The "Institut für Liechtensteinisches Recht und Rechtstheorie" (Institute of Liechtenstein Law and Legal Theory). Objectives and scientific profile

The Institute pursues the goal of taking a position on current legal problems affecting or at least partially affecting the Principality of Liechtenstein from a sound scientific-theoretical basis and taking into account insights from legal history and comparative law.

The Institute, like the Faculty of Law at UFL as a whole, is committed to jurisprudence as an applied science. As will be shown in more detail under I. and II., this in no way excludes the philosophy of law and legal theory as areas of research: quite the contrary. These two jurisprudential disciplines can certainly be practised in an application-oriented way as well by always keeping their justification-theoretical function in mind: Philosophy of law and legal theory define the conditions under which normative statements can claim to be *legal* statements, i.e. scientific knowledge about the content of law.

Pursuant thereto, the contents of sections I. and II. do not represent an area of research irrespective of the issues of applicable law addressed in sections III. and IV., but rather the necessary scientific-theoretical basis for well-founded solutions to legal issues. The justification-theoretical function of the philosophy of law and legal theory is also underscored here because it is usually neglected in jurisprudential research and teaching, not least due to the fact that it is increasingly being forgotten In scientific discourse.

The aforementioned goals give rise to the following research priorities:

I. The theoretical foundations of evaluation-conscious jurisprudence

This primarily concerns the necessity, but also the scientific-theoretical possibility of evaluation-conscious jurisprudence (1.), and then, building on this, its legal-theoretical foundations (2.).

1. On the necessity and possibility of evaluation-conscious jurisprudence

Explanation:
a) Jurisprudence is usually not seen as an evaluative or evaluation science, but rather as an evaluation-passive "normative science" whose task is limited to analysing and describing positive law. The view of jurisprudence as an analytical or descriptive normative science is the result of a philosophical-historical development in the 19th and 20th centuries, which led to the prevailing conviction, particularly in neo-Kantianism, that scientific knowledge is only possible as empirical statements about reality. Accordingly, the normative findings of jurisprudence were now limited to descriptive statements about empirical law, and thus to the interpretation of positive law. Evaluations were thus excluded from the realm of scientific knowledge, which, among other things, led to the fact that both criticism of positive law and the demand for alternative legal content can be assigned to a(n) (evaluative) legal policy with which jurisprudence wanted and wants to have little or nothing to do.

As widespread as the conviction of jurisprudence as an evaluation-passive normative science is, it proves to be untenable on closer examination (see *Jens Eisfeld*, Rechtswissenschaft und Verantwortung, in: 160². Wissenschaftsmagazin des Liechtenstein-Instituts, der Universität Liechtenstein und der Privaten Universität im Fürstentum Liechtenstein [UFL], 2021, pp. 66-69; *Jens Eisfeld*, Rechtsphilosophie und Theoriebildung im Zivilrecht, in: Jens Eisfeld et al [eds.], Zivilrechtswissenschaft. Bausteine für eine Zivilrechtstheorie, Tübingen 2024, pp. 85–136). The necessity of an evaluation-conscious jurisprudence follows from this.

b) Evaluation-conscious jurisprudence must first answer the question of its scientific-theoretical foundations. In other words, it has to possess a secure epistemological foundation that demonstrates the possibility of scientific evaluation and thus also the possibility of evaluation-conscious jurisprudence. Specifically, this relates to the conditions under which value judgements can be accorded epistemic character, i.e. under which conditions they can make a well-founded claim to objective truth and thus objective validity. Important preliminary work on this can be found above all in the (legal) philosophical works of Immanuel Kant (1724-1804) and Leonard Nelson (1882-1927).

