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COMMENTARY ON

Art. 26 FC

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Art. 26 Guarantee of ownership

[1] The right to own property is guaranteed.

[2] The compulsory purchase of property and any restriction on ownership that is equivalent to compulsory purchase shall be compensated in full.

CONTENT

I. HISTORY

1 Given the importance that the guarantee of property has historically had in constitutional struggles and in the philosophy of fundamental rights, its absence from the constitutional documents of the modern federal state is striking. Neither the Federal Constitution of 1848 nor that of 1874 contained a guarantee of property. However, this does not mean that property was not protected by fundamental rights before the guarantee of property was incorporated into the Constitution (see n. 2). Property was protected in all **cantonal constitutions**. Although the wording of these guarantees differed, the Federal Supreme Court ruled in 1948 that their respective scope of protection was identical. In addition, Article 23 of the Federal Constitution of 1874 provided implicit protection of property. It provided for the possibility of expropriation in the event of an overriding public interest, but only in return for full compensation.

2 From 1961, the Federal Supreme Court recognized the guarantee of property as an unwritten fundamental right. Finally, in 1969, the guarantee of property was incorporated into the Federal Constitution (Art. 22ter aBV). The same revision also granted the federal government fundamental competence for spatial planning (Art. 22^{quater} aBV). The guarantee of property rights, as explicitly stated in the Constitution for the first time, is therefore a counterpart and counterbalance to the rapidly growing role of the public authorities at that time with regard to the use, and in particular the developability, of land. The Federal Council considered it sensible to precede the fundamental competence for spatial planning with an explicit guarantee of property rights in order to "allay fears that private property would be fundamentally undermined or unduly restricted by the new federal powers." This did not, however, alter the fact that environmental and spatial planning administration was most likely to result in encroachments on the guarantee of property rights.

3 The Federal Constitution of 1999 incorporated the resulting guarantee of property with only editorial revisions in Art. 26 FC. During parliamentary deliberations, there were calls for Switzerland to also provide for the **"social obligation"** of property, as does the guarantee of property in the German Basic Law. However, the National Council rejected this. The significance of an explicit mention of social responsibility should not be overestimated. The question is not whether property can be subject to social obligations, but whether these obligations arise from the fundamental right itself, i.e. whether they are inherent in the fundamental right, or whether they can be derived from the context of the fundamental right (see the theories of property below, n. 37). This context includes the tasks and objectives of the Constitution, which can be specified by the legislature in the public interest and which can impose obligations on property. The councils also discussed replacing full compensation in the event of expropriation with "appropriate" compensation. This amendment was also rejected. There was also discussion of a proposal to compensate expropriations in full, but to compensate "appropriately" for encroachments on property that do not reach the expropriation threshold. This proposal initially gained a majority in the National Council. However, it was rejected by the Council of States because it would go beyond the "implementation mandate" for the new Federal Constitution.

4 The regulatory content of the guarantee of property rights has therefore **not changed** with the total revision of the Federal Constitution; the old case law and doctrine remain authoritative.

II. CONTEXT

5 As a normative concept, property is "complexly interwoven with principles of justice, freedom, and dignity." Like sovereignty for states, the ownership of individuals has **the supposed quality of the absolute**, the exclusive, the complete control over goods. It is therefore suitable as a state of desired

perfection and clarity about material circumstances. The position of individuals and the distribution of goods in society are strongly predetermined by the decisions that a society makes regarding the institution of property.

A. Strong institutional component

6 The guarantee of property has a **distinct institutional component**. It protects not only individual rights, but also the social institution of private property. It thus represents a fundamental social decision in favor of the decentralized distribution of rights of action (or at least against their concentration in the hands of the public authorities). The guarantee of property shares its strong institutional component with economic freedom, which complements the institution of private property with that of competition. These two institutions, which form the foundation of a market economy, are supplemented by the principles of the economic order (Art. 94 FC), which in turn impose a restrained relationship between the state and the market economy.

7 As important as property is for shaping society, many consider it even more central to the development of personality. Property and the guarantee of property have (in the best case) a **liberating function**. They are intended to protect a "piece of the world" (primarily against the state) in which secure, individual development is possible. This implies in particular that it is not only what is considered valuable by society or the market in an economic sense that can be protected as property. However, the image of a "piece of the world of one's own" has a fatal affinity with the idea of property as a "sphere free from state authority." This idea obscures the central role of the public sector in the creation, recognition, and protection of property and thus also the proactive role that the public sector must play in enabling such a sphere of freedom.

8 A common way of dealing with the complexity of property as a concept and legal institution is to first reduce property to its **partial aspect of ownership of things** and to formulate this in absolute terms, namely as the unrestricted power over a thing to the exclusion of all others. Central to this partial aspect is that the rights arising from ownership of things apply to all others ("erga omnes"). In a second step, compromises are introduced that every society must make when dealing with control over goods. It remains unclear how far these compromises can be taken before it no longer makes sense to speak of ownership. This is the technique used in Art. 641 para. 1 CC, which defines ownership under property law. It defines the "owner" (it does not mention female owners) as a subject who can dispose of an object "at will." At the same time, however, this paragraph also makes it clear that this only applies "within the limits of the legal system." This tension between the owner's freedom of disposal and the interests and rules of the general public is the fundamental problem of the legal institution of property and one of the central problems of the guarantee of property.

