The concept of 'Präjudizialität' in the Jurisprudence of the Austrian Constitutional Court

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I. Introduction

The core element of the powers of the Austrian Constitutional Court is to review laws and ordinances in accordance with the Constitution. The Constitutional Court thus has the power to rescind laws and ordinances, if it finds them to be unconstitutional.[1] In certain cases, however, the Constitutional Court's right of scrutiny depends on whether the norm in question is to be *applied* in a pending lawsuit. This pertains to the Constitutional Court's own proceedings, as well as to applications from any administrative, civil or criminal law court, the Supreme Administrative Court or parties to civil or criminal law court proceedings: according to the Constitution, the Constitutional Court may examine *ex officio* only those legal provisions which it would have to *apply* in a pending lawsuit. Likewise, a court must raise objections against the *application* of a provision in order to initiate its judicial review. And the party to court proceedings has to claim that their rights have been violated by the *application* of an unconstitutional provision. This limitation is referred to as 'Präjudizialität' (prejudiciality). 'Präjudizialität' is a prerequisite of judicial review and determines the subject of review ('Prüfungsgegenstand').

Within the subject of review, the Constitutional Court identifies and locates the origin of the constitutional problem ('Sitz der Verfassungswidrigkeit') and finally rescinds it.[2] In doing so, the Constitutional Court tries to interfere as little as possible with the legal system and therefore Parliament's sovereignty.[3] Since 'Präjudizialität' determines the subject of review, it indirectly affects the outcome of judicial review: the Constitutional Court can only rescind what is subject to its review and therefore prejudicial in a pending lawsuit.[4]

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[1] Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing: Oxford, Portland, 2011) pp. 199 ff.

[2] Herbert Haller, *Die Prüfung von Gesetzen: ein Beitrag zur verfassungsgerichtlichen Normenkontrolle* (Wien: Springer, 1997) p. 273; Michael Lang, 'Der Sitz der Rechtswidrigkeit', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 2010) 269-295, p. 276; Melina Oswald, 'Die Abgrenzung des Anfechtungsumfanges bei der konkreten Normenkontrolle' (2016) JBl 413-428, p. 415; Heinz Schäffer † and Benjamin Kneihs, 'Art 140 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 12. Lfg. 2013) paras 71 f.

[3] See VfSlg. (Collection of Rulings of the Constitutional Court) 11.826/1988, 13.772/1994 and 19.755/2013; cf. also Josef W. Aichlreiter, 'Die Bereinigungsmöglichkeit als Prozessvoraussetzung der generellen Normenkontrolle' (2000) JBl 537-538; Lang, 'Rechtswidrigkeit', pp. 278 ff., Oswald, 'Abgrenzung', p. 414; Michael Rohregger, 'Art 140 B-VG', in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Wien: Verlag Österreich, 6. Lfg 2003) paras 214, 281; Schäffer † and Kneihs, 'Art 140 B-VG', paras 48, 72.

[4] Lang, 'Rechtswidrigkeit', p. 276.

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But what does 'apply' or 'application' mean? Which provisions constitute the prejudicial norm? Doctrine has already considered these questions.[5] Partly, it provides an overview of the case law[6], partly, it examines certain questions in detail[7]; however so far doctrine has not established conclusively which provisions the Constitutional Court considers to be *applicable* in a pending lawsuit. The intention of this article is to close this gap: using the example of 'basic provision' ('Grundtatbestand') and 'exemption clause' ('Ausnahmetatbestand'), it examines

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[5] Above all Josef W. Aichlreiter, Michael Rohregger and Karl Spielbüchler deal with ‚Präjudizialität': Josef W. Aichlreiter, *Österreichisches Verordnungsrecht: Ein systemisches Handbuch* (Wien: Springer, 1988), vol. II, pp. 1292 ff.; Michael Rohregger, 'Zur Präjudizialität steuerlicher Ausnahmetatbestände im verfassungsgerichtlichen Normprüfungsverfahren' (1997) ÖStZ 417-422; Josef W. Aichlreiter, 'Präjudizialität', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 1998) 71-92; Karl Spielbüchler, "...anzuwenden hätte...", in Funk et al. (eds), *Der Rechtsstaat vor neuen Herausforderungen. Festschrift für Ludwig Adamovich zum 70. Geburtstag* (Wien: Verlag Österreich, 2002) 743-760; Rohregger, 'Art 140 B-VG', paras 123, 149; Josef W. Aichlreiter, 'Anmerkungen zur Rechtsprechung des VfGH zur Präjudizialität in den vergangenen zehn Jahren', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 2010) 261-268; Josef W. Aichlreiter, 'Art 139 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 12. Lfg. 2013) para. 17.

[6] Cf. Ludwig Adamovich, *Die Prüfung der Gesetze und Verordnungen durch den österreichischen Verfassungsgerichtshof* (Wien: F. Deuticke, 1923) pp. 261 ff.; Haller, *Prüfung*, pp. 157 ff.; Schäffer † and Kneihs, 'Art 140 B-VG', paras 40, 53; also Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Bundesverfassungsrecht*, 11th edn. (Wien: Manz, 2015) para. 1158; Theo Öhlinger and Harald Eberhard, *Verfassungsrecht*, 11th edn. (Wien: Facultas, 2016) paras 1013 f.; Walter Berka, *Verfassungsrecht*, 7th edn. (Wien: Verlag Österreich, 2018) paras 1093 ff.

[7] Cf. Reinhold Beiser, 'Schweiz: Schlechterstellung verheirateter Paare gegenüber unverheirateten verfassungswidrig' (1985) RdW 63; Wolf-Dieter Arnold, 'Aushöhlungstheorie und Erweiterung des Kreises der Anlassfälle als Gegenstand ungerechtfertigter Kritik' (1987) ZfV 230-245; Annemarie Hausleithner, 'Summum ius, summa iniuria? – Zur Aufhebung des § 1 Abs 1 Z 1 GrEStG durch den VfGH', (1987) RdW 102-108; Hans Ruppe, 'Aufhebung des § 1 Abs 1 Z 1 GrEStG durch den VfGH' (1987) NZ 57-61; Werner Fellner, '§ 1 Kommunalsteuergesetz verfassungswidrig? Ausnahmeregelung für die Österreichische Bundesbahnen; Verfassungswidrigkeit abgabenrechtlicher Bestimmungen?' (1997) RdW 93; Martin Hiesel, 'Die Rechtsprechung des VfGH zur Zulässigkeit gerichtlicher Verordnungs- und Gesetzesprüfung' (1997) ÖJZ 841-847; Wolf-Dieter Arnold, 'Die verfassungswidrige Befreiungsbestimmung', in Gerald Heidinger and Karl E. Bruckner (eds), *Steuern in Österreich: Gestern – heute – morgen* (Wien: Orac, 1998) 17-46; Gerhard Strejcek, 'Entscheidungsbesprechung zu VfGH 12. 4. 1997, G 400/96' (1998) ÖWZ 20-25; Michael Potacs, 'VfGH und Anwendungsvorrang' (2001) ZfV 756-759; Rudolf Thienel, 'Anwendungsvorrang und Präjudizialität im amtswegigen Normprüfungsverfahren vor dem VfGH' (2001) ZfV 342-358; Oliver Kempf and Peter Pülzl, 'Befreiungsbestimmungen im Ertragsteuerrecht: Verfassungsrechtlicher Bestandsschutz durch fehlende Präjudizialität', in Reinhold Beiser, Sabine Kirchmayr, Gunter Mayr and Nikolaus Zorn (eds), *Ertragsteuern in Wissenschaft und Praxis. Festschrift für Werner Doralt* (Wien: LexisNexis, 2007) 149-161; Reinhold Beiser, 'Materiales Verfassungsverständnis im Abgabenrecht – Präjudizialität, Gleichheit und Vertrauensschutz', in Konrad Arnold et al (eds), *Recht Politik Wirtschaft. Dynamische Perspektiven. Festschrift für Norbert Wimmer* (Wien: Springer, 2008) 23-51; Hermann Peyerl, 'Die Prüfungskompetenz des VfGH bei steuerrechtlichen Ausnahmebestimmungen: Präjudizialität und Sitz der Rechtswidrigkeit im Verfahren vor dem VfGH' (2010) ÖStZ 377-383; Oswald, 'Abgrenzung', p. 413-428.

