

„Geschenkt ist geschenkt, wiederholen ist gestohlen!“

Stimmt das Sprichwort mit der Wirklichkeit überein?

In nächster Zeit werden, wie jedes Jahr, Geschenke verteilt – viele Geschenke.

Weihnachten steht vor der Tür und immer häufiger wird auch schon zu Nikolaus am 6. Dezember geschenkt. Aber auch das ganze Jahr über wird geschenkt. Der Mensch hat sich dazu die verschiedensten Anlässe gesucht: Geburtstag, Namenstag, Hochzeitstag – und selbst eine Totenfeier geht nicht ohne Geschenke an die Zurückgebliebenen.

Wie ist dieses Treiben aber rechtlich zu beurteilen? Ist geschenkt geschenkt und kann man es sich wirklich nicht wiederholen?

Auf der Suche nach der Antwort hilft uns ein Blick ins Gesetz. Denn der erleichtert die Rechtsfindung.* Geregelt ist die Schenkung im Bürgerlichen Gesetzbuch (BGB) und zwar in den Paragraphen 516 bis 534. Sie fragen sich jetzt sicher: „Ist eigentlich alles gesetzlich geregelt? Kann ich noch nicht einmal etwas Schenken, ohne dass ein Paragraphenreiter daherkommt?“

Darauf kann ich nur sagen: „Das liegt an der Entwicklung unseres Rechtssystems. Unser deutsches Privatrecht lehnt sich stark an das Recht im römischen Reich an. Ja, das römische Reich mit den Gladiatoren und Caesar und Augustus und wie sie alle heißen. Demnach ist ein Vertrag die Grundlage für eine Schenkung. Das hat dann auch Eingang in das BGB gefunden, das schon seit dem 1. Januar 1900 gilt.“

Im Gesetz steht, dass der Schenker das Geschenk, was er gemacht hat, zurückfordern darf. Dafür gibt es folgende Gründe:

- 1) Das Geschenk wurde unter einer Auflage gemacht und der Beschenkte hat die Auflage nicht erfüllt. (§ 527 BGB)
- 2) Der Schenker ist verarmt und kann das Geschenk deshalb zurückfordern. (§ 528 BGB)
- 3) Der Beschenkte hat sich einer schweren Verfehlung gegen den Schenker oder einen nahen Angehörigen des Schenkers schuldig gemacht. (§ 530 BGB)

Unter Punkt 1) steht etwas von einer Auflage. Eine

* „Ein Blick ins Gesetz erleichtert die Rechtsfindung.“
(Juristenspruch)

Auflage ist die Verpflichtung, etwas zu leisten. Diese Leistung erfolgt aber *nicht* als Gegenleistung zum Geschenk! Dann wäre die Schenkung nämlich keine Schenkung mehr, sondern eine Dienstleistung oder Tausch o. ä.

Kommt der Beschenkte der Auflage nun nicht nach, kann der Schenker das Geschenk zurückfordern – jedoch nur in dem Maße, wie der Beschenkte es gebraucht hätte, um die Auflage zu vollziehen. Auflagen werden bei „üblichen“ Handschenkungen jedoch nur selten gemacht. Wenn doch, dann ist es häufig nicht notwendig, dass der Schenker etwas von dem Geschenk aufwendet, um die Auflage zu erfüllen. Diese Vorschrift ist deshalb nicht fruchtbar zu machen, um ein Geschenk zurückzubekommen.

Beim Punkt 2) könnte man denken, dass der Schenker arm wie eine Kirchenmaus sein muss. Das ist nicht ganz so. Verarmung im Sinne von § 528 BGB bedeutet, dass der Schenker nicht mehr in der Lage ist, seinen *angemessenen* Unterhalt zu bestreiten oder seinen Unterhaltspflichten für Verwandte oder Ehegatten nachzukommen. Lassen wir uns das auf der Zunge zergehen, merken wir, dass sich durch ein Weihnachtsgeschenk wohl nur selten jemand in finanzielle Nöte stürzen wird, sodass er sich nicht mehr unterhalten kann. Außerdem ist die Rückforderung ausgeschlossen, wenn der Schuldner *selbst* seine Verarmung zu verantworten hat. Folglich ist wohl auch diese Vorschrift nicht der richtige Ansatzpunkt.

