durch den Landesfürsten unter Berücksichtigung des demokratischen Prinzips and des Völkerrechts, in: Archiv des Völkerrechts 1998, p. 128 ff. (p. 137 f.).

[21] Cf. to text of law: WILLE, p. 359 ff.; cf. alsoStGH 1996/28-32-37-43, judgment of 21.2.1997, LES 1998, 57 (59), where the State Court of Justice designated Art. 22 of the new law as appropriate.

"In the exercise of their office, the members of the State Court of Justice are independent and subject only to the Constitution and the laws (Art. 106 of the Constitution).
In the exercise of their judiciary function, they may not accept any commands and advice from the Prince, the Government or any other authority. The prohibition on reporting is also maintained".

This ruling is exemplary and reflects the standard still valid today concerning the requirements of judicial independence[22] that grants the State Court of Justice a position of outstanding importance in its own jurisprudence[23].

Its independence of the other State authorities is the decisive legitimization of a constitutional court. The European Court of Human Rights requires from courts that *every appearance of dependence* is to be avoided. The independence of a court is determined by the criteria of the way in which its members are appointed, their irremovability, an adequately long period of office and the outward appearance[24]. The Court has described this, with the famous quotation of Lord Chief Justice Hewart in mind, as follows: "Justice must not only be done; it must also be seen to be done"[25].

B. The sphere of competence of the constitutional court judge and of the other judicial organs concerning the verification of constitutionality

1. Examination of the laws and other legally relevant acts

a. General: manner of check

By virtue of its position and its sphere of competence in the structure of the Liechtenstein constitution, the State Court of Justice has correctly described itself as the "guardian of the Constitution"[26]. Indeed, it is of the greatest importance for the guarantee of the Constitution that it is not the Legislature itself (as in Switzerland, for instance) nor the Executive either but a third and neutral instance that performs this examination.

In its capacity as a constitutional court, the State Court of Justice may verify the most diverse acts of law as to their compatibility with the higher-ranking rules of law. Pursuant to Art. 23 StGHG, the individual decisions and judgments of the ordinary courts or the administrative appellate instance can be verified as to their compatibility with the Constitution in the *constitutional or individual complaint* procedure. This also includes a judicial review

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[22] Cf. BATLINER, Verfassungsstaat p. 391 ff.; KIENER REGINA, Richterliche Unabhängigkeit. Verfassungsrechtliche Anforderungen an Richter and Gerichte, Bern 2001, p. 58 ff., p. 228 ff.
[23] Cf. StGH 1998/25, judgment of 24.11.1998, LES 2001, 5 (8) with further notes Cf. also the well-founded judgment StGH 1999/41-55, decision of 10.4.2001, unpublished, Para. 2.
[24] Cf. FROWEIN/PEUKERT, N. 89 to Art. 6 EMRK with notes; TRÄGER ERNST, Der gesetzliche Richter, in: Festschrift for Wolfgang Zeidler, Band I, Berlin/New York 1987, p. 123 ff., esp. p. 138 f.
[25] StGH 1999/41-55, decision of 10.4.2001, unpublished, Para. 2.1. (basic decision on the problem of industrial disputes); Delcourt judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 11, § 31 and BATLINER, Questions p. 61 Note 106; STEFAN TRECHSEL, Gericht and Richter nach der EMRK, in: Gedächtnisschrift für Peter Noll, Zürich 1984, p. 385 ff., esp. p. 394 f. with notes
[26] StGH 1982/65/V, Judgment of 15.9.1983, LES 1984, 3 (4), cf. BATLINER, Verfassungsstaat p. 410; HÖFLING, p. 36 f.; WILLE, p. 115, p. 285; BATLINER, Questions p. 68 ff.

(accessory, concrete) of the applicable laws and statutory instruments in the form of preliminary questions [27].

A kind of judicial review of laws and statutory instruments is also carried out in the *preparation of opinions* by the State Court of Justice pursuant to Art. 16 StGHG[28].

Finally, the actual *judicial review procedure* pursuant to Art. 24 ff. StGHG allows the contestation at any time of laws and statutory instruments on account of incompatibility with the higher-ranking law. This is an abstract judicial review procedure[29]. In contrast, following a well-known judgment of the State Court of Justice[30], treaties cannot be verified for compatibility with the national constitution since Art. 104 LV and Art.23 StGHG do not provide for this competence. In this sense, the State Court of Justice always dismissed petitions for examinations of this nature as inadmissible[31]. It is, of course, not correct to infer from this that no verifications of treaties by the State Court of Justice take place at all. The State Court of Justice does indeed "indirectly" verify the "national effectiveness" of a treaty with regard to validity, content and scope[32]. This has played a role in the question of rank, the question of direct applicability and of the proper proclamation of a treaty[33]. Admittedly, this does not change anything in the statement that treaties formally concluded under international law cannot be verified in general by the State Court of Justice as to their conformity with national law but individual aspects, especially the proper proclamation of such, can certainly be examined[34].

In the Liechtenstein system of constitutional jurisdiction and pursuant to Art. 104 Para. 2 LV, there is only a *repressive* judicial review of constitutionality, i.e., only the laws and orders that have been proclaimed, have become effective and are thus valid in law can be verified as to their conformity with the Constitution[35]. In this case, the judicial review is no longer a part of the lawmaking process. The State Court of Justice justifies its view with its competence which according to Art. 104 Para. 2 LV is merely cassatory (and not reformative[36]) since it may only quash laws and government orders that are already in force[37].

The *preventive judicial review* clarifies and decides the question of the constitutionality or legality of a legal provision before it comes into force. The French Constitution provides for a very far-reaching preventive judicial review of laws and organic laws. In Liechtenstein, despite the absence of a constitutional basis, initial forms of a preventive judicial review are apparent. The opinion to be prepared by the State Court of Justice pursuant to Art. 16 StGHG could certainly be used in the sense of a preventive judicial review. However, the State Court

[27] See on the pluri-functionality of the constitutional complaint: HÖFLING, Verfassungsbeschwerde p. 143 f., p. 152 ff.
[28] Cf. WILLE, p. 90 ff.
[29] Cf. WILLE, Verfassungsgerichtsbarkeit p. 36 f.
[30] Judgment of 30.1.1947, ELG 1947-1954, 191 (206).
[31] Cf. e.g., StGH 1981/18, order of 10.2.1982, LES 1983, 39 (41); StGH 1993/4, judgment of 30.10.1995, LES 1996, 41 (46 f.).
[32] Cf. BATLINER, Schichten p. 296.
[33] Cf. in detail WILLE, P. 264 ff.; KLEY, Verwaltungsrecht p. 57 ff.
[34] Cf. StGH 1996/28-32-37-43, judgment of 21.2.1997, LES 1998, 57 (59).
[35] Cf. StGH 1996/35, judgment of 24.4.1997, LES 1998, 132 (136).
[36] Cf. StGH 1996/46, judgment of 5.9.1997, LES 1998, 191 (195).
[37] Cf. StGH 1980/10, decision of 10.12.1980, LES 1982, 10 (11); StGH 1996/4, judgment of 25.4.1997; cf. WILLE, p. 76 Note 30.

of Justice has resisted such an idea und has not responded either to wishes of this kind[38]. The need for a preventive judicial review cannot be dismissed[39], this is shown by the delimitation problems in the preparation of opinions on the one hand while on the other the legislature has opened the way to a preventive judicial review in one point. According to Art. 70b of the Public Rights Act (*Volksrechtegesetz*), in the case of an initiative petition there is provision for an examination of the conformity of the Constitution and treaties in the first instance by the Government and the Diet. The latter may declare a petition null and void but this decision can be referred to the State Court of Justice. This is a selective judicial review in which law that is not yet legally valid is verified. In 1992[40], the law had to be amended, mainly because of the priority application of EEA law before Liechtenstein law. With reference to political rights, a preventive judicial review also makes political sense; otherwise, the Diet would be expected to vote on a bill that subsequently might prove to be unconstitutional.

In its constitutionality, Liechtenstein follows the Austrian and German models and concentrates all constitutional jurisdiction in the State Court of Justice that has the sole right to verify legal provisions for constitutionality and legality (Art. 28 Para. 1 StGHG) and to quash them if they are unconstitutional. The submission procedure provided for in Art. 28 Para. 2 is in line with this:
"Any court, when the unconstitutionality of a law is asserted in a pending action or when a provision of a statutory instrument appears to it to be unconstitutional or illegal, may interrupt the proceedings and submit the question to the State Court of Justice."

The courts can accordingly interrupt the proceedings and bring the case before the State Court of Justice when an unconstitutional matter in the proceedings is claimed and appears to be well founded[41]. The courts may not decide such questions themselves[42]. However, the ordinary courts and the administrative appellate instance have the authority to interpret simple laws in conformity with the Constitution and thus to avoid the declaration of unconstitutionality[43].

In contrast to this, there is the *diffuse system* of constitutionality that allows any judicial instance and authority to verify the compatibility of rules of law with the Constitution and to deny the application of unconstitutional rules. However, this procedure, practiced in Switzerland and the United States of America, does not lead to the annulment of unconstitutional statutory provisions but in actual fact the constant non-application of such provisions is equivalent to a formal annulment.

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[38] Cf. StGH 1969/19, decision of 13.7.1970, ELG 1967-72, 251 (256), according to which no expert opinion may be given on the constitutionality of an existing court; with delimitation very much in mind also StGH 1995/14, expert opinion of 11.12.1995, LES 1996, 119 (122); StGH 1995/25, expert opinion of 23.11.1998, LES 1999, 141 (148).

[39] So also WILLE, P. 77.

[40] Cf. LGBl 1992 No. 100 and the report and motion of the Government to the Diet for the amendment of the Public Rights Act, No. 48/1992, p. 2 ff. (4).

[41] Cf. e.g., StGH 1993/18 and 1993/19, judgment of 16.12.1993, LES 1994, 54 (58).

[42] Cf. StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (39); StGH 1993/4, judgment of 30.10.1995, LES 1996, 41 (49 concerning the partial unconstitutionality of Art. 28 Para. 2 StGHG); VBI 1994/24, decision of 13.7.1994, LES 1994, 137 (138).

[43] Example: VBI 1999/57-60, decision of 18.8.1999, LES 2000, 12 (14); OGH Ex 70/2000-24, order of 7.9.2000, LES 2000, 243 (245); OGH 8 Rs 35/98-75, order of 2.7.1998, LES 1999, 40 (42). The State Court of Justice naturally interprets simple laws in conformity with the Constitution as well, cf. e.g., StGH 1997/3, judgment of 5.9.1997, LES 2000, 57 (62). The ordinary courts are self-evidently also permitted positive constitutional qualifications, cf. e.g., OGH Rs 263/98-27, order of 1.4.1999, LES 2000, 80 f., this is often the case when and court does not wish to submit a petition pursuant to Art. 28 Para. 2 StGHG: cf. e.g., OGH C 175/99, judgment of 2.12.1999, LES 2000, 92 (96).

