Legal rationale for a ban on externalisation under German and European property law

by
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Abstract

This paper focuses on the formal institution of property rights and inquires whether property ownership has an inherent limitation with regard to the externalisation of production costs onto society and the environment. In this context the introduction of a ban on externalisation into property law derived from the social function of property acknowledged by constitutional law is investigated.

With an increasing level of abstraction of conveyance of property rights (e.g., share ownership in umbrella funds vs. sole proprietorship) the link between the owner and the object of ownership became more and more tenuous; likewise the allocation of responsibility attached became increasingly opaque. In respect to agency it is therefore assumed that unconstrained opportunities for externalisation leave the rules of exchange undefined, bear a high risk of unfair competition, and with regard to the cost of externalisation allow for free riding.

In modern societies, institutions acting cooperatively in the interest of free market trade, e.g., within the EU, provide protection for goods and enforcement of contracts. But contract negotiation and enforcement in other parts of the world that have lower environmental and social standards, e.g., China, are difficult. Therefore, it is argued that creating a level playing field in the EU requires the development of instruments on domestic markets to fend of unfair competition by actors benefiting from externalisation.

As present (informal) rules fail to effectively prevent corporations externalising their production costs the formal rules of property rights may need revision. Against this background the paper assesses the potential legal rationale and possible obstacles for introducing an obligation of sustainability into German and European property law and amending competition law to force enterprises to internalise externalised costs. Both the case law of the German Federal Constitutional Court and that of the Court of Justice of the European Union offer points of departure.
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1. Introduction: Globalisation, externalisation and the call for limitations of property ownership

Contemporary industrial production processes in the global economic system are characterised by an excessive use of finite natural resources. Businesses are criticised for shifting or externalising the costs of their heavy use of such resources to the community. If over-exploitation of resources were to continue unimpeded at current levels, in the long term, if not in the medium term, this would lead to the greater scarcity of capital and consumer goods which constitute future objects of disposable private property. Continuing to consume the natural resources which are the foundation of all life on the basis of an understanding of property that emphasises the freedom of a private owner to rule over things – an understanding that has been shaped by the free-market social model of the Civil Code – would necessarily lead to private property destroying its own raison d’être as a legal institution, particularly as economic property and raw materials property.

While intensified global competition forces corporations to cut their costs institutional voids in the system of global governance enable them to do so by allowing exploitation and destruction of the environment. Without considering these negative external effects, falling production costs per unit suggest an increase in productivity. The internalization of external cost, conversely, would correct this phenomenon and prevent the depletion of our natural resources. The question thus arises of how to establish a level playing field for sustainable economic development, a playing field where the players and their agents would have both an incentive to comply with the rules as well as the possibility to fend off unfair behaviour of their peers.

In this context the role of the owner as the principal bearing the responsibility corresponding to the economic yield of the ownership of the productive property is key. However, with an increasing level of abstraction of conveyance of property rights (e.g., share ownership in umbrella funds vs. sole proprietorship) the link between the owner and the object of ownership became more and more tenuous; likewise the allocation of responsibility attached became increasingly opaque. In respect to agency it is therefore assumed that unconstrained opportunities for externalisation leave the rules of exchange undefined, bear a high risk of unfair competition, and with regard to the cost of externalisation allow for free riding.

As present (informal) rules fail to effectively prevent corporations externalising their production costs the formal rules of property rights may need revision. The preservation of society’s natural foundations of life as an ultimatum for social self-preservation thus takes on a more precise shape with regard to economic policy, legal policy, and most of all, property policy.

The Scherhorn proposal

In 2012 Gerhard Scherhorn has presented a proposal aimed at promoting sustainable competition and preventing commercial enterprises from externalising ecological and social costs (Scherhorn 2012). As part of its Taking & Giving initiative the Ethical-Ecological Rating research group at Goethe University Frankfurt am Main führter developed this proposal.
sustainability to German property law and amending competition law to force enterprises to internalise externalised costs.

Such a ban goes far beyond the often piecemeal regulations of the past, such as bans on specific production practices or emissions limits for the release of specific pollutants. This is all the more urgent as past efforts towards sustainability have had limited if any impact, leading to a growing depletion of the natural foundations of life and natural resources. The ban is intended in particular to redress the Civil Code’s general neglect of protection for commons. In this context – using the example of Germany – a number of questions need to be discussed:

- Could a legal ban on externalisation be incorporated into the legal framework of the welfare state?
- If so, could an amendment of the regulation of property under civil law be reconciled with the current understanding and functions of property?
- And finally, would this legal reform stand up to the constitutional guarantee of property in Article 14 of the Basic Law (GG).

**Approach**

In Germany, the changing function of property as manifested in the case-law of the Federal Constitutional Court offers a point of departure for the implementation of a ban on externalisation. The social function of property derived from the constitutionally based obligation of property ownership vis a vis the general public (Art. 14 GG) which has been increasingly recognised and acknowledged in case-law and in the legal literature, opens up possibilities for developing a sustainable definition of property. Yet Germany is not the only country in Europe with points of departure for long-term implementation of the proposed ban on externalisation. Some countries, like Germany, set forth a social obligation for property ownership as a constitutional restriction, whereas many others, which do not have such a constitutional principle, at least have constitutionally stipulated sustainability principles that can be drawn upon.

These different points of departure can also be found at the EU level. While the European treaties shy away from property law in view of the divergent national property systems (see Art. 345 TFEU), a discrete concept of property under European law is emerging as evidenced by Art. 17 of the European Charter of Fundamental Rights and the case-law of the CJEU, especially as it relates to Art. 1 of the additional protocol to the ECHR from 1952. This is especially true for the social obligation of property ownership developed by the CJEU for European property law, adapted from the German Federal Constitutional Court.

Among the suggestions to tackle the deficits of globalization that have been put forward is the implementation of a global governance system (Homann 1991) arguing that nobody could reasonably expect managers to come to decisions that would put their firm in a serious competitive disadvantage endangering the firm’s existence in the long run. While this approach focuses on control and enforcement it ignores the question of own-
ership underlying the relevant Agency Problem.\(^2\) However, while a less anthropocentric understanding of property ownership takes into account the ecological requirements and limits of the legal concept of private property the crucial question is not only how to develop and promote such a new paradigm but how to enforce compliance on global markets.

2. The proposal for a legal ban on externalisation

The core of the Scherhorn proposal consists of two elements, namely adding an obligation of sustainability to German property law and amending competition law to force enterprises to internalise externalised costs.

2.1. Property law – Introducing an obligation of sustainability

To introduce an obligation of sustainability German property law should be supplemented as follows by an additional Paragraph 2 in Section 903 of the Civil Code:

“The owner can use the natural foundations of life to which he has access as common goods for his purposes. But he must handle organic resources in accordance with their nature and ensure that these resources can regenerate themselves. He must also replace used inorganic resources either with other equivalent resources or renew them by means of recovery (recycling in closed loops).”

Similarly Scherhorn postulates to amend Art. 17 of the EU Charter of Fundamental Rights\(^3\) by adding a third paragraph (Scherhorn 2012).