Eine weitere Möglichkeit bietet Punkt 3), der auf ethische Grundsätze abstellt. Verhält sich der Beschenkte undankbar gegenüber dem Schenker oder einem seiner Angehörigen, so darf der Schenker die Schenkung widerrufen. Das führt dazu, dass der Schenkungsvertrag im Nachhinein vernichtet wird – der Beschenkte hat etwas ohne (Rechts-) Grund erlangt; der Schenker kann das Geschenk herausverlangen.

Was aber sind grober Undank und schwere Verfehlungen? Dafür gibt es keine genauen Definitionen – leider. Deshalb sind sie sogenannte

GENERALKLAUSELN, Ausdrücke also, die durch persönliche Wertung ausgefüllt werden. Im Endeffekt bestimmt damit der Richter, was darunter zu verstehen ist.

Nach dem BGH ist objektiv eine gewisse Schwere der Verfehlung und subjektiv eine tadelnswerte Gesinnung erforderlich. Entscheidend ist jedoch immer die Gesamtwürdigung unter der Berücksichtigung des Verhaltens des Schenkers.

Das heißt auf deutsch: Der Beschenkte muss etwas machen, was als schwere Beleidigung anzusehen ist. Dabei muss er seinen bösen Charakter zeigen. Das Verhalten des Schenkers ist aber immer mit zu berücksichtigen. Deshalb scheidet häufig ein Widerruf aus, wenn der Schenker den Beschenkten provoziert hat.

Kann das aber die Lösung sein? Die ethisch-moralische Pflicht, zu bestimmten Anlässen wie Weihnachten oder Geburtstag zu schenken, wird durch das Gesetz ausgehebelt, indem sich der Schenker einfach darauf berufen kann, dass der Beschenkte ihm Undank gezollt hat? Und das obwohl die Vorschrift seit dem 1. Januar 1900 besteht, als Ethik und Moral von größerer Bedeutung waren, als sie es heute zu sein scheinen? Das kann nicht sein, denken Sie? Das denke auch ich.

Überlegen wir kurz, wann der Spruch überhaupt Geltung erlangt: Oftmals wird er ausgesprochen, wenn man jemandem (gerade) etwas geschenkt hat: Man fragt, ob man es kurz (!) wiederhaben könnte, aus welchem Grund auch immer. Meist möchte man dem Beschenkten sein Geschenk gar nicht nehmen, sondern es einfach nur kurzer Hand gebrauchen. Verweigert wird einem dies dann häufig scherzhaft mit dem Spruch „Geschenkt ist geschenkt, wiederholen ist gestohlen!“. Es kann aber

auch passieren, dass nach einem Anstandsgeschenk (Weihnachts- oder Geburtstagsgeschenk o. ä.) der Beschenkte etwas Komisches oder Beleidigendes zum Schenker gesagt hat oder er der ethisch-moralischen Pflicht nicht nachkommt, dem Schenker einen Gefallen zu tun und ihm dadurch seinen Dank zu zeigen. Daraufhin fordert der Schenker sein Geschenk zurück. Jedoch ist dies, mit etwas Abstand betrachtet, oftmals überzogenes Verhalten und der Spruch hat durchaus seine Berechtigung. Wie aber löst das Gesetz diesen Konflikt der Ethik und Moral?

Am BGB haben kluge Köpfe insgesamt ca. 25 Jahre gesessen. Es ist also nicht anzunehmen, dass sie diesen Fall übersehen haben. Das haben sie auch nicht; sie haben § 534 BGB entwickelt:

§ 534 [BGB] Pflicht- und Anstandsschenkungen.

Schenkungen, durch die einer sittlichen Pflicht oder einer auf den Anstand zu nehmenden Rücksicht entsprochen wird, unterliegen nicht der Rückforderung und dem Widerruf.

Dadurch werden Schenkungen dem Recht des Widerrufs und der Rückforderung entzogen (Punkte 1 bis 3), die einer ethisch-moralischen, sittlichen Pflicht entsprungen sind. Das sind die anfänglich erwähnten Anlässe, zu denen rege geschenkt wird.

Also folgt das Gesetz der Moral und Ethik und der Spruch „Geschenkt ist geschenkt, wiederholen ist gestohlen!“ hat durchaus seine Berechtigung in den erwähnten Situationen.

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