

Summary: The penalty-exempting effect of preventively provided legal information – at the same time, considerations on recourse to § 17 StGB in the case of an unclear legal situation

This thesis deals with the penalty-exempting effect of preventive legal information. With the increasing legal regulation of almost all areas of life, the legal enquiry efforts of citizens willing to act are also increasing. Difficulties arise in situations in which the person willing to act approaches a respondent, receives legal information that negates the law, acts in reliance on this information and the court later considers the action to be unlawful.

A particular challenge exists in the situation – which is extremely relevant in practice – in which legal information is obtained when the legal situation is objectively unclear. If it cannot be inferred beyond doubt from the law whether an intention is lawful or unlawful and the courts have also not yet specified the norm, the risk of incorrect interpretation must not lie unilaterally with the norm addressee. This applies above all if the latter has obtained legal information.

A person who cannot recognise that he or she is committing injustice when he or she commits the act will not be punished. The first part explains the possible indications for exemption from penalty. The legal system guarantees the foreseeability of penalty objectively through the principle of certainty and subjectively through the principle of guilt.

The second part defines the term "unclear legal situation" and deals with the question of whether a legal information can have a penalty-exempting effect even if the legal situation is unclear. It is shown that even in unclear legal situations, recourse can be made to the error of prohibition in § 17 StGB and unclear legal situations cannot be overcome with the help of the prohibition of certainty, the prohibition of retroactivity or by recourse to considerations of reasonableness.

The third part deals with the question of when the person requesting information is in an error of prohibition. It is preferable to affirm an error of prohibition already when the person acting doubts the commission of an unlawful act – more concretely: the unlawfulness of the intention under criminal law. Anyone who receives legal information that negates the law and relies on it is usually in an error of prohibition.

Only those who cannot recognise that they are committing an injustice are blameless. The fourth part of the thesis deals with the question of when the error of prohibition is unavoidable for the person requesting information. Only if the person requesting information may rely on the legal information, the person cannot realise that he or she is committing injustice. After the circle of respondents is determined, on whose expertise and objectivity the person requesting information may generally rely, indications of insufficient expertise and the respondent's bias are developed. The information must also meet certain formal and material requirements. Here again, knowledge of certain circumstances may be an indication that the person requesting information may not rely on the information.

If the person requesting information turns to a respondent from whom he or she may expect competent and objective information and he or she cannot recognise that he or she may not rely on the information, he or she acts blamelessly. The legal information then has a penalty-exempting effect.