2.2. Competition Law - Instruments to fend of unfair competition

In modern societies, institutions acting cooperatively in the interest of free market trade, e.g., within the EU, provide protection for goods and enforcement of contracts. But contract negotiation and enforcement in other parts of the world that have lower environmental and social standards, e.g., China, are difficult. Therefore, it is argued that creating a level playing field in the EU requires the development of instruments on domestic markets to fend of unfair competition by actors benefiting from externalisation.

Therefore, the mandate should be supplemented with a ban on passing off externalisations as market performance. Consequently, Section 4 of the Act Against Unfair Competition (UWG) should be amended adding a Para. 12 as follows:

\(^2\) I would further argue that with a different, more decentralised ownership structure, i.e., comprising citizens, consumers and employees as owners of productive property, shareholder value ceases to be the only determining variable; when, e.g., consumers become co-owners of utilities their double role is inclined to change their behaviour of management. This question, however, lies out of the scope of this article and needs to be investigated separately.

\(^3\) Art. 17 - Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.
(Unfairness shall have occurred in particular where a person) “12. gives the impression that a low price or a special quality or feature of a product is attributable to the provider’s market performance although the benefit is derived from failing to undertake efforts to preserve used natural foundations of life according to Section 903 Par. 2 of the Civil Code (BGB).”

The competitors or competing businesses themselves should monitor such a ban on externalisation, as they are more capable than government authorities at estimating a business’s externalisation costs. Any competitor, trade association, chamber, environmental organisation or consumer organisation could then sue businesses suspected of violating Section 4 Par. 12 UWG before the responsible Regional Court according to Section 8 UWG. The defendant business must then show that it is not guilty of prohibited externalisation, i.e. that it in fact internalised the costs. If the defendant business cannot prove this, competitors can claim damages from the defendant in accordance with Section 9 UWG and compensation for costs incurred to assert this claim in accordance with Section 12. In addition, the responsible court could in accordance with Section 12 UWG grant the petitioner the right to make the verdict public at the expense of the losing company.

3. The functional context of property rights as a formal institution

The functional context of property rights play a key role with regard to the possible form of the ban on externalisation under property law on the one hand and a possible violation of the basic right to property on the other. Following introductory considerations of legal policy (3.1.) and definitions (3.2.), this section describes inherent limits of the right to property (3.3.).

3.1. Property and the welfare state

The current model of the welfare state has faced a crisis of funding and legitimacy since German reunification, but especially against the backdrop of the sovereign debt crisis in Europe. In the countries of southeast, south and southwest Europe hit hardest by the crisis, but also in Germany, there is cause for concern that the welfare state cannot be sustained over the long term in its current form and scope without far-reaching reforms.

Growing asymmetries in the development of income, which have been widely and justly criticised, and associated asymmetries in the ownership structure as documented, e.g., in the Federal Government’s latest Poverty and Wealth Report, threaten social equilibrium and can call into question both the social consensus and social peace – one of the highest legal goods of a community in every political system.

These kinds of unfavourable developments contradict a wide variety of considerations, especially:

- Legal ethics and constitutional law (human dignity, equality)

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5 Vgl. Der Vierte Armuts- und Reichchtsbericht der Bundesregierung, vorgelegt vom Bundesministerium für Arbeit und Soziales am 6. 3. 2013 (ISSN 1614-3639), Zusammenfassung S. XI und XI.
• Labour law and social legislation (right to fair and equal pay for equal work and adequate means of subsistence)
• Socioeconomic considerations (preservation of work force as “human capital” and economic factor)
• Last but not least, overall social considerations (preservation of social and civic peace)

Neither are they compatible with the constitutional principle of the welfare state (“social state” Art. 20 Par. 1; 28 Par. 1 S. 1 GG), nor with property ownership’s intrinsic obligation to society derived from the institution of private property as such (as per Art. 14 Par. 2 S. 1 GG) and the obligation to serve the public good when exercising the right to it (as per Art. 14 Par. 2 S. 2 GG), nor with the principle of sustainability, which, as an inherent constitutional principle through Art. 20a and 109 Par. 2 and 4 GG, has for some time been equally acknowledged as valid constitutional law.

Conversely, one could derive the need to introduce legislation for introducing a legal obligation to use property sustainably, especially from

• The general principle of the “social state” in Art. 20 Par. 1; 28 Par. 1 S. 1 GG and the special social obligation of property ownership in Art. 14 Par. 2 S. 1 and 2 GG;
• Legislators’ protection and warranty duties derived from environmental protection and its inherent principle of sustainability, which are constitutionally mandated according to Art. 20a GG.6

However, a legislative initiative of this sort would have to be constitutional within the framework of the currently applicable definition and content of property rights and the system protecting it.

3.2. Property, a historical, not a logical category – Definition and contents

Property ownership is a fundamental legal institution of every developed economic society and legal community and is a key determinant of its economic, social and legal structures.8 A key issue in the present discussion about a legislative enactment of the constitutional principle of sustainability is its compatibility with and integration in the currently applicable definition and content of property.

The discussion focuses on whether, and if so, to what extent, the benefits that owners of production facilities enjoy from natural resources (externalisation) and from the general public’s foundations of life simultaneously oblige such owners to undertake efforts to preserve these natural foundations of life (internalisation) to compensate for their use of these resources. The demand for an obligation on the part of owners to use property sustainably stands in opposition to the argument of a violation of the owner’s constitutionally guaranteed sphere of protection. Such a violation could pertain to the property or shares of business owners, co-owners, and shareholders as partners or shareholders.

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7 Zu diesen Scholz in MDH (2013), Art. 20 a, Rdn. 5 ff., insofern jedoch widersprüchlich und nicht folgerichtig, als er in Art. 20 a keinen Verfassungsauftrag sehen will.
8 Hierzu und zum folgenden m. w. A. Roggemann, Mitarbeiterbeteiligung und Eigentum, Berlin 2010, S. 61 ff.
Civil lawmakers and the framers of the constitution refrained from defining property in Section 903 BGB and Art. 14 GG; rather, their definition is presumed, leaving it open for developments and changes in the function of property as a legal institution. They thereby confirm the fact that “... property is a historical, not a logical category”.9 The legal quality of property law as a basic and human right has been recognised for a long time,10 and property as a legal institution traces its roots far back into the ancient world.11 At the same time, property law and the framework of property rights are not constants but variables that depend on historical and socioeconomic developments – thereby also allowing their future development and change in a post-industrial European welfare state.