B. Relationship to other provisions

9 All fundamental rights can only be fully understood when viewed **in conjunction with all other fundamental rights** and with the provisions on tasks set out in the Constitution. This applies to an even greater extent to the guarantee of property rights. An important reason for this interdependence is the protective function that property rights have for other fundamental rights. This applies in particular to economic freedom. The guarantee of property protects the existence and value of factors of production whose *use* for the purpose of earning an income is protected by economic freedom. A minimum level of material security and autonomy is also necessary for a person to be able to engage in political activity. Georg Müller therefore describes property as a "complementary and promoting element of political freedom." Procedural fundamental rights, for their part, provide important

preliminary and flanking protection for the guarantee of property. Only where effective and fair procedures are available can property, however defined, be effectively protected.

10 Even more than the objects protected by other fundamental rights (such as art, science, and religion, whose existence is also conceivable outside a legal system), property is a **social construct**; an object of protection that cannot exist outside the legal system or precede the legal system, but is created by it. A central problem of the guarantee of property is therefore that it must protect from the reach of the law that which can only come into being through the legal order (see below, n. 40).

11 Furthermore, the guarantee of property stands in a **reciprocal relationship** with a number of **other constitutional provisions**:

- Section 4, "Environment and Spatial Planning" (Art. 73-80 FC), is particularly relevant in practice. This section establishes a number of powers for the federal government and the cantons. These mainly concern conflicts over the scarcity of natural resources and geographical space and may therefore significantly interfere with property rights.
- The same applies to the federal government's power to regulate energy transport (Art. 91 FC).
- Art. 108 FC (promotion of housing construction and home ownership) has a two-edged effect on property. On the one hand, it can form a basis for restricting property.
- On the other hand, it raises the question of whether there is a mandate for an actual property policy, i.e., state intervention to enable broad sections of the population to acquire residential property (see below, n. 12).
- From an economic perspective, a central element of the guarantee of property is the protection of rights of action (for the term, see n. 47) in connection with real property. Art. 109 FC (rental) is also important as a framework for the basis for intervention. It gives the federal government the possibility to restrict owners in how they rent out real estate.
- Art. 8 para. 4 FC, which provides for measures to eliminate disadvantages for people with disabilities, creates potential conflicts with the guarantee of ownership. The legislature balanced this area of conflict with the enactment of the Federal Act on the Elimination of Discrimination against People with Disabilities (DDA) in 2002.

12 The guarantee of property rights, together with Articles 108 (promotion of housing and home ownership) and 109 FC (rental housing), lay the foundations for enabling as many people as possible in Switzerland to have adequate housing. The phrase "The Confederation shall promote (...) the acquisition of home ownership" in Art. 108 para. 1 FC initially suggests that the Constitution expresses a preference for home ownership over renting. However, this is the only reference in the Constitution to an actual **policy of promoting property ownership**; such a policy is more pronounced in other legal systems. The preliminary draft for the total revision of 1977 still contained an explicit mandate to promote property ownership (Art. 30 lit. d, g, and h). The Federal Constitution of 1999, on the other hand, contains only this allusion to a property policy. This suggests that the Swiss constitutional order has hardly developed the idea that the state has a duty to facilitate the acquisition of property in addition to guaranteeing existing property rights. According to this understanding, the state is not required to pursue a "property policy."

13 The federal government and the cantons have **specific expropriation laws**. These usually form the legal basis for the formal expropriation of land. However, other laws may also form the basis for formal expropriation.

14 Unlike most other civil liberties, **international law** plays a subordinate role in the protection afforded by the guarantee of property rights. An important reason for this is that Switzerland has not ratified the First Protocol to the ECHR, which contains a guarantee of property rights in Article 1. However, it is generally accepted that this guarantee does not go as far as Article 26 FC. Nevertheless, the ECHR does have a certain effect on the protection of property, for example through the right to a fair trial in Article 6 ECHR. This guarantees every person "in the determination of their civil rights and obligations or of any criminal charge against them" a "fair trial" before "an independent and impartial tribunal established by law." Where property is interfered with or deprived, the ECHR thus guarantees access to a court where this may not be provided for under national procedural law. The ECHR can provide further protection for property through its accessory prohibition of discrimination (Art. 14 ECHR), for example where entitlement to benefits is discriminatory, as was the case in Switzerland with regard to widowers.

III. CONTENT OF THE GUARANTEE OF PROPERTY (PARA. 1)

A. Bearer of the guarantee of property

15 Unlike other fundamental rights, which are guaranteed to "every person" (Art. 9 FC) or "every human being" (Art. 10 FC), the guarantee of property rights merely states that they are "guaranteed." It applies **in principle to all natural and legal persons**.

1. Exclusion of certain natural persons from legal capacity?

16 In the literature, there are two different views as to whether exclusion from the acquisition of property constitutes a restriction of the guarantee of property or a partial exclusion from the guarantee of property. This question is relevant in connection with real property, the acquisition of which may be subject to authorisation for certain groups of persons. The most important example in practice can be found in Art. 2 of the **Federal Act on the Acquisition of Real Estate by Persons Abroad** (ANRA), also known as the "Lex Koller." Another example is the requirement for a permit to acquire an agricultural business by persons who are not considered to be self-employed farmers (Art. 6 in conjunction with Art. 61 para. 1 and Art. 63 para. 1 lit. a of the Federal Act on Rural Land Law, BGBB).