In Liechtenstein, there is no provision at all for any acceptance (or filter) procedure before the courts and especially not before the State Court of Justice. The constitutional court judge is obliged to admit a formally correct complaint submitted within the period allowed and to deal with it when the procedural preconditions apply. Non-admission on account of unimportance, obvious lack of justification, overloading of the court, etc., is not possible and is alien to the Liechtenstein legal tradition.

Constitutional questions can be brought before the State Court of Justice in various proceedings. If the legal procedure of Art. 11 und 23 ff. StGHG is taken, the following alternatives are possible: the constitutional complaint (individual complaint) pursuant to Art. 23 StGHG (in the following b); the cassation of laws and statutory instruments pursuant to Art. 24 ff. StGHG (in the following c); as a special case of the latter the submission procedure pursuant to Art. 28 Para. 2 StGHG (d) and the interpretation of the Constitution pursuant to Art. 112 LV and Art.29 StGHG (in the following e). The opinion not provided for by the Constitution according to Art. 16 StGHG has already been examined above and in the absence of thematic relevance is not pursued further in the following[44].

b. Individual or constitutional complaint pursuant to Art. 23 StGHG

In the proceedings pursuant to Art. 23 StGH, the State Court of Justice verifies the observance (of the basic rights in particular but not only these) of the Constitution and of the European Human Rights Convention and the observance of the EEA treaty[45] that has a quasi-constitutional ranking. According to the ingress of Art. 23 StGHG, the matter to be contested is a “decision or order of a court or administrative authority". According to the State Court of Justice Act and the Constitution, the area of controversial State acts is exceptionally wide; they may all be verified in respect of their constitutionality[46]. However, the exhaustion of the stages of appeal is always the precondition for the individual complaint procedure. Only when the appellant has passed through the judicial stages of appeal can a constitutional complaint be brought before the State Court of Justice. For this, the law provides for a period of "14 days after the service of the decision or order" of the last ordinary instance[47]. If it is not clear for the individual case in question whether an ordinary right of appeal is still open, it is advisable to also file a constitutional complaint at the same time as the ordinary right of appeal (in question) is lodged[48].

It is possible in practice to contest resolutions of the Diet before the State Court of Justice[49]. The State Court of Justice assumes that even an individual resolution of the Diet (as, for instance, the resolution of the Diet on the necessity of an expropriation) may be contested on account of the violation of constitutionally guaranteed rights[50]. Even when the State Court of Justice refers to

[44] Cf. above Para.I.B.1.a.
[45] Cf. StGH 1998/3, judgment of 19.6.1998, LES 1999, 169 (171); see also Para. III.A.2.
[46] Cf. StGH 1995/28, judgment of 24.10.1996, LES 1998, 6 (11).
[47] Cf. Ingress of Art. 23 StGHG and StGH 1995/16, judgment of 24.11.1998, LES 2001, 1 (3); StGH 1997/40, judgment of 2.4.1998, LES 1999, 87 (89); StGH 1995/16, judgment of 24.11.1998, LES 1999, 137.
[48] Cf. e.g., the procedure for StGH 1996/47, judgment of 5.9.1997, LES 1998, 195 (199).
[49] Cf. StGH 1992/8, judgment of 23.3.1993, LES 1993, 81.
[50] Cf. StGH decision of 16.6.1954, ELG 1947-1954, 266 (268 f.); StGH 1992/8, judgment of 23.3.1993, LES 1993, 77 (79); cf. also BATLINER, Rechtsordnung und EMRK p. 156. See in regard to the right of expropriation and procedure: BECK IVO, Das Enteignungsrecht des Fürstentums Liechtenstein, thesis, Bern 1950.

resolutions with the character of an order in this connection, this practice nevertheless appears very dubious since Art. 23 only envisages a "decision of a court or administrative authority" as a subject of contestation. The Diet does not at allow itself at all to be subsumed under this[51]. In an early decision[52], the State Court of Justice had argued with the a majore minus conclusion: when it is invoked for the purpose of annulling on account of unconstitutionality a law for which the agreement of the Diet and the sanction of the Prince are necessary, it must certainly be able to annul a resolution of the Diet which is unconstitutional. With this rather unconvincing argumentation, the State Court of Justice should be able to quash every single thing that a State body decides, e.g., the constitutional acts of the Prince.

But it is precisely the constitutional acts of the Prince[53] that may not be brought before any Liechtenstein instance since Art. 104 LV in conjunction with Art. 23 StGHG does not allow this course of law. The European Court of Human Rights in the Wille judgment[54] against Liechtenstein used this deficiency to note a violation of the right to complaint pursuant to Art. 13 EMRK[55]. The Liechtenstein constituent body and legislature has not so far remedied this deficiency. It would be urgently necessary to subject the actions of the Prince in his capacity as a State institution to a control by the State Court of Justice so that the protection of the basic rights be comprehensively assured. Incidentally, this fact of the absence of a possibility of contestation of the constitutional acts of the Prince has nothing to do with the so-called "absolute immunity pursuant to Art. 7 Para. 2 LV" according to which the person of the Prince is sacrosanct and inviolable[56]. Here it is a question of the actions of the Prince carried out as a State institution and not of his personality. His actions as a State institution should certainly be made subject by the legislature to judicial practice.

The constitutional complaint is not intended to lead to any further examination of the facts and the legal position through the normal channels[57]. "Since the law must be applied to everybody in the same manner, it could be concluded that any violation of the law by a public authority against a citizen would also mean a breach of the right of equality before the law. (...) (It is) not already a question of the violation of the right of equality when a breach of the law as such has taken place but only when this has occurred with intent, i.e., a specifically

[51] See concerning this problem: WILLE, p. 110, p. 232 ff.
[52] Cf. StGH decision of 16.6.1954, ELG 1947-1954, 266 (268 f.).
[53] With the exception of the Princely domain administration, cf. Art. 100 LV.
[54] Judgment of the European Court of Human Rights of 28.10.1999 (Enlarged Board), European Court of Human Rights, Publications 1999 VII; German translation in: ÖJZ 2000, p. 647 ff. (= LJZ 2000, p. 105-108) or NJW 2001, p. 1195 ff.
[55] Also with reference to the refusal of the sanction of a law that infringes Art. 3 ZP I EMRK (Cf. Para. I.A.2.), shows the corresponding problem in regard to Art. 13 EMRK.
[56] Cf. WILLE, p. 110; KLEY, Verwaltungsrecht p. 315 f.; BATLINER, Verfassungsstaat p. 411. In the area of political rights, there was a singular case in the which physical acts of the Prince were interpreted as unconstitutional interference in the freedom of choice and freedom of vote, cf. StGH 1993/8, judgment of 26.6.1993, LES 1993, 91 and: BATLINER, Fragen p. 71; BATLINER, Verfassungsstaat p. 410; BATLINER MARTIN, Die politischen Volksrechte im Fürstentum Liechtenstein, thesis. Fribourg 1993, p. 202 f., p. 206.
[57] Cf. the next footnote but one and StGH 1997/34, judgment of 2.4.1998, LES 1999, 67 (69); StGH 1995/28, judgment of 24.10.1996, LES 1998, 6 (11); StGH 1996/20, judgment of 5.9.1997, LES 1998, 68 (73); StGH 1996/8, judgment of 30.8.1996, LES 1997, 153 (157); StGH 1994/16, judgment of 11.12.1995, LES 1996, 49 (55); StGH 1993/25, judgment of 23.6.1994, LES 1995, 1 (2); StGH 1994/9 and 1994/11, judgment of 23.6.1994, LES 1994, 106 (114) with notes; StGH 1993/1, judgment of 23.3.1993, LES 1993, 89; StGH 1992/10 and 1992/11, judgment of 23.3.1993, LES 1993, 82; StGH 1988/4, judgment of 30./31.5.1990, LES 1991, 1 (2) with further notes; StGH 1982/35, Expert opinion 15.10.1982, LES 1983, 105 (106); StGH, judgment of 9.2.1961, ELG 1955-61, 179 (182); StGH 1961/1, decision of 12.6.1961, p. 4, unpublished. Cf. further evidence in WILLE, P. 110 f.; WILLE, Verfassungsgerichtsbarkeit p. 38 f.

qualified injustice or breach of the law"[58]. Infringements of laws and statutory instruments are accordingly not breaches of the Constitution unless an unconstitutional or illegal rule is applied or the law is applied in a qualified subjective manner. The State Court of Justice can only examine applications of the law as to "whether the law would have been applied in an unthinkable or in such a grossly and subjectively incorrect manner that the decision taken was equivalent to a demonstrably unconstitutional or, in the specific case, to an evidently willfully subjective application of the law and thus the findings of the court would have been marred by such a serious defect that such findings were to be equated with a proven illegal act"[59]. False statements of facts by the courts are likewise not breaches of the Constitution. Only particularly gross defects in the determination of the facts, e.g., a gross non-conformity with matters in the records also involves a breach of the prohibition of arbitrary decision-making[60]. The recognition of the prohibition of arbitrary decision-making as an unwritten and independent right of the Constitution[61] has caused no change in the legal situation. The prohibition of arbitrary decision-making is not a basic right to the faultless and correct application of the law; only qualified breaches of the law or serious infringements of the requirement for justice represent arbitrariness[62]. The State Court of Justice thus avoids undue interference on its part in the independence of the lower courts when it makes use of its constitutional power of examination and cassation[63].

The appellate procedure before the State Court of Justice is an independent action in comparison with the preceding administrative, civil or penal proceedings. For this reason, the State Court of Justice can itself clarify the facts by collecting evidence, for example, when insufficient factual data has been collected[64]. Such determination of the facts (possibly on a supplementary basis only) is to allow the State Court of Justice to find the answer to the question of whether the decision or the judgment infringes the basic rights guaranteed by the Constitution, the EMRK or the international pact on civil and political rights. New assertions of facts (nova) are evidently no longer admissible before the State Court of Justice.

Anyone who asserts that he has been wronged by a decision or order of a court or an administrative authority in his constitutionally guaranteed rights is entitled to lodge a complaint. A complainant must therefore have suffered a grievance through a governmental act and must show in a plausible manner that the grievance violates his basic rights. This legitimization precondition also applies in proceedings pursuant to Art. 23 StGHG and follows from Art. 17 Para. 1 StGHG in conjunction with Art. 92 Para. 1 LVG, according to which the complainant

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[58] StGH 1961/1, decision of 12.6.1961, p. 4, unpublished.