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which provisions the Constitutional Court considers to be applicable in a pending lawsuit, hence which provisions constitute the prejudicial norm.

The Constitution suggests that the question of which provisions should be applied in a pending lawsuit is a preliminary question to the Court's proceedings. This preliminary question must be assessed separately from the Court's ruling on whether the norm in question is unconstitutional or not. Thereby, the Constitution seems to refer to legal methodology. At first glance, certain rulings of the Constitutional Court suggest that the Constitutional Court in fact assesses 'Präjudizialität' from a methodological point of view. However, it quickly becomes clear that methodological considerations cannot conclusively explain the jurisprudence of the Constitutional Court.

This article will therefore seek to analyse whether it is the standard of judicial review rather than methodological considerations that determines the Court's assessment of 'Präjudizialität'. After all, the Constitutional Court must have specific 'reservations' ('Bedenken') relating to the constitutionality of a certain provision to initiate its judicial review ex officio. The same applies to applications by any administrative, civil or criminal law court or the Supreme Administrative Court: if the respective applicant seriously doubts whether a norm is constitutional, they must file an application with the Constitutional Court. Hence, not legal-methodological considerations, but rather the standard of judicial review could determine the Constitutional Court's assessment of 'Präjudizialität'.

The first part of the analysis (II.) therefore focuses on the idea of 'Präjudizialität' as a preliminary question; one which can be answered using legal methodology. Using four cases as examples, all of them from the field of tax law, this article first investigates whether the Constitutional Court in fact assesses 'Präjudizialität' from a methodological point of view. In its second part (III.), using the same four cases as examples, the article will then examine whether the Constitutional Court's assessment of 'Präjudizialität' is led by specific constitutional reservations against the constitutionality of the norm in question rather than by methodological considerations. It will be of primary interest whether the standard of judicial review indicates which provisions the Constitutional Court considers to be applicable in a pending lawsuit.

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II. Legal Methodological Considerations

A. Norm Structure

A legal provision consists of the facts and the legal consequence.[8] If the facts of a case meet the facts of a legal provision, the legal consequence provided for in that provision must be applied. Legal provisions do not necessarily have to result in positive legal consequences; they may also provide that a legal consequence does not apply in certain cases, i.e. they may have a restrictive or negative effect.[9] If the facts of a case meet the facts of a restrictive legal provision, a legal consequence that another provision had already – in principle – provided for does not apply. In other words: if the facts of a case meet the facts of a restrictive legal provision, this case is exempt from the legal consequence that had already in principle been stipulated for this case.

Restrictive provisions, i.e. exemption clauses, are often found in the legal system. Frequently, the legislative authority enacts basic provisions, i.e. general rules, and then limits these rules, thus stipulating exemptions. This is not least due to a purely practical reason: sometimes it may be burdensome and unclear to already include all exemptions in the basic provision. The legislative authority would have to specify in detail for which cases a legal consequence has to apply. To better understand a norm, it may be helpful to lay down a general rule first and then provide for exemptions.[10]

Sometimes the Constitutional Court considers basic provisions and their exemption clauses together as prejudicial norm. At first glance, it seems to be guided by legal-methodological considerations regarding the norm structure: basic provision and exemption clause form an entity that can only be applied as such. Against this background, it will be examined whether considerations regarding the norm structure can explain the ruling of the Constitutional Court.

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[8] See for example Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriffe*, 2nd edn. (Wien: Springer, 1991) p. 196; Karl Engisch, *Einführung in das juristische Denken*, 7th edn. (Stuttgart: Kohlhammer, 1977) pp. 17 ff.; Peter Koller, *Theorie des Rechts*, 2nd edn. (Wien: Böhlau Verlag, 1997) pp. 78 ff.

[9] Hans Carl Nipperdey, *Lehrbuch des bürgerlichen Rechts: Allgemeiner Teil, Allgemeine Lehren, Personen, Rechtsobjekte* (Tübingen: Mohr, 1952), vol. I/I, pp. 116-117; Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn. (Berlin: Springer, 1991) p. 259.

[10] Karl Wolff, *Die Gesetzessprache* (Wien: Hollinek, 1952) p. 110.

B. Ruling on the Value Added Tax Act 1972

The Value Added Tax Act 1972[11] provided for a value added tax rate of twenty percent.[12] For an exhaustive list of cases this tax rate was exceptionally reduced.[13] A reduced tax rate of ten percent applied, amongst others, to services of hospitals and care institutions.[14] A general practitioner filed an appeal against his value added tax assessment with the Constitutional Court. The tax authority and the Finance Directorate respectively had applied the normal tax rate of twenty percent in accordance with the Value Added Tax Act. Yet, the general practitioner considered it to be unconstitutional that his services were taxed at the normal tax rate, while the Value Added Tax Act favored services of hospitals and care institutions. On the occasion of his complaint, the Constitutional Court reviewed the exceptionally reduced tax rate for services of hospitals and care institutions in the Value Added Tax Act. Although this exemption from the normal tax rate was not relevant in the pending lawsuit, the Constitutional Court considered it to be prejudicial.[15]

Once, the Value Added Tax Act had favoured services of doctors just as it favoured services of hospitals and care institutions; the reduced tax rate had also applied to services of doctors.[16] But the legislative authority had eliminated the exemption of services of doctors, subjecting their services to the basic provision, i.e. the normal tax rate.[17] This suggests that the Constitutional Court could not subsume the services of the complainant under another exemption: the legislative authority had initially considered it politically opportune to exempt services of doctors from the normal tax rate of twenty percent. For this purpose, it had considered it necessary to provide for a separate exemption clause. Hence a *different* exemption clause could not cover services of doctors. Still, on the occasion of the complaint of the general practitioner, the Constitutional Court reviewed the exemption clause of services of hospitals and care institutions in the Value Added Tax Act.[18] It remains unclear why.

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[11] UStG (Austrian Federal OJ 223/1972 as amended by Austrian Federal OJ 587/1983; all Austrian federal statutes can be accessed via https://www.ris.bka.gv.at/Bund/ by their title, amendments can be found by their OJ number).

[12] § 10 (1) UStG.

[13] § 10 (2) UStG.

[14] § 10 (2) line 9 UStG.

[15] VfSlg. 13.178/1992; cf. Arnold, 'verfassungswidrige Befreiungsbestimmung', p. 23 f.

[16] Before amended by Austrian Federal OJ 410/1988.

[17] Austrian Federal OJ 410/1988.

[18] VfSlg. 13.178/1992.

C. Ruling on the Municipal Tax Act

The Constitutional Court came to a similar conclusion in a case regarding the Municipal Tax Act. According to the Austrian Municipal Tax Act 1993[19], municipal tax was levied on the total amount of salaries and wages paid by an enterprise to its employees employed in domestic business premises. By way of exemption, the Austrian Federal Railways, amongst others, were not subjected to municipal tax.

