Liechtenstein

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I. INTRODUCTION

Liechtenstein took advantage of the 40th anniversary of its Council of Europe membership in autumn 2018 to hold a well-attended event on the European Court of Human Rights (ECHR). Throughout their speeches, judges and academics emphasized the importance of the ECHR and its jurisprudence.[1] Liechtenstein's respect for human rights is also reflected by the fact that several delegations of the Council of Europe visited the country during the last few years.[2] The country takes their recommendations seriously and implements them, whether through legislative amendments[3] or alterations of the administrative process.

In 2018, no amendments of the Constitution were voted for by Parliament. Yet, one amendment was discussed and will be voted on in early 2019.[4]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Throughout 2018, the Parliament was preoccupied with a number of questions concerning its own organization.

The Splitting of a Political Party

In summer 2018, one Member of Parliament (MP) of the party "The Independents" (*Die Unabhängigen*) lost their membership in it after having discussed the best method of party organization. As a consequence, two other MPs joined him and left the party on their own. After the summer break, the parliamentary group of the The Independents consisted of only two MPs. The by-law of the Parliament (*Geschäftsordnung für den Landtag*) demands three MPs to form a parliamentary group. As the Constitution and the laws do not contain any special regulation for this new situation, the President of Parliament proposed an accord—in touch with all the political parties. The accord was voted for unanimously by Parliament on 5 September 2018. Among other things, it stated that the The Independents would lose their status as a parliamentary group. On the other side, the three dissidents (who have meanwhile founded a new political party named "Democrats in Favor of Liechtenstein" (*Demokraten pro Liechtenstein*) would form another parliamentary group. One of them would take a seat on the board of Parliament while the member of The Independents would have to leave the board. The Independents would continue to

[1] The third issue of the Liechtensteinische Juristen Zeitung has been devoted to the ECHR membership anniversary: LJZ 3 [2018] 103-156.

[2] See for 2018: European Commission against Racism and Intolerance (ECRI): Fifth report on Liechtenstein (adopted on 22 March 2018, published on 15 May 2018), ECRI(2018)18. Group of States against Corruption (GRECO): Third evaluation round, Compliance Report, published on 30 May 2018, GrecoRC3(2018)3. Action against Trafficking in Human Beings (GRETA): Combined 1st/2nd Evaluation Round, Government's Reply to GRETA's Questionnaire, submitted 28 August 2018, GRETA(2018)24.

[3] See chapter II (Implementation of the GRECO-Recommendations).

[4] See chapter II (Abolition of the principle of rotation).

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receive public funding, as the financing of Liechtenstein's political parties is based on the results of the elections and not on their constitution as a parliamentary group. The Parliament then nominated six members to build a special commission. The commission was tasked to propose amendments to the Constitution and to parliamentary laws to regulate the consequences of party splitting and MPs dissenting prior to the next parliamentary elections.

To be precise: It is the first time in history that members of five political parties are represented in Parliament. The Independents had run for election in 2013 for the first time and immediately won four seats out of 25, and five seats in 2017. Until 1993, only two political parties had sent members to the Parliament. Up to 2018, no political party that had made it into Parliament was dropped.

The Composition of the Joint Body for the Selection of Judges

After the elections in March 2017, the Parliament nominated four members of the Joint Body for the Selection of Judges (*Richterauswahlgremium*), regulated by Art 96 of the Constitution. Each of the four political parties represented in the Parliament made a proposal for one MP. Johannes Kaiser was elected for the "Progressive Party of Citizens" (*Fortschrittliche Bürgerpartei*). After a disagreement with the Prime Minister (who happened to be a member of the same party) and with the board of the party, Johannes Kaiser quit the party in March 2018.

But he did not accept leaving the Joint Body. Therefore, the question arose as to whether the Joint Body was properly composed. The wording of Art 96 of the Constitution provides that: "The Reigning Prince and Parliament shall avail themselves of a joint body for the selection of Judges. The Reigning Prince shall chair this body and have the casting vote. He may appoint as many members to this body as the number of representatives delegated by Parliament. Parliament shall delegate one of its Members for each electoral group represented in Parliament (…)."

The Constitution itself does not use the words "political party". Instead, the term "electoral group" is used (similar to Art 96 of the Constitution), which refers to the statute regulating the elections (*Volksrechtegesetz*). In this statute, 30 persons signing an electoral list are labelled as "electoral group". For the running members of a political party, the representatives of the respective political parties are supposed to sign the electoral list. Given that the concept of the *Volksrechtegesetz* theoretically allows a group of 30 friends to sign a list without possessing a party-like structured organization (membership fees, board), the term "electoral group" does not function as a synonym for "political party". Furthermore, Liechtenstein law does not provide a legal basis on which MPs sitting in commissions can be recalled.