17 However, there are two reasons why these persons should **not be excluded from the personal scope of protection of the guarantee of property**, but rather why the corresponding obstacles should be treated as restrictions on the guarantee of property. The first is that this is only a partial curtailment of the protection of fundamental rights. In this respect, it is misleading to say that these persons are not holders of the fundamental right. The second reason is the obligation of justification imposed on the state in the event of restrictions on fundamental rights: if the curtailment of the fundamental right is treated not as a restriction of a fundamental right but as an exclusion from it, the state is problematically exempt from this obligation of justification.

2. The community as a holder of fundamental rights

18 The Federal Supreme Court has consistently held that a **community** may also invoke a right that is tailored to private individuals if it is affected in the same way as a private individual. This applies in particular if the community's property interests are affected. In legal theory, this is understood to mean that communities can also invoke the guarantee of property rights if they are affected in the same way as private individuals. When this is the case is less clear. It is certainly the case where a community is affected in its financial assets (i.e., in the assets it owns for their monetary value) and not

in its administrative assets (i.e., in the assets it owns for their use value). However, there are also voices in legal doctrine that consider the community to have fundamental rights even for assets in administrative assets and in public use (those assets that can be used by private individuals for their intended purpose); the prerequisite for this is that the community is not affected in the exercise of its public function, but as the owner. This view deserves approval. It is not clear why the community as owner should be less protected than private individuals. Where communities are in a special situation or have a special responsibility (for example, toward public tasks performed by another community or toward the fundamental rights of private individuals), this circumstance can be better taken into account by giving it appropriate consideration when examining the conditions for intervention than by completely excluding the public authorities from fundamental rights.

19 Based on these considerations, it therefore makes sense that **public companies in private law** can also invoke the guarantee of property rights, even if the Federal Supreme Court has left this question open to date. The special position of public companies in competition can also be better addressed if this is taken into account in the context of a weighing of interests than if these companies are denied fundamental rights.

B. Dimensions of the guarantee of property

20 More than other civil liberties, the guarantee of property is usually divided into different dimensions of its scope of protection, typically into the **guarantee of existence, value and institution**. The guarantee of existence protects the scope or existence of property (n. 21 f.). Unique to the guarantee of property is the guarantee of value (or "guarantee of asset value"), which is added to the guarantee of existence and, under certain circumstances, replaces it (n. 23 ff.). The institutional guarantee secures the institution of property in society and the fundamental decision in favor of a property-based economic order (n. 27 ff.). The three components support and complement each other. It is therefore artificial to assume that all aspects of the guarantee of property must be assigned exclusively to one of these three dimensions.

1. Guarantee of existence

21 The guarantee of existence **protects** the **existence of the property** of a legal entity, i.e. the existence of the sum of a person's property rights (see below, n. 48 ff.) against unjustified interference. This protection is not absolute. Interference is permissible under the conditions of Art. 36 FC and additionally under the conditions of the value guarantee in Art. 26 para. 2 FC. The protective effect of the guarantee of existing rights therefore consists in raising the threshold for interference and linking it to certain justification mechanisms.

22 A distinction must be made between the guarantee of existing rights and the **guarantee of vested rights**. The guarantee of vested rights plays an important role in construction and spatial planning law and ensures that buildings constructed under the old law can continue to be used or extended or converted despite changes in the legal situation. Its protective effect is primarily directed against the legislature, which must introduce new law in a "lenient" manner and provide for transition periods and exceptions. Originally developed in case law, the guarantee of vested rights has also found its way into law (see Art. 24c and Art. 37a RPG). In contrast to the guarantee of existing rights, it does not protect the existence of property rights, but rather the continued existence of rights that no longer exist under the new legal situation for a certain period of time or under certain circumstances. Its relationship to the guarantee of ownership is not entirely clear. In any case, it does not arise exclusively from the guarantee of ownership, but also from the protection of legitimate expectations (Art. 9 FC). However, since the guarantee of vested rights protects property rights, namely the possibility of carrying out

economically interesting acts that would no longer be possible under the new law, it is in any case also a component of the guarantee of ownership (see below, n. 47 ff.).

2. Value guarantee

23 If there is a lawful interference with the existence of property and if, in addition, the conditions for formal or material expropriation are met (for these terms, see below, n. 77), **the guarantee of existence "transforms"** ("se transforme") **into a guarantee of value**, or it "melts" into a guarantee of value.

24 Contrary to the impression given by the wording of Art. 26 para. 2 FC, the value guarantee applies **only to a fraction of the encroachments** on constitutionally protected property. The prerequisite for this is either formal expropriation or a restriction of ownership that is so severe that it amounts to formal expropriation (see n. 126 below). The vast majority of restrictions on ownership, whether they originate from legislation or from the application of law, must be accepted without compensation. This makes the guarantee of existing rights and the conditions for interference arising from it all the more important.

25 In addition to Art. 26 para. 2 FC, the value guarantee is **also enshrined** in various federal and cantonal laws, such as Art. 16 EntG and Art. 5 para. 2 of the Spatial Planning Act (RPG).