On the occasion of a lawyer's appeal against his municipal tax assessment, the Constitutional Court reviewed the basic provision of tax liability *and* the exemption of the Austrian Federal Railways: according to the Constitutional Court, the exemption clause might violate the equality clause, thus making the basic provision unconstitutional. Therefore, the Constitutional Court reviewed not only the basic provision of tax liability, which was relevant in the pending lawsuit and therefore prejudicial. It also considered the exemption of the Austrian Federal Railways to be applicable, hence prejudicial. Together, the basic provision and the exemption clause constituted the prejudicial norm. Eventually, the Constitutional Court found that the interplay between the basic provision and the exemption clause indeed violated the equality clause. Yet, it rescinded only the exemption clause, i.e. the exemption of the Austrian Federal Railways from the municipal tax: since the exemption of the Austrian Federal Railways was prejudicial, it was not necessary for the Constitutional Court to rescind the basic provision and with that municipal tax as such.[20]

It seemed anything but obvious to apply the exemption of the Austrian Federal Railways in the lawyer's lawsuit: as a lawyer he did not operate a railway and he was not in competition with the Austrian Federal Railways either. Even the competent administrative authority claimed that it had not applied the exemption in the lawyer's lawsuit.[21] To subsume the lawyer under the exemption of the Austrian Federal Railways therefore seemed as far-fetched as to subsume services of the self-employed doctor under the exemption of hospitals and care institutions. However, the reasoning of the Constitutional Court suggests that it was led by structural considerations: according to the Constitutional Court, the municipal tax assessment was based on the basic provision of tax liability. It argued that the 'normative content'[22]

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[19] KommStG (Austrian Federal OJ 819/1993).

[20] VfSlg. 14.805/1997; see Arnold, 'verfassungswidrige Befreiungsbestimmung', p. 24 f; Karl- Fellner, '§ 1 Kommunalsteuergesetz verfassungswidrig?', 93; Peyerl, 'Prüfungskompetenz', p. 380; Rohregger, 'Präjudizialität steuerlicher Ausnahmetatbestände', p. 417; Strejcek, 'Entscheidungsbesprechung', pp. 23 f.

[21] VfSlg. 14.805/1997.

[22] VfSlg. 14.805/1997 (translated by the author).

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of this provision could only be determined 'in conjunction'[23] with the exemption: the lawyer was subjected to taxation (within the meaning of the basic provision of the municipal tax) *and not* exempt by an exemption clause. The administrative authority had confirmed the complainant's tax liability. In doing so, however, it also had to examine whether the complainant was covered by the exemption clause, according to the Constitutional Court.[24] Together, the basic provision and the exemption clause constituted the prejudicial norm.

Thus, the Constitutional Court seemed to be guided by legal-methodological considerations: in order to determine the applicable norm in the pending lawsuit, the administrative authority had to relate on both the basic provision and the exemption clause. The basic tax liability and its exemption clause formed an entity that could only be applied as such. Legal-methodological considerations regarding the norm structure seem to have led the Constitutional Court to regard the basic provision and the exemption clause together as prejudicial norm.

Considerations regarding the norm structure can also explain why the Constitutional Court regarded the exemption of services of hospitals and care institutions in the Value Added Tax Act as prejudicial: the general practitioner had to tax his services based on the normal tax rate. In order to establish that the services of the general practitioner should be subjected to the normal tax rate, the Constitutional Court also had to consider the exemption of services of hospitals and care institutions. Therefore, the tax reduction for services of hospitals and care institutions was applicable in the pending lawsuit. The Constitutional Court seemed to assess the 'Präjudizialität' of the exemption clauses from a methodological point of view.

D. Ruling on the Ordinance on Lump Sum Computation of Taxable Income

Compared to these rulings, a ruling on the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry appears contradictory: the Income Tax Act 1988[25] allowed the Federal Minister of Finance to issue, by way of exemption, lump sum regulations for the computation of taxable income of certain groups of taxpayers. For example, the Ordinance on Lump Sum Computation of Taxable Income of Agriculture and Forestry[26] allowed farmers and foresters to

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[23] VfSlg. 14.805/1997 (translated by the author).

[24] VfSlg. 14.805/1997.

[25] EStG 1988 (Austrian Federal OJ 400/1988).

[26] LuF-PauschVO 2011 (Austrian Federal OJ II 471/2010).

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determine their taxable income using average rates. By way of exemption, ordinances also allowed lump sums for other groups of taxpayers, such as restaurant owners.

A tax consultant filed an appeal against his income tax assessment with the Independent Finance Tribunal. He wanted to determine his taxable income based on the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry. But the Independent Finance Tribunal dismissed his appeal: as the tax consultant was neither a farmer nor a forester he was not allowed to determine his taxable income based on the Ordinance. Eventually, the tax consultant turned to the Constitutional Court. He criticized the Ordinance as unconstitutional, as a full lump sum was stipulated only for the computation of income from agriculture and forestry, but not for the computation of income from self-employment. The Constitutional Court, however, dismissed his appeal: according to the Constitutional Court the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry was to be applied exclusively for the computation of income of agricultural and forestry. It was not applicable in the tax consultant's lawsuit and therefore not prejudicial. The Constitutional Court could not review the Ordinance.[27]

This ruling seems to contradict the ruling on the Municipal Tax Act. Like the exemption of the Austrian Federal Railways, the Ordinances on Lump Sum Computation of Taxable Income formed negative constituent elements: the Income Tax Act 1988 provided for lump sums that could be issued for the determination of income.[28] The lump sums thus presented themselves as a form of taxable income computation. For all taxpayers, the Income Tax Act 1988 laid down in principle whether they had to determine their taxable income by means of net equity comparison or on a cash basis.[29] In addition, numerous ordinances provided for an indispensable right to claim lump sums for the computation of income if certain conditions were met. The Ordinances on Lump Sum Computation of Taxable Income were seen as a form of income computation: they allowed certain groups of taxpayers to determine their income by using lump sums rather than by the detailed computation methods laid down in the Income Tax Act. The Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry exempted farmers and foresters from the detailed record-keeping requirements of

[27] VfSlg. 19.683/2012.

[28] § 17 (4) and (5) EStG 1988.

[29] § 4 and § 5 EStG 1988; cf. Kurt Ubelhoer, Sebastian Pfeiffer, Eline Huisman and Erich Schaffer, *Introduction to Austrian Tax Law* (Wien: Facultas, 2014) paras 17 ff.

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income computation; it was thus a negative constituent element, i.e. an exemption clause.

In principle, the tax consultant had to calculate his income by net equity comparison or on a cash basis. However, he was only subjected to the detailed record-keeping obligations if he was not allowed to use lump sums for the computation of his income. With this knowledge, however, the Constitutional Court could and should have regarded the ordinance as prejudicial just as it had considered the exemption clause for the Austrian Federal Railways to be applicable in the pending lawsuit. The Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry as well as the exemption of the Austrian Federal Railways formed negative constituent elements. And yet, the Constitutional Court did not regard the ordinance as prejudicial. Structural considerations cannot explain the discrepancy between the ruling on the Municipal Tax Act and the ruling on the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry.