For the purpose of civil law, property regulates the allocation of physical goods to legal entities, making it an essential part of the relationship between humans and their environment. Although Section 903 BGB limits the content of property to objects and animals within the meaning of Section 90 and 90a BGB,12 the much more comprehensive constitutional guarantee of property comprises not only objects but all other assets under private law as well as those subjective legal positions under public law acquired through one’s own achievements that their owner can use to serve private interests.13

The scope of the right to physical property as per Section 903 BGB concerns the relationship of the owner to other legal entities under private law. The scope of the right to property protected by Art. 14 GG primarily concerns the relationship of the owner to the state.14 As a result of the far-reaching third-party effect15 of the Basic Law and the direct effect that the Federal Constitutional Court’s case-law (in particular on property) has on the entire legal system, the effect of the constitutional guarantee of property nevertheless extends beyond this classic scope of a basic right as a right of defence and thus also shapes the system of private law as such.16

A two-fold effect is ascribed to the guarantee of property in Art. 14 GG:

- As an individual guarantee it is a subjective right protecting the individual owner’s property in its current state.
- As an institutional guarantee it secures the existence of the legal institution of property as private property within the legal system as a whole.17

Both protective purposes are fixed in terms of their content and time, making them neither total nor absolute:

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12 Der eigentumstheoretische Sonderfall des menschlichen Körpers bleibe hier außer Betracht.
15 The so-called “Grundrechtsdrittwirkung”, i.e., that basic or constitutional rights are at least indirectly valid also between private parties.
16 Beispiel: BVerfG v. 26. 5. 1993, 1 BvR 208/93, BVerfGE 89, 1, 6.
17 BVerfGE 24, 367, 389.
• In terms of content, the protection of property only includes what the current legislation on property defines as property by virtue of its legal power to define pursuant to Art. 14 Par. 1 S. 2 GG.\(^\text{18}\)

• In terms of time, the extent of protection only includes the property in its currently existing state, not chances of profit, expectations or future outlooks.\(^\text{19}\)

This limit on the content of the constitutional protection of property is particularly important for assessing the proposed amendment to the law involving the addition of a supplementary obligation of sustainability in Section 903 BGB (see above section 2.1.). As future profit expectations do not fall under the constitutional protection of property, introducing a supplementary law of this type is not unconstitutional just because it – as should be assumed – reduces existing chances for and future expectations of profit. This is true as long as the amendment does not interfere with the very essence of the basic right (more on the system of restrictions and essence of property ownership in Section 4.3.).

3.3. Inherent legal limitations of the right to property

Based on the original object of property under civil law, the core of the content of property is seen in the comprehensive allocation of an object, and thus as an absolute “right of rule over an object”\(^\text{20}\) which is directed at and excludes all other non-entitled persons or entities.

This common formulation is imprecise insofar as all rights from legal relationships can only exist between legal persons or entities, not between these and objects.\(^\text{21}\) The content of the so-called “right of rule over an object” therefore also constitutes an interpersonal legal relationship in the form of a current or potential personal right of rule as an owner’s right of rule \textit{vis-à-vis the non-owner}, who is excluded from rule over the same object. If the owner has transferred its right of rule over the object to the non-owner, the latter is still subject to the owner’s will as regards rule over the object. Property therefore represents an essential social, economic and political power factor.\(^\text{22}\)

This understanding of property ownership not only as an absolute right of rule over an object to the exclusion of all non-owners but a comprehensive, that is to say “in itself” seemingly unlimited absolute right of rule over an object in relation to nature and its nonhuman organisms and resources, reaches its philosophical extreme (which endures to this day) in Idealism, which sees property as “the external sphere of freedom” of the individual,\(^\text{23}\) because two persons who, in distinguishing themselves from each other,


\(^{19}\) Vgl. BVerfGE 68, 193, 222; 74, 129, 148, dazu Pieroth/Schlink, a. a. O., S. 227.

\(^{20}\) More details in Damian Hecker, \textit{Eigentum als Sachherrschaft}, Paderborn 1990, p. 220 ff. with a critique of this anthropocentric understanding of property, which at its core is aimed at absolute rule over the world of physical goods and nature, on p. 243 ff.

\(^{21}\) Dazu Säcker, MünchKomm 6. Aufl. 2013, § 903 BGB, Rdn. 8, unter Hinweis auf Oertmann, Der Dinglichkeitstheorie, Iherings Jahrb. 31 (1892), 415 ff., 430.


“would only exist for each other as owners”. This notion of property as a material prerequisite for the realisation of individual personal freedom continues to shape the theory and practice of property to this day: “In case-law and main doctrine, the close connection between property and freedom is a chief underlying reason, if not the actual underlying reason, for the guarantee of property”.

The power of ownership as an individual right is seen positively as a right to possession, use and disposal and negatively as a defence right that excludes all non-entitled others. This absolute, idealistic conception of property, which is characterised by “total (undivided), abstract power to rule over an object and absolute judicial protection”, deserves critical examination and possibly legal reform in light of growing distortions and unfavourable developments evident in the highly asymmetric social structures of a small society of owners and a large society of non-owners and in ecosystems that are being exploited to depletion. There is all the more reason for this in the face of a one-dimensional, anthropocentrically reduced and therefore erroneous view of things, which has lost sight of the big picture of the interdependent nature of life on Earth, whether one calls it creation or the ecosystem: “Legal dogma has all too often seen human dignity solely in freedom. It needs to consider human beings as potential property owners capable of subduing the Earth.”

The explosive quality of the reform proposal by means of supplementing Section 903 with a legally binding sustainability postulate lies in the fact that it pits the anthropocentric, abstractly limitless claim that humans make to rule over objects (“deal with the thing at one’s discretion”), against a legal limit also with regard to nature and the environment as parts of the world of physical goods over which they rule; a limit that has always existed and been inherent to every right to property but has not been perceived as such. This would provide the fundamental criticism levelled from the outset against the BGB’s socially deficient, free-market approach with an instrument for interpreting and applying property law.

4. Property – a multifunctional legal institution in flux

To assess the feasibility of a ban on externalisation it is indispensable to take account of the evolution of the institution of property and its current state as reflected in constitutional law. Therefore, this section describes the sub-functions of property (4.1.), giving special attention to developments in the case law of the Federal Constitutional Court and the associated shift in the function of property, especially its social function. After ana-

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24 So a. a. O., § 40, S. 104.
29 However, it is hard to overlook what are the probably far-reaching consequences, especially in the economic realm, and even harder to estimate and calculate them – which is why they require additional, transnational numerical modelling, if possible.
lysing the subsequent differentiation of the initially uniform definition of property (4.2.),
the proposed amendment to Section 903 BGB is positioned relative to the system of limits for and essence of property (4.3.).

4.1. Changes in the function of property

Property is a multifunctional legal institution in flux.\(^{30}\) The individual functions of property can be briefly characterised and summarised as follows.

4.1.1. Twofold social-economic function of property

Property is both a legal and an economic category. The general assignment of liability and risks is one aspect of this duality. On the one hand, the economic essence of property is the owner’s right to receive the income it earns.\(^{31}\) On the other hand, private property has the economic function of both assessing and assigning economic risk and liability; it is the foundation of a credit system based on collateral, in particular on mortgage of private real estate ownership. The legal institute of property not only provides the indispensable frame for a market economy and competition, it also delivers the basis and the point of connection to related economic categories: “Property does not exist outside the economy, but it rather gives significance to all terms and concepts that are meaningless in non-ownership economies; this applies especially to interest, money and credit, but also to value, price, profit and market”.\(^{32}\)

Another aspect of this duality is the delimitation of the individual in its relationship to society. After all, the limits of inclusion and exclusion are often congruent to those of owners and non-owners, as social integration in the modern consumer society increasingly entails economic opportunities, or in other words, is facilitated by property ownership. At the same time property also furthers an important emancipatory impulse – of distinguishing oneself from others – which is a mirror image of its power to enable participation.\(^{33}\) Both aspects are inextricably linked to the significance of property ownership for the political stability of a functioning democracy. Early evidence of this can be found in Alexander Hamilton’s Federalist Papers of 1788: “[...] power over a man’s support is a power over his will.”\(^{34}\) This makes economic independence an important condition for the development of personal and political freedom.