[59] StGH 1993/13 and 1993/14, judgment of 23.11.1993, LES 1994, 49 (51); ähnlich StGH 1992/10 and 1992/11, judgment of 23.3.1993, LES 1993, 82; StGH 1991/12a and 1991/12b, judgment of 23.6.1994, LES 1994, 96 (97) with further notes; StGH 1988/14, judgment of 27.4.1989, LES 1989, 106 (107); StGH 1988/15, judgment of 28.4.1989, LES 1989, 108 (112); StGH 1985/12, judgment of 28.5.1986, LES 1988, 41 (44); also StGH 1986/11, judgment of 6.5.1987, LES 1988, 45 (48) with further notes; StGH 1987/4, judgment of 9.11.1987, LES 1988, 87 (88); StGH 1987/18, judgment of 2.5.1988, LES 1988 131 (132 f.); StGH 1987/23, judgment of 3.5.1987, LES 1988, 138 (139) with further notes; StGH 1985/13, judgment of 28.10.1986, LES 1987, 40 (42); StGH 1985/14, judgment of 28.10.1986, LES 1987, 43 (44); StGH 1984/6 and 1984/6 V, judgment of 6.10.1984, LES 1986, 61; StGH 1984/11 and 1984/11 V, judgment of 25.4.1985 bzw. 7.4.1986, LES 1986, 63 and 67.

[60] Cf. StGH 1995/6, judgment of 23.2.1999, LES 2001, 63 (67); StGH 1998/63, decision of 27.9.1999, LES 2000, 63 (66); StGH 1998/44, Jus & News 1999, p. 28 ff. (35).

[61] Cf. StGH 1998/45, judgment of 22.2.1999, in: LES 2000, 1 (6 f.) or in: Jus & News 1999, p. 243 ff. or in: ZBl 1999, 586 ff.; cf. the commentary of KLEY ANDREAS, in: Jus & News 1999, p. 256 ff. and see also HOCH, p. 76-79.

[62] Cf. the concise presentation in HOCH, p. 74-79.

[63] Similarly WILLE, Verfassungsgerichtsbarkeit p. 55.

[64] Cf. StGH 1996/38, judgment of 24.4.1997, LES 1998, 177 (180).

must be aggrieved (wronged or disadvantaged)[65]. A complainant is aggrieved or disadvantaged when he has personally suffered a disadvantage through the contested act of state and this can be remedied by the annulment demanded (so-called actual legitimate interest in the proceedings) [66]. It must be clear that the disadvantageous action of the State occurred in the protected area of a basic right of the Constitution or of the EMRK.

At the latest since Liechtenstein became a member of the EMRK, foreign citizens also belong to the group of those entitled to lodge a complaint[67]. In addition to natural and juridical persons[68], the State Court of Justice has even considered condominium ownership groups as entitled to lodge a complaint[69]. The State Court of Justice has even gone so far as to also award such a right to entities of public law[70]. In justification of this view, it notes that the text of the Constitution and of the State Court of Justice Act has been consciously formulated in a flexible form to impose an interpretation allowing account to be taken of all the important needs for the protection of the Constitution as such. This ruling is correct to the extent that the Constitution grants entities of public law collective legal positions similar to basic rights. This is the case, for instance, with the communal autonomy, based on the fundamental rights, that has the character of a corporate freedom right. Within the intendment of Art. 110 LV, the local authorities are namely “always provided with a relevant area of autonomy and freedom of decision so that they can effectively function (as such)."[71]. In addition, for the protection of their area of autonomy, the local authorities can claim all those basic rights that directly serve for the enforcing of the autonomy of the local authority or are closely related to such, such as, for instance, a fair hearing pursuant to Art. 31 LV or the right to file a complaint pursuant to Art. 43 LV. "However, from the outset, local authorities are excluded from the classic rights of freedom"[72]. But the basic rights, protected procedure-wise by Art. 23 StGHG, evolved historically in favor of private persons and never for the protection of the States or of public entities. Only in exceptional cases are these entitled to lodge at the State Court of Justice a complaint on account of the violation of constitutionally guaranteed rights, namely when they are affected like individuals by a contested act of state, i.e., when they themselves are not active in a sovereign manner within the framework of the administration of the private sector and are involved like individuals in civil law matters[73].

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[65] Cf. StGH 1998/25, judgment of 24.11.1998, LES 2001, 5 (6) with further notes; StGH 1997/40, judgment of 2.4.1998, LES 1999, 87 (88) with further notes; StGH 1997/20, judgment of 29.1.1998, LES 1998, 288 f.; cf. HÖFLING, Verfassungsbeschwerde p. 155, on the renunciation of the actual legitimate interest in the proceedings.

[66] Cf. StGH 1998/25, judgment of 24.11.1998, LES 2001, 5 (6) with further notes; StGH 1980/8, judgment of 10.11.1980, LES 1982, 4 (6).

[67] See in detail StGH 1990/16, judgment of 2.5.1991, LES 1991, 81 (82); StGH 1997/19, judgment of 5.9.1997, LES 1998, 269 (272); HÖFLING, p. 59 ff.; HOCH, p. 82.

[68] Juridical persons can cite basic rights to this extent and are thus entitled to complain when this corresponds to the nature of the juridical person, cf. StGH 1998/47, judgment of 22.2.1999, LES 2001, 73 (77) with further notes; StGH 1984/14, decision of 28.5.1986, LES 1987, 36 (38 f.); StGH 1977/3, decision of 24.10.1977, LES 1981, 41 (43); HOCH, p. 83; HÖFLING, P. 64 f.

[69] Cf. StGH 1998/14, judgment of 4.9.1998, LES 1999, 226 (229).

[70] Cf. StGH 1984/14, judgment of 28.5.1986, LES 1987, 36 (38).

[71] StGH 1998/27, judgment of 23.11.1998, LES 2001, 9 (11); cf. also StGH 1981/13, decision of 16.6.1981, LES 1982, 126 (127); StGH 1984/14, decision of 28.5.1986, LES 1987, 36 (39). See also: NELL JOB VON, Die politischen Gemeinden im Fürstentum Liechtenstein, LPS 12, Vaduz 1987; BIELINSKI JAN, Die Gemeindeautonomie im Fürstentum Liechtenstein, Vaduz 1984.

[72] StGH 1998/27, judgment of 23.11.1998, LES 2001, 9 (11); cf. also StGH 1998/27, judgment of 23.11.1998, LES 1999, 291 (294); StGH 1998/10, judgment of 3.9.1998, LES 1999, 218 (223); StGH 1997/21, judgment of 17.11.1997, LES 1998, 289 (291).

[73] Cf. StGH 1998/10, judgment of 3.9.1998, LES 1999, 218 (223). Nach StGH 1996/31, judgment of 26.6.1997, LES 1998, 125 (130) as a rule entities of public law or parts of the administration, such as the Director of Public

The constitutional complaint procedure is most suitable for verifying the agreement of laws and statutory instruments with the higher-ranking law. In Liechtenstein, there is no provision for an individual and abstract complaint against laws and statutory instruments[74]. A private person can only bring about a verification of laws and statutory instruments when he as a petitioner brings a complaint against a decision or judgment before the State Court of Justice, this individual action being based on a rule of a law or statutory instrument. Only in this (usual) combination of circumstances is it possible for a private individual to petition for the examination of the constitutionality or legality of a rule[75]; the contestation – examined below – of statutory instruments within the intendment of Art. 25 Para. 2 StGHG is reserved. There is no provision for a taxpayer's suit as such against laws and statutory instruments - as in possible in Switzerland as a constitutional complaint against cantonal decrees – and this is also consistently excluded by the State Court of Justice[76]. Through this, private persons can only indirectly initiate the test of constitutionality by contesting an individual court or administrative decision; it is here, therefore, that the specific judicial review important in practice takes place. If the State Court of Justice considers the rule on which the decision or order is based to be unconstitutional or illegal, it annuls the contested act of state in the individual case *and* the contested rule with effect against all persons[77].

From this, it is evident that the constitutional complaint pursuant to Art. 23 StGHG not only has to subjectively assure protection of the basic rights but that it also assumes the function of implementing the objective constitutional system. This is even more apparent when it is considered that the State Court of Justice also examines a constitutional complaint for other reasons than those claimed by the complainant. The alleged unconstitutionality of a law can result from a rule other than that cited; the State Court of Justice can then extend its examination – but is not obliged to – and perform it ex officio[78].

The parties in constitutional complaint proceedings are first of all the complainant, possibly (but not necessarily) represented by a lawyer, and the supreme instance of the proceedings in question. On the other hand, there are no advocates-general representing the interests of the State. It is rather the case that this task is assumed by the last instance of the ordinary legal process.

c. Cassation of laws and statutory instruments pursuant to Art. 24 ff. StGHG

Pursuant to Art. 24 ff. StGHG, laws and statutory instruments may be subjected to an abstract and objective judicial review procedure, quite separate from a specific case of legitimate interest in the proceedings, before the State Court of Justice. This is clear from the fact pursuant to Art. 24 Para. 1 that this contestation of rules is possible "at any time" and, according to Art. 26, "without a special interest" . The purpose of the procedure is to

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Prosecutions, do not have any legitimation to file a complaint. See on this also HOCH, p. 83 f. with footnote 89 with further notes.

[74] Cf. StGH 1982/26, order of 1.7.1982, LES 1983, 73.

[75] Cf. StGH 1963/3, decision of 17.10.1963, ELG 1962-1966, 209 (210); cf. WILLE, p. 114.

[76] Cf. StGH 1993/15, judgment of 16.12.1993, LES 1994, 52 (53).

[77] Cf. BATLINER, Rechtsordnung und EMRK p. 113; WILLE, p. 334 ff.

[78] Cf. StGH 1997/32, judgment of 2.4.1998, LES 1999, 16 (20) and StGH 1997/33, judgment of 2.4.1998, LES 1999, 20 (24).

implement objective law[79] and, within the framework of the stepped structure of the legal system, it assures the priority of the corresponding higher-ranking rules.

For the contestation of laws and according to Art. 24 Para. 1 StGHG, the Government and the local authorities are entitled to file a petition; the law excludes every other petitioner[80]. According to Art. 24 Para. 3 StGHG, in cases in which it has to apply provisions of law, the State Court of Justice may examine the constitutionality of laws ex officio or on the petition of a party. In all other cases, it is established practice for the State Court of Justice not to carry out an examination ex officio or on the petition of a party but only on the application of the Government or of a local authority[81].

As a result, this considerably reduces the circle of authorized petitioners concerning the contestation of laws. The abstract law verification procedure cannot therefore acquire any importance in the practice of government. In addition, the Government can use the expert opinion procedure according to Art. 16 StGHG by which it can achieve a somewhat similar result. On account of that, this institution is not examined further here[82].

According to Art. 25 Para. 1 StGHG, the courts and the local authorities are entitled to file petitions in the case of the dependent contestation of statutory instruments. Such a contestation is dependent because both these petitioners may only contest those statutory instruments that they "directly or indirectly have to apply in a certain case" (Art. 25 Para. 2 StGHG). The local authorities can contest statutory instruments as part of a specific judicial review but up to now no local authority has filed such a petition[83]. The local authorities can adequately defend their interests in laws and regulations through the inquiry/response procedure so that the judicial review procedure has proved unnecessary for them. For the courts, this right of application does not increase their powers. Pursuant to Art. 28 Para. 2 StGHG, they are entitled anyway in “pending proceedings" to submit statutory instruments and laws to the State Court of Justice[84]. On the other hand, it is self-evident that the Government as the source of statutory instruments[85] cannot submit an application. If it is uncertain as to the constitutionality or legality of a draft statutory instrument, it can request an expert opinion pursuant to Art. 16 StGHG.