E. Ruling on the Income Tax Act 1988

The Income Tax Act 1988[30] established in principle a progressive tax rate.[31] By way of exemption, this rate was cut by half, among others for retained earnings by persons with income from agriculture, forestry, or commercial activities.[32] The basic tax rate therefore came with numerous exemptions. A specialist in radiology appealed against his income tax assessment. He wanted to tax the profits he had not withdrawn using the reduced rate. But the Independent Finance Tribunal dismissed his appeal: according to its ruling, the radiologist earned income from self-employment, not from agriculture and forestry or commercial activities. He was therefore not entitled to the tax reduction. To appeal this decision, the radiologist turned to the Constitutional Court. Although the preferential treatment of income from agriculture and forestry or commercial activities was not relevant in the pending lawsuit, the Constitutional Court considered it to be applicable and therefore prejudicial.[33]

Just like in the ruling on the Ordinance on Lump Sum Computation of Taxable Income, the complainant in the aforementioned Income Tax Act case sought to benefit from the preferential treatment of income from agriculture and forestry or commercial activities – even though he himself earned income from self-

[30] EStG 1988 (Austrian Federal OJ 400/1988 as amended by Austrian Federal OJ I 180/2004).

[31] § 33 (1) EStG 1988.

[32] § 11a (1) icw § 37 (1) EStG 1988.

[33] VfSlg. 18.030/2006.

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employment. Neither in this case nor in the case of the Ordinance on Lump Sum Computation of Taxable Income was it obvious to subsume the complainant's income the preferential provision. The Income Tax Act clearly differentiated between profits from agriculture and forestry and commercial activities on the one hand and profits from self-employment on the other hand.[34] In the ruling on the Ordinance on Lump Sum Computation of Taxable Income, the Constitutional Court therefore found that "the income tax assessment was undisputedly based solely on income from self-employment"[35]. By contrast, in the ruling on the preferential treatment for retained earnings by persons with income from agriculture, forestry or commercial activities in the Income Tax Act 1988, the Constitutional Court simply did not address this question. Although the complainant undeniably obtained income from self-employment, the Constitutional Court considered the preferential treatment of persons with income from agriculture, forestry or commercial activities to be prejudicial.[36]

In abstract terms, it seems just as illogical to apply the exemption clause for retained earnings by persons with income from agriculture, forestry or commercial activities on retained earnings by a radiologist, as determining the tax consultant's income based on the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry. In both cases, the attempt to subsume the determination of income tax of the complainants the exemption of the determination of income tax of persons with income from agriculture, forestry (or commercial activities) was doomed to fail. In both cases the Constitutional Court could have used the exemption clause only as a negative constituent element. It only became clear which tax rate or type of computation of profit the taxpayer had to choose when taking into account the exceptional preferential treatment of persons with income from agriculture, forestry (or commercial activities). Hence the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry formed a negative constituent element, much in the same way as the tax cut. And yet, one time the Constitutional Court considered the exemption clause to be prejudicial; the other time, it did not. Legal-methodological considerations regarding the norm structure therefore fail to conclusively explain the 'Präjudizialität' of basic provisions and exemption clauses. The jurisprudence of the Constitutional Court remains inconsistent from a structural point of view.

[34] Cf. § 2 (3) EStG 1988.

[35] VfSlg. 19.683/2012 (translation by the author).

[36] VfSlg. 19.185/2010.

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III. Standard of Judicial Review

A. Principle of Equality

The equality clause[37] ('Gleichheitssatz') states that all nationals are equal before the law, thereby protecting citizens in different ways: first of all, the equality clause forces the legislative authority to treat equal issues in an equal manner unless there are valid reasons for an unequal treatment. Correspondingly, it forbids treating issues equally that are essentially unequal.[38] The equality clause therefore provides for an 'equality test' ('Gleichheitsprüfung') of norms. In its case law, the Constitutional Court furthermore developed a specific 'objectivity test' ('Sachlichkeitsprüfung'), preventing provisions that are, *per se*, objectively unjustified.[39]

Finding an object of comparison is the first step of an equality test.[40] According to Pöschl, the equality clause does not oblige the legislative authority "to treat everyone

[37] Cf. Art 7 (1) B-VG and Art 2 StGG.

[38] Magdalena Pöschl, 'Gleichheitsrechte', in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlmayer (eds), *Handbuch der Grundrechte in Deutschland und Europa: Grundrechte in Österreich*, 2nd edn. (Heidelberg: C.F. Müller Verlag, Wien: Manz, 2014), vol. VII/I, 251-318, paras 32 ff.; Stelzer, *Constitution*, pp. 242 ff.; see also Walter Berka, 'Art 7 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 1. Lfg. 2003) paras 32, 40; Wolfgang Gassner, *Gleichheitssatz im Steuerrecht: Eine Aufgabe für Juristen und Wirtschaftswissenschaftler* (Wien: Institut für Finanzwissenschaften und Steuerrecht, 1970) p. 2; Wolfgang Groiss, Gernot Schantl and Manfried Welan, 'Betrachtungen zur Verfassungsgerichtsbarkeit' (1975) ÖJZ 365-376, p. 372; Raoul Kneucker and Manfried Welan, 'Zur Entwicklung des Gleichheitsgrundsatzes in Österreich' (1975) ÖZP 5-22, p. 14; Karl Korinek, 'Gedanken zur Bindung des Gesetzgebers an den Gleichheitsgrundsatz nach der Judikatur des Verfassungsgerichtshofes', in Heinz Schäffer (ed.), *Im Dienst an Staat und Recht. Internationale Festschrift Erwin Melichar zum 70. Geburtstag* (Wien: Manz, 1992) 39-55, p. 44; Magdalena Pöschl, 'Über Gleichheit und Verhältnismäßigkeit' (1997) JBl 413-434, p. 426; Magdalena Pöschl, 'Was kommt nach der Gleichheitswidrigkeit?' (2010) JRP 362-371, p. 363; Reinhard Rack and Norbert Wimmer, 'Das Gleichheitsrecht in Österreich' (1983) EuGRZ 597-613, p. 603; Klaus Tipke, 'Zur Methode der Anwendung des Gleichheitssatzes unter besonderer Berücksichtigung des Steuerrechts', in Werner Doralt, Wolfgang Gassner, Eduard Lechner, Hans Georg Ruppe, Michael Tanzer and Joef Werndl (eds), *Steuern im Rechtsstaat. Festschrift für Gerold Stoll zum 65. Geburtstag* (Wien: Orac, 1990) 229-243, p. 230.

[39] Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Wien: Springer, 2008) p. 260; see also Pöschl, 'Gleichheitsrechte', para. 36; Sigmund Rosenkranz, *Das Bundes-Gleichbehandlungsgesetz* (Wien: Orac, 1997) p. 49; Stelzer, *Constitution*, pp. 242 ff.

[40] Pöschl, *Gleichheit*, p. 205; see also Berka, 'Art 7 B-VG', para. 44; Groiss, Schantl and Welan, 'Betrachtungen zur Verfassungsgerichtsbarkeit', pp. 369, 372; Korinek, 'Gedanken', p. 45; Heinrich Neisser, Gernot Schantl and Manfried Welan, 'Betrachtungen zur Verfassungsgerichtsbarkeit' (1969) ÖJZ 645-654, p. 648; Pöschl, 'Gleichheit und Verhältnismäßigkeit', p. 426 f.; Rosenkranz, *Bundes-Gleichbehandlungsgesetz*, p. 50.

equally in every respect".[41] Rather, an obligation for equal treatment arises "only when essential similarities exist between two groups of comparison".[42]

In theory, any provision that stipulates rules that differ from the subject of review can be a potential object of comparison.[43] Yet of course, not every provision is suitable as an object of comparison. In most cases, the difference is obvious and the different treatment is therefore clearly required. In these cases, justification is not necessary. An equality test would be redundant, as its result would already be determined *ex ante*.[44] Consequently, the Constitutional Court does not perform an equality test if it cannot even remotely recognize essential similarities.[45] Of course conversely, a comparison of identical facts and norms is likewise redundant.[46] In the context of an equality test, those provisions are of interest which give rise to doubts as to the objective justification of equal or unequal treatment.[47] Therefore, the challenge is to find a suitable object of comparison; one that is 'close enough' to the subject of review to conduct a meaningful equality test. This is always the case when two provisions and the issues to be regulated are predominantly similar. In this case, only a closer examination will clarify whether the rules are compatible with the equality clause.[48]

Thus, for an equality test, two provisions are needed, which can and should be compared with each other.[49] Each of those provisions would be constitutional if the other one did not exist, and *vice versa*. It is the interplay between the two provisions that violates the equality clause, not one of the two provisions per se. Hence, the equality clause does not state *which* one of the two provisions is to be rescinded by the Constitutional Court.[50] It is only necessary *that* one of them (and therefore their

[41] Pöschl, 'Gleichheitsrechte', para. 32 (translated by the author).