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30 Zu den einzelnen Eigentumsfunktionen näher Roggemann, Mitarbeiterbeteiligung a. a. O., S. 64 ff., 69-
31 L. O. Kelso and M. J. Adler, ”The Capitalist Manifesto“, Random House, 1958, p. 15; referring to Pollock v. Farmers’ Loan & Trust Co., United States Supreme Court Reports, Vol. 157, 1895, p. 429ff: ”For what is the land but the profits thereof? ... A devise of the rents and profits or of the income of lands passes the land itself both at law and in equity“.
33 Vgl. Charles A. Reich, Yale Law Journal, April 1964: „[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrational and ‘antisocial’ activities are given the protection of law. ... “.
34 Vgl. A. Hamilton, The Federalist Papers Nr. 73, 1788: „In the main, it will be found that a power over a man’s support is a power over his will“.
4.1.2. Sub-functions of property

In this context four legal functions of property may be distinguished:\(^{35}\)
- the (primary) triple legal force of the model proprietor – to own, to use and to dispose exclusively;
- the right to receive the entire yield and to assume the liability and risks – the “economic function”;
- the guarantee of personal rights\(^{36}\) and freedom,\(^{37}\) the “individual function”; and
- the integrational or “social function”.

These legal functions of property and the constitutional principles backing them give rise to forces that are in a permanent state of tension and need to be balanced against each other over and over again.

**Figure 1: ...**

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\(^{36}\) “[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrational and ‘antisocial’ activities are given the protection of law . . . .”, Charles A. Reich, *Yale Law Journal*, April 1964.

\(^{37}\) “In the main, it will be found that a power over a man’s support is a power over his will”, Alexander Hamilton, *The Federalist Papers*, No. 73, 1788.
4.1.3. Focus on the social function of property

In positive law, the social function of property is clearly anchored in the constitutional principle of the welfare state (Art. 20 Par. 1 GG) and in the social mandate and public welfare clauses of Art. 14 Par. 2 S. 1 and 2 GG. In a series of landmark decisions, the Federal Constitutional Court accordingly specified the contents of property law: On the one hand it broadened the extent of protection of the Basic Law's guarantee of property in line with the needs of our contemporary free market society as well as the requirements of the principle of the welfare state; on the other it more clearly defined and narrowed the limits of property and of the exercise of the right to it that result from its social function. The following decisions in particular illustrate this interpretational development, which can be regarded as a step forward from the viewpoint of the welfare state:

(1) The "Apartment Misuse decision" of 21 Jan. 1974 (BVerfGE decision 38, 348) goes back to a case over the transformation of an apartment building into a brothel. The owner was fined for violating the legal prohibition to misuse housing space.

The Federal Constitutional Court declared the legal prohibition of misuse to be constitutional. "The constitutional requirement to take the public welfare into account while using private property (Art. 14, Par. 2, GG) also includes the precept of consideration for the interests of those people depending on the use of the relevant ownership objects (FCC decision 37, 132, 140). This reliance determines a social relation and a special social function of these objects of ownership."

(2) In the "Codetermination verdict" of 1 March 1979 (1 BvR 532/77, BVerfGE decision 50, 290) the Federal Constitutional Court declared the expansion of employees' codetermination stipulated by the Codetermination Act of 4 May 1976 to be constitutional. In German corporations with more than 2,000 employees, shareholders and employees each nominate half of the members of the supervisory board with the chairman being chosen by the shareholders. In cases of conflict the chairman has the casting second vote.

In this heavily debated ruling, the court argued that constitutionally protected property is characterised by its service of private interests, i.e., assignment to a legal entity, and that it has the task of guaranteeing this entity freedom in the sphere of property law. However, the Federal Constitutional Court distinguishes with regard to the function of property and its constitutional protection depending on whether it directly serves to protect one's personal freedom or not. "The authority of the legislator to determine content and limitations of property is the broader the more the object of ownership is part of a social relation and serves a social function." Although the protection of Article 14 of the Basic Law also includes share ownership and ownership of enterprise holdings, the restrictions resulting from the Codetermination Act have to be accepted as a determination of content and limitation of property within the range of the justified social obligation of share ownership in major enterprises.

(3) The famous "Gravel Pit decision" of the Federal Constitutional Court of 15 June 1981 (BVerfGE decision 58, 300) is seen as an important and often discussed turning point in jurisdiction. A property owner who had been excavating gravel on his properties since

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39 The acronym „BVerfGE” stands for „Bundesverfassungsgerichtsentscheidung”, i.e., decision of the Federal Constitutional Court.
1936 was denied the permit that he applied for to continue his excavations by reason of the Water Resources Act, as the excavations were believed to threaten the drinking water supply of a nearby town. He filed for damages but this was denied as well. The court declared the limitations of land ownership by water protection law to be constitutional: “The constitution advises the legislator to create a property system, which respects both private interests of the individual as well as those of the public.” (…) “The guarantee of private property as a legal institution prohibits that such areas are excluded from private law, which are the elementary core of constitutionally protected economic activities... However, the guarantee of the legal institution will not be infringed if goods necessary for the general public to secure public welfare interest and protection from threats, are allocated to public law and not civil law.” (p. 339).

This change in the function of property to the benefit of the welfare state, validated by the Federal Constitutional Court, documents the open process of development that the legal institution of property is subject to. This process of interpretation needs to be supplemented and continued with an ecological constitutional principle of sustainability. It remains to be seen if and when constitutional judges will shape the law to lead to a similar ecological change in the function of property. The introduction of a ban on externalisation could accelerate this much-needed process of development.

4.2. “Uniform property” and its differentiation

The prevailing opinion still assumes that property has uniform content – content that does not distinguish between objects of property, i.e., different items of property (such as movable objects and real property) or subjects of property, i.e., different holders of the right to property (such as homeowners or shareholders).

This concept of property has been rightly criticised as “general and empty” and there have long been calls for it to be replaced with a differentiation in the concept of property and the legal consequences ascribed to it commensurate with the “gradation of different objects of property” and their “modified, qualitatively different assigned positions”. Graduated concepts of property with different types of property were most commonly developed under the influence of the community-oriented legal ideologies of Nazism (after 1933) and state socialism (after 1945). The concept of doing away with private

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41 On the point of departure “that a central, unified concept of property rests on a basic legal policy decision”, see Westermann/Gursky/Eickmann, SachenR, 8th ed. Heidelberg, Munich, etc. 2011, p. 42; for a clearer presentation see Westermann, 2nd ed., Karlsruhe 1953, p. 112 f. with references to preceding contrary opinions. For an example of a normativistic understanding of the concept of property that negates socioeconomic prerequisites see Palandt/Bassenge, Section 903 BGB, Par. 1: “as a formal assigned concept it (the concept of property) is unchanging and identical for all things”.
43 The socialist civil law of the GDR, used here to represent other legal systems in socialist states, knew individual property in the form of personal (consumable) property, the “dying” form of private property, and three other forms of collective property manifested as state property (public property, state-owned enterprises), co-operative property (agricultural and trade co-operatives), and social property (parties, unions, sporting associations). More on this in Roggemann (ed.), Eigentum in Osteuropa, Berlin 1996, p. 24 ff.
ownership of the means of production, which the economic systems of state socialism aspired to achieve, and did achieve to a large degree, turned out to be unsuccessful. Instead of the extreme of the isolated individual, the other extreme, the Volksgemeinschaft, becomes the point of departure and focal point of the property system for a time. The end of state socialism a quarter of a century ago launched a broad renaissance of private property in Central and Eastern Europe with privatisation and reprivatisation of state economies.

