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Questionnaire

Reply by the Constitutional Court of Austria

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A. Court description

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A description of the Austrian Constitutional Court is available in the CODICES database.

B. Social integration

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

Asylum law cases:
In 2008, the Constitutional Court found itself confronted with enormous challenges, when the system of legal protection in asylum matters was re-organized. According to the new provisions, complaints against decisions issued by the then newly founded Asylum Tribunal could be filed only with the Constitutional Court and no longer also with the Supreme Administrative Court. This reform brought about an increase in the number of asylum-law cases the Constitutional Court deals with annually, from previously 250 to 2500-3000 cases at present, and to an increase of the total annual caseload from previously 2000–2500 to more than 5000 cases today. The Constitutional Court has been able to cope with this situation without building up a backlog only by extensively re-organizing its own operations. By doing so, it has managed to keep the average length of proceedings constant at approx. 8 months.

As of 1 January 2014, a milestone reform in the almost 100-year history of the Austrian Federal Constitution was accomplished with the creation of a two-tier system of administrative jurisdiction. Asylum (and aliens-law) decisions by administrative authorities can now be challenged at the newly set up *Bundesverwaltungsgericht* (Federal Administrative Tribunal), the successor organisation to the Asylum Tribunal; the decisions of the Federal Administrative Tribunal are subject to ex-post review by the Constitutional Court and the Supreme Administrative Court. As of now, it is hard to predict how this two-tier system of administrative jurisdiction will affect the Constitutional Court's workload in asylum matters.

As regards taxation and social security law, two landmark decisions are singled out from the Constitutional Court's comprehensive case law and briefly outlined in the following.

Taxation law: "Family taxation"
By its much-noted and heavily criticized ruling of 12/12/1991, compendium of cases *VfSlg. 12.940*, the Constitutional Court repealed a provision of the Income Tax Act according to which the payment of maintenance for children was not deductible as an exceptional expense. The Court found that the equality principle had been violated in three respects: when comparing the duty of maintenance for children with the duty of maintenance for divorced spouses, when comparing this expense for children with other exceptional expenses, and when comparing the financial capacity of parents under a maintenance obligation with that of child-less taxpayers. A comparison of the exceptional expense for children with other exceptional expenses – in particular with spousal maintenance – had to be made because the income tax system recognizes non-tariff based differences of financial capacity only by way of deduction from income as exceptional expense. The Constitutional Court had always held the opinion that it is imperative to consider the financial capacity of taxpayers, as it would require a substantive justification if the criterion of capacity were to be abandoned in one isolated area only. The necessity to provide not only for one's own livelihood but also maintenance for children from income earned, the Court argued, reduces the financial capacity of parents and is not just a

matter of personal preference or risk. Unlike the comparative cases, however, maintenance payments are not considered in a manner that takes account of the reduced financial capacity of parents and therefore treated as a matter of personal preferece or risk and such left solely for the parents shoulder.

The discrimination of parents under maintenance obligations as against persons under no maintenance obligations is not avoided by the mere fact that the minimum subsistence level is guaranteed for taxpayers and their children. The inadequate consideration of actual maintenance payments might lead to a situation where parents with higher maintenance obligations might, in the final analysis, be taxed to the minimum subsistence level. While family allowances and supplementary child allowances, in their effect, fully lead to zero income taxation of those portions of income required for children in the lower income brackets, the zero-rated amounts are considerably lower than the amounts needed for child maintenance in the higher income brackets, which might severely impair the financial standing of parents under maintenance obligations as compared to persons not liable for maintenance (in the same income bracket). The fact that parents in higher income brackets must be offered higher tax relief than those in lower income brackets in order to achieve equal treatment is merely a consequence of the fact that the tax burden generated by full taxation of the income needed for maintenance purposes is, by comparison, higher for such parents than for others due to progressive taxation.

Social security law: “Different retirement ages for women and men“.
By its decision of 06/12/1990, compendium of cases *VfSlg. 12.568*, the Constitutional Court repealed the provisions of the General Social Insurance Act (*ASVG)* on different retirement ages for men and women for violating the equality principle. The difference in retirement age may lead to women being disadvantaged in working life and provide further grounds for discrimination. Given their traditional social roles, many women are especially burdened by housekeeping and child-rearing duties. The Court argued that, taking an average view as required, different retirement ages for men and women were not a suitable instrument for adequately taking into account the different social roles of women and men. The lower retirement age rather benefited women whose careers had not been interrupted by housekeeping and child-rearing and who could therefore complete more periods of insurance than those whose burdens should actually be compensated for. Neither can the existing differences in the statutory retirement age be justified by biological reasons.