2. The fundamentals of legal theory in evaluation-conscious jurisprudence

Explanation:
a) The fundamentals of legal theory in evaluation-conscious jurisprudence are of central importance to the further development of the Institute's profile in that they form the common starting point for all further focus areas. They are based on an epistemology of scientific evaluation (1. b above) and enable the derivation of normative criteria by which the legitimacy (the objective validity or binding nature) of positive law can be assessed. These normative criteria or legal principles are scientific value judgements that find their ultimate justification in the so-called ground of law, the reason for legitimisation of all normative statements that are formulated and enforced by the state power. This ground of law is not, for instance and as usually claimed, the state power itself or the de facto recognition of the law by the population ("theory of recognition"). Instead, it is the unwritten legal principle of human dignity, which gives every human being the same right to the development of his/her personality, to the realisation of his/her possibilities corresponding to his/her nature (see *Leonard Nelson*, Kritik der praktischen Vernunft [2nd ed., Fürth 1972]; *Hans Wagner*, Die Würde des Menschen [2nd ed., Paderborn 2014]; critical of the doctrine of the ground of law – that still prevails today – *Leonard Nelson*, Die Rechtswissenschaft ohne Recht [Leipzig 1917]).

b) The accusation that the legal order is thus based on a doctrine of principles that makes positive law uncertain or even undermines it must be rejected. What is special about the theory of principles called for here is not that legal principles are formulated at all, but rather the reasons given for them: The application of statutory law is not possible at all without a large number of unwritten legal principles, which, however, are not understood in the prevailing legal theory in the same way as here, as active value-based decisions of jurisprudence, but rather as evaluation-passive discoveries of jurisprudence in positive law. In fact, however, these alleged discoveries are regularly concealed self-evaluations, i.e. value-based judgements made by the practitioner of law himself, which are subordinated to positive law.

In contrast, jurisprudence based on sound reasoning is characterised by the fact that it identifies the normative criteria on the basis of which it evaluates positive law as its own value-based judgements. Accordingly, the legal statements of evaluation-conscious jurisprudence do not have to comply with positive law; on the contrary, it sees itself – with regard to positive law – not least as critical jurisprudence (see in particular section II. below).

c) The ground of law underlies the entire legal order and therefore forms its systematic starting point. Since "jurisprudence" (apart from the basic subjects) is to be understood as the totality of all systematic and therefore well-founded statements on the content of the law, the ground of law also forms the ultimate reason for legitimisation of these jurisprudential statements. The ground of law and the normative criteria or legal principles that can be derived from it thus serve jurisprudence as a whole to make scientific, i.e. well-founded, statements about the content of the law.

II. The critical review of legal concepts of positive law

Explanation:
1. This research focus directly follows on from the foregoing observation/statement (section I. 2. b) that positive law contains a large number of unwritten legal principles, knowledge of which however – according to the prevailing legal theory – is only possible through evaluation-passive discovery in positive law. According to the prevailing view, all scientifically recognisable law, i.e. the legal order or the legal system as a whole, is always empirically predetermined. Consequently, knowledge of law or jurisprudence can only make visible or "(re)construct" an already existing – albeit still partially "concealed" – legal system.

2. The opposition – in terms of epistemology and legal theory – between the doctrine of principles called for above (section I. 2.) and the prevailing theory of law should now be taken as an opportunity to critically examine recognised legal concepts or unwritten principles of positive law. The "Institut für Liechtensteinisches Recht und Rechtstheorie" is, as far as can be recognised, alone with this research question, since – as a quick glance at the textbooks on "legal logic" shows – the special features of the formation of jurisprudential concepts are no longer questioned at all. This applies in particular to the conceptual-theoretical premises of the prevailing view that all law is empirically predetermined. The legal order then appears as an independently existing "legal world", as a reality plot exclusively assigned to jurisprudence, which, as Fritz von Hippel once critically remarked, can only be scientifically analysed "unter quasi-naturwissenschaftlichen Gesichtspunkten" – from a quasi natural-scientific point of view.

