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Title

Das Damoklesschwert des strafrechtlichen Untreuebestands über den Stiftungen : zugleich
Besprechung der Dissertation von Tom Lassmann über "Stiftungsuntreue"

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Abstract

For a long time, foundations were spared prosecution in cases of investigation into embezzlement. Consequently, the legal literature on foundations obviously saw no reason to legally assess the foundations' area of action under criminal law. This finding is all the more remarkable because in general foundations, in contrast to corporations and societies, lack an efficient control mechanism that pays stringent attention to the founder's intentions, especially when confronted with embezzlement of the foundation assets. Obviously, the foundations are still governed by the overruling thought that those people who preside over the foundation are 'good people' and are therefore above and beyond any criminal suspicion as far as their actions are concerned. This prejudice which is still cultivated, must however, since the publication of Tom Lassmann's dissertation 'Stiftungsuntreue' (i.e. 'Foundation Embezzlement', Duncker & Humblot, Berlin 2008) be finally laid to rest. Notwithstanding the meager practical material available, the author quite rightly points out that there are no grounds to exclude foundations from prosecution under criminal law, not least because of their

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‘important general preventative control function’. The examination on ‘the actual and central difficulties of prosecution for embezzlement under foundation law’ focuses on the ‘breach of duty’ as a criterion. However, the author must limit the canon of duties enlarged upon in the area of foundations to ‘specific fiduciary duties’ that directly concern the offender's duty to take care of assets. The initial attempt of the Federal Court of Justice (Bundesgerichtshof = BGH) to reduce the breach of specific fiduciary duties to ‘grave’ breaches of duty is quite rightly dismissed by T. Lassmann. However, he also must realize that clearly identified breaches of duty will be the exception rather than the rule. On the background of a rather moderate argument put forward by T. Lassmann concerning the Damoclean Sword of embezzlement that hangs over the foundations, it is more than ever necessary that the law of foundations should investigate the influence of criminal law on foundations in a fundamental examination. In this context, it is worth examining the question on what grounds foundations, and even more charitable foundations, have come into the focus of the Public Prosecutor. Finally, it must be examined whether the virulent ‘criminalization’ of foundations - as shown by T. Lassmann in his dissertation spectacularly titled ‘Stiftungsuntreue’ (‘Foundation Embezzlement’) - is the right way to discipline the foundations and put them back on track. (HRK / Abstract übernommen)