The Constitutional Court held the view that adequately considering different burdens on persons or groups of persons in working life when determining the pension insurance entitlement regime is a matter which falls within the lawmaker’s policy-making discretion. The provisions challenged, which merely differentiate by sex and juxtapose women as a uniform group to men, did in reality not consider the specificities which should serve for their justification. They

predominantly benefited women whose role in society does not differ from that of men, while women who are particularly burdened by house-keeping and caring for dependents could make use of such provisions to a much lesser extent. The lawmaker can however – without violating the equality principle, and based on an average view – compensate for the disadvantages which groups of person typically suffer in working life due to e.g. higher physical or mental strain, by designing the entitlement regime accordingly, for instance by setting a lower retirement age.

However, the lawmaker is not in a position to immediately align the general statutory retirement age for men and women, as this would violate the protection of legitimate expectations in a statutory differentiation which has existed basically for decades. Especially in the area of pension law, the protection of legitimate expectations is of paramount concern.

This decision by the Constitutional Court has been implemented progressively by a special federal constitutional law (Federal Law Gazette no. *BGBl. 832/1992*).

1.2. How were issues of social integration or conflict transformed into legal issues?

Issues of social integration or conflict and/or issues of discrimination are brought before the Constitutional Court within the remit of its constitutional powers. The following proceedings are primarily available:

Complaint against decisions of the first-instance administrative tribunals:
Pursuant to Art. 144 Federal Constitutional Law (*Bundes-Verfassungsgesetz, B-VG*), decisions of first-instance administrative tribunals can be challenged before the Constitutional Court if the complainant claims that one of his/her constitutionally guaranteed rights was infringed by the decision, or that the application of an unlawful general norm (in particular of a statutory provision) would violate his/her rights. If the Constitutional Court finds in favour of the complainant in that the law applied might be unconstitutional, it will initiate judicial review proceedings ex-officio (Art. 140.1.1.b B-VG)

Judicial review
Pursuant to Art. 140 B-VG, the Constitutional Court rules on the unconstitutionality of laws
- upon application by the Supreme Court, a competent second-instance court of law (from 01/01/2015 any court of law), an administrative tribunal or the Supreme Administrative Court, provided that these courts had to apply the said statutory provision in a case pending before them (concrete review),
- ex-officio, if it had to apply that law in a pending case (see above), and

- upon application of an individual claiming that his/her rights have been directly violated by this unconstitutionality, provided that the law has become effective for this individual without a court or administrative decision having been rendered (subsidiary challenge).
- Moreover, the Constitutional Court decides on the unconstitutionality of federal laws upon application of one third of the members of the National Council, the Federal Council or a province government, and on the unconstitutionality of a province law upon application of one third of the members of a province parliament or the federal government (abstract review).

Regulatory review

The lawfulness of regulations (general legal norms enacted by administrative authorities) can also be challenged before the Constitutional Court. The procedure is similar to that of judicial review. In this type of proceedings, there are no provisions for a qualified parliamentary majority having a right of challenge.

Challenging of election results

Pursuant to Art. 141 B-VG, the Constitutional Court decides on challenges of election results (elections for Federal President, general parliamentary elections, elections for the European Parliament, for the governing bodies of the statutory professional interest representations, elections of province governments and of municipal bodies having executive functions). The challenge must claim that the election was unlawful. The Constitutional Court is held to allow an election to be challenged if the unlawfulness claimed has been proven and could have had an impact on the outcome of the election.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

The draft paper uses a very wide notion of social integration which apparently covers everything that is useful to avoid or settle social conflicts. Such a broad-based understanding of social integration includes any form of discrimination and therefore a considerable portion of the case law of the Constitutional Court, in particular on the principle of equality. From this principle, the Constitutional Court derives a general and comprehensive imperative of objectivity which every sovereign act must comply with.

To a large extent, the review of legal provisions according to the principle of equality as regards discrimination comprises value judgements and, related thereto, a balancing of interests. This holds in particular for the question of whether given differences are that significant in real terms that they would justify unequal treatment, or whether facts that are governed by laws are that similar that the principle of equality imposes equal treatment (on that matter, see the decisions outlined under 1.1).