Three main forms of property appear in the economic dealings of today’s social market economy (see also figure ? above):

- Private property in a narrow sense guarantees personal and economic freedom.
- Incorporated property organises economic might independently of the individual capacity of the single shareholders.
- State property ensures a minimum of equality for all citizens.

Corporate property ownership constituted in companies with share capital did not become significant until the broad introduction of limited liability in the second half of the 19th century. This model introduces the possibility of making ownership separate from the management of a company but at the same time can result in a loss of direct control (known as the principal-agent problem).

The form of the ban on externalisation under property law presented for discussion here can be justified following from what has been said as a consequence of the social obligation of property defined in Art. 14 par. 2 GG. For a long time, it has been evident and increasingly recognised by property theory that the function of property has a specific “social relation” beyond the simple “relation to things”; it thus transcends the simple physical control over objects that implies ownership and subordination of nature and in this dimension is critically important for social integration as an element of social stability, democracy and economic justice. Further adoption by jurisprudence of recent insights from the social sciences, especially sociology and political science, as well as ecology, could strengthen this trend.

The Federal Constitutional Court’s property case-law, especially its landmark codetermination ruling of 1 March 1979, pointed the way to a solution to the dilemma of a fossilised concept of property and to a path for the crucial further development of property rights and the gradual correction by the welfare state of the alarming rise in undesirable developments in the ownership structure and the economic and social power

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45 The system of property in the socialist state failed with its dysfunctional assignment of shared or just rudimentary owner competence over state-owned enterprises and state administrative bodies and with the dissolution of the concept of combined responsibility, divorcing the individual, decentralised power of disposal and (personal) owner risk.

46 As in Nazi Germany ... ;

47 So Hecker, a. a. O., S. 245.

48 See Ferguson, Niall (2009): The Ascent of Money, Penguin Books; the company with share capital first appeared as a business structure in Great Britain during the late 16th century.


50 1. 3. 1979, 1 BvR 532/77, BVerfGE 50, 290 = NJW 1979, 699.
structures that result. From the functional context addressed in this decision, in which an object of property serves either to directly secure personal freedom (e.g. in a residence used by oneself) or – merely – to generate income, to engage in commercial activity and to serve general economic interests, one can set up a ranking in line with the Federal Constitutional Court and deduce from “different assigned positions” and assigned rights a heterogeneous power of definition on the part of lawmakers:\(^{51}\)

**Figure 2:** ...

**Increasing social relationship**

Owner as defined in civil law (personal property)

Owner as defined in civil law (land, houses, means of production)

Owner as defined in civil law (joint owner, partner, shareholder)

Non-owner as defined in civil law (occupant, user, tenant)

Non-owner (contract partner, employee)

Non-owner (interested party, neighbour, passer-by, co-user of nature)

Non-owner (rightful claimant, pensioner, unemployed person)

**Decreasing relationship to material things**

Home ownership (apartment ownership)

Land ownership

Direct ownership of the means of production

Ownership of the means of production mediated by company law\(^ {52}\)

Valuable private legal positions (assets)

Pension or other social entitlement under public law


-> A decreasing personal material relationship between the owner and the property object

-> corresponds to an increasing social relationship between society and the property object.

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\(^{52}\) In this context see P. Badura, “Eigentum”, Handbuch des Verfassungsrechts, § 10, p. 386: “In large companies, the personal relation to individually exercised ownership rights is more or less weakened. [In this case] it is evident how much this economic property is related to society.”
This context provides grounds for a corresponding growing authority on the part of lawmakers to define property as well as to limit the exercise of property rights. Within this system of coordinates, case law also has a broad range of pro and contra arguments for conflict resolution at its disposal. An amendment to Section 903 BGB can been seen as a continuation of this line of development.

4.3. System of restrictions and essence of property ownership in the context of the proposal

Property rights take effect both as a subjective right in its concrete manifestation of a subjective right enjoyed by individual owners and as a legal institution and objective component in the market economy of a welfare state. Their extent unfolds in a system of content determination, restrictions and “restrictions on restrictions” as follows.

**Determination of content by lawmakers (Art. 14 Par. 1 S. 2 GG); considering**

- The “interests of the public” (Gravel Pit decision of the Federal Constitutional Court)
- The principle of the “welfare state” (Art. 20 Par. 1; 28 Par. 1 GG) as a general limit on content
- The social obligation of property ownership (Art. 14 Par. 2 S. 1 GG) as a special limit on content
- The obligation to serve the public good as a specific limit on the exercise of the property rights (Art. Par. 2 S. 2 GG)

**The restrictions on this authority of lawmakers to determine content and potentially set limits (so called restrictions on restrictions) are:**

- Essence guarantee (Art. 19 Par. 2 GG)
- Principle of proportionality
- General abstract legal regulation (no expropriation)

**The effect of the essence guarantee as well as the individual and the institutional guarantee of property ownership is seen**53 in

- An inalienable “minimum content” and “core stock” of owner powers, especially the power of disposal
- An ongoing service of private interests (minimum of a “yield on property”)
- An indefinite duration of property

This essence guarantee of property, especially the – in theory – “eternal claim” it contains in contrast to the in principle time-barrable claim under the law of obligations at the same time makes the institution's constitutional guarantee of private property sketched out above a primary argument – hitherto unacknowledged in property theory – for the amendment of Section 903 BGB under discussion here for the introduction of a binding regulation on exercising the right in consideration of the sustainability principle: Continuing to legally allow the unrestricted exercise of the right to property in dis-

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posing of natural resources (in terms of natural resources consumed in the production process, a process that at the same time always necessarily represents a process of property production) has wide-reaching consequences. It not only excludes, according to current legal opinion, other non-beneficiaries from accessing things as per Section 903 S. 1 second half BGB and from participating in this process of property production. But with rising consumption and ultimately the depletion of the resources needed for the production process, continuing to exercise the right in this way inevitably leads to a foreseeable curtailment in the production process and the incremental abrogation of private property altogether.

**In short:** Without legislative content determination by means of introducing a sustainability principle into property law, private property as productive property would eliminate itself in future by using up the resources on which production depends. The constitutional guarantee of private property as economic property would then be “groundless” in the truest sense of that word, i.e., without material support.

5. **Is there legal justification for a ban on externalisation under property law?**

Support for a ban on externalisation begins with Federal Constitutional Court case law on the social obligation of property ownership, discussed above:

(i) To justify the constitutionality of a ban on externalisation, the general fellow citizens’ dependence on the general public’s basis of life is grounds for social relevance. Here, the point of reference for the constitutional demand that private property be used for the public good (Art. 14 Par. 2 GG, see above Apartment Misuse decision by the Federal Constitutional Court) encompasses the mandate to consider fellow citizens’ claim to an intact environment. Such consideration would then manifest itself in a sustainability mandate with a corresponding ban on externalisation.

