

■ CONSTITUTIONAL DEVELOPMENTS

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Focus: Separation of Powers

The principle of separation of powers is considered to be a "fundamental principle" of the Austrian Constitution. Although it is not named expressly, it appears by synopsis of different constitutional provisions, such as the organizational and functional separation of entities or the system of checks and balances and not least in Article 94 Federal Constitutional Law (hereinafter: B-VG), which reads:

"Judicial and administrative powers shall be separate at all levels of proceedings."

From Article 94 B-VG the Constitutional Court deduces the obligation for the legislator to assign a case entirely to the courts or the administrative authorities for enforcement.¹ This means no authority is entitled to be court and administrative authority at once. Further, stages of appeal and directives between courts and administrative authorities are prohibited. Finally, jurisdiction of courts and administrative authorities in the same matter is excluded.

Despite these relatively clear prohibitive rules, in some fields this principle is breached and nevertheless not unconstitutional. One of these examples is the administration of justice, and *Ulrike Grieshofer* discusses a judgment regarding the exemption of the duty of serving as a juror or lay assessor, in which the Administrative Court had concerns against the provided possibility of an appeal from an administrative authority to the president of the criminal court of first instance (VfSlg 15.986/2000). Another example is the so-called "successive authority", whereby an opportunity to file a complaint against the decision of an administrative authority with a court is provided by law. Examples for "successive authority" can be found in the law of tenancy or in the field of energy law, which the second decision of the Constitutional Court discussed by *Christina Hochhauser* and *Franziska Paefgen* is about (VfSlg 18.449/2009). *Konrad Lachmayer* discusses the last judgment, which is also the latest with regard to Article 94 B-VG of the Constitutional Court and relates to criminal proceedings in the context of independent police investigations (VfSlg 19.281/2010). Through an amendment in the Code of Criminal Procedure the legal protection was concentrated at the courts, however without constitutional basis.

1 Cf VfSlg. 2778/1954, 2902/1955, 3236/1957, 3424/1958, 4455/1963, 5630/1967, 6537/1971, 7273/1974, 7882/1976, 9590/1982, 10.300/1984, 10.452/1985, 11.259/1987, 16.772/2002, 17.083/2003, 19.281/2010.

All three judgments underline the formal understanding of Article 94 B-VG as a constitutional provision and do not refer to the separation of powers as a fundamental principle.

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