Art. 26 StGHG provides for the independent contestation of a statutory instrument by a group of at least one hundred persons with the right to vote. Up to now, this institution has not played much of a role but it does have a certain potential. Statutory instruments do not have any such direct legitimization as laws and it is certainly conceivable that a group of one hundred persons among those affected by it could be found to oppose a statutory instrument. Herbert Wille therefore makes the following comment on such a prognosis: "It would also

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[79] KLEY, Rechtsschutz p. 254 ff.

[80] At any rate in StGH 1982/26, order of 1.7.1982, LES 1983, 73. For the modalities of such a petition, see: WILLE, P. 157 ff.

[81] Cf. StGH 1981/17, order of 10.2.1982, LES 1983, 3 (4); StGH 1982/65 V, judgment of 15.9.1983, LES 1984, 3 (4).

[82] Cf. the exact presentation of the reasons: WILLE, p. 106 f., p. 149 ff.; WILLE, Verfassungsgerichtsbarkeit p. 36 f.

[83] Cf. WILLE, P. 155.

[84] There is a certain difference between the two rules ("pending proceedings" [Art. 28 Para. 2], "to be used directly or indirectly" [Art. 25 Para. 2]); the State Court of Justice does not draw any distinction in respect of the precondition of prejudiciality for the application , cf. WILLE, P. 172 footnote 194 with evidence.

[85] For the issue procedure of statutory instruments, see: SCHURTI ANDREAS, Das Verordnungsrecht der Regierung des Fürstentums Liechtenstein, thesis. St. Gallen 1989; SCHURTI ANDREAS, Das Verordnungsrecht der Regierung, Finanzbeschlüsse, in: BATLINER, Verfassung p. 231 ff.

certainly appear that the contestation of a statutory instrument is more promising than the (abstract) judicial review procedure for laws"[86].

The State Court of Justice is also authorized ex officio, without an application for an examination, to verify the constitutionality of laws and statutory instruments. However, pursuant to Art. 24 Para. 3 and Art.25 Para. 1 StGHG, it must have to directly apply the provisions of law or statutory instruments in a specific case or indirectly as regards preliminary questions or interpellations. The ex officio examination can therefore only be carried out in conjunction with a judicial review procedure initiated by an external application or in other proceedings before the State Court of Justice in which it must apply provisions of law[87]. In this sense, the State Court of Justice can only be active in pending proceedings.

d. Submission proceedings pursuant to Art. 28 Para. 2 StGHG

Art. 28 Para. 2 StGHG foresees a systematic submission procedure for the system of concentrated constitutional jurisdiction. Any court may interrupt a pending action and have an applicable provision of a law or statutory instrument of relevance[88] for the decision verified for constitutionality by the State Court of Justice. This application leads to a specific judicial review[89]. The ordinary courts of all instances, i.e., the District Court, the High Court of Appeal, the Supreme Court of Justice and also the administrative appellate instance have the right to submit an application[90]. It too, according to present-day practice in respect of Art. 28 Para. 2 StGHG, is unquestionably a court, although the State Court of Justice has decided otherwise in another respect[91].

For laws, according to the text of Art. 28 Para. 2 StGHG and court practice, the unconstitutionality must first be asserted by one of the parties. Otherwise, the court may not submit the question to the State Court of Justice. In the case of statutory instruments, the court may do this on its own initiative and ex officio "when a provision of a statutory instrument appears to it to be unconstitutional or illegal"[92]. However, the court must file a well-founded motion of its own to the State Court of Justice. On the other hand, the court may not simply submit to the State Court of Justice a contention to this effect by a party without a motion in arrest of judgment and stating a justification in law of its own. Otherwise a taxpayer's suit not provided for by the law would be made possible[93]. If, however, the court in question considers the complaint of unconstitutionality as not established, the parties may submit a complaint to the State Court of Justice after completing the stages of appeal on account of the application of a provision considered to be unconstitutional[94]. This order of the legal remedies ensures

[86] Cf. WILLE, P. 156.
[87] Cf. in this respect StGH 1981/17, for example, order of 10.2.1982, LES 1983, 3 (4); StGH 1982/37, judgment of 1.12.1982, LES 1983, 112 (113).
[88] Cf. WILLE, Verfassungsgerichtsbarkeit p. 37; WILLE, P. 80 ff., p. 168 ff.
[89] Vgl. WILLE, Verfassungsgerichtsbarkeit S. 37; WILLE, S. 80 ff., S. 168 ff.
[90] Cf. StGH 1997/42, judgment of 18.6.1998, LES 1999, 89 (93); StGH 1997/28, judgment of 29.1.1999, LES 1999, 148 (152); StGH 1998/12, judgment of 3.9.1998, LES 1999, 215 (217); WILLE, P. 178 ff. with evidence.
[91] Cf. on the position of the administrative appellate instance: KLEY, Verwaltungsrecht p. 195; WILLE, p. 180 ff.
[92] Cf. StGH 1981/17, judgment of 10.2.1982, LES 1983, 3 (4); cf. also StGH 1996/40, judgment of 20.2.1997, LES 1998, 137 (140).
[93] Cf. StGH 1993/15, judgment of 16.12.1993, LES 1994, 52 (53).
[94] Cf. e.g., StGH 1993/18 and 1993/19, judgment of 16.12.1993, LES 1994, 54 (58); VBI 1996/17, decision of 29.5.1996, LES 1997, 40 (46).

full observance of the protection of law and of the right of complaint according to Art. 43 LV[95].

Pursuant to Art. 104 Para. 2 LV and Art.11 Section 2 StGHG, the examining competence for statutory instruments is expressly related to "Government statutory instruments" whereas Art. 25 ff. speak of "statutory instruments". Nevertheless, the State Court of Justice has also qualified directives of the national real estate transaction commission, applicable statutory instruments of the Swiss Federal Council or general-abstract tariff sheets of local authorities and local building regulations as "statutory instruments" and accordingly verified[96] such. This rather extensive practice is justified since otherwise there is the risk that the system of the concentrated judicial review would be eroded.

A court is not obliged on account of the unconstitutionality of a law (Art. 28 Para. 2 StGHG) or on account of the unconstitutionality or illegality of a statutory instrument (Art. 25 Para. 2 and Art.28 Para. 2 StGHG) to interrupt the proceedings and submit the question to the State Court of Justice. According to the text of the law, the courts and in the case of Art. 25 Para. 2 StGHG also the local authorities are free to file such a petition. For a long time, the State Court of Justice followed the discretion in law to decide this of the parties entitled to petition[97]. In a questionable change in its practice, the State Court of Justice re-interprets the "can" of Art. 25 Para. 2 or Art. 28 Para. 2 StGHG as a "must". A court is accordingly obliged to interrupt the proceedings if it has doubts about the constitutionality of a law or statutory instrument[98]. The State Court of Justice has justified the change in its practice by stating that on account of the concentrated competence in constitutional questions pursuant to Art. 104 Para. 2 LV the discretionary clauses ("can") are to be restrictively interpreted. This is not convincing since the disallowance monopoly of Art. 104 Para. 2 LV does not require – as correctly recognized by the legislature – such a liability to present[99].

e. Interpretation of Constitutional provisions according to Art. 29 StGHG and Art.112 LV

Art. 29 StGHG merely paraphrases Art. 112 LV on the interpretation function of the State Court of Justice as the court of jurisdictional conflict between the Diet (the People) and the Government (the Prince). Among other things, it is also the elliptical incorporation of the State power in the Prince and in the People pursuant to Art. 2 LV which positively forces this interpretation. Pursuant to Art. 112 LV, the State Court of Justice decides disputes of interpretation between the Government (the Prince) and the Diet that cannot be settled by agreement between the Prince (the Government) and the Diet. Up to now, the doctrine had unanimously followed this interpretation of Art. 112 LV[100] that was also repeated by Herbert

[95] Cf. StGH 1993/15, judgment of 16.12.1993, LES 1994, 52 (53).
[96] Cf. StGH 1997/28, judgment of 29.1.1999, LES 1999, 148 (152) with further notes; StGH 1981/18, decision of 10.2.1982, LES 1983, 39 (41); cf. also StGH 1996/1-2, judgment of 25.10.1996, LES 1998, 123 (125) on the contestation of supposed administrative orders but in fact of statutory instruments.
[97] summed up in StGH 1993/12, judgment of 16.12.1993, LES 1994, 52 (53).
[98] Cf. StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (39).
[99] See on the criticism in detail: WILLE, p. 187 ff.
[100] Report and motion of the Government to the Diet on the State Court of Justice Act No. 71/1991, p. 19; WILLE HERBERT, Verfassungsgerichtsbarkeit and duale Staatsordnung im Fürstentum Liechtenstein, in: Commemorative Publication for Gerard Batliner, Kleinstaat and Menschenrechte, Basel 1993, p. 95 ff., esp. p. 103; BATLINER, Verfassungsrecht p. 26 f. and p. 85; BATLINER, Schichten p. 291 ff.; BATLINER, Rechtsordnung and EMRK p. 105 ff.; KELSEN HANS, Constitutional opinion of 10.9.1929, publ. by the Committee of the

Wille in a lecture in 1995. It was precisely this interpretation of Art. 112 LV that led the Prince to impose a general prohibition on the speaker from practicing his profession. He asserted that this interpretation was unconstitutional and that the speaker was therefore unsuitable for the office of a judge. It was only logical that the Prince in his proposals for the Constitution wished to remove Art. 112 LV[101]. The Prince justified his motion for cancellation as follows:
"The present Draft Constitution provides for the cancellation of the old Art. 112. The old article could have led to the State Court of Justice, instead of being a judicial organ, becoming a law-making body that in the event of a lack of agreement between the Government and the Diet simply broadens the Constitution by a generally binding interpretation. Law-making is, however, the prerogative of the Prince and the Diet or the People and not of a court"[102].

If the reasoning of the Prince is followed, the dispensation of justice in general would have to be abolished since of course it not only always decides disputes in the individual case but at the same time through this also develops the legal system further in an abstract sense. This is why in the sources of law doctrine "judge-made law" is a fully recognized and independent category[103]. The European Court of Human Rights also expressly recognizes this necessary quality of any jurisprudence[104]. Any person opposing "judge-made law" is also opposed to jurisdiction and here to the jurisdiction of the constitutional court to which the protection of human rights, freedom and the constitutional State as a whole is entrusted[105].

Art. 112 LV derives from the German constitutionalism of the 19th century[106] and is absolutely necessary for the elimination of hopeless conflicts between the supreme State bodies. The Kingdom of Saxony, for instance, had a corresponding ruling:
"(1) Should doubt arise concerning the interpretation of individual points of the Constitutional Charter and such cannot be eliminated by agreement between the Government and the Diet, the pros and cons of the dispute shall be submitted by both the Government and the Diet to the State Court of Justice for a decision. (...)
(3) The judicial pronouncement given shall be regarded and followed as the authentic interpretation."

