



SEGRETERIA DI STATO PER GLI AFFARI ESTERI, GLI AFFARI POLITICI,
LA COOPERAZIONE ECONOMICA INTERNAZIONALE
E LA TRANSIZIONE DIGITALE



Aspects of constitutionalism in European small-sized States



Atti della Conferenza

ASPETTI DEL COSTITUZIONALISMO NEGLI STATI EUROPEI DI PICCOLE DIMENSIONI

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RELATORI

Il ruolo degli organi giurisdizionali superiori nel garantire l'indipendenza giudiziaria negli Stati europei di piccole dimensioni con particolare riguardo al Liechtenstein.

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Presidente della Corte Costituzionale del Liechtenstein.

A few general remarks on judicial independence in micro States

When talking about judicial independence one can distinguish between two contents of this term: It comprises first the impartiality of the judge vis-à-vis the parties of a court proceeding; and second, the independence of the judiciary from the other branches of the government. As to both of these dimensions safeguarding judicial independence is a specific challenge in a micro State. In such small communities a considerable part of the population are acquainted with one another or have even friendly relationships. As we will see, I am a striking example for this.

So as to impartiality there is a much higher probability than in larger states that in a specific court case a party or its counsel has a close relationship with the judge. If the same high standards of impartiality as in larger states were to be applied in micro States the functioning of the judiciary could be jeopardized. This challenge is also acknowledged by the institutions of the Council of Europe, especially by the ECtHR, but less so by the Greco commission. We will come back to that in more detail.



In Liechtenstein additional specific factors can be identified, which aggravate the problem to maintain sufficient judicial independence. One is linked to the following fact: Apart from full-time judges also part-time judges serve in the Liechtenstein judiciary. Many of these part-time judges are practicing lawyers. These lawyers regularly have to recuse themselves from their judicial function. This risk is even higher if such a judge belongs to a law firm with several partners.

Furthermore in contrast to full-time judges part-time judges are appointed only for the relatively short office term of five years. These judges might be tempted to only render uncontroversial court decisions in order to secure their reappointment for a further term in office.

In Liechtenstein a second specific threat to judicial independence is the role of the Prince. According to the Constitution of 1921 the Prince has always had a decisive say in the appointment of judges. In this context we will have to address the leading case of the Strasbourg court *Wille v.*

Liechtenstein and the constitutional reform of 2003 which even increased the Prince's powers.

Jurisprudence of the Constitutional Court on judicial impartiality

The Constitutional Court, as do the ordinary courts, tries to strike a balance between a high standard of judicial impartiality on the one hand and the functioning of the judiciary on the other. In a long-standing case law the Constitutional Court emphasizes that especially in a very small state like Liechtenstein, it must be prevented that the judiciary be excessively hindered by recusals of judges or that the judiciary even run the risk of being paralysed thereby. This jurisprudence has been confirmed in a decision of the Strasbourg court concerning Liechtenstein of 2015 (A.K. versus Liechtenstein). In this case I had recused myself because one of the parties was my brother. But the complainant had nonetheless rejected all five judges of the Constitutional Court for the simple fact of having a working relationship with me. Although the Strasbourg Court criticized the handling of the specific case by the Constitutional Court, it emphasized that especially in a small state high impartiality standards had to be lowered if the functioning of the judiciary was at stake.

Generally, it can be stated that the Liechtenstein Constitutional Court strictly applies the case law of the Strasbourg court concerning the impartiality of judges. In this context the Strasbourg court in 2005 decided the leading case *Steck-Risch et al. v. Liechtenstein*. It concerned a Constitutional

Court decision on an appeal against a decision of the Administrative Court. The problem was that a member of the Constitutional Court was a law firm partner of a member of the Administrative Court. Again, that member of the Constitutional Court happened to be. The Strasbourg court first made clear that it was quite conscious of the specific circumstances in a microstate. It argued as follows: "The Court

notes at the outset that the complaint is to be seen against the background of a part-time judiciary operating in a small country like Liechtenstein, where the same persons perform double functions as judges, on the one hand, and as practicing lawyers, on the other. The Court has no reason to doubt that legislation and practice on the part-time judiciary can be framed so as to be compatible with Article 6." The court then examined the nature of the relations of the two partners in our law firm. It emphasized first that my partner and I merely shared office space but did not obtain a common income; and second that there was no relationship of subordination or of close friendship between the two partners. Based on these criteria the Court concluded that our partnership did not involve any professional or financial dependence that may have cast doubt on my impartiality as a constitutional judge.

This decision by the Strasbourg court has been fundamental for the Liechtenstein judiciary. The Constitutional Court applied it strictly in its own case law. This Strasbourg decision helped to assure the well functioning of the Liechtenstein judiciary ever since it was handed down in 2005. This is especially so for the following reason: Some Liechtenstein law firms are reluctant to encourage their partners to volunteer for a part-time judicial function. Therefore, only a minority of law firms provide the majority of part-time judges. Accordingly it is not unusual that situations like in the *Steck-Risch* case can occur, where partners of the same law firm sit in different court instances.