The President of the Parliament then asked a Liechtenstein lawyer to provide an expert opinion. The answer remains unpublished, but clear: Nobody may force an MP to leave the Joint Body or any commission before the end of their term. Immediately thereafter, the Hereditary Prince informed the Parliament about his fear that the composition of the Joint Body for the Selection of Judges might be unconstitutional if the Progressive Party of Citizens continues to be unrepresented in the Joint Body, but rather an independent MP makes part of it. For this reason, the Parliament voted on 2 May 2018, for an MP of the Progressive Party of Citizens to re-join the Joint Body. At the same time, the Parliament decided to require a second expert opinion to answer the questions of the Hereditary Prince. The second expert did not follow the first one's opinion. On 4 June 2018, Johannes Kaiser declared his resignation as a member of the Joint Body.

Even if the situation seems to be resolved, the question of how to deal with crossbenchers as members of commissions remains to be discussed and hopefully answered by the Special Commission formed after the splitting of the The Independents.

Implementation of the GRECO-Recommendations Concerning Party Funding

An amendment to the statute regulating public funding of political parties[5] will be voted upon by Parliament in spring 2019. The amendment is not linked to the splitting of The Independents, but rather motivated by the recommendations made by GRECO in 2016[6] and 2018[7] during their third evaluation round "transparency of party funding".

The sum spent on political parties will not be changed. Political parties will have to publish their accounts (to show all their sources of income). Receiving anonymous donations will no longer be legal, but the parties will not be required to publish the names and addresses of their donors.[8]

Abolition of the Principle of Rotation from Case to Case for the Alternate Judges of the Constitutional Court and the Administrative Court

Art 102 para 4 of the Constitution and the Constitutional Court Statute (*Gesetz über den Staatsgerichtshof, StGHG*) will be amended in 2019.[9] In September 2018, the Parliament passed the amendments without any further discussion during the first

[5] LGBl 1984 Nr 31 LR 162, https://www.gesetze.li/konso/1984.31.

[6] Group of States against Corruption (GRECO): Third evaluation round, Evaluation Report, published on 2 June 2016), GrecoEval3Rep(2016)2Theme II.

[7] Group of States against Corruption (GRECO): Third evaluation round, Compliance Report, published on 30 May 2018), GrecoRC3(2018)3.

[8] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr 55/2018 (3 July 2018) < http://bua.gmg.biz/BuA/?buanr=55&buajahr=2018> accessed 5 February 2019.

[9] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr. 51/2018 (12 June 2018) < http://bua.gmg.biz/BuA/?buanr=51&buajahr=2018 > accessed 5 February 2019 and BuA Nr 88/2016 (9 October 2018) < http://bua.gmg.biz/BuA/?buanr=88&buajahr=2018 > accessed 5 February 2019.

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reading. As a consequence, one may expect new rules on the call for alternate judges of the Constitutional and Administrative Courts to be passed in early 2019.

The new wording of Art 102 obliges the two Courts to adopt their own rules of procedure. In them, they will have to describe the selection mechanisms of alternate judges. Until now, Art 102 para 4 stated that the substitution shall be undertaken "by the principle of rotation from case to case".

The previous rule resulted in a situation in which alternate judges were called up alphabetically without respect to their special skills or their disposability, thereby provoking delays. The amendment will make proceedings in front of the Constitutional Court and Administrative Court resemble those in front of ordinary courts. Therewith, the amendment is part of a series of adaptations inspired by the government's search for more efficiency and standardisation.

Dispute on Parliament's Right to Information vis-à-vis the Government

In December 2017, a number of MPs raised an initiative to extend their right to information vis-à-vis the government. The proposal to amend the Administrative Control Statue (*Geschäftsverkehrs und Verwaltungskontrollgesetz*) was modelled after Art 7 of the Swiss Parliament Statute.[10]

The decisive proposal was contained by Art 20 Sec 1, suggesting that all MPs should obtain the right to request the government and the state administration to provide them with any information and documents necessary to perform their parliamentary mandates. The government considered the proposal as unconstitutional given that Art 63 of the Constitution would only subject the government to parliamentary control but not the entire administration. References to Art 7 of the Swiss Parliament Statute left the government unimpressed, given that information rights provided by Liechtenstein's Constitution could not be compared with its Swiss counterpart.[11]

On 1 March 2018, 13 out of 25 MPs decided to consider the initiative as constitutional. However, 15 out of 25 MPs decided—during the same session—to refer the initiative to a special parliamentary commission. The latter has not yet reported on the issue and as a result, one might expect a prolonged and lingering conflict between the Parliament and the government.