It is indeed so – as pointed out by the Saxon provision – that the interpretative judgment of the State Court of Justice is considered as an act of legislation. It is namely an authentic interpretation of universal validity (Art. 39 Para. 1 StGHG). It is true that in the Liechtenstein Constitution there is likewise the authentic interpretation in the procedure of creating

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Liechtenstein Popular Party, p. 18; PAPPERMANN ERNST, Die Regierung des Fürstentums Liechtenstein, thesis. Cologne 1967, p. 88. See in particular the detailed discussion in BATLINER, Fragen p. 72 ff. with further notes; WILLE, Verfassungsgerichtsbarkeit p. 31 f., p. 40. Commission de Venise, commission européenne pour la démocratie par le droit, Rapport adopté lors de la 46e session plénière, le 9-10 mars 2001, DCL-INF (2001) 9, p. 12. The contrary opinion of KOHLEGGER KARL, Die Justiz des Fürstentums Liechtenstein und der Republik Österreich, in: Commemorative Publication for Otto Oberhammer, Vienna 1999, p. 34 ff., esp. p. 59 is based on an ambiguous text without consideration of the necessary juridical interpretation elements in detail.

[101] Cf. WINKLER, P. 126.

[102] Cf. Constitutional proposal of the Princely House of 2.2.2000, p. 41.

[103] Cf. KLEY, Verwaltungsrecht p. 75 ff. with notes.

[104] See the quotation noted in Para. III.a.1.

[105] Cf., for instance, WILLE, Verfassungsgerichtsbarkeit p. 20 f. with further notes; KLEY, Rechtsschutz p. 21 ff.

[106] Analog rulings are known: § 153 Para. 1 and 3 of the Constitutional Charter for the Kingdom of Saxony of 4.9.1831, Text: HUBER ERNST R., Dokumente zur Deutschen Verfassungsgeschichte, Band 1: 1803-1850, Stuttgart 1961, p. 223 ff. (247). See also analogously § 191 Para. 1 and 3 of the Constitution of Hohenzollern-Sigmaringen of 1833, cf. on this BATLINER, Fragen p. 77 Footnote 132 with further notes

constitutional law (Art. 111 Para. 2 in conjunction with Art. 65 Para. 1 LV)[107]; however, this can be blocked like the ordinary constituent and legislative process in the event of a difference of opinion. The agreement between the Government and the Diet mentioned in Art. 112 LV means exactly an act of authentic interpretation according to Art. 111 Para. 2 LV that has to be carried out by the constitutional legislature. The competence of the State Court of Justice is subsidiary[108]; only when the constitutional legislature (Diet, People and Prince) are unable to reach such an agreement may one of the parties invoke the State Court of Justice.

The ruling of Art. 112 LV could not better express the fact that in 1921 the constitutional State was established in Liechtenstein. Accordingly, all the State institutions (Prince and Government, Diet and People, the courts) are subordinate to the Constitution and, with Art. 112 LV, the established constitutional law is ultimately made enforceable. The concept of the independent State Court of Justice as an "arbitrator" between the Prince and the Diet or People[109] does not accurately reflect the state of affairs since the two critical elements of the elliptical State do not live under the rule of an arbitrator but under the rule of a Constitution defining the basis and justification of the State as a whole. The State Court of Justice is appointed to interpret this Constitution and is specifically bound to the Constitution[110]. Gerard Batliner has aptly described this important sense of Art. 112 LV[111]:
"The historic roots of such provisions date back to German constitutionalism with the dual State system of Ruler and Diet and the need for a legally protective bond. Thus it is that also Art. 112 LV is an attempt to protect the dual State with its democratic and parliamentary and its monarchical components from drifting apart and to determine the outline of the Constitutional State – not by a political authority but by a neutral, powerless court instance totally bound to the Constitution having neither 'sword' nor 'purse', 'neither force nor will, but merely judgment' (Alexander Hamilton, Federalist Papers No. 78)".

According to a communication of the Diet of 25.9.1995, the State Court of Justice was called on[112] to prepare an expert opinion on the interpretation of Art. 112 LV to obtain clarity as to its scope. The State Court of Justice did not, however, respond to this request since an examination pursuant to Art. 16 StGHG may only deal with legislative matters and the interpretation of laws and statutory instruments. Conversely, Art. 112 LV in conjunction with Art. 29 StGHG does not allow any scope for the tentative opinion requested on provisions of the Constitution. The State Court of Justice did not indeed respond to the request but considered the answering of this question so important that it gave a substantive obiter dicta answer. The State Court of Justice performed its task as a State-preserving bond in the elliptical State system in excellent fashion. It was correct not to respond to the request but conversely the need for a clarification of the legal position is so great that the State Court of Justice clearly showed where it stood. And this was in the following points:

a) Pursuant to Art. 112 LV, the State Court of Justice is indeed competent to interpret the Constitution[113].

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[107] Cf. WINKLER, p. 122 f. and with examples p. 130 f. The authentic constitutional interpretation is also found in Switzerland and does not need to come from the legislative body, cf. HANGARTNER YVO / KLEY ANDREAS, Die demokratischen Rechte in Bund and Kantonen der Schweizerischen Eidgenossenschaft, Zürich 2000, p. 651 f.
[108] Cf. WINKLER, p. 121.
[109] WINKLER, p. 29 f.; cf. also WILLE, Verfassungsgerichtsbarkeit p. 23 with further notes
[110] See the very detailed presentation in: BATLINER, Fragen p. 72 ff.
[111] BATLINER, Fragen p. 79. See also BATLINER, Verfassungsstaat p. 407.
[112] Cf. StGH 1995/45, judgment of 23.11.1998, LES 1999, 141 (148).
[113] Cf. StGH 1995/25, order of 3.11.1998, LES 1999, 141 ff., Section 3.1., 4.2., 5.2., 5.4., 5.5. (in the following footnotes only the sections relating to this order are given).

b) This competence is subsidiary to the authentic interpretation creating constitutional law pursuant to Art. 111 Para. 2 LV[114].
c) The action before the State Court of Justice is a dispute between State institutions over a specific constitutional question which in the sense of a procedural requirement is the reason for a decision on the interpretation of the disputed constitutional provision[115].
d) The decision on the interpretation is not just an individual, concrete act but is of universal validity[116].
e) An "agreement between the Government and the Diet" pursuant to Art. 112 is to be understood as the authentic interpretation by the legislature within the intendment of Art. 111 Para. 2 LV[117].

Entirely in accord with its historical background, the State Court of Justice has therefore interpreted Art. 112 LV as an important provision which in an extreme emergency decides a dispute between the supreme organs of the State and, subsidiarily, leads to an authentic interpretation of the Constitution. Art. 112 LV enables the State Court of Justice to find a way out of a political stalemate situation and to remain bound by the Constitution whereby it may not proceed to a discretionary provision of law, for instance. This interpretation of the State Court of Justice has now become established to such an extent that the Commission de Venise for Democracy and Constitutionality has also included it in full in a report[118].

2. Settlement of conflicts between judicial organs

In the constitutional State in which the powers are divided, the Constitution and the laws assign the different tasks to the State institutions and at the same time these institutions are made dependent on each other through provisions for cooperation. Conflicts of competence between the State institutions and within the jurisdiction are therefore possible and the Constitution must make provision for the appropriate procedures for their solution. A distinction is drawn between the positive conflicts of competence in which two or more State institutions claim the constitutional or legal competence in a specific case and the negative conflicts of competence in which all the State institutions deny competence.

The Liechtenstein Constitution also appoints the State Court of Justice as a court of jurisdictional conflict that has to decide the corresponding conflicts in the procedure of individual complaint, in the verification of laws and statutory instruments and in the interpretation of the Constitution. Pursuant to Art. 104 Para. 1 LV, the State Court of Justice is appointed to decide such conflicts when it is a question of such between courts and administrative authorities. According to the State Court of Justice Act, the competence of the State Court of Justice to decide also extends to conflicts between the civil and criminal courts on the one hand and the administrative appellate instance on the other[119]. Pursuant to Art. 39 Para. 2 StGHG, the decision of the State Court of Justice on jurisdictional conflict must contain only the pronouncement of the competence.

[114] Cf. Section 4.2., 5.2., 5.4., 5.5.
[115] Cf. Section 4.3., 5.1., 5.2.
[116] Cf. Section 3.1., 4.2., 5.2., 5.4., 5.5.
[117] Cf. Section 5.4.
[118] Commission de Venise, commission européenne pour la démocratie par le droit, Rapport adopté lors de la 46e session plénière, le 9-10 mars 2001, DCL-INF (2001) 9.
[119] Cf. Art. 12, 30 Para. 1 and 32 StGHG and also BATLINER, Verfassungsrecht p. 99.

Conflicts of competence between the Prince and the Diet concerning the interpretation of individual constitutional provisions are likewise brought before the State Court of Justice pursuant to Art. 112 LV and Art.29 StGHG. However, since there are no such conflicts between courts, reference is made to the preceding remarks[120].

II. Relations between the constitutional court judge and the other judicial organs

A. Organic connection

In the organic relation between the State Court of Justice and the other courts, there are no connections in the sense, for instance, that the State Court of Justice has any influence on the appointment of the other judges. The essential connection is solely via the jurisprudence of the State Court of Justice in constitutional questions.

B. Procedural connection

The lower administrative authorities and courts have the status of a litigant before the proceedings before the State Court of Justice pursuant to Art. 18 StGHG and within this framework can express their opinions to the State Court of Justice before the latter takes its decision (known as replications[121]). When a court ultimately refers to the State Court of Justice in preliminary ruling proceedings pursuant to Art. 28 Para. 2 StGHG, it must explain in a well-founded motion of its own why a law or statutory instrument violates the Constitution. A dialogue as such between the State Court of Justice and the court submitting the petition with question and answer does not take place. If, for instance, the formal preconditions for an examination by the State Court of Justice are not met, it may not carry out such an examination and the petition must be dismissed without further discussion with the lower instance.

C. Functional connection

§ 1. The examination and its consequences

The decisions of the State Court of Justice *in the individual case* represent mandatory precedents for the other judicial organs and also for the administrative authorities. Art. 42 Para. 2 StGHG states that those court or administrative authorities that by reason of a ruling made by the State Court of Justice have to give a decision or order are bound to the legal view of the State Court of Justice. This concerns all decisions and judgments quashed by the State Court of Justice in the individual complaint procedure on account of an unconstitutionality (Art. 38 Para. 1 StGHG). If the State Court of Justice considers a decision or judgment to be constitutional, it dismisses the petition. This only means, of course, that the

[120] Cf. Para. I.B.1.e.

[121] Cf. e.g., StGH 1996/21, judgment of 21.2.1997, LES 1998, 18 (21 f.); accordingly, the replication of the lower court cannot replace a defective reasoning of its decision pursuant to Art. 43 LV.

constitutionally necessary minimum has been observed but not that the decision or judgment "was satisfactory"[122].