26 Does the guarantee of value **strengthen or weaken the guarantee of property?** It could be argued that the guarantee of value weakens the protection afforded by other civil liberties because the state can interfere with the fundamental right if it is prepared to pay for the interference, which is not the case with other civil liberties. However, this argument overlooks the fact that the value guarantee only comes into play when it is lawful to interfere with the existence of property protected by fundamental rights, i.e. when the conditions that must also be met for interference with other civil liberties have already been met. The value guarantee therefore applies in addition to, and not in place of, the conditions normally required for civil liberties (see Art. 36 FC), and in this respect affords property a higher level of protection than other goods protected by fundamental rights. However, it would be wrong to conclude from this that the constitutional legislator accords property a higher normative value than other goods protected by fundamental rights. The increased protection can be explained by the function of the guarantee of property, in particular its internalization function (see n. 111). This special position is of practical relevance in distinguishing between areas of fundamental rights protection: if a good falls within the scope of the guarantee of property (rather than within the scope of another fundamental right), it may also enjoy the increased protection of the guarantee of value.

3. Institutional guarantee

27 The institutional guarantee does not primarily protect individual holders of fundamental rights. Its protected interest is a **fundamental societal decision in favor of a property-based order**. Like other fundamental rights, the guarantee of property goes beyond the protection of mere subjective rights in its institutional aspect. The institutional guarantee is not based on a fundamental social decision in favor of a restrained state or minimal social equality. Rather, it is based on a fundamental decision to decentralize the factors of production in society or, conversely, to prevent the concentration of the factors of production in the hands of a few. This is the most central "regulatory function" of the guarantee of property rights; decentralization ensures that misallocations of resources in society remain manageable and can be corrected. The institutional guarantee provides protection against political measures that would gradually or immediately centralize control over factors of production. The most plausible candidate for such centralization is the state, which seeks control over more and more factors of production in its efforts to establish a planned economy. However, the

public sector is not the only conceivable driver of centralization. According to this view of the guarantee of institutions, the concentration of virtually all factors of production in the hands of a private monopolist would also be contrary to the guarantee. A redistribution of factors of production in society by the public sector may well interfere with the guarantee of existence (because it must take from some in order to give to others). However, it is compatible with the guarantee of institutions as long as this redistribution does not undermine property as an institution and serves to decentralize rather than concentrate factors of production. Essential to this decentralization function is that factors of production remain distributed in society not only formally but also substantively, i.e., that property does not increasingly become an empty shell, but retains its actual economic value and must encompass actual material freedom of action. In this respect, this decentralization function also includes the prohibition formulated by the Federal Supreme Court of depriving property of its "substance" or "essential core."

28 Despite this high degree of compatibility with a redistributive state, the guarantee of institutions is a fundamental decision in favor of the **market as a "coordination principle,"** even if this may be a socially embedded market. The guarantee of property rights is not the only provision in the Constitution that reflects this fundamental decision. It is also expressed in Art. 5a FC (subsidiarity), Art. 27 FC (economic freedom) and Art. 94 FC (principles of the economic order). However, the decentralization of production factors is a prerequisite for this fundamental decision and also anticipates it. The reason for this is the decentralized discovery and information process, i.e., the ability to generate information and allocate it meaningfully, even if the system is far too complex to be overviewed from a central vantage point. Only a market can provide this process (even if it is strongly embedded). The alternative would be a central actor who controls all production factors but cannot allocate them sensibly because he does not have this discovery process at his disposal. The decentralization of the allocation and transaction of production factors and a reasonably functioning discovery and information process are therefore mutually dependent. If, in the words of the Federal Supreme Court, economic freedom is the "guardian of a private economic order," then the guarantee of property is a prerequisite for this.

29 The **institutional guarantee is regularly equated with the core content** of the guarantee of property rights (or with the essential content, the German equivalent of core content) (see below on core content, n. 33 ff.). The two legal concepts do indeed have certain parallels. For example, both exist independently of the weight of the public interest. No matter how significant this is, it cannot justify an encroachment on either the institutional guarantee or the core content. Nevertheless, equating the institutional guarantee with the core content makes little sense and is misleading. The core content of a freedom right protects the innermost, most fundamental sphere of an individual's protected interest and has a strong connection to the dignity of the person concerned. It gives concrete form to human dignity in a specific context. However, the guarantee of institutions does not primarily concern the dignity of the individual, but rather a fundamental decision of society. It is "not merely the 'last bastion' for the protection of the property rights of individuals," but fulfills a preliminary function in this regard.

30 The following measures are considered **incompatible with the guarantee of institutions**:

- The main case in which protection under the guarantee of institutions applies is so-called **confiscatory taxation**. Taxation is considered confiscatory if it reaches such an extent that the assets would be gradually depleted by taxation alone or that the accumulation of new assets or an independent lifestyle would become illusory solely due to the tax burden. Case law on confiscatory taxation is restrictive. There is no published Federal Supreme Court decision in which confiscatory taxation has been recognized. An older, unpublished decision in which the capital value of a life

annuity was taxed in such a way that the recipient of the annuity would have had to take on high levels of debt in order to pay the tax, thereby jeopardizing the purpose of the annuity – to secure a livelihood – may serve as a guide. Together with the income tax payable on the annuities, the tax burden would have been 55% of the capital value of the life annuity (for the relationship between this case law and the guarantee of core content, see n. 34).