III. CONSTITUTIONAL CASES

1. StGH 2017/82 and StGH 2017/83

In their 2017 report, the authors Bußjäger/Gamper referred to several judgments of the Liechtenstein Constitutional Court[12] concerning the access to law. They mentioned that the Constitutional Court on 4 December 2017 examined the constitutionality of Art 83 para 1a Asylum Act[13] on this provision. The Constitutional Court then asked the government explicitly how a complainant who was not assisted by a lawyer could be expected to lodge a complaint in line with the necessary legal requirements if the remedy could only be expected to be effective if it had been given sufficient legal aid (as according to Art 43 Constitution).

On 27 March 2018, the Constitutional Court issued its decision. The facts of the case are summarized below.

The applicants, asylum seekers from the Republic of Macedonia and the Republic of Serbia, had made an application for asylum in the Principality of Liechtenstein. The member of government in charge then declared these applications inadmissible in his decisions of 24 April 2017 and 24 May 2017. Against these decisions, the applicants made a writ to the Head of the Administrative Court, including an application for legal aid. In his orders from 27 June 2017 and 28 June 2017, the Head of the Administrative Court qualified these writs as formal complaints, confirmed the member of government's decision and dismissed the applications for legal aid.

In a constitutional complaint, the applicants alleged that the qualification of the writs as formal complaints constituted a violation of their right to legal aid and the prohibition of arbitrary. Only by mentioning the intention on making a complaint in the writ, the writing cannot be qualified as such. The applicants argued that under these circumstances they would be deprived of the possibility of submitting a complaint meeting all legal requirements. Under the law of the Principality of Liechtenstein, there would be no possibility to get access to aid for the comprehensive conduction of a complaint against the decision of the member of government, especially not for the formulation of the complaint itself.

Under the amended Art 83 para 1a Asylum Act, the application for legal aid could be made the earliest together with the introductory writ (i.e., the application for asylum) or the complaint (against a negative decision), and the application for legal aid would be treated during deciding on the principle cause.

The Constitutional Court acknowledged the intention of the lawmaker to accelerate asylum proceedings and pointed out that restrictions to the right to legal aid are permissible as long and as far as the constitutional right to an effective complaint will be maintained. Yet, the Constitutional Court maintained that this is the case only if the applicant is rightfully represented by a

[10] Parliament of Liechtenstein, 'Gesetzesinitiative Informationsrecht' (4 December 2017) <https://www.landtag.li/files/medienarchiv/Gesetzesinitiative_Informationsrecht.pdf.> accessed 5 February 2019.

[11] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr. 1/2018 (16 January 2018) <http://bua.gmg.biz/BuA/?buanr=1&buajahr=2018 > accessed 5 February 2019.

[12] Peter Bussjäger, Anna Gamper, *Global Review of Constitutional Law* (2018), 181 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613> accessed 6 February 2019.

[13] LGBl. 2016 Nr. 411, https://www.gesetze.li/chrono/2016.411.

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lawyer while filing the introductory writ or the complaint including the application for legal aid.

However, the primary objections of the Constitutional Court concerned more common cases in which a lawyer does not rightfully represent the applicants. Before Art 83 para 1a Asylum Act had entered into force, the treatment of the application for legal aid before the introductory writ could be guaranteed the right to complaint, since a positive decision on the question of legal aid beforehand ensured the payment for legal representation. Under the current legal situation, the applicant faces the risk of not finding a lawyer filling out his complaint because payment cannot be guaranteed.

According to the Constitutional Court's constant jurisdiction, the right to legal aid (which derives from the constitutional right to complain and the principle of equality) is not only of procedural but also of substantive character. This substantive character cannot be undermined. While restrictions to the right of complaint can be permissible if they are of public interest and in accordance with the principle of proportionality, Art 83 para 1a Asylum Act restricts the right excessively. The prevention of the possibility to first decide on the question of legal aid and only afterwards on the principal question undermines the right to legal aid in asylum cases. As a result, this legal allegation would make a positive decision on the granting of legal aid ineffectual, since the principal claim has already been decided.

Therefore, the Constitutional Court revoked Art 83 para 1a Asylum Act as unconstitutional. Nevertheless, it noted, that the aim behind this legal allegation would be justifiable if the lawmaker would abolish the obligation to a concurrent decision on the application for legal aid and the complaint (Art 83 para 1a phrase 1). Thereupon, after a final positive decision on the granting of legal aid, an appointed legal representative can complement the complaint within a newly set time limit.

With the amendment of the Asylum Act of 5 October 2018,[14] the lawmaker introduced the unprecedented right of asylum seekers to not only require translations of the decisions of their cases but also information and consultations on the applicable law and the changes of success of judicial remedies.