[42] Pöschl, 'Gleichheitsrechte', para. 32 (translated by the author).

[43] Pöschl, *Gleichheit*, p. 140 f.; cf also Berka, 'Art 7 B-VG', para. 41; Raoul Kneucker, 'Die Bindung des Steuergesetzgebers an den Gleichheitssatz der Bundesverfassung' (1966) ÖStZ 217-223, p. 220; Kneucker and Welan, 'Entwicklung', p. 15; Pöschl, 'Gleichheit und Verhältnismäßigkeit', p. 427.

[44] Pöschl, 'Gleichheit und Verhältnismäßigkeit', p. 427.

[45] Cf. Pöschl, *Gleichheit*, p. 205.

[46] Tipke, 'Methode', p. 233.

[47] Pöschl, 'Gleichheit und Verhältnismäßigkeit', p. 427.

[48] Pöschl, 'Gleichheit und Verhältnismäßigkeit', p. 427.

[49] Pöschl, *Gleichheit*, p. 209.

[50] Pöschl, 'Gleichheitswidrigkeit', p. 362 f; cf. also Jörn Ipsen, 'Nichterklärung oder "Verfassungswidrigerklärung" - Zum Dilemma der verfassungsgerichtlichen Normkontrollpraxis' (1983) JZ 41-45, p. 41; Hartmut Maurer, 'Zur Verfassungswidrigerklärung von Gesetzen', in Hans Schneider and Volkmar Götz, *Im Dienst an Staat und Recht. Festschrift für Werner Weber um 70. Geburtstag* (Berlin: Duncker & Humblot, 1974) 345-368, p. 354.

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interplay) is eliminated.[51] The equality clause allows the Constitutional Court to decide in what way its violation needs to be corrected. It may decide to bring those previously disadvantaged in line with the previous beneficiaries or *vice versa*: it may decide to lower the level for all.[52]

However, the room for maneuver of the Constitutional Court is determined by the subject of review: if the Constitutional Court contrasts two provisions, it examines their relation. Yet, in any judicial review, a specific norm remains the subject of review.[53] The Constitutional Court examines the interplay of a provision (the *subject of review*) with another provision (their *relation*). Depending on which of the two provisions is subject of review the Constitutional Court can only remove the violation of the equality clause in one of the two possible ways.

This peculiarity of an equality test as part of judicial review seems to be especially important in the interplay between basic provisions and exemption clauses. Exemption clauses exempt certain facts of a case from a basic provision that would otherwise be applied. Basic provisions and exemption clauses thus are as obvious as ideal for comparison: they are necessarily close. If this were not the case, the basic provision would not be able to cover those facts that are to be exempt by the exemption clause, thus making the exemption redundant. At the same time, the legislative authority makes a firm distinction: it wants to see the exempt cases treated differently from the ones covered by the basic provision. Basic provisions and exemption clauses are therefore particularly suited for comparison.[54] It is obvious that, in the search for a suitable object of comparison, the Constitutional Court initially considers provisions that the legislative authority treats decidedly unequally and therefore often compares basic provisions and exemption clauses. Thereby, the equality clause makes no determination as to whether the Constitutional Court has to rescind the rule or the exemption (assuming the equality clause is violated).

To some extent, however, 'Präjudizialität' determines which norms the Constitutional Court can rescind[55]: it restricts the specific judicial review to those norms that are applicable in a pending lawsuit, thus determining the subject of review. Once the subject of review has been determined, the Constitutional Court can review its

[51] Pöschl, 'Gleichheitswidrigkeit', p. 362.

[52] Pöschl, 'Gleichheitswidrigkeit', p. 362.

[53] Berka, *Verfassungsrecht*, para. 1975; Mayer, Kucsko-Stadlmayer and Stöger, *Bundesverfassungsrecht*, paras 1151 ff.

[54] Cf. Hausleithner, 'Summum ius, summa iniuria?', p. 105; also Arnold, 'Aushöhlungstheorie', pp. 130 f.

[55] Cf. also Lang, 'Rechtswidrigkeit', p. 276.

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interplay with another provision. Depending on which provisions it considers to be applicable, however, there might not be room left for the Court to decide whether it rescinds the basic provision or the exemption clause. With this knowledge and against this background, the Constitutional Court's assessment of 'Präjudizialität' of basic provisions and exemption clauses shall once again be investigated.

B. Ruling on the Value Added Tax Act 1972

The Value Added Tax Act provided for a tax liability of twenty percent. By way of exemption, a reduced tax rate of ten percent applied, amongst others, to services of hospitals and care institutions.[56] A general practitioner lodged a complaint with the Constitutional Court regarding this exceptionally reduced tax rate for services of hospitals and care institutions. The Finance Directorate had taxed his services at the normal rate of twenty percent. However, before the Constitutional Court the general practitioner argued that him having to pay taxes on his services at the normal tax rate while hospitals and care institutions were allowed to make use of the reduced tax rate violated the equality clause. The Constitutional Court shared his reservations: according to the Constitutional Court, the Value Added Tax Act stipulated preferential treatment for medical services performed in a hospital, while medical services outside a hospital were not favoured. This, the Court argued, might violate the equality clause.[57] Although the exemption clause for services of hospitals and care institutions was not relevant in the pending lawsuit, the Constitutional Court considered it to be applicable and therefore prejudicial.[58]

In its ruling on the Value Added Tax Act, the Constitutional Court compared the basic provision, which was relevant in the lawsuit of the general practitioner, to the preferential treatment for services of hospitals and care institutions granted by way of exemption. The Value Added Tax Act explicitly differentiated between the basic tax rate, which applied, amongst others, to services of the doctor, and the preferential treatment of services of hospitals and care institutions. While hospitals and care institutions benefitted from a tax reduction, the Value Added Tax Act denied the doctor the reduced tax rate. This seemed problematic, given that the doctor as well as hospitals and care institutions were essentially similar; after all, both generated turnover from medical services.[59] Basic provisions and exemption clauses were suitable objects of comparison of an equality test.

[56] § 10 (2) UStG.
[57] VfSlg. 13.178/1992.
[58] VfSlg. 13.178/1992.
[59] Cf. also VfSlg. 13.178/1992.

The Constitutional Court examined whether the similarities between the doctor and hospitals as well as care institutions were in fact so essential that they also required equal treatment in legal matters. In that case, the unequal treatment would violate the equality clause, thus making it unconstitutional. The equality clause did not state how the Constitutional Court should correct the (potential) inequality.[60] It did not matter whether the Constitutional Court rescinded the basic provision and therefore the taxation of services of self-employed doctors; or whether, conversely, it eliminated the preferential treatment of services of hospitals and care institutions in the Value Added Tax Act. It was only the relation between the basic provision and the exemption clause that seemed problematic, but not the exemption clause itself.

