

CORPORATE IDENTITY AS FOUNDATION OF THE CRIMINAL LIABILITY OF LEGAL PERSONS (1): THEORETICAL PRINCIPLES

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SUMMARY

The different models for the criminal liability of juristic persons reveal a tension between individualist and realistic approaches. For individualists a corporation is the product of a union of individuals. This means that a juristic person can only be held criminally responsible if the conduct and fault of an individual involved in the entity are attributed to the juristic person. For realists a corporate entity has an existence independent of its individual members. The juristic person is blameworthy because its corporate identity or corporate ethos encouraged the criminal conduct. A study of organisational theory reveals that corporate crime may not necessarily be traced to the fault of specific individuals. Corporate criminality often is the result of complex decisions on different levels of the corporate hierarchy and furthermore is encouraged by the manner in which the organisation is structured. Prominent scholars such as the American philosopher Peter A French and the Australian Brent Fisse rejected an individualist approach and attempted to develop models of corporate fault based on the corporate identity idea. The failure of a corporation to take preventative or corrective measures in reaction to corporate criminal conduct is regarded as the basis for corporate fault by these authors. French calls this the "principle of responsive adjustment" whilst Fisse names it the concept of "reactive fault." A more sophisticated model (the "corporate ethos" model), which is also more reconcilable with the basic notions of criminal law, was developed by the American legal scholar Pamela Bucy.

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A corporation will be held criminally responsible if its corporate ethos has encouraged the criminal conduct. The corporate ethos can be established with reference to numerous factors such as the corporate hierarchy, corporate goals, the existing monitoring and compliance systems and the question whether employees are rewarded or indemnified for inappropriate behavior.

KEYWORDS

Criminal liability; doctrine of identification; vicarious liability; juristic persons; organisational theory; corporate identity; corporate culture