3. The legal-theoretical consequence of this development is not that the legal order, in contrast to the natural law of the Enlightenment, would no longer contain any pre-legal – and thus: a priori or metaphysical – principles. Rather, the prevailing legal theory is characterised by the fact that these principles – now often referred to as "legal principles" or "basic concepts of law" – are regarded as predetermined and therefore unchangeable characteristics of the respective legal institute. The a priori (metaphysical) character of these principles remains hidden because one does not want to become aware of their decision-making or evaluative character, as legal principles can only be recognisable as *positive* law if they are presented as already existing and the work of the legal dogmatist therefore seems to be limited

to a purely descriptive understanding of them. Legal principles then do not appear to require any further justification, as they are not intended to represent an (evaluative) *decision* by those applying the law in favour of a certain legal content, but rather to be recognisable by way of an (analytical, descriptive) *discovery* of an entity already predetermined in positive law. For jurisprudence, this finding gives rise to the necessity of first becoming aware of the decision-making or evaluative character of the development of theory in jurisprudence, in order to then ask about the appropriateness in terms of the matter at hand and the fairness in terms of the interests of the individual legal principles or basic legal concepts, which often date back to the 19th century – a task to which modern legal history can make a significant contribution.

III. The study of constitutional and state theory issues, which also include the relationship of national law to European law and international law

Explanation:
Constitutional and state theory issues always concern the problem of the legitimacy of the exercise of state power. The question of the ground of law addressed in section I. 2. therefore precedes all special constitutional law issues, and as long as the former has not been satisfactorily clarified, addressing the latter remains uncertain. Here are two examples:

1. In Liechtenstein constitutional law, the problem of an "unverzichtbaren Verfassungskerns" (indispensable constitutional core) is discussed, i.e. the question of an indisputable core element of constitutional law. However, such a core element cannot be convincingly justified on the basis of the prevailing theory of the ground of law – which recognises the basis of legitimacy of (positive) law in state power and in the de facto recognition of the law by the population – because under these conditions there can be no law that would be withdrawn from sovereign disposition. The uncertainties resulting from this must have an impact on the question of the content of this indispensable constitutional core and its position in the tiered structure of the legal order. Yet the relationship between Liechtenstein constitutional law and EEA law, in particular the question of the limits of the primacy of EEA law over national law, for instance, remains unresolved.

2. The second example concerns the theory of democracy, i.e. the question of the conditions under which democratic majority decisions are able to legitimise the exercise of state power. Specifically, the question arises here as to whether and to what extent the majority principle requires a limitation based on the theory of principles, which sets limits for the state legislature (including the constitutional legislature).

3. The Institute aims to contribute to the solution of these and other issues of constitutional and state theory (such as the right of the state to sovereignty, the relationship between state and church or the limits of emergency law), taking into account comparative legal analyses of the constitutional law of the Principality of Liechtenstein, Switzerland, Austria and Germany. Particular attention must first be paid to the question of whether and to what extent the issues addressed can be traced back to the prevailing theory of ground of law, i.e. to the conviction that the ground of law of the state can only be based on power and acceptance. Furthermore, the question must be asked whether these issues can be better

solved with a ground of law theory that establishes the state's reason for legitimisation in an unwritten principle of law (from which further principles of law can then also be derived).

IV. Other current legal issues in the Principality of Liechtenstein

Explanation:
Another important objective of the Institute is to express opinions on current legal issues in the Principality of Liechtenstein. Due to the critical focus of evaluation-conscious jurisprudence (section I. 2. b above), this also covers the assessment of legislative measures, which also include constitutional amendments.

The assessment of legislative measures includes the balancing of interests on which these measures are based. This is worth emphasizing because the legislative balancing of interests is not usually the subject of jurisprudential review. Although it is undisputed that all (statutory) law is the result of a balancing of interests or an assessment of interests, according to the prevailing legal theory however, for which all legal knowledge must be gained *in* positive law, the legal scholar must accept the legislative assessment of interests as legitimate per se. However, this conviction stands and falls with the prevailing doctrine of the ground of law, which in principle grants legitimacy to all state action that can invoke power and acceptance. In contrast, according to the view developed in section I. 2., state action is only legitimised if it satisfies the normative criteria that can be derived from a legal principle (human dignity) underlying the entire legal order. The question of the fulfilment of these criteria includes a critical review of the balancing of interests on which the respective legislative measure is based.