(ii) Although in conflict with Article 14, a ban still would be legally permissible as an amendment of the definition of property and therefore constitutional. Here it is important to consider the degree of conflict. As the bond between the owner and the thing owned becomes more attenuated the power of the legislator to define property becomes broader. While it is narrow with personal property it for example is broader with share ownership (see the above Codetermination ruling by the Federal Constitutional Court); this leads to an equally far-reaching power of definition with regard to the conflict between share ownership and a ban on externalisation.

(iii) Legislative amendments of this type and design would not create a liability for compensation – which would be the consequence of an act bordering on expropriation (“enteignungsgleicher Eingriff”), for instance. If the legislator can limit the right to property– without compensation – when amending the definition of property justified by the protection of natural resources (see Gravel Pit decision of the Federal Constitutional Court above) it is implicit that he may make the use of property contingent on internalisation. In the case cited, the
court’s definition of property even made the object of property economically worthless.

That being said, a ban on externalisation must still be judged from the standpoint of a balanced relationship between the conflicting interests of the parties. The Federal Constitutional Court has considered this multifunctional effect of property in terms of its social impact a legal policy task for lawmakers who define and restrict property rights:

“Lawmakers who define the content and limits of property do not enjoy unlimited creative freedom (cf. Constitutional Court decisions 101, 239, 259). When fulfilling the task of defining that Art. 14 Par. 1 Sentence 2 of the Basic Law assigns to them, they must take account both of the constitutionally guaranteed legal status of the owner and the mandate regarding a socially just property system that follows from Art. 14 Par. 2 of the Basic Law, and so they must provide a just compromise and even balance between the parties’ legitimate interests. Giving preference or disadvantage to one party is not in agreement with the constitutional ideas of socially bound private property.”

The key issue here is who should be subject to the ban on externalisation. An informed observer would assume that enterprises, especially corporations and similar business entities such as limited partnerships, would be most affected. For this reason, the following section focuses on the conveyed ownership of means of production, purposely excluding crafts, trades and the service sector. Thus in the context of a balanced relationship between the interests of participants, the specific form of share ownership of productive property on the one hand and the manifestation of the social function in the relationship between (share) owners and managers on the other hand is of particular significance.

5.1. Ownership and control of productive property

With an increasing level of abstraction of conveyance of property rights (e.g., share ownership in umbrella funds vs. sole proprietorship) the link between the owner and the object of ownership became more and more tenuous; likewise the allocation of responsibility attached became increasingly opaque. The growing separation between property rights, ownership, and the control of productive property has long been considered as a problem, as the following quotations from the 1950’s illustrate:

“In the most important sectors of our political economy, most individuals are in the process of being effectively separated from any discernible ownership relation to industrial property. That relation is tenuous enough when individuals are actual stockholders. It ceases to exist when the individual becomes a contract-claimant for the pension or other benefits he expects to receive through a trust fund or other similar institution which holds legal title to the stock and other corporate securities making up its portfolio.”

And referring to the above:

“This notion from the late ’50s that ownership has been divorced from control of productive property today has become commonplace. The evidence is now before us that, with the advent of pension trusts, mutual funds and the large accumulation of corporate...

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54 In seinem Beschluss vom 22. 2. 2001 – 1 BvR 198/98. Vgl. auch BVerfGE 101, 54, 74.
stock in the hands of bank trustees, ownership itself as an operating reality is diminishing. We have reached a stage in the evolution of property – speaking only of productive property – where the individual is an owner because he possesses a piece of paper which says he is. The sole advantage left to the possessor of the paper, however, is the right, under certain circumstances, to receive income.\(^6\)

Because of economic differentiation, particularly the rise of the business corporation, earlier simple forms of property acquisition and use by the typical owner holding possession have become inadequate. This has led to conventional forms of economic property (esp. with regard to share ownership) becoming increasingly abstract. Equitable ownership leads to a situation where the possessor holds the right to (but not abusively) use, possess and dispose; the formal owner, on the other hand, does not have the right of physical control over the object of ownership ("right of rule over an object"), but merely an abstract control right which is in no respect identical with the typical rights of a model owner.\(^7\)

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57 Consequently the legislature attempted to deal with the ownership by way of security differently than with "real" ownership, e.g., when passing the new insolvency code in Germany, led to accusations of expropriation.

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Figure 3: ...


The original corporate context of liability was therefore attenuated by concentration of capital, e.g., investment funds, often international, that are largely disconnected from
corporate liability of an identifiable subject of ownership and thereby severed from its general and particular social ties. These constitute a new form of international, supra-governmental equity ownership and a resulting anonymity of private property with negative consequences. As globalisation continues to lengthen value chains international anonymous ownership makes more and more difficult to identify the direct (negative) consequences of production processes. To achieve the above-mentioned balance of interests particular account must be taken of this unique structure and its liability-related deficits.

5.2. The ban on externalisation as recognition of property’s social function

In this context the ban on externalisation is a mirror image of the ever more abstract relationship between the enterprise as a commercial entity and its shareholders. On the one hand there is the relationship between business operations and the actual impact of externalisation, which in becoming more and more abstract is correspondingly more difficult to identify. On the other hand we have the owner, who – like the non-owner – lives in the very same environment which increasingly suffers from long-term, irreversible deterioration. Just as something like protesting against the perceptible local impact of externalisation can no longer adequately reflect how fellow citizens depend on the common natural foundations of life, there is a need for the law to re-define property of legal entities (which in turn confer share ownership to their shareholders).

This basic idea is also to be found in the case law of the Federal Constitutional Court. According to the principles of the Codetermination ruling (see above), the power of lawmakers to intervene by defining the substance and restrictions of property grows apace with the subject’s increasing social relevance, as the Federal Constitutional Court has regularly concluded in its case law. Unrestrained externalisation affects everyone, not just local communities and consumers. The survival needs of present and future generations for resources and environmental sustainability therefore becomes of overriding social relevance. With this case law, the Federal Constitutional Court implicitly but inexorably modifies the prevailing notion of “uniform property”. At the same time it confirms – and legitimates – the individuals right to private property acquired through his or her own work. Its constitutional claim to protection as per Article 14 of the Basic Law decreases proportionally with the growing depersonalisation of property as a result of anonymous “owner rights positions” brokered by multiple intermediaries as financial products remote from the thing owned. The decisive factor, therefore, is not so much the non-transparent value chain but the outflow of profits via the investor chain paired with the dwindling possibility of the individual shareholders influence.

This is where the ban on externalisation under property law comes into play – balancing interests in recognition of property’s social function. It compensates for the ever-weaker link between formal owners who are not able to exercise their legal property rights or their corresponding social obligations on the one hand and the corporate property administered by management on the other, thereby re-establishing equilibrium. In other words, as a consequence of the principal-agent problem, the ban on externalisation can

58 Grundlegend hierzu das „Mitbestimmungsurteil“ des BVerfG vom 12. 2. 1979 (BVerfGE 50, 290, 342); dazu Thormann (1996: 188 ff.).
59 See Locke ..
help to ensure a minimum of sustainability by restraining market forces. Intervention on the basis of the (extended) social function of property also agrees in principle – as shown – with the case law of the Federal Constitutional Court and therefore would be legitimate pursuant to Article 14 Par. 1 Sentence 2 of the Basic Law.