The legal position is more difficult in all those cases in which the State Court of Justice must pronounce on the constitutionality of a law or the legality of an order. This examination, which is possible in all actions of all kinds pursuant to Art. 11 StGHG and in the opinion pursuant to Art. 16 StGHG, can end with the most diverse results. In the contestation of a law or statutory instrument or of an individual provision, the corresponding rules of law are declared null and void (Art. 38 Para. 2-4 StGHG). These are naturally only the unconstitutional and illegal parts of a law or statutory instrument. If the State Court of Justice finds that the rules of law examined are in conformity with the Constitution and the law, it dismisses the petition for examination and the State Court of Justice may confirm the constitutionality of the rules of law examined[123]. In actual fact, this is not necessary since it is obvious from the dismissal that the rules of law in question are in conformity with the Constitution. The State Court of Justice may also decide not to annul an unconstitutional legal rule and instead of this make an interpretation of it in conformity with the Constitution. In such cases, the courts are required to interpret the law in question in this sense from then on [124].

In the procedure concerning the interpretation of provisions of the Constitution pursuant to Art. 112 LV / Art. 29 StGHG and in the examination procedure pursuant to Art. 16 StGHG, the "ruling on this is to be pronounced in what sense these provisions are to be interpreted"[125]. As regards the consequences of the decisions of the State Court of Justice, Art. 42 Para. 1 StGHG states that these become final and enforceable on the expiry of fourteen days after service. The decision of the State Court of Justice develops its effect with legal force unless it "cancels" (ex nunc) a decree, judgment, law or statutory instrument . This is clearly apparent from Art. 104 Para. 2 LV and Art.38 Para. 1-3, 43 Para. 2 StGHG which in each case talk of "quash" ("kassieren") or "cancel" ("aufheben"). An act of State or a legal rule can only be canceled when this was previously valid[126]. With canceled legal rules, this means that up to the time of their cancellation they are indeed unconstitutional or illegal but are nevertheless valid and effective in law[127]. It is only a question of an ex tunc effect when the disputed act of law or legal rule suffers from such serious defects that it could not come into force at all[128] and the State Court of Justice merely needs to determine its invalidity. As an example of such an incipient and serious defectiveness, mention may be made in my opinion of the new Princely House Act of 1993. This was proclaimed without the obviously necessary consent of the Diet[129] and is therefore null and void[130]. If the decision quashes an order or judgment, this is only effective for the parties concerned (inter partes). If, on the other hand, the decision of the State Court of Justice (also) quashes a law, statutory instrument or parts thereof, this

[122] Cf. e.g. StGH 1996/31, judgment of 26.6.1997, LES 1998, 125 (132).
[123] Cf. e.g. StGH 1997/14, judgment of 17.11.1997, LES 1998, 264 (Section 1 of the Purview).
[124] Cf. OGH Cg 99.00142, order of 13.1.2000, LES 2000, 112 (114) with further notes; cf. on the interpretation in conformity with the Constitution: KLEY ANDREAS, Auslegung des liechtensteinischen Verwaltungsrechts, LJZ 1996, p. 84 ff., esp. p. 85 Note 18-20 with further notes
[125] Art. 39 Para. 1 StGHG.
[126] StGH 1976/7, judgment of 10.1.1977, in: STOTTER, p. 204, Section 11.
[127] Cf. WILLE, P. 329.
[128] Cf. on the invalidity of decrees: VBI 2000/31, decision of 6.9.2000, LES 2000, 181 (183 f.); VBI 1996/39, decision of 9.9.1996, LES 1997, 233 (235); KLEY, Verwaltungsrecht p. 127 ff.
[129] Vgl. z.B. BATLINER, Verfassungsstaat S. 408.
[130] Cf. the exact reasoning in KLEY, Verwaltungsrecht p. 41-44.

cancellation "applies for all persons" (erga omnes)[131]. It is only logical that a decision of the State Court of Justice that cancels a rule of law is published in the national gazette whereby the cancellation can only achieve legal force with the erga omnes effect (Art. 43 Para. 2 StGHG)[132].

According to Art. 43 Para. 2 StGHG, the cancellation of rules of law is not regularly bound to any deadline but come into force with their announcement. In many cases, however, the mere cancellation of illegal or unconstitutional rules of law is not enough. It is rather the case that the cancellation of rules of law can lead to conditions that are undesirable as regards legal policy and exceptionally a correction of the unconstitutional legal situation can be carried out by the legislature within the maximum period of six months set by law[133]. In this case, the State Court of Justice sets in the purview of its judgment a period of maximum six months within which the force of law of the cancellation is delayed. As the constitutional court, the State Court of Justice is not permitted to take action against the lack of activity of the legislature[134]. It may only cancel (quash) unconstitutional laws and statutory instruments but not supplement them or even issue new laws. This latter area is the prerogative of the legislative power alone[135]. "This problem, which occurs relatively often in connection with the function of the constitutional court as a 'negative legislator', as it were, is aggravated by the fact that the cancellation of a rule of law identified as unconstitutional can only be delayed by precisely the maximum period of six months pursuant to Art. 43 Para. 2 StGH"[136]. This delay allows the legislature to adjust the legal situation[137]. However, the delay does not apply to the successful complainants since these should not fail to enjoy the success of the their complaint[138]. The State Court of Justice has indicated that it would abandon its reserve "if, despite the not unobjectionable legal situation from the viewpoint of basic rights, the legislature were to be inactive for a fairly long period"[139].

If the legal maximum period of six months is not enough on account of the complexity of the subject-matter to be settled for the legislature to correct the unconstitutional situation in actual fact, the State Court of Justice resorts to the *appellate decision* which, however, is not regulated in law[140]. "A correction of the unconstitutional situation is nonetheless urgent. The Government and the Diet are thus urged to take in hand such a revision … without delay"[141]. For the case that

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[131] Art. 24 Para. 1 StGHG speaks only in such terms with regard to the verification procedure for laws; this must also apply analogously for the verification of statutory instruments.
[132] Cf. StGH 1968/2, decision of 12.6.1968, ELG 1967-1972, 236 (237).
[133] Cf. StGH 1981/19, judgment of 10.2.1982, LES 1983, 43 (44); StGH 1994/6, judgment of 4.10.1994, LES 1995, 16 (23).
[134] Cf. StGH 1981/5, judgment of 14.4.1981, LES 1982, 57 (59).
[135] Cf. StGH 1981/14, decree of 9.12.1981, LES 1982, 169; StGH 1993/3, judgment of 23.11.1993, LES 1994, 37 (39); StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (37).
[136] StGH 1995/20, judgment of 20.5.1996, LES 1997, 30 (37).
[137] Cf. Art. 43 Para. 2 StGH and StGH 1994/6, judgment of 4.10.1994, LES 1995, 16 (23); StGH 1993/4, judgment of 30.10.1995, LES 1996, 41; StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (37).
[138] Cf. StGH 1994/6, judgment of 4.10.1994, LES 1995, 16 (23); StGH 1994/4, judgment of 26.5.1994, Erw. 5, p. 20, unpublished.
[139] Cf. StGH 1993/3, decision of 23.11.1993, LES 1994, 37 (39); cf. also StGH 1991/14, judgment of 23.3.1993, LES 1993, 73 (75 f.).
[140] Cf. WILLE, P. 314 ff.; cf. also StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (38).
[141] StGH 1995/12, judgment of 31.10.1995, LES 1996, 55 (61); StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (39) on the equality of the sexes in old-age and survivors' insurance; StGH 1993/3, judgment of 23.11.1993, LES 1994, 37 (39). For the same reasons, the State Court of Justice had not annulled the Road Traffic Act in the absence of announcement: "Here as elsewhere it holds true that according to the Liechtenstein legal system there are rules of law that in principle are certainly voidable but not absolutely null and void", StGH 1980/10, judgment of 10.12.1980, LES 1982, 10 (11). Cf. other non-cancellations of not fully announced laws for reasons of practicability: StGH 1981/18, judgment of 10.2.1982, LES 1983, 39 (43); StGH 1984/12,

it cannot eliminate an unconstitutionality with a cassation of provisions of law, the State Court of Justice has considered Art. 38 Para. 1 StGHG as incomplete. Appellate decisions represent a pragmatic intermediate solution that allows "the constitutional court to exercise its constitutional control function in an unequivocal manner and to designate unconstitutional rules of law as such even when a cassation in exceptional cases is not possible for important practical or constitutional reasons. The practical need to take such appellate decisions in certain kinds of cases precisely in connection with the general principle of equality and the precept of the equal treatment of the sexes has also become apparent in Switzerland and … in Germany"[142]. When the State Court of Justice takes an appellate decision, a complainant is reimbursed for the costs incurred by him in the constitutional complaint proceedings [143].

It is not a question of an appellate decision when the State Court of Justice quashes an unconstitutional legal ruling but at the same time outlines to the legislature how a ruling in conformity with the law could be formulated[144]. In this case, the cassation restores the constitutional situation but the State Court of Justice offers advice to the legislature. Such an "advice decision" is also made when the State Court of Justice designates a legal situation as "not unproblematic" since it could lead "to unsatisfactory results and in some cases to actual cases of hardship"[145]. The State Court of Justice advises the legislature here to change a legal situation that is in conformity with the Constitution but is unsatisfactory.

The other instances usually follow the judgments of the State Court of Justice. If this does not happen, for whatever reason, a complainant can once more file a complaint pursuant to Art. 23 StGHG and thus submit the constitutional question to the State Court of Justice once again. The latter will then as a rule confirm its earlier ruling and quash the decision or order[146].

§ 2. Interpretation by the constitutional court judge

In Liechtenstein, constitutional jurisdiction is implemented in its concentrated form. The State Court of Justice "unequivocally favors an examination monopoly both of laws and of statutory instruments in that it claims the judicial review of such exclusively for itself. It has never left any doubt about this"[147]. This sole competence of the State Court of Justice excludes that it feels or sees itself bound in constitutional questions to the interpretation of another instance. For questions of the interpretation of statutory and administrative law alone (i.e., without constitutional relevance), the State Court of Justice in its function as the constitutional court within the intendment of Art. 104 LV is not even competent. It is therefore not a question of it being bound to the interpretation of another instance.

Art. 42 Para. 2 StGHG formally binds the court and administrative authorities to the decisions of the State Court of Justice when they have to issue decisions or orders on the basis of its

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judgment of 8./9.4.1986, LES 1987, 70 (72) and for reasons of legal equality in tax legislation: StGH 1989/15, judgment of 31.5.1989, LES 1990, 135 (141).

[142] StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (38 f.); cf. on appeal decision KLEY, Rechtsschutz p. 323 Note 544.

[143] Cf. StGH 1995/20, judgment of 24.5.1996, LES 1997, 30 (39).

[144] Cf. e.g. StGH 1996/29, judgment of 24.4.1996, LES 1998, 13 (17).