The equality test as part of judicial review, however, did require a specific subject of review. The Constitutional Court could only examine and – in the case of a violation of the equality clause – rescind a specific provision. Which provisions would end up being rescinded by the Constitutional Court depended significantly upon the subject of review and thus on the question which provisions the Constitutional Court considered to be prejudicial. But why did it regard the exemption clause as prejudicial, even though it was not relevant in the pending lawsuit?

In the case of the Value Added Tax Act, the Constitutional Court had two options: if it considered (only) the basic provision to be prejudicial – after all (only) this provision was relevant in the pending lawsuit – it would have been able to rescind only the basic tax rate of twenty percent. By doing so, the Court would not only have lifted the previously disadvantaged group to the level of the previous beneficiaries. Rather, it would have exempted the previously disadvantaged from the tax entirely. However, the ruling would not have affected the exceptionally reduced tax rate for services of hospitals and care institutions. In this case, those who originally enjoyed preferential treatment would now be at a disadvantage: they would have had to continue to tax their services, albeit at the rate of ten percent. The wording of the basic provision did not allow the Constitutional Court to lower the tax rate for the previously disadvantaged group from twenty percent to ten percent.[61]

However, by qualifying the provision on the exceptionally reduced tax rate as subject of review, the Constitutional Court opened up another possibility of correction: it could have rescinded the exceptionally reduced tax rate for services of hospitals and care institutions, lowering them to the level of services of self-employed doctors. As

[60] Pöschl, 'Gleichheitswidrigkeit', p. 362.

[61] If the Constitutional Court had rescinded § 10 (1) UStG.

a result, hospitals and care institutions would have had to pay tax on their services at a rate of twenty percent just as the self-employed doctors had to.[62]

C. Ruling on the Municipal Tax Act

The ruling on the Municipal Tax Act confirms that the Constitutional Court assesses 'Präjudizialität' from the perspective of the equality clause: on the basis of a lawyer's complaint, the Constitutional Court examined the basic provision of municipal tax liability and the exemption clause for the Austrian Federal Railways.[63] The complainant had to pay municipal tax. He only fulfilled the basic provision of municipal tax liability, but not the exemption clause. Yet, the Constitutional Court considered the basic provision and the exemption clause together as prejudicial norm. The Constitutional Court was concerned that the interplay between the basic tax liability and the exemption of the Austrian Federal Railways would violate the equality clause: according to the Court, on the one hand, public utilities of public corporations (such as social insurance institutions or the Austrian Broadcasting Corporation) were subjected to tax liability. In addition, private transport and wagon companies were also subjected to municipal tax. On the other hand, the Municipal Tax Act exempted the Austrian Federal Railways from tax liability. However, according to the Court, the Austrian Federal Railways also offered infrastructure services which were in the interest of the general public and it was in competition with other bus and railway companies. The Court argued that the Municipal Tax Act treated the Austrian Federal Railways differently from private companies that offered transport services or other public utilities.[64] The Court deemed this unequal treatment to violate the equality clause. Evidently, the Court compared the basic tax liability with the exemption clause of the Austrian Federal Railways.

The Constitutional Court considered the basic provision and the exemption clause as suitable objects for comparison: the Municipal Tax Act explicitly exempted the Austrian Federal Railways from municipal tax liability. Without the exemption, it would be subjected to municipal taxation, just as the lawyer, transporter, or infrastructure service provider. The Constitutional Court reviewed the interplay between the basic tax liability and exemption of the Austrian Federal Railways. From

[62] In the end, the Constitutional Court dismissed its concerns: It noted significant differences between hospitals and care institutions and self-employed doctor that could justify the unequal treatment (VfSlg. 13.178/1992).

[63] § 1 KommStG and § 8 KommStG.

[64] VfSlg. 14.805/1997.

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the perspective of the equality clause, that is to say the standard of judicial review, the basic provision and the exemption clause were both part of the prejudicial norm.

At last, the Constitutional Court found the interplay between the basic provision of tax liability and the exemption of the Austrian Federal Railways to violate the equality clause.[65] However, the equality clause made no determination as to whether the Court should rescind the tax liability or the exemption clause. Only the interplay between the two provisions was problematic, not one of them *per se*. From the perspective of the equality clause, it did not matter whether the Constitutional Court rescinded the tax liability for all taxpayers as such; or whether it abolished the exemption of the Austrian Federal Railways and thus lowered the Austrian Federal Railways to the level of other taxpayers. By regarding the basic provision of tax liability *and* the exemption clause as prejudicial, the Constitutional Court opened up both options: it could either rescind the basic provision or the exemption clause and thus try to interfere with the legal system as little as possible. The standard of review and, with that, the possibility of correcting the potential unconstitutionality determined which provisions the Constitutional Court considered to be prejudicial.

D. Ruling on the Ordinance on Lump Sum Computation of Taxable Income

This serves to clarify the ruling on the Ordinance on Lump Sum Computation of Taxable Income: a tax consultant filed an appeal against his income tax assessment. He claimed that the exceptional Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry violated the equality clause. The Constitutional Court, however, decided that the lump sums for farmers and foresters was not prejudicial in the pending lawsuit and therefore dismissed the tax consultant's appeal.[66] According to the Court, the Ordinance on Lump Sum Computation of Taxable Income did not apply for the consultant's income from self-employment. He had to determine his taxable income by the basic taxable income computation in the Income Tax Act 1988.

The Constitutional Court did not contrast the basic provision regarding the computation of taxable income with the Ordinance on Lump Sum Computation of Taxable Income, which means it did not compare the basic provision and the exemption clause. The interplay between the provision regarding the computation of taxable income, which were relevant in the lawsuit of the tax consultant, and the preferential treatment of farmers and foresters was therefore not under examination. The Ordinance on Lump Sum Computation of Taxable Income for Income of

[65] VfSlg. 14.805/1997.

[66] VfSlg. 19.683/2012.

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Agriculture and Forestry was neither an object of comparison in an equality test as part of judicial review nor did it become subject of review. It was not part of the prejudicial norm.

E. Ruling on the Income Tax Act 1988

By contrast, in the ruling on the reduced tax rate in the Income Tax Act 1988, the Constitutional Court did compare the reduced income tax rate for retained earnings by persons with income from agriculture and forestry or commercial activities with the basic tax rate, which was relevant in the lawsuit of the radiologist. The Court did so although the radiologist received income neither from agriculture or forestry nor from commercial activities, but from self-employment.[67] The Income Tax Act 1988 basically provided for a progressive tax rate; by way of exemption, this rate was cut by half for retained earnings by persons with income from agriculture, forestry, or commercial activities.[68] In the pending lawsuit, the complainant had to tax his income from self-employment at the normal rate – including his retained earnings.

Like the tax consultant in the ruling on the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry, the radiologist wanted to benefit from the preferential treatment of income from agriculture and forestry or commercial activities; likewise, the exemption did not cover the complainant's case. Unlike in the ruling on the Ordinance on Lump Sum Computation of Taxable Income, however, the Constitutional Court shared the complainant's reservations against the preferential treatment of income from agriculture and forestry or commercial activities to violate the equality clause. The Court raised "the question whether it [was] objectively justified to deny a tax reduction of this nature to persons who receive income from self-employment".[69] According to the Constitutional Court, the fact that the preferential treatment of income from self-employment was not applicable, required justification.[70]

The Constitutional Court compared the tax rate at which the radiologist had to tax his retained earnings with the reduced tax rate for retained earnings by persons with income from agriculture and forestry or commercial activities. The Court therefore contrasted the basic provision and the exemption clause. Although the preferential tax rate was not relevant in the pending lawsuit, the Constitutional Court regarded

[67] VfSlg. 18.030/2006.