In systems where the constitution provides for a separation of powers it is, as a general rule, the ordinary lawmaker which, in delivering its legal policy tasks and legitimated by democratic elections, decides on the policy objectives to be pursued by legislation and by which individual means these objectives are to reached. While being curtailed by the constitutional principle of equality, this power is not fully eliminated. In its established case law, the Constitutional Court recognizes the lawmaker's "discretionary scope of legal-policy making". Within this scope, the lawmaker is free to pursue its policy objectives in the manner it deems appropriate.

Specifically, the following areas of law come under the heading of "social integration": labour law, family law, aliens law, social law, social insurance law, citizenship law, taxation law and criminal law. In the past, the Constitutional Court's extensive case law related to all those areas.

Regarding discrimination based on age difference, the Constitutional Court ruled in regulatory review proceedings (compendium of cases *VfSlg. 19.277* of 15/12/2010) that the regulations in force governing the use of public transport, which granted a fare discount for senior citizens to men as of 65 years and to women as of 60 years, was unlawful. For lack of any objective justification, such different age limits were in violation of the principle of equal treatment.

In recent years, the Constitutional Court has increasingly dealt with family law issues in the widest sense.

In the proceedings decided by way of its ruling of 14/12/2011, compendium of cases *VfSlg. 19.596*, the finding of state authorities was challenged that two children had not acquired Austrian citizenship by parentage through their genetic mother, as she was not the mother of the children in the legal sense, since the children were born in the USA by a surrogate mother. US law (according to which the intended mother – and not the surrogate mother – is also the mother in the legal sense) was inapplicable, because it referred to Austrian law according to the domicile principle. The decisions rendered by US courts on the motherhood of the mother who was genetically related to the children were contrary to Austrian *ordre public*, as surrogate motherhood is forbidden in Austria and could therefore not be recognized. The Constitutional Court repealed the decision by the administrative authorities as being arbitrary and thus in violation of the principle of equality. Given the mandatory character of the US provisions governing the requirements and legal consequences of surrogate motherhood, a reference to Austrian law is out of the question. Besides, the Austrian prohibition of surrogate motherhood is not part of the *ordre public* which in fact protects the best interests of the children, something which the challenged authority had totally failed to consider. Accordingly, the legal motherhood of the genetic mother established under US law therefore has to be recognized in Austrian citizenship law.

Over the last decade – and following the case law of the European Court of Human Rights – the Constitutional Court has accorded special attention to the protection of same-sex partnerships from discrimination as compared with traditional heterosexual partnerships and marriages.

By way of its ruling of 10/10/2005, compendium of cases *VfSlg. 17.659-17.680,* the Constitutional Court for instance repealed a provision of the General Social Insurance Law (*Allgemeines Sozialversicherungsgesetz)* which precluded co-insurance for health of same-sex partners keeping the household. Consistent with the case law of the European Court of Human Rights, the Constitutional Court could not see any factual justification for a differentiation by sex and/or sexual orientation.

The ruling of 03/03/2012, compilation of cases *VfSlg. 19.623*, rested on the following facts: On establishing a registered civil partnership, one partner changed his surname to the surname of the other partner and made use of his right to add his old name after the new one. The authority had interpreted the legal situation in that the compound name – in contrast to the rules governing a name change after marriage – must not be linked by a hyphen. The Constitutional Court could not see any factual justification for this diverging interpretation which disadvantaged registered partners as against married spouses.

By way of its ruling of 19/06/2013, G 18/2013 et al., the Constitutional Court repealed a provision of the Civil Status Act as unjustified and in violation of the non-discrimination principle enshrined in the European Convention on Human Rights. According to that provision, a registered civil partnership (between same-sex partners) could only be established at the offices of a district administration authority, while a marriage could be solemnized (not only at a civil registry office, but also) at any other venue which does justice to the importance of marriage as an institution.

By way of its ruling of 10/12/2013, G 16/2013, the Constitutional Court repealed a provision of the Reproductive Medicine Law *(Fortpflanzungsmedizingesetz)* which excluded women who lived in a same-sex partnership from medically-assisted procreation by sperm donation. The Constitutional Court found this to be an incommensurate interference with the rights protected by the European Convention on Human Rights concerning the wish of lesbian women living in a partnership to procreate, as well as a discrimination through the Reproductive Medicine Law limiting artificial insemination to heterosexual partnerships and marriages.