- An unrestricted right of first refusal on the part of the community with regard to a **public land monopoly** to be gradually established, or an attempt to concentrate all land ownership in the hands of the state and to grant private individuals only building rights or similar rights.
- The possibility for the public authorities to **freeze land prices and compulsorily rent out** apartments without this being subject to any conditions other than the general objective of guaranteeing the right to housing.

31 However, the following are considered **compatible with the guarantee of institutions**:

- **Wealth taxes that are higher than income**. Wealth taxes encroach on the substance of wealth. That alone does not make them contrary to fundamental rights. Therefore, if a tax burden resulting primarily from a wealth tax amounts to 200% of a taxpayer's income for a short period of time, this does not constitute confiscatory taxation.
- In general, **a certain percentage** of income or wealth accounted for by taxes is not in itself sufficient to constitute confiscatory taxation. What is relevant is rather the tax burden over a relatively long period. If special circumstances arise in certain years, these must be disregarded. The cumulative effect of different taxes and the possibility of passing taxes on to others are also decisive.
- Situations in which a taxpayer **deliberately foregoes** an achievable return on their assets (for example, because they hold precious metals or speculate on the zoning of land) and the tax burden is therefore higher than the return on the assets.
- A **wealth tax** that would amount to up to 46% of income for very high incomes, but would not prevent the creation of new wealth.
- Even relatively **far-reaching interventions in the land, housing, and rental markets** are compatible with the guarantee of institutions. For example:
  - the expropriation of abusively vacant apartments (however, a violation of the guarantee of institutions would be assumed if the use cannot be withdrawn under any conditions other than to secure the right to housing);
  - the obligation to create at least one-third of the residential use as affordable housing in the case of rezoning and new zoning and to rent it out permanently at cost;
  - the possibility for the city administration to determine 15% of the tenants in buildings whose construction or renovation it has subsidized;
  - a ban on the demolition, conversion, or change of use of apartments that are not dilapidated or in need of renovation (however, this plan violated the guarantee of existing rights);
  - a requirement for approval for the sale of apartments for which there is a shortage on the housing market (however, the way in which the approval requirement was designed, which made it impossible to take private interests into account, was in this case a violation of the principle of proportionality and the guarantee of existing rights).

32 So is the institutional guarantee necessary at all, or does it **merely have "declaratory significance"?** The fact that there are only a few examples in which the institutional guarantee has had a concrete

protective effect in case law should not lead to the conclusion that it plays no role in legal practice. The decision in favor of a property-based order and the decentralization of factors of production is one of the most fundamental decisions a political community can make. It is therefore logical that the institutional guarantee shapes political decisions more than legal ones and that it can and must serve as a protective function against political decisions rather than against administrative actions. The decentralization of factors of production remains a permanent task even if the political forces that want to communitize the factors of production lose momentum. This is not least because an increasing concentration of factors of production cannot occur exclusively at the state level.

4. Core content

33 Separating the institutional guarantee from the core content allows those aspects that are directly relevant to the protection of human dignity to be considered the core content of the guarantee of property rights. The guarantee of property is less often associated with the protection of dignity than other fundamental rights – unjustly so. Eugen Huber's formulation may seem drastic when he writes in the explanatory notes to the draft of the Swiss Civil Code that "a personality without the right to dispose of property (...) would be a concept without content." Nevertheless, the ability to exercise control over property is a fundamental expression of personality; permanently preventing a person from exercising this control is therefore an attack on their dignity. In cases where a person is "deprived of their place in the world and exposed to the struggle for bare existence" through the denial of property, this threshold is crossed. Weighing private and public interests can no longer achieve justifiable results in such drastic interventions. The balance must be tipped in favor of the interests and dignity of the individual. This anticipation of the outcome of the balancing exercise is precisely the essence of the understanding of the core content of fundamental rights as advocated here.

34 One reason for the often problematic equation of core content and institutional guarantee is likely to be that there is no case law on the violation of core content, except with regard to the question of confiscatory taxation, which may fall within the intersection of core content and institutional guarantee. However, it is also true of other fundamental rights that there are hardly any cases in which a violation of the core content has been alleged. As a reference point, which fortunately hardly ever occurs, it may nevertheless be useful to draft such cases. One could think, for example, of cases in which a person is deliberately deprived of their "last shirt" in order to exclude them from society.

35 In the literature, the **guarantee of value as a component** of the guarantee of property is sometimes considered to be part of its **core content**. This is unconvincing for several reasons. It is true that the guarantee of value is formulated in absolute terms for those cases in which it applies (formal expropriations and expropriation-like restrictions on property) and does not allow for any deviations by the legislature. However, firstly, these constellations only account for a small proportion of property interventions and, secondly, case law has developed various techniques to prevent the value guarantee from being triggered (see n. 126 below).