But wherever the small size of the country does not come into play the Constitutional Court applies high standards in its jurisprudence in recusal cases. So for example, in a case where a party had lodged a criminal complaint against the spouse of a judge the Constitutional Court overturned

the decision of a lower court which had denied any impartiality.

Independence of the judiciary from the Prince

It has already been mentioned that the Prince plays an important role as to the selection and appointment of judges. In this context the above mentioned case *Wille v. Liechtenstein*, which the Strasbourg Court decided in 1999, is key. This decision has become a leading case on the exercise of freedom of expression by public office holders. Mr. Wille had been the President of the Liechtenstein Administrative Court. After Mr. Wille had favoured a certain interpretation of the Constitution in a public lecture the Prince refused to appoint him for a second term as President of the Administrative Court. The Prince explicitly argued in a letter to Mr. Wille that his interpretation of the Constitution was untenable and that he therefore was not fit to perform his duties as a judge. The Strasbourg Court decided that this intervention by the Prince was a violation of Mr. Wille's freedom of expression. But the decision also affected the independence of the judiciary from the other constitutional bodies. It was to be feared that this Princely intervention could have a considerable chilling effect on the whole judiciary. If a controversial scholarly statement by Mr. Wille had cost him a second term in office, then any unconventional court decision might have the same effect – even more so, when a few years later, the constitutional amendment of 2003 entered into force. As mentioned, this constitutional amendment even increased the powers of the Prince in the appointment process of judges. As some of you may remember, this constitutional amendment of 2003 triggered a monitoring proceeding by the Venice Commission against Liechtenstein. The then Liechtenstein member of the Venice Commission, Gerard Batliner, even feared

that especially the members of the Constitutional Court were now so exposed to the Prince's influence that their independence was to be questioned in general.

In hindsight it can be stated that Mr. Batliner's concern was not quite justified. In fact, the Constitutional Court was rather unimpressed and handed down a series of decisions that reduced the negative impact of the constitutional amendment of 2003 to a large extent. Also in various scholarly publications members of the Constitutional Court criticized the constitutional amendment and also supported the Strasbourg Court's findings in the *Wille* case. It seems to me that, in doing so, my fellow justices and myself could considerably reduce the chilling effect of the Prince's encroachment upon the independence of the judiciary in the *Wille* case. If the members of the highest Liechtenstein Court dare to challenge the Prince and, quite contrary to the *Wille* case, are not reprimanded for it, then also the rest of the Liechtenstein judiciary is encouraged not to succumb to self-censoring.

Currently a Princely intervention as in the *Wille* case is hardly feasible any more. This is also due to the fact that in the meantime Prince Hans Adam has delegated his powers to his son, Crown Prince Alois. And the Crown Prince has proved to be very reluctant to provoke any constitutional conflicts.

Greco and the current reform of the judiciary

In the *Steck-Risch* case the Strasbourg court, as mentioned, did not put into question that practicing lawyers can also be part-time judges; neither did the Strasbourg court challenge that in Liechtenstein these judges are appointed only for a five-year term with the option of reelection. However, as also indicated, the Greco commission has a somewhat different approach here.

In its last evaluation report on Liechtenstein of September 2020 Greco recommended that “(i) the issue of the full professionalisation of all judges and limiting the number of part-time judges be given careful consideration and that (ii) rules on conflicts of interest dealing with the specific situation of part-time judges also working as practising lawyer be introduced”. As to the second recommendation all courts have already introduced such rules on conflicts of interests for judges in general, and for part-time judges who are also practicing lawyers in particular. As to the first recommendation to limit the number of part-time judges this is being addressed in the current judicial reform.

This current reform also includes the reduction of the number of part-time judges on the Constitutional Court – despite the fact that Greco explicitly excluded the Constitutional Court from its recommendations to increase the number of professional judges. GRECO stated that it was “mindful that the composition of Constitutional Courts in a number of States does not follow the same rules as other courts.” Nevertheless it is planned that in the future the positions of President and Vice-President of the Constitutional Court will be full-time. Also in the other Liechtenstein courts the number of part-time judges will be reduced dramatically. But while the full-time judges of the other courts will be appointed for a tenure until retirement age of 65, the full-time constitutional judges will only be appointed for a single 15-year-term. It is planned that the Liechtenstein Parliament pass this bill on judiciary reform next month.

Outlook

In concluding this presentation it can be stated that the main challenges to the independence of the judiciary in Liechtenstein have already been or are currently

addressed. On the one hand it was possible to minimize the negative effects of the Wille case and of the constitutional reform of 2003. This was mainly due to a determined jurisprudence of the Constitutional Court and critical publications of its members. On the other hand the current judicial reform will eliminate conflicts of interest of judges considerably due to the reduction of the number of part-time judges. But at the same time impartiality standards must continue to be compatible with the well-functioning of the Liechtenstein judiciary. In this regard the Constitutional Court will strictly rely on the standards established by the Strasbourg court in the Steck-Risch case mentioned in detail above.