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

2.3. Does your Court directly apply international instruments in the field of social integration?

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

The Constitutional Court's standards of review are the constitutionally guaranteed rights on the one hand, and the entire body of constitutional law in an objective sense on the other. Every subjective right that is based on an objective-law provision of constitutional rank is a "constitutionally guaranteed" right.

The Austrian Federal Constitution does not contain an exhaustive catalogue of fundamental rights. Which rights are "constitutionally guaranteed" is derived from different sources of law.

The constitutionally guaranteed rights include the rights and freedoms enshrined in the European Convention on Human Rights and its additional protocols (with the exception of protocol No 12), because the European Convention on Human Rights and its additional protocols have the same rank as Austrian federal constitutional law.

The law of the European Union is not part of Austrian constitutional law; however, it takes precedence also over constitutional law.

In its ruling of 14/03/2012, compendium of cases *VfSlg. 19.632/2012*, the Constitutional Court held that the rights and freedoms granted by the Charter of Fundamental Rights of the European Union (in the following: the Charter) can be invoked as constitutionally guaranteed rights in complaints (Art. 144 B-VG) and also constitute a standard of judicial review.

This view was first based on the notion that within Union law the Charter forms an area that is clearly delineated and stands apart from other primary and secondary Union law. In this respect, the rights and freedoms emanating from the Charter differ from the legal positions which the Court of Justice of the European Union has derived from general principles of law or from the common constitutional traditions of the Member States. The decisive second line in the Constitutional Court's reasoning is geared to the principle of equivalence under Union law according to which procedures which are provided for under national law to enforce Union law rights must not be more unfavourable than procedures in which similar claims resulting from national law are raised. In fact, several rights contained in the Charter have been modelled in their wording and intention on the rights of the European Convention on Human Rights which –

as has been mentioned – have constitutional rank in Austria. Moreover, the rights laid down in the Charter have the same function for the scope of Union law as the constitutionally guaranteed rights of the Federal Constitution have for the autonomous area of national law in Austria.

Generally speaking, the role of constitutional courts in Europe today is no longer limited to an isolated interpretation of national constitutional law. In recent years, we have seen a growing influence of European law on national constitutional law, but also interactions between European and national law, and this for different reasons. This holds in particular for the area of fundamental rights (but also for other constitutional-law contents which are determined or influenced by international law treaties at regional level, in particular within the remit of the Council of Europe). Examples for the Council of Europe include, specifically the:

- European Convention on Human Rights,
- European Social Charter,
- European Convention for the prevention of torture and inhuman or degrading treatment or punishment, and the
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.

In contrast to the European Convention on Human Rights which – as outlined – has constitutional rank in Austria, is directly applicable constitutional law and forms a standard of review for the Constitutional Court, the other international instruments mentioned have the status of (mere) ordinary laws.

For the constitutional courts of the Member States of the European Union, Union law is an additional layer of law subject to a larger degree of dynamic change and enjoying primacy of application.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

The complexity of the interplay of national constitutional law, the law of the European Union, and the European Convention on Human Rights becomes apparent in the most recent reference for a preliminary ruling submitted by the Constitutional Court to the Court of Justice of the European Union (compendium of cases *VfSlg. 19.702* of 28/11/2012) on data retention:

The European data retention directive requires suppliers and/or operators of publicly available electronic communication services to store the traffic and location data of all users for a defined

period for the purpose of investigating, detecting and prosecuting serious crimes. At national level, the directive was transposed in April 2012 by an amendment of the Austrian Telecommunications Law, amongst others. Several applications for judicial review are pending with the Constitutional Court claiming that the provisions of that law are unconstitutional and that the data retention directive is in violation of Art. 8 of the Charter of Human Rights of the European Union. Prompted by these proceedings, the Constitutional Court developed doubts about the validity of this directive, but also about the interpretation of Art. 8 of the Charter, which is why it submitted a reference for a preliminary ruling to the Court of Justice of the European Union.