36 The core content of the guarantee of property rights is in **tension with the theory of immanence** (see below, n. 40). If this theory is applied unfiltered, the objective scope of protection of the guarantee of property rights is at the discretion of the legislature. In theory, the legislature could therefore also dispose of the innermost core content. This shows that the legislature must be bound by fundamental rights in one form or another with regard to the scope of protection of the guarantee of property rights, and that the immanence theory cannot therefore be applied without restriction (see n. 43). Even if it is true that the concept of property cannot precede a legal system, it can nevertheless precede the legislature (at least in its basic features) insofar as it derives from the constitution. The

legislature's obligation to uphold the core content of the guarantee of property rights, which is based on the dignity of the individual, is therefore relatively unproblematic to achieve, because the protection of such core content does not derive exclusively from the guarantee of property rights itself, but also from Art. 36 para. 4 FC and Art. 8 FC. The obligation to protect the dignity of the individual even where very weighty public interests argue in favor of a legal redefinition of property cannot therefore be waived by the legislature.

C. Material scope of protection

1. Theories of property

37 In line with the great complexity of property as a concept and as a social and legal construct, the **objective scope of protection** of the guarantee of property is also **complex** and subject to considerable uncertainty. The object of protection of the guarantee of property is "not a human activity or characteristic, but an institution created by the legal system." However, this formulation already anticipates what is controversial in legal doctrine and unclear in case law, both with regard to private property and with regard to the object of protection of the guarantee of property rights: Namely, the question of whether property exists prior to the law and is then restricted by the law (**restriction theory**), or whether property is an institution of the legal system that can only come into existence with the legal system and is therefore inherently subject to the limits of property as defined by the law (**immanence theory**). The two theories are mutually exclusive and have significant weaknesses.

a. Weaknesses of property theories

38 One way of dealing with the problem of the two inadequate theories is to point out the **limited practical relevance** of this debate and relegate it to the ivory tower. Nevertheless, the shortcomings of both theories mean that not only are the contours of the substantive scope of protection of the guarantee of property rights vague, but also the question of whether the protected right is originally a fixed quantity from which deductions are made or a social construct that changes with changing political, economic, and technological conditions.

39 First, let us consider the problems of the barrier theory: **property cannot precede the law**, but is only created by the legal system. This is because the rights of action associated with a particular good are not natural or evident, but can only result from some kind of minimal social consensus. Even if one were to assume such a pre-state existence of property, it would be impossible for there to be a natural or original scope of property (which would be a prerequisite for the barrier theory to work). This is because every conceivable form of property use creates interference with other legal participants and their property. Before a legal framework and a conflict resolution mechanism exist, there is no way of classifying one interference as a naturally permissible component of property and another as excessive interference.

40 The immanence theory, on the other hand, has the weakness that it can only protect property within the framework of existing law and therefore, in principle, **cannot protect it against legislation**. It protects property whose substance can be arbitrarily diluted, as long as this is done through legislation rather than through the application of law. To avert this problem, a criterion would be needed to determine when legal norms shape property and when they restrict it. So far, it has not been possible to identify such criteria. For logical reasons, this cannot be achieved; it would presuppose a pre-legal substance of property, which cannot exist. It is therefore notoriously unclear whether property is being interfered with or whether the scope of protection of property is being restructured. This is

problematic because the relationship between the extent to which the scope of protection is affected and the permissibility of the interference, which is not always clear with regard to other fundamental rights, is particularly important in the context of the guarantee of property. It determines whether the guarantee of value applies.

41 The fragility of property under the theory of immanence is demonstrated by the fact that the constitution itself provides for **selective exceptions to the guarantee of property**. In these cases, according to a general assessment, interests other than those of the owner take precedence. There is therefore no weighing of interests. Examples include construction work in moors and moorland areas of national importance (Art. 78 para. 5 FC), the construction of minarets (Art. 72 para. 3 FC) or the construction of second homes under certain circumstances (Art. 75b in conjunction with Art. 197 no. 9 para. 2). It is therefore clear that the scope of property can be determined by the legal system and could, in theory, also be rendered meaningless by constitutional law itself.

b. Compromise in practice

42 The **Federal Supreme Court** originally based its decisions on the **immanence theory**. Its case law on interference with property remained limited to individual, specific interventions by the administration, whereby it was considered fundamentally undisputed that legislation could reorganize the scope of protection of the guarantee of property, i.e., that the limits of property are inherent in the law. In the course of the 20th century, however, the Federal Supreme Court gradually moved away from the immanence theory without fully embracing the barrier theory. A complete shift to the barrier theory would mean that restrictions on property rights imposed by legislation would also be treated as interference with the scope of protection, which it only does in very exceptional cases (see below, N. 119). The result is an unclear and often contradictory situation.

43 In the **absence of a third theory** that could overcome the weaknesses of the barrier theory and the immanence theory, we are left with a fragile (and ultimately contradictory) compromise between these two theories. This corresponds to Swiss practice. On the one hand, the fiction of property as something that precedes the legislature is often invoked, or at least it is insisted that the substance of property cannot be arbitrarily stripped away by legislation and that property must therefore have a pre-legal substance. On the other hand, case law leaves no doubt that the concept of property can be redefined by the legislature in order to make it compatible with public interests and the interests of third parties, although the legislature remains bound to a certain extent by the guarantee of property. In this respect, it is not unreasonable to point out that the concept of property derives from the constitution and is therefore not pre-state but pre-legal. However, this only applies to the cornerstones of property, to its inner sphere. Many important aspects of property, which also enjoy fundamental rights protection, arise only from the law. The concern that the legislature could completely undermine property is therefore exaggerated, at least on the assumption that the legislature respects the Constitution.

