

Property Rights, Globalisation and the Social Function of Property – Part II:

“Introducing an Obligation of Sustainability into Property Law”

- Introduction to the debate: Property, a historical not a logical category;
- Corporate property – a separate category sui generis;
- Forms of property in relation to the sub-functions of property;
- Commons as an object of property law;
- Sustainability as property’s self-conserving function.

Compact course / Blockseminar:

5/6/9 ECTS / MES modules: ZB Wirtschaft, ZB Politik, ZB Recht, WPM 1, WPM 6 // IBA modules: S & E-Module; Faculty of Law: Master of German and Polish Law (Module 3); SPB 5 (European Law) (without ECTS)

Dates / Termine:

Introduction Tuesday 16 October, 15h-16h, AM02

1st part Fri./Sat. 11 & 12 January, 10-13h & 14-17h; HG104

2nd part Fri./Sat. 25 & 26 January, 10-13h & 14-17h; HG104

3rd part (Presentation of results) Sat. 2 February 10-13h & 14-17h; HG104

This course is a continuation of the seminar from the previous winter semester; an introductory session at the beginning of the semester will give an overview to the topic.

The course has a twin course in October at the University Federico II in Naples, Italy; it is held in English language.

Registration until 10 October 2018 at kelso-professorship@europa-uni.de.

Sustainability and property ownership – Introduction to the debate

Property is a fundamental legal institution found in every economically developed society; it is also a key determinant of its economic, social and legal structures. A vital issue in the present discussion of a legislative enactment of a constitutional principle of sustainability is its compatibility with and integration into the prevailing definition and content of property.

As the conveyance of property rights becomes more and more abstract (e.g., share ownership in umbrella funds vs. sole proprietorship), the link between the owner and the object of ownership becomes more and more attenuated and the allocation of responsibility correspondingly tenuous and opaque. Given the social and environmental impact of the economic activities of the corporation this is of particular import. The discussion focuses on the question of whether, and if so, to what extent, the benefit owners of productive property derive through depleting natural resources and degrading the environment from reduced production costs (externalisation) assigns them the corresponding duty of preserving and restoring these natural foundations of life to compensate for their exploitation (internalisation).

The challenge

The obligation of owners to use their property sustainably potentially conflicts with the owner’s constitutionally guaranteed sphere of protection. Imposing this obligation could affect the corporate property and that of business owners and shareholders. A functional analysis of the different forms of property allows assessing the intensity / degree of conflict with the owners’ constitutional rights when the legislator is determining the content and extent of property rights.

From a legal point of view the main thesis of the seminar is that an obligation of sustainability can be introduced into property law as an extension of the social function of property. This proposal assumes that pursuant to the power of the legislator to determine the content and limits of property rights, a distinction must be made between different forms of property. Towards this end the seminar discusses the property of corporations into the functional context of property rights as a hybrid category distinct from private and public property; we are also debating the Commons / Environment as a fourth category to the existing.

The jurisdiction of the German Federal Constitutional Court

In order to balance the conflicting interests of the parties involved, the legislator must take into account both the constitutionally guaranteed legal rights of the owner and the mandate regarding a socially just property system in accord with constitutional principles (e.g., Art. 14 Par. 2 of the German Basic Law). Based on the case law of the German Federal Constitutional Court (especially its landmark „co-determination“ decision and the “nuclear exit” decision), the seminar argues on behalf of a general principle asserting that

- the legislative power to define contents and restrictions of property rights increases apace with the social relevance of the property owned,
- while the intensity of conflict decreases as the relationship between the owner and the object owned becomes more depersonalized and abstract.

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, in particular the Court stresses the peculiarities of share ownership: “Unlike with tangible property where the freedom to use, the decision thereon and the attribution of the consequences coincide in the person of the owner in the case of share ownership this connectedness is by large dissolved.” The Court acknowledges that different forms of corporations and different ownership structures lead to different extent of conveyance of property rights and concludes “that, however, the membership powers of the shareholder are legally conveyed through the shareholder assembly as organ of the corporation and that the use of the property and the responsibility for this use fall apart in the way typical for corporations.”

Literature

Reader and literature will be announced in October.

Performance test and credits: ECTS: 6/9. Regular attendance; term paper; oral presentation; first draft of the term paper by 4 February 2019, finalized term paper by the end of the semester.