[145] Cf. StGH 1998/42, judgment of 4.9.1998, LES 1999, 295 (298); cf. also the advice of the State Court of Justice to reform the LVG, cf. KLEY, Verwaltungsrecht p. 317 with notes; WILLE, Verfassungsgerichtsbarkeit p. 46.

[146] Cf. the example: StGH 1997/38, judgment of 2.4.1998, LES 1999, 80 (82).

[147] WILLE, P. 73.

judgments. In the case of a cancellation "bound to the legal view", the State Court of Justice refers the case back to the lower court[148]. The Diet and the legislative organs[149] involved are likewise bound by the decisions of the State Court of Justice. This follows on the one hand from the six-months' period described above for the delay in the force of law of a decision canceling a rule of law since the delay is intended to enable the legislature to correct the unconstitutional situation by the issue of new rules of law. The binding character of the decisions of the State Court of Justice follows just as clearly from Art. 112 LV which must decide conflicts of competence between the Diet and the Prince when such cannot be settled by agreement. This decision is binding and final; the legislature would not have spoken of a decision in Art. 112 LV if such a conflict could be interrupted merely by a "non-binding piece of advice" from the State Court of Justice and could subsequently – since it was not binding – be continued.

Art. 29 StGHG in conjunction with Art. 112 LV is available for the interpretation of constitutional provisions. In its interpretations on the basis of Art. 29 StGHG, the State Court of Justice speaks of a "generally binding perception"[150] implemented in the form of a "decision" pursuant to Art. 38 StGHG. From this there results the clearly binding character of the interpretations of the Constitution formulated by the State Court of Justice. For the interpretation of the provisions of laws and statutory instruments, use can be made of the examination procedure according to Art. 16 StGHG which in a certain sense competes with the judicial review procedure[151].

III. Intervention of the European judicial organs

A. The constitutional court judge and the other judicial organs in the light of the jurisprudence of the European Court of Human Rights

§ 1. Binding effect of judgments of the European Court of Human Rights in Liechtenstein

There are no national regulations in Liechtenstein concerning the binding character and implementation of the judgments of the European Court of Human Rights (in the following: the "Court"). The problem is therefore to be discussed on the basis of the law of the European Convention of Human Rights[152].

The Court pronounces a declaratory judgment on the legal question of whether a Treaty State has infringed the substantive rights of the Convention and its supplementary protocols[153]. On the other hand, the Court has no competence to order a State to conduct a lawsuit or hold a hearing

[148] Cf. e.g. StGH 1996/29, judgment of 24.4.1996, LES 1998, 13 (Section 2 of the Purview).
[149] Cf. on the constituent and legislative procedure: HOCH HILMAR, Verfassungs- and Gesetzgebung, in: BATLINER, Verfassung, p. 201 ff.
[150] StGH opinion of 8.3.1952, in: STOTTER, p. 223, Section 1.; excerpts printed in: StGH 1995/25, opinion of 23.11.1998, LES 1999, 141 (145 f.).
[151] Cf. on this Para. I.B.1.a above and also WILLE, P. 90 ff., esp. p. 102 f.
[152] See in detail on this KLEY ANDREAS, Das Verfahren vor dem Europäischen Gerichtshof für Menschenrechte and die Tragweite seiner Urteile, AJP 1997, p. 997 ff.
[153] Cf. VILLIGER, P. 144.

once again[154] or to annul a national act nor may it oblige a State to amend its legislation. In a few cases, the Court has imposed a negative condition on a Treaty State. In the deportation cases where an imminent deportation would have infringed Art. 3 and/or 8 EMRK, it included the following negative condition in the purview: "For these reasons, the Court decides that the enforcement of the deportation order against X would mean a violation of Art. 8 in relation to the two complainants"[155]. Such a directive logically includes an obligation of the State under the provisions of the Convention to refrain from the deportation since the Treaty States have undertaken in Art. 46 Para. 1 EMRK to abide by the final judgment of the Court in all legal matters in which they are a party.

The judgments decide the disputes between the parties as to whether a State has infringed the Convention. As a rule, the Court emphasizes the individual effect of its judgments. In the judgment of Ireland vs. the United Kingdom[156], this noteworthy excerpt is to be found:
"In actual fact, the judgments of the Court serve not only to decide the cases brought before it but in more general terms to explain, secure and develop the provisions of the Convention and in this manner to contribute to the observance of the obligations by the States that have undertaken these as contracting parties (Art. 19)".

As final judgments of a declaratory character according to Art. 44 EMRK, they admittedly bind only the Treaty State in question. The judgment does not have any direct effect nationally since as declaratory judgments they cannot annul any national legal act. The Court cannot, it is true, issue any orders but the State concerned has to remedy the EMRK infringement and as far as possible establish a state of affairs that is in conformity with the Convention[157]. Two important cases are to be distinguished here, namely the infringement of the Convention by an application of a law where the actual application conflicts with the Convention and by a law which as such is contrary to the Convention.

The *infringement of the Convention occurs on the basis of a national legal rule which is as such in conformity with the Convention but is interpreted in a manner contrary to the Convention.* The implications of the declaratory judgment are limited on this case to the individual case judgment. Unlike Switzerland[158], however, Liechtenstein has not admitted any new grounds for appeal in the procedural rules. This is why the obligation for Liechtenstein to adjust the decisions and judgments conflicting with the EMRK follows directly from Art. 46 Para. 1 EMRK .

In the other case, the *infringement of the Convention by a law which as such is contrary to the Convention.* The Court here can only examine the specific case before it and determine whether the manner in which the national rules of law were applied or have affected the complainant have resulted in an infringement of the Convention. However, it cannot verify the national rules of law

[154] Cf. Saïdi judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 261-C, § 47 = ÖJZ 1994, 323; Belilos judgment of the European Court of Human Rights , Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 132, § 76 = EuGRZ 1989, 32.
[155] Cf. Beldjoudi judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 234-A = EuGRZ 1993, 559.
[156] Cf. Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 25, § 154 = EuGRZ 1979, 152.
[157] Cf. FROWEIN/PEUKERT, p. 728.
[158] Cf. Art. 139a Law governing organization of the administration of justice, Art. 66 Para. 2 Verwaltungsverfahrensgesetz, Art. 229 Section 4 Federal Criminal Process, Art. 200 Para. 1 lit. f Military Penal Process.

and practice in abstracto[159]. This problem became clear in the two similar cases of Marckx and Vermeire vs. Belgium. The Marckx case concerned the restriction of the right of inheritance of illegitimate children under the Belgian Code Civil. According to this, illegitimate children did not have an interest in the estate of their grandparents. The Court assessed this as an infringement of the prohibition of discrimination and stated the following – as an explanation, so to speak – as to the effect of its judgment in 1979[160]:
"It is not the task of the Court to carry out an abstract examination of the legal text contested ... . However, it cannot be avoided that its decision – of which there is no doubt – will have effects above and beyond the specific case, especially as the infringements which have occurred have their direct roots in the legal texts and not in the individual enforcement measures named. Nevertheless, the decision cannot by itself annul or amend the contested provisions. It has essentially a declaratory character and leaves it to the State to decide the means to be used in its national legal system to meet the obligation imposed on it by Art. 53.
Even so, the Government has an obvious interest in learning the implications of the present judgment in terms of time (...). In regard to the overall circumstances, the principle of legal security necessarily inherent in the law of the Convention and in Community law releases the Belgian State from questioning actions or the legal situation dating back before the announcement of the present judgment."

The Belgian legislature gave itself time up to 1987 before amending the Code Civil to conform with the Convention of Human Rights. In the intermediate period of eight years, the Belgian courts rejected the direct acceptance of the equal treatment of all descendants demanded by the Court. Accordingly, the legal situation in conflict with the Convention continued. Even before the new Belgian inheritance law came into effect, the Vermeire complaint was lodged and addressed the same legal problems as the Marckx case. The Court again found an infringement of the prohibition of discrimination and stated that it would have certainly been possible for the Belgian courts to follow the observations of the Marckx judgment. The prohibition of a discrimination based on the illegitimate descent of the complainant represented an adequately specific and complete rule[161]. The latitude allowed to the State in the meeting of the obligations from Art. 46 Para. 1 EMRK[162] could not justify the suspension of the Convention until an appropriate legislative reform came into force[163]. It is thus clear that also in the case of a law that is fundamentally contrary to the Convention the Contracting States under Art. 46 Para. 2 EMRK are required to no longer apply the rule of law in question as from the pronouncement of the judgment and to revise the rule as soon as possible. In such combinations of circumstances, the scope of the judgments therefore reaches far beyond the individual case judged although the text of the Convention does not expressly state this. For Liechtenstein, this means that in the first place the State Court of Justice must ensure in its jurisdiction that it observes the obligations from the Convention according to the interpretation of the Court in Strasbourg. But also the ordinary courts, the administrative appellate instance and the other State institutions are required

[159] Cf. Schimanek judgment of 1.2.2000 concerning complaint 32307/96, ÖJZ 2000, p. 817; The Holy Monasteries judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 301-A, § 55 = ÖJZ 1995, p. 429; Urteil Padovani des europäischen Gerichtshofes für Menschenrechte, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 257-B, § 24 with notes = ÖJZ 1993, p. 668; VILLIGER, p. 104 f. with further notes
[160] Marckx judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 31, § 58 = EuGRZ 1979, 460.
[161] Cf. Vermeire judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 214-C, § 25 = EuGRZ 1992, 13.
[162] Previously Art. 53 aEMRK.
[163] Cf. Vermeire judgment of the European Court of Human Rights, Publications de la Cour Européenne des Droits de l'Homme, Série A, vol. 214-C, § 26 = EuGRZ 1992, 13.

to observe the Convention by an interpretation of the basic law in conformity with the Convention and not to allow such conflicts to arise at all in the first place[164].

In Liechtenstein, the only case so far brought before the Court, Wille vs. Liechtenstein[165], has not (yet) been implemented. Liechtenstein appears to take the view that with the payment of the damages pursuant to Art. 41 EMRK the matter is ended. This is, however, not correct since the Prince must correct his decision which is contrary to the EMRK and, through an amendment of Constitution, a repetition of this state of affairs must be made impossible[166]. As long as this is not done, the obligation from Art. 46 Para. 2 will not yet have been implemented by Liechtenstein. The Ministerial Committee has not yet noted the correct enforcement of the judgment in a resolution pursuant to Art. 46 Para. 2 either. The increasingly slow implementation of judgments by the Treaty States has led the Ministerial Committee of the Council of Europe to direct a corresponding admonition to the States[167].

§ 2. Other questions in connection with the procedure before the Court

In Liechtenstein, constitutional jurisdiction is centralized at the State Court of Justice. It is therefore only logical that the Liechtenstein jurisdiction on the European Human Rights Convention is likewise concentrated at the State Court of Justice. In this sense, Art. 23 Para. 1 lit. b StGHG allows individual complaints also on account of infringements of the EMRK which possesses "constitutional rank in effect"[168]. This is objectively correct since the EMRK laws and the laws of the Constitution are closely linked in actual fact and mostly overlap in their content. The same applies also to the international pact on civil and political rights of December 16, 1966 of which Liechtenstein is a member[169].