In addition to Art. 8 of the European Convention on Human Rights, the Austrian Constitution contains yet another fundamental right to data protection (section 1, Data Protection Act 2000), whose limits are drawn narrower than those of Art. 8 of the European Convention on Human Rights; amongst others, a stricter standard applies as regards the proportionality of interference. If the minimum retention period set out in the directive were found to be disproportionate, Union law would in fact require the implementation of a directive which – being part of European secondary law – would take precedence also over constitutional law, inasmuch as the Austrian lawmaker found no other way to implement the directive than in contravention of said fundamental right. Given the precedence of the directive, the Constitutional Court would not have a means to review it by the standard of the national fundamental right to data protection. The questions referred to the Court of Justice of the European Union concerned two sets of issues: first, the validity of the data retention directive as such, and second, the interpretation of Art. 8 of the Charter.

The questions on the validity of the directive concern the compatibility of the directive with Articles 7, 8 and 11 of the Charter, i.e. the respect of private and family life, the protection of personal data, and the freedom of opinion and of information. As regards the questions on interpretation it should be noted that, where the fundamental rights enshrined in the Charter correspond to the rights guaranteed by the European Convention on Human Rights, they have the same meaning and scope as these rights (see 2.4. supra). It has already been mentioned that in Austria the fundamental right to data protection which is (equally) of constitutional rank guarantees the protection of personal data, in addition to Art. 8 of the European Convention on Human Rights. In detail, the questions which the Constitutional Court referred to the Court of Justice of the European Union related to the compatibility and the interaction of the provisions of national constitutional law, the fundamental rights of the Charter, and the European Convention on Human Rights, including the case law of the European Court of Human Rights.

As to their substance, the Constitutional Court considered the measures provided for in the directive (period of retention; multiplicity of entities which are obliged to retain data; collection of data not prompted by a particular occasion and on a mass scale for an unlimited circle of

persons; risk of abuse) as questionable in terms of achieving their intended objective, which is why it held doubts about the proportionality of the interference.

In its judgment of 08/04/2014, C-293/12 and C 594/12, the Court of Justice of the European Union declared the data retention directive to be invalid because the interference it provided for is incompatible with the rights guaranteed in the Charter and therefore incompatible with the principle of proportionality.

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law" *Staatszielbestimmungen*, …?

The standards of judicial review and of the review of decisions of administrative tribunals conducted by the Constitutional Court are the constitutionally enshrined rights as well as the totality of constitutional law in an objective sense (for an extensive elaboration see 2. supra).

Art. 7 B-VG contains anti-discrimination provisions in the form of "state goals" which include the equality of disabled and non-disabled persons as well as the equality of men and women.

The Austrian Federal Constitution does not contain a social state clause. Neither does the definition of the state goals in Austrian constitutional law include any reference to the principle of the social state, even though Austria of course is a social state as its ordinary legislation stands. Apart from the social rights granted by the Charter of Fundamental Rights of the European Union, on which there is no case law by the Constitutional Court yet, there are no social fundamental rights of constitutional rank in Austria.

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

There are various ways in which individuals can seize the Constitutional Court:

As outlined in 1.2, individuals can file complaints against decisions by administrative tribunals inasmuch as such decision, or the application of an unconstitutional law, regulation or state treaty allegedly violates a constitutionally guaranteed right of the complainant.

Pursuant to Art. 140 B-VG, the Constitutional Court pronounces on the unconstitutionality of laws upon application of a person who claims that his/her rights have been directly violated on account of such unconstitutionality, provided that the law became effective for this individual without a court of administrative decision having been issued (see also 1.2 supra). As of 01/01/2015, individuals who maintain that their rights have been violated on account of the application of an unconstitutional law as a party in proceedings decided by a first-instance court of law can file an application for judicial review with the Constitutional Court when an appeal is lodged against such decision.

An individual may therefore claim a violation of all “constitutional rights“ with the Constitutional Court in the manner described above.

3.3. Does your court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

No.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

The Constitutional Court repeals legal provisions which are in contradiction with the Constitution. In doing so, it must respect the lawmaker’s discretionary scope of policy-making.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

The Constitutional Court can only act by a procedure that is laid down in the Federal Constitution and – apart from the possibility of ex-officio judicial review – it can only act upon application. Its decisions are binding in character.

3.6. Has your Court ever encountered difficulties in applying these tools?

As a general rule no (see however C.4. infra).

3.7. Are there limitations in the access to your Court (for example only by state powers), which prevent it from settling social conflicts?