2. StGH 2018/074

In this case, the Constitutional Court had to deal with the question of the indirect application of fundamental rights in disputes under private law. The applicant, a deputy senior medicinal officer of the department of internal medicine, claimed that the appellee had dismissed him unlawfully after he had made a criminal charge against a senior medical officer based on the suspicion that the latter had conducted active euthanasia on several patients. Whereas the Court of First Instance had dismissed the applicant's action, the Court of Second Instance followed the applicant's complaint. The Court stated that given that the freedom of expression protects the reporting of grievances, there was no such misfeasance found that could justify a dismissal without prior notice. However, the Supreme Court varied this decision and found the dismissal legal.

In a constitutional complaint, the applicant alleged that the Supreme Court's decision constituted a violation of his constitutional right of freedom of expression, the principle of equality and prohibition of arbitrary decision-making. By reporting sincere grievances to the state attorney, he saw himself in the role of a whistle-blower. Therefore, the qualification of his conduct as a constitutive ground for dismissal would infringe the above-mentioned constitutional rights. The freedom of expression, guaranteed by Art 40 of the Constitution and Art 10 of the ECHR, implies the freedom of communication as well as (political) opinion making.

First of all, the Constitutional Court analysed if the freedom of expression could have been affected in the case. Even though the dismissal of the applicant was part of a civil law dispute and there was no general grounding for third-party effects of fundamental rights in the ECHR, the right of freedom of expression reaches beyond the classic understanding as a protective right against the state. Thus, by implying effects on third parties in civil law, a dismissal on the grounds of the exercise of one's constitutional right is unlawful. In consequence, the state also needs to guarantee the freedom of expression in employment relationships, which in this case means interpreting labour laws in favour of the freedom of expression, especially Sec 1173a Art 53 and Art 4 of the Civil Rights Code.

The Constitutional Court further acknowledged the applicant's perspective to see himself as a whistle-blower and thus akin to the constitutional protection of the freedom of expression. The Constitutional Court has pointed out that a whistle-blower is understood as an employee who reveals serious misconduct in his work environment out of mostly altruistic reasons.

Even though freedom of expression is affected in this case, and even though Sec 1173a Art 53 and Art 4 of the Civil Rights Code thus need to be interpreted according to the Constitution, further considerations need to be taken into account, namely the public interest, duties and responsibilities of the whistle-blower as well as possible damages. The Constitutional Court did not doubt the public interest of the information released. However, it remains questionable whether the conduct of the applicant fulfilled the high demands that come along with the severity and sensitivity of the accusations and consequences for those involved. By not taking all reasonable measures for validating the reliability of the accusations (in this case additionally looking at the paper patient file when knowing about the incompleteness of the electronic version), the Constitutional Court had followed the Supreme Court's opinion that in such context, the applicant acted recklessly.

[14] LGBl 2018 Nr 270, https://www.gesetze.li/chrono/2018.270.

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As a consequence, the Constitutional Court declared that there had not been any violation of the freedom of expression. Additionally, the Constitutional Court found that no violation of the principle of equality had taken place. The Supreme Court had declared that the noticing period can depend exemplarily on the sensibility of the manner and can therefore vary among different cases. Correspondingly, this special case must not be compared with other dismissals with a shorter noticing period, hence not harming the principle of treating equal things equally and unequal things unequally.

IV. LOOKING AHEAD

On Sunday, 24 March 2019, elections will be held in all of the 11 municipalities. The citizens have to elect mayors and six to 12 members of the municipal councils. The big question is if more women will be voted for than in 2015, when 85 men were elected as members of municipal councils, but only 19 women. If not, women's organizations can be expected to re-voice claims for a women's quota.[15]

V. FURTHER READING

Janine Bürzle, *Das Legalitätsprinzip im Spannungsfeld zwischen Politik und Recht: Eine Untersuchung der höchstgerichtlichen Judikatur in Liechtenstein*, Schriftenreihe UFL, Editions Weblaw, Bern 2018

Liechtenstein-Institut (ed.), Kommentar zur Liechtensteinischen Verfassung. Online-Kommentar, Bendern 2016, www.verfassung.li (notes on more Articles of the Constitution have been put online)

Patricia M. Schiess Rütimann, 'Die Freiheiten des liechtensteinischen Gesetzgebers beim Einfügen der EMRK in die nationale Rechtsordnung', *LJZ* 3/2018, 143

Patricia M. Schiess Rütimann, 'Juristische Gutachten im Gesetzgebungsprozess,' *LJZ* 2/2018, 69

Sebastian Wolf, Peter Bussjäger, and Patricia M. Schiess Rütimann, 'Law, small state theory and the case of Liechtenstein', *Small States & Territories*, Vol. 1, No. 2, 2018, 183

[15] Peter Bussjäger & Anna Gamper, 'Liechtenstein', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The 2017 I-CONnect-Clough Center Global Review of Constitutional Law* (2018) 177, 181.0.

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