[68] §§ 11a (1) icw 37 (1) EStG 1988.

[69] VfSlg. 18.030/2006 (translated by the author).

[70] VfSlg. 18.030/2006.

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this exemption as prejudicial.[71] Once again, the Constitutional Court assessed 'Präjudizialität' from the perspective of the equality clause: unlike in the ruling on the Ordinance on Lump Sum Computation of Taxable Income, it considered the preferential treatment of income from agriculture and forestry or commercial activities as a suitable object of comparison. By doing so, however, the exemption clause itself became part of the prejudicial norm, allowing the Constitutional Court to make what it deemed to be the most reasonable correction of the violation of the equality clause while interfering with the legal system as little as possible.

Methodological considerations failed to conclusively explain the discrepancy between the ruling on the Ordinance on Lump Sum Computation of Taxable Income and the ruling on the reduced tax rate in the Income Tax Act 1988. However, the equality clause, hence the standard of review, did explain why the Constitutional Court considered the exemption clauses to be prejudicial in the pending lawsuit.

IV. Conclusion

One of the Constitutional Court's main powers is to review laws and ordinances in accordance with constitutional law. Sometimes its right of scrutiny depends on whether the norm in question is to be applied in a pending lawsuit, that is to say if it is prejudicial. 'Präjudizialität' is an independent process requirement and is intended to limit the subject of judicial review. The Constitutional Court has to assess 'Präjudizialität' in each judicial review either upon application or *ex officio*. And yet so far, it remained unclear which provisions the Constitutional Court considers to be applicable in a pending lawsuit. Therefore, using the example of basic provisions and exemption clauses, the article examined which provisions in the jurisprudence of the Constitutional Court constitute the prejudicial norm.

The wording of the Constitution suggests that the question which provisions should be applied in a pending lawsuit is a preliminary question to the Court's proceedings; and that this preliminary question should be answered using legal methodology. At the first glance, the jurisprudence of the Constitutional Court gives the impression that the Court assesses 'Präjudizialität' as a preliminary question from the perspective of the pending lawsuit; and that it relies on legal-methodological considerations. The norm structure for example, i.e. the relationship between basic provisions and exemption clauses, influences its assessment of 'Präjudizialität'.

However, the first part of the analysis showed that structural considerations cannot conclusively explain the case law of the Constitutional Court. Therefore, the second

[71] VfSlg. 18.030/2006; cf. also VfSlg. 9524/1982.

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part of the analysis focused on specific reservations relating to the constitutionality of the norm in question that had motivated the respective applicant or the Constitutional Court to apply for or (*ex officio*) initiate judicial review. It was found that not structural considerations alone but rather the standard of judicial review determines 'Präjudizialität': the Constitutional Court considers a provision that it uses as an object of comparison in an equality test to be prejudicial – irrespective of whether it is relevant in the pending lawsuit or not. From the perspective of the equality clause, all objects of comparison are (potentially) part of the prejudicial norm. By potentially identifying all objects of comparison as prejudicial, the Constitutional Court allows itself to make what it deems to be the most reasonable correction of a violation of the equality clause while interfering with the legal system as little as possible.

The Constitutional Court considered the interplay between the general municipal tax liability and the exemption clause of the Austrian Federal Railways as violating the equality clause. Even though the exemption clause was not relevant to the pending lawsuit, from the perspective of the equality clause it was indeed prejudicial on the occasion of a lawyer's complaint. Thus the Constitutional Court was able to rescind the exemption clause rather than the entire basic provision. Likewise the Constitutional Court considered the reduced income tax rate for retained earnings by persons with income from agriculture and forestry or commercial activities from the perspective of the equality clause as prejudicial on the occasion of a radiologist's complaint. By doing so, the Constitutional Court opened up the possibility of correcting the unconstitutionality in what it considers to be the best possible way. And the exceptional preferential treatment of services of hospitals and care institutions in the Value Added Tax Act was, on the occasion of the complaint of a general practitioner, prejudicial from the perspective of the equality clause, despite not being relevant in the pending lawsuit. By contrast, the Constitutional Court did not consider the Ordinance on Lump Sum Computation of Taxable Income for Income of Agriculture and Forestry as an object of comparison in an equality test; therefore it did not become part of the prejudicial norm.

Against the background of the judicature of the Constitutional Court, those provisions are *applicable* in a pending lawsuit that lead to the (potential) unconstitutionality of the lawsuit. With this understanding of 'Präjudizialität', the Constitutional Court regularly gives itself the possibility of correcting the unconstitutionality in what it considers to be the best possible way.

'Präjudizialität' can therefore be viewed from two different angles: according to the text of the Constitution, 'Präjudizialität' is a preliminary question to judicial review and, as such, independent of the standard of review and the outcome of judicial review. The Constitutional Court, however, regularly assesses 'Präjudizialität' as a

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means to an end to correct any unconstitutionality in the pending lawsuit as accurately as possible. As long as the Court is not guided by its opinion on the constitutionality of the norm in question, its approach abides by the Constitution. It is a legitimate aim to interfere with the legal system as little as possible while guaranteeing the constitutionality of legislative acts in a pending lawsuit. Therefore the Court's assessment of 'Präjudizialität' is to be endorsed.

Bibliography

Ludwig Adamovich, *Die Prüfung der Gesetze und Verordnungen durch den österreichischen Verfassungsgerichtshof* (Wien: F. Deuticke, 1923)

Josef W. Aichlreiter, *Österreichisches Verordnungsrecht: Ein systemisches Handbuch* (Wien: Springer, 1988), vol. II

Josef W. Aichlreiter, 'Präjudizialität', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 1998) 71-92

Josef W. Aichlreiter, 'Die Bereinigungsmöglichkeit als Prozessvoraussetzung der generellen Normenkontrolle' (2000) *Juristische Blätter* 537-538

Josef W. Aichlreiter, 'Anmerkungen zur Rechtsprechung des VfGH zur Präjudizialität in den vergangenen zehn Jahren', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 2010) 261-268

Josef W. Aichlreiter, 'Art 139 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 12. Lfg. 2013)

Wolf-Dieter Arnold, 'Aushöhlungstheorie und Erweiterung des Kreises der Anlassfälle als Gegenstand ungerechtfertigter Kritik' (1987) *Zeitschrift für Verwaltung* 230-245

Wolf-Dieter Arnold, 'Die verfassungswidrige Befreiungsbestimmung', in Gerald Heidinger and Karl E. Bruckner (eds), *Steuern in Österreich: Gestern – heute – morgen* (Wien: Orac, 1998) 17-46

Reinhold Beiser, 'Schweiz: Schlechterstellung verheirateter Paare gegenüber unverheirateten verfassungswidrig' (1985) *Recht der Wirtschaft* 63

Reinhold Beiser, 'Materiales Verfassungsverständnis im Abgabenrecht – Präjudizialität, Gleichheit und Vertrauensschutz', in Konrad Arnold et al (eds), *Recht Politik Wirtschaft. Dynamische Perspektiven. Festschrift für Norbert Wimmer* (Wien: Springer, 2008) 23-51

University of Vienna Law Review, Vol. 2:1 (2018), pp. 129-153. https://doi.org/10.25365/vlr-2018-2-1-129.