The Austrian Federal Constitution contains broad and conclusive rules concerning the initiation of proceedings before the Constitutional Court which differ depending on the type of procedure (see 1.2 and 3.2 supra). According to the detailed constitutional provisions, access is not limited to the state powers.

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

Especially within the framework of judicial review, the Constitutional Court can help the constitutionally guaranteed rights prevail if they were violated by the lawmaker.

4.2. Does your Court *de facto* act as a 'social mediator', or/and has such a role been attributed to it?

The Constitutional Court acts within the scope of its powers conferred to it by the Federal Constitution.

4.3. Have there been cases when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

The political significance of the Constitutional Court becomes evident when taking a look at the tasks conferred on it. Functionally, the Constitutional Court is an institution operating at the interface between law and policy-making: On the one hand, it is a genuine court in the constitutional sense, autonomous and independent from the legislature, executive and/or government; its decisions are based solely on the law, in particular on the Constitution as the supreme norm of the legal order of the state. On the other hand, decisions rendered by the Constitutional Court may have considerable political impact.

This holds in particular for the power to review the constitutionality of acts of the democratically legitimated lawmaker. In this respect, the Constitutional Court stands in latent opposition to Parliament as the lawmaker and/or the political parties behind it which make up the

parliamentary majority. When reviewing the constitutionality of laws, the Constitutional Court must respect the discretionary policy-making scope which the lawmaker enjoys whilst ensuring respect of the Constitution. If a legal provision is in contradiction with the Constitution, it must be repealed by the Constitutional Court as unconstitutional, even if this may appear politically inexpedient.

In any democracy, political issues are primarily decided by the lawmaker which is legitimated by direct election and which is in a position also to decide (by simple majority) on key issues relating to how society is organized. The Constitution entrusts the lawmaker with the responsibility of determining which tasks should be delivered by the state, according to which political principles they are organized, and how conflicts between different social groups and interests are solved. In the absence of a broad consensus among the political powers it may happen that a narrow majority will decide those very issues. If the resultant law is challenged before the Constitutional Court, the latter will have to respect the lawmaker's discretionary scope of policy-making. In matters which are subject to political value judgements it is not its task to enforce a more expedient or meaningful solution. There is no general definition of what exactly is covered by the lawmaker's discretionary scope of policy-making and what is subject to limitation by constitutional norms; this question must be decided on a case-by-case basis.

The Constitutional Court must make value judgements itself, especially where it is held to apply constitutional provisions that require specification, such as the equality principle. It may be debatable, for instance, whether the introduction of tuition fees is materially justified or not (in which case it would violate the principle of equality). Nevertheless, the Constitutional Court is held to pronounce on such questions if seized and must not shrink from making the related value judgements even if these may be "political" issues in some way or other.

Until the early 1980s, the Constitutional Court exercised judicial self-restraint and conceded the lawmaker a fairly broad discretionary scope of policy-making. This had to do with the methodological dominance of the strictly positivist Vienna school of legal doctrine. It dominated jurisprudence in Austria for almost a century. This "older" jurisprudence of the Constitutional Court has always been criticized as being overly restrained. In the context of two politically sensitive judicial review proceedings in the 1970s concerning abortion (judgment of 11/10/1974, compendium of cases *VfSlg. 7400*) and the organisation of universities (judgment of 03/10/1977, compendium of cases *VfSlg. 8136*) the Constitutional Court dismissed the applications which had been filed. The conservative opposition party and a large part of academia reproached the Constitutional Court for not properly exercising its constitutional powers and therefore failing to deliver its task of protecting constitutionally guaranteed rights. Since the 1980s, the Constitutional Court has gradually loosened this self-restraint under the influence of the case law of the European Court of Human Rights to which it accords particular importance, given the fact that the European Convention on Human Rights is effective in Austria

not only as a state treaty but also as constitutional law, and also in the light of the case law of foreign constitutional courts, in particular of the German Federal Constitutional Court. It has developed a jurisprudence which is geared to the principles of interpretation as they are upheld by the above-mentioned supreme courts, while at the same time significantly narrowing the lawmaker's discretionary scope of policy-making. This shift in jurisprudence initially prompted academic criticism, but now from an opposite angle: The Constitutional Court was criticized for excessively influencing the process of political decision-making by the lawmaker. Meanwhile, this novel style of jurisprudence has become largely accepted, even though some criticism still persists.