44 Nevertheless, the compromise that emerges is fragile and is strained by the fact that the Federal Court only recognizes infringements of fundamental rights through changes in the law in exceptional circumstances, thereby giving the **legislature considerable freedom** over the substance of property. As a rule, it assumes without further ado that new law redefines the scope of protection of the guarantee of property.

c. Functional understanding of property as a navigational aid

45 This fragile compromise is probably best navigated by using a **functional understanding of property** as a guiding principle. This asks which goods and aspects of goods are most crucial for the

purposes for which property is protected by fundamental rights. Attributing certain functions to a fundamental right is always risky. It is an interpretative exercise that can also lead to a problematic reduction of functions. However, without having to reduce the purpose of the guarantee of property exclusively to these functions, it is necessary to grant it, in particular, a decentralization function (see above, n. 27) and a function to protect the dignity and autonomy of the individual (see above, n. 33). In our view, these fundamental functions alone are sufficient to stabilize the fragile compromise between pre-existing property and property that can be shaped by legislation, because these two functions limit the extent to which property can be stripped of its substance, regardless of the specific theory of property. These functions are expressed in two dimensions of protection of the guarantee of property, namely in the institutional guarantee (for the decentralization function) and in the guarantee of core content (for the dignity function).

46 The function of the guarantee of property would be undermined, for example, if the public authorities were to intervene in property to such an extent that this would result in a (gradual) concentration of production factors in the hands of the public authorities. In this respect, property cannot be circumscribed other than by legislation, but the **legislator's freedom of design is not unlimited**; it too is bound by the guarantee of property. It must exercise its discretion in such a way that the decentralization function, the autonomy function, and the dignity preservation function of property are guaranteed.

47 However, this compromise is based on a concept of property according to which property cannot be qualitatively distinguished from other forms of entitlement to goods other than by the fact that it is protected by the guarantee of property. In this respect, property is a **bundle of rights of action** to permissibly interfere with others, which can be distinguished from other rights of action by the fact that it is specially protected by fundamental rights and, in particular, is reinforced by a guarantee of value.

2. Autonomy of the constitutional concept of property

48 The **constitutional concept of property** is **autonomous** from that of private law. This means that although private property under property law is part of the scope of protection of the guarantee of property, it must be defined separately from the concept of private law and, in particular, must be broader than the latter. There is a tendency in the literature to regard private property in rem as a relatively secure foundation for the scope of protection of the guarantee of property and to build the more unclear and complex aspects on this foundation. However, this view is not without problems because it suggests a supposed clarity regarding the scope and content of property in rem. However, a typical situation in which the guarantee of property comes into play is when property is affected by public law regulation or an administrative act. In this case, the scope of property is determined (among other things) by the regulatory framework of public law. Its scope therefore cannot be readily determined from property law alone.

49 Among the institutions of private law, the autonomous concept of property in the guarantee of property rights also protects, beyond property under property law, **possession**, **limited rights in rem, intellectual property rights**, and **obligatory claims**, such as those arising from lease or rental agreements.

50 It remains an open and fundamental question how autonomously the constitutional concept of property can be shaped by property law without becoming vague. This question is likely to become more important as more and more goods are **no longer tied to a physical object** but exist as legal conventions and/or technical innovations (such as rights of use to data; see below, n. 71 f.).

3. Important aspects in which the scope of protection of the guarantee of property rights is unclear

51 For the sake of **clarity**, it is worth first pointing out the areas in which the contours of the material scope of protection of the guarantee of property rights are particularly diffuse before going into these points in detail:

- First, it is unclear whether property rights or property *per se* are the subject of the protection afforded by the guarantee of property (n. 52 ff.).
- A particularly important component of property whose relationship to the scope of protection of the guarantee of property rights is unclear is claims under public law (n. 58 ff.).
- A term that causes ongoing uncertainty in the context of the guarantee of property rights is that of acquired rights and various alternative terms that have been developed for it (n. 60 ff.).
- The question of taxation, which is not in itself regarded as an interference with the guarantee of property, poses difficulties. It is unclear when it is so intensive that it must be regarded as confiscatory (which in turn raises the question of whether confiscatory taxation constitutes a violation of the core content, n. 66 f.).
- It is also unclear how and to what extent factual interests are protected by the guarantee of property (n. 68 f.).
- Finally, it is largely unclear how the guarantee of property relates to the increasingly important asset of data and the economically interesting rights of use of data (n. 71 f.).

a. Property as such

52 For the purposes of the present discussion, assets can be defined as the sum of all economic goods to which a person is entitled. The question of whether **assets as such are protected by the guarantee of property** can be described as the central ambiguity of the material scope of the guarantee of property. Many other ambiguities depend on this question, such as whether taxation constitutes an infringement of fundamental rights, to what extent factual interests are protected, to what extent interests and rights vis-à-vis the public sector fall within the scope of protection, and whether pure financial losses constitute an infringement of the guarantee of property rights. The doctrine is divided. Biaggini considers it “undesirable” to structure the guarantee of property as a general protection of assets. Even according to Dubey, assets themselves are clearly not part of the scope of protection. Waldmann objects that, in view of the purpose of the guarantee of property, those assets that serve to secure livelihoods must in any case be included in the scope of protection of the guarantee of property. He describes the content of the guarantee of property as a “bundle of enforceable rights,” a concept that makes it difficult to exclude assets from this, as a person's assets are the totality of their valuable rights. Tschumi and Riva consequently place assets defined in this way within the scope of protection of the guarantee of property rights (which shifts the problem to the question of what should be considered valuable rights).