6. Comparison with property law in other European countries

The transnational dimension of implementing this ban on externalisation raises the question of whether such a ban in other EU Member States would also be justified. This brief analysis cannot discuss the specific details of property law in every European country. Instead, it will use several examples (Austria, France, Poland, Italy, Spain and Sweden) to broadly present the different characteristics of property law in the different national legal systems of Europe. This approach can help to identify possible points of reference for implementing the ban on externalisation in other European countries.

Every Member State examined guarantees protection of property under constitutional law. In every case, the restriction of property law has two main components. In the first component, each constitutional law allows the expropriation of private owners for justified or urgent reasons for the public interest and the general good. Such an option of expropriation is always coupled with the duty of duly compensating owners for the loss of their expropriated property. Secondly, all of these constitutions emphasise the possibility of limiting the use of property for reasons of the public interest; these limits are always to be regulated by law.

A constitutionally stipulated social obligation of property, as found in Germany, could offer a suitable anchoring point for introducing a ban on externalisation in other European countries. However, only a few other EU Member States have constitutions with this type of explicit social obligation. Among the countries examined here, only Italy and Spain join Germany in establishing a codified social function for property in their constitution.

A constitutional social obligation of property does not exist in many of the national legal systems of Europe, but there could be other points of contact for implementing a ban on externalisation in EU Member States. Some of the most promising possibilities are constitutional stipulations for environmental protection or for sustainable economic development of the type found in Article 20a of the German Basic Law. In fact, most of the countries examined do have corresponding constitutional regulations (A, FR, IT, PL, SE). Among these, two countries in particular stand out. Article 41 of Italy’s constitution expressly requires the Italian government to steer public and private economic activities for the general good. In 2005 France passed an Environmental Charter that became part of French constitutional law. This charter requires every person to take part “in the preservation and the improvement of the environment” (Art. 2) and to contribute to “repair the damage that they cause to the environment” (Art. 4). Finally, it requires policymakers to promote sustainable development and “to reconcile the protection and enrichment of the environment with economic development and social progress” (Art. 6). While the Environment Charter does contain broad guidelines for the government and for individuals, in this context one must ask whether and if so what binding effect the Charter law actually has.
The examples just discussed (see appendix for an overview) show that – while there are many similarities in particular aspects – property law is heterogeneous in European countries. Justifying the ban on externalisation on the basis of an explicit social obligation of property as in Germany is probably the exception rather than the rule, yet most EU countries have other constitutional guidelines on environmental protection, sustainability and the general good that offer points of contact for implementation. The extent to which implementation might be successful in these countries is not discussed here.

7. A ban on externalisation under EU property law?

The legal sources of the European Union did not initially contain a binding regulation on right to property. But the European Court of Human Rights in Strasbourg developed its own legal dogma of fundamental ownership protection, drawing on the European Convention on Human Rights of 1950, the rules of the EU Treaties, and a comparison of national constitutions. The court's decisions have significant similarities with the sometimes controversial concept of the German Federal Constitutional Court, whereas some Western European constitutions do not acknowledge content, limitations and social responsibility to the same extent (see above ??). In 2001 the European Charter of Fundamental Rights, which finally became binding European law with the entering into force of the Lisbon Reform Treaty at the end of 2009 has complemented and brought forward this process by finally stipulating a European regulation of the right to property in Art. 17.

7.1. European Community law in a narrower sense

Property law as European law was not included in the EEC Treaty. Article 345 Treaty on the Functioning of the European Union – TFEU (ex-Art. 295 ECT) of the contract states: “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.” Otherwise the project of European integration would not have had a majority to begin with because of differences and variant traditions regarding the system of property law. But the whole logic of the treaties (limitation of national subsidies, freedom of services, free movement of goods) implicitly requires – despite state interventional tendencies (especially in agriculture) – an economic system, which is based on a market economy and on private property. This is reflected in Article 119 TFEU (ex-Art. 4 ECT), included under the “Maastricht Treaty” in 1992, establishing the “basic principle of an open market society with free competition”, which seems to acknowledge private ownership. Likewise Article 50 (ex-Art. 44 ECT), where the “freedom of acquisition and possession of real estate” enunciated in the context of the freedom of entrepreneurship clearly refers to private ownership.

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60 This is also true of the ownership-related constitutional and political question of privatisation-socialisation (Article 345 TFEU).
61 J. M. Thiel, "Grundrechtlicher Eigentumsschutz im EG-Recht", Juristische Schulung, 1991, p. 274, deals with the problem of whether Article 222 leaves only the organisation of ownership to the Member States or whether all ownership guarantees are excluded from EC control.
Furthermore, in accordance with Article 345 TFEU, which expressly excludes legal and political jurisdiction over property from the competence of the EU, the areas of authority developed in the secondary legislation of the European Community (Regulations and Directives) do not contain a specific ownership law. Since European property law is weakly developed, the national systems of property law differ to a great extent. Despite the caveat favouring national systems of property law in Art. 345 TFEU, comparable guidelines and standards for European protection of property developed some time ago and the right to property is recognised as a basic Community right.  

7.2. Ownership and European fundamental rights

A broader development took place in the area of fundamental rights. The foundation treaty, the “Constitution of the European Community”, did not contain a catalogue of fundamental rights. But the European Court of Justice developed European Community fundamental rights in the manner of English common law through its decisions concerning specific cases. The court drew on the main principles of freedom in the treaties, the regulations of the Convention, and the constitutional traditions of the Member States. The work of the court is already approved by secondary legislation. After the Common Declarations of the Community’s organs regarding fundamental rights from 1977 (soft law), Art. 6 III Treaty on European Union – TEU (introduced with Art. F II of the Maastricht Treaty) stipulates “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Furthermore, Article 6 I TEU now confirms “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”. This clearly gives national courts and the European Court of Justice the means to control whether fundamental rights are respected or not.

However, the standard of the European Community’s fundamental rights is in permanent development. Furthermore the concept of the Convention and interpretation by the European Court of Human Rights played an important role regarding the development of the property function in the European legal system. Article 1 of the additional protocol to the ECHR from 1952 guarantees that property is respected. Expropriations are only licit in the public interest and may be done only by law. State regulations limiting the use of property for the general welfare remain unaffected. As in the German Federal Constitutional Court’s ownership decisions, European courts must distinguish be-

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64 Siehe EuGH, Slg. 1979, 3727 (Fall Hauer). Zum Rahmen eines europäischen Binnenmarktes in Gestalt einer „wettbewerbsfähigen sozialen Marktwirtschaft“ vgl. Art. 3 Abs. 3 EUV.