Walter Berka, 'Art 7 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 1. Lfg. 2003)

Walter Berka, *Verfassungsrecht*, 7th edn. (Wien: Verlag Österreich, 2018)

Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriffe*, 2nd edn. (Wien: Springer, 1991)

Karl Engisch, *Einführung in das juristische Denken*, 7th edn. (Stuttgart: Kohlhammer, 1977)

Karl-Werner Fellner, '§ 1 Kommunalsteuergesetz verfassungswidrig? Ausnahmeregelung für die Österreichische Bundesbahnen; Verfassungswidrigkeit abgabenrechtlicher Bestimmungen?' (1997) *Recht der Wirtschaft* 93

Wolfgang Gassner, *Gleichheitssatz im Steuerrecht: Eine Aufgabe für Juristen und Wirtschaftswissenschaftler* (Wien: Institut für Finanzwissenschaften und Steuerrecht, 1970)

Wolfgang Groiss, Gernot Schantl and Manfried Welan, 'Betrachtungen zur Verfassungsgerichtsbarkeit' (1975) *Österreichische Juristen-Zeitung* 365-376

Herbert Haller, *Die Prüfung von Gesetzen: ein Beitrag zur verfassungsgerichtlichen Normenkontrolle* (Wien: Springer, 1997)

Annemarie Hausleithner, 'Summum ius, summa iniuria? – Zur Aufhebung des § 1 Abs 1 Z 1 GrEStG durch den VfGH' (1987) *Recht der Wirtschaft* 102-108

Martin Hiesel, 'Die Rechtsprechung des VfGH zur Zulässigkeit gerichtlicher Verordnungs- und Gesetzesprüfung' (1997) *Österreichische Juristen-Zeitung* 841-847

Jörn Ipsen, 'Nichterklärung oder "Verfassungswidrigerklärung" - Zum Dilemma der verfassungsgerichtlichen Normkontrollpraxis' (1983) *Juristenzeitung* 41-45

Oliver Kempf and Peter Pülzl, 'Befreiungsbestimmungen im Ertragsteuerrecht: Verfassungsrechtlicher Bestandsschutz durch fehlende Präjudizialität', in Reinhold Beiser, Sabine Kirchmayr, Gunter Mayr and Nikolaus Zorn (eds), *Ertragsteuern in Wissenschaft und Praxis. Festschrift für Werner Doralt* (Wien: LexisNexis, 2007) 149-161

Raoul Kneucker, 'Die Bindung des Steuergesetzgebers an den Gleichheitssatz der Bundesverfassung' (1966) *Österreichische Steuerzeitung* 217-223

Peter Koller, *Theorie des Rechts*, 2nd edn. (Wien: Böhlau Verlag, 1997)

University of Vienna Law Review, Vol. 2:1 (2018), pp. 129-153. https://doi.org/10.25365/vlr-2018-2-1-129.

Karl Korinek, 'Gedanken zur Bindung des Gesetzgebers an den Gleichheitsgrundsatz nach der Judikatur des Verfassungsgerichtshofes', in Heinz Schäffer (ed.), *Im Dienst an Staat und Recht. Internationale Festschrift Erwin Melichar zum 70. Geburtstag* (Wien: Manz, 1992) 39-55

Michael Lang, 'Der Sitz der Rechtswidrigkeit', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Wien: Linde, 2010) 269-295

Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn. (Berlin: Springer, 1991)

Hartmut Maurer, 'Zur Verfassungswidrigerklärung von Gesetzen', in Hans Schneider and Volkmar Götz, *Im Dienst an Staat und Recht. Festschrift für Werner Weber um 70. Geburtstag* (Berlin: Duncker & Humblot, 1974) 345-368

Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Bundesverfassungsrecht*, 11th edn. (Wien: Manz, 2015)

Heinrich Neisser, Gernot Schantl and Manfried Welan, 'Betrachtungen zur Verfassungsgerichtsbarkeit' (1969) *Österreichische Juristen-Zeitung* 645-654

Hans Carl Nipperdey, *Lehrbuch des bürgerlichen Rechts: Allgemeiner Teil, Allgemeine Lehren, Personen, Rechtsobjekte* (Tübingen: Mohr, 1952), vol. I/I

Theo Öhlinger and Harald Eberhard, *Verfassungsrecht*, 11th edn. (Wien: Facultas, 2016)

Melina Oswald, 'Die Abgrenzung des Anfechtungsumfanges bei der konkreten Normenkontrolle' (2016) *Juristische Blätter* 413-428

Hermann Peyerl, 'Die Prüfungskompetenz des VfGH bei steuerrechtlichen Ausnahmebestimmungen: Präjudizialität und Sitz der Rechtswidrigkeit im Verfahren vor dem VfGH' (2010) *Österreichische Steuerzeitung* 377-383

Magdalena Pöschl, 'Über Gleichheit und Verhältnismäßigkeit' (1997) *Juristische Blätter* 413-434

Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Wien: Springer, 2008)

Magdalena Pöschl, 'Was kommt nach der Gleichheitswidrigkeit?' (2010) *Journal für Rechtspolitik* 362-371

Magdalena Pöschl, 'Gleichheitsrechte', in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlmayer (eds), *Handbuch der Grundrechte in Deutschland und Europa: Grundrechte in Österreich*, 2nd edn. (Heidelberg: C.F. Müller Verlag, Wien: Manz, 2014), vol. VII/I, 251-318

Michael Potacs, 'VfGH und Anwendungsvorrang' (2001) *Zeitschrift für Verwaltung* 756-759

Reinhard Rack and Norbert Wimmer, 'Das Gleichheitsrecht in Österreich' (1983) *Europäisches Grundrechte-Zeitschrift* 597-613

Michael Rohregger, 'Zur Präjudizialität steuerlicher Ausnahmetatbestände im verfassungsgerichtlichen Normprüfungsverfahren' (1997) *Österreichische Steuer-zeitung* 417-422

Michael Rohregger, 'Art 140 B-VG', in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Wien: Verlag Österreich, 6. Lfg 2003)

Sigmund Rosenkranz, *Das Bundes-Gleichbehandlungsgesetz* (Wien: Orac, 1997)

Hans Ruppe, 'Aufhebung des § 1 Abs 1 Z 1 GrEStG durch den VfGH' (1987) *Österreichische Notariats-Zeitung* 57-61

Heinz Schäffer † and Benjamin Kneihs, 'Art 140 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Wien: Verlag Österreich, 12. Lfg. 2013)

Karl Spielbüchler, "...anzuwenden hätte...", in Funk et al. (eds), *Der Rechtsstaat vor neuen Herausforderungen. Festschrift für Ludwig Adamovich zum 70. Geburtstag* (Wien: Verlag Österreich, 2002) 743-760

Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing: Oxford, Portland, 2011)

Gerhard Strejcek, 'Entscheidungsbesprechung zu VfGH 12. 4. 1997, G 400/96' (1998) *Österreichische Zeitschrift für Wirtschaftsrecht* 20-25

Rudolf Thienel, 'Anwendungsvorrang und Präjudizialität im amtswegigen Normprüfungsverfahren vor dem VfGH' (2001) *Zeitschrift für Verwaltung* 342-358

Klaus Tipke, 'Zur Methode der Anwendung des Gleichheitssatzes unter besonderer Berücksichtigung des Steuerrechts', in Werner Doralt, Wolfgang Gassner, Eduard Lechner, Hans Georg Ruppe, Michael Tanzer and Josef Werndl (eds), *Steuern im Rechtsstaat. Festschrift für Gerold Stoll zum 65. Geburtstag* (Wien: Orac, 1990) 229-243

Kurt Ubelhoer, Sebastian Pfeiffer, Eline Huisman and Erich Schaffer, *Introduction to Austrian Tax Law* (Wien: Facultas, 2014)

Karl Wolff, *Die Gesetzessprache* (Wien: Hollinek, 1952)

University of Vienna Law Review, Vol. 2:1 (2018), pp. 129-153. https://doi.org/10.25365/vlr-2018-2-1-129.