It is worth noting that since Liechtenstein joined the European Economic Area (EEA) on May 1, 1995 the State Court of Justice has also admitted the complaint of the infringement of EEA law. Its justification for this is that the EEA Treaty – like the European Human Rights Convention[170] - is of a character amending or supplementing the Constitution in fact so that the State Court of Justice has to exercise its judicial review function also with regard to the conformity of national laws and statutory instruments with EEA law[171]. On its merits, this is indeed a convincing justification; however, it should have been urgently demanded from the

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[164] Cf. e.g. OGH 1 Ur 127/99-23, judgment of 3.5.2000, LES 2000, 224 (225).
[165] Cf. above Para. I.B.1.e.
[166] See right to complaint pursuant to Art. 13 EMRK in Para. I.B.1.b.
[167] Cf. DH 2001 (66) of 26.6.2001, EuGRZ 2001, 260.
[168] Cf. StGH 1995/21, judgment of 23.5.1996, LES 1997, 18 (28); cf. alsoHÖFLING WOLFRAM, Liechtenstein and die europäische Menschenrechtskonvention, Archiv des Völkerrechts 1998, p. 140 ff. (148).
[169] LGBl 1999/46. Cf. on this WILLE, Verfassungsgerichtsbarkeit p. 38.
[170] So BATLINER, Rechtsordnung and EMRK p. 91; WILLE HERBERT/BECK MARZELL, Liechtenstein and die Europäische Menschenrechtskonvention, in: LPS 10, Vaduz 1984, p. 227 ff.
[171] Cf. StGH 1998/3, judgment of 19.6.1998, LES 1999, 169 (171); StGH 1996/34, judgment of 24.4.1997, LES 1998, 74 (80). In this sense also: BRUHA THOMAS/BÜCHEL MARKUS, Staats- and völkerrechtliche Grundfragen einer EWR-Mitgliedschaft, LJZ 1992, p. 3 ff. (5); HÖFLING, p. 31 with further notes. See also the interesting discussions in VBI 1997/31, decision of 17.9.1997, LES 1998, 207 on the position of the EEA Treaty in the stepped structure of the legal system. In StGH 1997/19, judgment of 5.9.1997, LES 1998, 269 (272) the State Court of Justice refers to the four basic freedoms of the EEA Treaty without, however, qualifying these in law. In respect of the freedom of movement of persons, the transitional period for Liechtenstein has been extended to 2006 so that this EEA right remains suspended, cf. Decree No. 191/1999 of the Joint EEA Committee, LGBl 2000/97, cf. STEINER PETER, Freizügigkeit and Niederlassungsrecht im Fürstentum Liechtenstein im Rahmen des EWR, LJZ 2000, p. 1 ff. (7); cf. also HOCH, p 83.

constituent and legislative body that it give tangible shape to this important extension in its competence at least in Art. 23 StGHG as in the European Human Rights Convention when, after all, the State makes a treaty involving an amendment to the Constitution. The State Court of Justice avoids conflicts between EEA law of equal status and the basic rights of the Constitution by not verifying from the start the conformity of EEA law with the Constitution except in the case of the infringement of "basic principles and core concepts" of the basic rights contained therein[172].

Pursuant to Art. 35 Para. 1 EMRK, the Liechtenstein and national rights of appeal are to be exhausted before the Court is involved. This is why in every case where this is legally possible and admissible an action must be brought before the State Court of Justice before an action is examined by the Court[173].

B. The constitutional court judge and the other judicial organs in the light of the jurisdiction of the EFTA Court of Justice

Since Liechtenstein is not a member of the European Union, the question of the formal binding of the Liechtenstein State Court of Justice does not arise. Of course, the analog question regarding the European Economic Area (EEA), of which Liechtenstein (today only still with Iceland and Norway) has been a member since 1995[174], still has to be addressed.

Pursuant to Art. 1, the EEA Treaty of 1992 serves for the on-going and balanced consolidation of the commercial relations between the Contracting Parties under the same conditions of competition and with the observance of the same rules. The obligations from the EEA Treaty comprise the assurance of the unrestricted transfer of goods and services, unrestricted capital transactions and the establishment of a system protecting competition from distortion. The States also undertake to promote closer collaboration in other areas such as research and development, the environment, education policy and social policy (Art. 1 Para. 2 lit. a to f). For the implementation of these aims, the Treaty States are to take all the appropriate measures of a general or special nature (Art. 3 Para. 1 EEA Treaty). The successful realization of the EEA Treaty depends on the joint and consistent application of all the EEA rules. For this purpose of the uniform interpretation and application of EEA law[175], two organs have been set up, namely the EFTA Supervisory Authority (corresponds to the EU Commission) and the EFTA Court of Justice (corresponds to the Court of Justice of the European Communities). The tasks, legal position and procedure of the EFTA Court of Justice correspond approximately to those of the European Court of Justice in Luxembourg[176]. The competence of the EFTA Court of Justice covers the following matters[177]:

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[172] StGH 1998/59, unpublished, quoted in HOCH, p. 83 Note 85.

[173] All decisions and judgments of the administrative authorities and courts may therefore be contested before the State Court of Justice; only the decisions of the Prince may not be contested: these may be contested directly before the Court, cf. above Para. I.B.1.b.

[174] Cf. LGBl 1995/68.

[175] See on the position of international law in the Liechtenstein legal system: BECKER STEFAN/BÜCHEL MARKUS, Zur innerstaatlichen Geltung des im Fürstentum Liechtenstein aufgrund Völkerrechts anwendbaren ausländischen Rechtsbestandes (1st Part), LJZ 1992, p. 89 ff.

[176] Cf. EFTA Court of Justice: Message of the Swiss Federal Council on the approval of the Treaty on the European Economic Area of 18.5.1992, BBl 1992 IV p. 1 ff. (p. 499 ff., esp. p. 509 ff.); BAUDENBACHER CARL, Homogenität - Parallelität - Going First: Betrachtungen zur Rechtsstellung des EFTA-Gerichtshofs am Beispiel der Rechtsprechung zur Betriebsübergangsrichtlinie, in: Hübner Ulrich/Ebke Werner F. (ed.), Commemorative Publication for Bernhard Grossfeld on his 65th birthday, Heidelberg 1999, p. 55-71; BAUDENBACHER CARL, Vier

- actions of the EFTA Supervisory Authority against an EEA Member-State concerning an insufficient implementation, application or interpretation of an EEA rule;
- settlement of disputes between two or more EFTA States;
- appeals against decisions of the EFTA Supervisory Authority in matters of competition;
- delivery of opinions on the application of courts of EEA Member-States concerning the interpretation of an EEA rule.

Admittedly, from the published case law of the State Court of Justice there is no great relevance of the EFTA Court of Justice for the jurisdiction of the State Court of Justice[178]. Conversely, however, the possibility of expert opinions from the EFTA Court of Justice plays a role for Liechtenstein. The administrative appellate instance requested the Court for an interpretation of EEA rules on several occasions after a decision of the Government had been contested before it[179]. In the EEA Treaty, the EFTA Court of Justice performs the role of a central judicial organ for the further development of the Treaty. In this, there is an intended analogy with the Court of Justice of the European Communities as regards the primary law of the European Union and also – somewhat more distantly – with the State Court of Justice concerning constitutional jurisdiction. In the Liechtenstein legal system, EEA law is implemented in an optimal manner and with the proper mechanism to assure its effectiveness since of course EEA law has a rank practically equivalent to constitutional law and may be directly invoked in individual complaint proceedings before the State Court of Justice. The State Court of Justice and the EFTA Court of Justice may therefore both be considered as the guardians of EEA law.

Bern, September 12, 2001

Jahre EFTA-Gerichtshof, in: EuZW 9/1998, p. 391-397; BAUDENBACHER CARL, Das Verhältnis des EFTA-Gerichtshofs zum Gerichtshof der europäischen Gemeinschaften, in: LJZ 16/1996, p. 84-94; BAUDENBACHER CARL, Between Homogenity and Independence: The Legal Position of the EFTA Court in the European Economic Area, in: Columbia Journal of European Law 1997, p. 169-227.

[177] Cf. the exemplary list in Art. 108 Para. 2 EEA Treaty.

[178] In the Liechtenstein collection of decisions, only a few decisions deal with this problem. In StGH 1998/56, judgment of 28.9.1999, LES 2000, 107 ff., the State Court of Justice examined the emtrenchment clause pursuant to Art. 112 EEA Treaty as to its compatibility with the legality principle of Art. 92 LV, the EFTA Court of Justice not being involved in this. Cf. also StGH 1998/3, judgment of 19.6.1998, LES 1999, 169 (171); StGH 1998/9, judgment of 3.9.1998, LES 1999, 178 (184). In StGH 1998/37, judgment of 22.2.1999, LES 2001, 69 (72), the State Court of Justice had examined a possible discrimination of citizens of the EEA States without directly referring to a judgment of the EFTA Court of Justice.

[179] This concerns the E-3/98 case with judgment of 10.12.1998; and furthermore the E-4/00, E-5/00, E-6/00 cases with judgment of 14.6.2001, all referring to the prohibition of secondary practices for doctors. The judgments have been published in Internet: http://www.efta.int/structure/court/efta-crt.asp.

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Abbreviations

BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Legal Gazette of the Swiss Federation)
ELG	Entscheidungen der Liechtensteinischen Gerichtshöfe (Decisions of the Liechtenstein Courts)
EMRK	Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4.11.1950, LR und SR-CH 0.101, LGBl 1982/60/1 (Convention on the Protection of Human Rights and Basic Freedoms of 4.11.1950, LR and SR-CH 0.101, LGBl 1982/60/1)
EuGRZ	Europäische Grundrechte-Zeitschrift (European Basic Rights Journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (European Journal of Economic Law)
LES	Amtliche Liechtensteinische Entscheidungssammlung (Official Liechtenstein Collaboration of Decisions)
LGBl	Landesgesetzblatt (Legal Gazette)
lit.	littera (letter)
LJZ	Liechtensteinische Juristen-Zeitung (Liechtenstein Jurists' Journal)
LPS	Liechtenstein Politische Schriften (Liechtenstein Political Texts)
LR	Systematische Sammlung der liechtensteinischen Rechtsvorschriften Systematic Collection of Liechtenstein Legal Rules)
LV	Verfassung des Fürstentums Liechtenstein
NJW	Neue Juristische Wochenschrift (New Jurists' Weekly)
OGH	Oberster Gerichtshof (Supreme Court of Justice)
ÖJZ	Österreichische Juristen-Zeitung (Austrian Jurists' Journal)
StGH	Staatsgerichtshof (State Court of Justice)
StGHG	Gesetz vom 5.11.1925 über den Staatsgerichtshof, LGBl 1925/8, LR 173.10 (Law of 5.11.1925 on the State Court of Justice)
VBI	Verwaltungsbeschwerde-Instanz (administrative appellate instance)

(Translation from the German)