65 Efforts to enact them later failed; having the European Human Rights Convention ratified by the European Community/Union as an organisation was discussed, but not realised.


between expropriation limits on the one hand and rules for determination of limits on the use of property on the other, according to their effect – as limitations of use as such do not establish a duty of compensation.69 Furthermore, the integrational or “social function” of ownership has also been recognised on a European level. The European Court of Human Rights interprets the Convention in such a way that the guarantee of property not only includes real rights, but also all legally acquired rights, including rights to incorporeal goods.70

**7.3. European Charter of Fundamental Rights and the social obligation of property**

Since the adoption of Article 17 of the European Charter of Fundamental Rights as part of the Treaty of Nice in 2001, the definition of the contents of property rights became more precise.71 At that time, the Charter, as a mere catalogue of policies, was not genuine *jus cogens* and thus had no *res judicata* effect. With the ratification of the European Reform Treaty and the inclusion of the European Charta of Basic Rights as part of it, on 1 December 2009 the Charter became binding European Law. It acknowledges in Art. 17 the right to property; restrictions limiting the use of property in terms of time, space and object are permissible here too. Furthermore, Art. 17 Par. 1 S. 3 gives lawmakers the power to regulate the use of private property in the general interest, which corresponds to the guarantee of property in the ECHR and to the Member States’ individual implementation of the basic right to property.72

CJEU case-law has consistently shown that the guarantee of property under EU law cannot claim unlimited application but must be seen in relation to its social function.73 Following this line of argument, one can use the principle of social responsibility to derive a supplement to the guarantee of property in Union law as well.74 In case T-65/98, Van den Bergh Foods/Commission ECR 2003, II-4653, paragraph 170, the CJEU writes the following in its judgment of 23/10/2003:

“Although, according to established case-law, the right to property forms part of the general principles of Community law, it is not an absolute right but must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. (e.g. judgments of the Court in Case Hauer, para. 23, of 11 July 1989 in Case 265/87, Schräder, [1989], 2237, para. 15, and of 5 October 1994 in Case C-280/93, Germany/Council, [1994], 1-4973, para. 78).”

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71 Article 17, Right to Property, Paragraph 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Paragraph 2. Intellectual property shall be protected.
This suggests that the social responsibility of property ownership would also offer an option for a justification of the ban on externalisation under European law.

7.4. Competences and basis for authorisation as regards the ban on externalisation

The provisions for the internal market (Art. 114 TFEU, ex-Art. 95 ECT) and for the environment (192 TFEU, ex-Art. 175 ECT) are worth considering as a legal basis for a ban on externalisation aimed at sustainability. According to Art. 4 II a and e TFEU, both fall under shared competence, i.e. the “Member States shall exercise their competence to the extent that the Union has not exercised its competence” (Art. 2 II TFEU). Sometimes, then, legislative acts of the EU can lead to Member States not being able to exercise their competence (suspensory effect). In matters regulated by the EU, the only elements that are excluded are those that are not covered by EU legislative acts. So then if a genuine European ban on externalisation were to be added to the Acquis Communautaire, there is the question of how much room would remain for a national regulation. Article 114 IV and V TFEU (internal market) and Article 193 TFEU (environment) allow Member States to enact parallel measures on the condition that they respect content and procedure-related requirements, thus providing a partial solution to the suspensory effect of EU legislative acts. So if preference were to be given to a European solution, the potential for national lawmakers to act in both areas would have to be analysed separately and in detail.

For obvious reasons, it is very difficult to reach a unanimous supranational compromise either in the Commission or in the Council. Therefore the search for a legal foundation for harmonisation with regard to a commitment to sustainability by introducing a ban on externalisation for example at the Directive level has to focus on those “majority vote” regulations if it is to be successful.

8. Conclusions

8.1. Constitutionality of a ban on externalisation

The ban on externalisation is a mirror image of the ever more abstract relationship between the enterprise as a commercial entity and its shareholders. On the one hand there is the relationship between business operations and the actual impact of externalisation, which in becoming more and more abstract is correspondingly more difficult to identify. On the other hand we have the owner, who – like the non-owner – lives in the very same environment which increasingly suffers from long-term, irreversible deterioration. A ban on externalisation under property law balances interests in recognition of proper-

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76 One needs to examine the depth of the regulation and therefore the reach of such a suspensory effect separately for each legislative act of the EU.

77 This possibility of greater protection turns out differently in these two areas; for further evidence for Art. 192 TFEU see C. Calliess in Calliess/Ruffert, EUV/AEUV 4th ed. 2011, Art. 193 AEUV, Par. 5 ff. and for Art. 114 see Tietje in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union 50. Ergänzungs- lieferung 2013, Art. 114 Rdn. 156 ff. AEUV.
ty’s social function. It compensates for the ever-weaker link between formal owners who are not able to exercise their legal property rights or their corresponding social obligations on the one hand and the corporate property administered by management on the other, thereby re-establishing equilibrium.

In other words, as a consequence of the principal-agent problem, the ban on externalisation can help to ensure a minimum of sustainability by restraining market forces. Intervention on the basis of the (extended) social function of property also agrees in principle – as shown – with the case law of the Federal Constitutional Court and therefore would be legitimate pursuant to Article 14 Par. 1 Sentence 2 of the Basic Law.

8.2. The problem: unequal impact on individual Member States within the EU

As shown above, the central matter with regard to the ban on externalisation at the European level is the demand for owners to have an obligation of sustainability derived from the social obligation property ownership entails. An additional burden of this kind for businesses is controversial in terms of the EU’s relationship to other economic powers but also among the Member States themselves, and has typically been turned down. The issue usually only plays a minor role in newly industrialised countries with rapid economic growth, but there is passionate debate about its significance for legal, economic and fiscal policy in Germany and other EU Member States. Particularly as regards economic imbalances in the euro zone (see figure 5), the focus has been on the issue of unequal impact on the competitiveness of individual countries.

Figure 5

Economic Imbalances in the Euro Area

Source: Own diagram produced in collaboration with Sebastian Wurst.
Presuming that the political process within the EU reaches a critical mass and the stage of concrete legislative proposals from the Commission, the most important question is therefore whether such a regulation requires unanimity in the Council or whether it might be achieved through a majority vote. This hinges on competences, bases for authorisation (legal bases) and the applicable legislative process.

8.3. Outlook – Practical implementation

However, even though this provides certain transnational points of departure for a future legal ban on externalisation at the European level, the actual implementation of such a ban seems unlikely given the legal differences within the EU and the significant economic imbalances. This will likely impede both a European legislative solution for the whole of Europe as well as to a unilateral application in Germany, which would unfairly burden German businesses, irrespective of the problems it might create under European law.

In forward-looking recognition of this development and the resulting need for regulation, the EU has not only attached special significance to the subject of sustainability in the framework of its Sustainable Development Strategy, it is postulating the sustainable design of the European Economic Area as an integral part of its Europe 2020 strategy. The aim is for social and environmental issues to become a natural, mandatory component of economic thinking in the EU and of the future organisation of the European jurisdiction.78

The German minister of development aid, Gerd Müller, has similar aspirations with his call to reform world trade and integrate social and environmental standards as basic principles in the statutes of the WTO.79 The proposal by the Ethical-Ecological Rating research group to introduce a ban on externalisation in German property and antitrust law, which this expert opinion discussed, can therefore be classified, regardless of the question of its chances at implementation, as an attempt at offering some initial concrete ideas for acting to achieve this goal, in light of what hitherto has been a very general and underdeveloped call for more sustainability in the economic process.

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Bibliography


Hamilton, A. (1788), The Federalist Papers Nr. 73, 1788.


Locke, John (...),