53 The **Federal Supreme Court** has remained **unclear** on this issue. On the one hand, it leaves no doubt that the freezing of individuals' assets (as part of sanctions against persons accused of being close to a problematic regime) constitutes an interference with the guarantee of property. The effect of this sanction is not to block individual specific assets, but rather all assets (including potential assets) located in Switzerland, either now or in the future. On the other hand, the Federal Supreme Court has consistently held that only individual property rights are protected, but not property as such. The problem with this position is that it means that interference with parts of the whole is

considered interference with a fundamental right, but interference with the whole is not. This does not make much sense because it is not possible to interfere with the whole without interfering with some of its components. If one were to argue that there is a difference between the specific individual rights arising from ownership and assets as a mere general capacity, it could be countered that assets are characterized precisely by their flexible usability. Certain subsets of assets can be used for specific powers (such as the acquisition of goods). Any interference with assets as such is therefore an interference with specific property rights, even if it is not clear which ones. The Federal Supreme Court also assumes that interference with property only exists if this interference also results in a loss of assets. This (problematic) view suggests that ultimately the assets (the sum of the property rights) must constitute the object of protection behind the guarantee of ownership.

54 Some authors argue that an interference only exists if it affects **specific claims** of the person concerned, but not if it affects the assets themselves. This view can be based on older case law. It seems like a relic from a time when the guarantee of property rights could still import the principle of specificity of property law into the protection of fundamental rights because the property of fundamental rights holders was still essentially tied to physical objects. However, this position no longer corresponds to economic reality and the economic needs that the guarantee of property rights is intended to protect. This can be seen in the invocation of the guarantee of institutions (above, n. 27 ff.). With its formulation on the institutional guarantee, namely that the "institution of private property" must not be "emptied of its substance," the Federal Supreme Court intends the institutional guarantee to overcome a legalistic view by adding a dose of economic realism. It focuses on the economic substance of property and does not limit itself to its legal shell.

55 Since the Federal Supreme Court has attributed **certain factual interests** to the guarantee of property (see below, n. 68 ff.), the objection that a particular course of action must correspond to an explicit, legally protected interest in order to fall within the scope of the guarantee of property is no longer valid.

56 Another source of uncertainty is the prohibition of confiscatory taxation. This prohibition states that property may not be taxed to such an extent that it would be confiscated (see n. 30). Above this threshold, the property is therefore part of the scope of protection in any case. However, this means that the scope of protection changes with increasing intensity of intervention. To explain this, some scholars postulate **different areas of protection** for the different dimensions of the guarantee of property rights. According to this approach, the guarantee of existence and the guarantee of value protect only individual property rights, while the guarantee of the institution (which protects against confiscatory taxation, among other things) also protects property itself. However, the different dimensions of the guarantee of property rights do not protect different legal interests, but rather different aspects of the same legal interest. This ad hoc adaptation of doctrine to established practice seems to be motivated more by considerations of practicality and the protection of fiscal interests of the public sector than by the pursuit of coherence and legal certainty.

57 Overall, the exclusion of property as such from the scope of protection of the guarantee of property raises more questions than it answers. From a dogmatic point of view, it therefore makes sense to regard the **totality of the economic assets** of a legal entity as its constitutionally protected property. Any state action that diminishes these assets must then, as a matter of principle, be required to meet the requirements of a restriction of fundamental rights. The decisive question then shifts to where the line is drawn between a restriction of property that must be accepted without compensation and a restriction that amounts to expropriation and must therefore be fully compensated (see below, n. 104 ff.). This question can then be answered in a more meaningful, coherent, and clear-cut manner than

the question of the boundary between property and assets, which makes no sense either economically or legally.

b. Public law claims

58 The question of the extent to which assets as such fall within the scope of protection of the guarantee of property rights is also linked to the second major area of uncertainty regarding the scope of protection, namely the question of the extent to which **public law claims** are part of the scope of protection. Here, too, there is a conflict. On the one hand, there is a teleological argument, and on the other, the objection of practicability. The teleological argument emphasizes that public law claims constitute a large part of the real assets of individuals in a modern state. If autonomy and security are central purposes of the guarantee of property rights, then such claims must also be included in principle, because an increasing part of this autonomy and security depends on them in practice. They are "functional equivalents" of private ownership of property. This does not mean that public law claims have the full range of qualities that property rights have. It is sufficient that they are comparable (not identical) in terms of the functions that the guarantee of property is intended to protect. A pension claim, for example, fulfills a similar function for autonomy and security as real property. This also applies if real property fulfills other functions. Insofar as it is a mandatory provision, a claim arising from it is also a compulsory substitute for conventional private property, as it ties up assets that would otherwise have been freely available. On the other hand, there is the objection that this publicly produced real wealth is so omnipresent and so complexly and inextricably interwoven with privately produced or acquired goods (every good contains privately and socially produced components) that fundamental rights protection of these goods quickly reaches the limits of practicability and jeopardizes the ability of the public authorities to act.

59 The most common approach to dealing with this problem is to look for criteria for the legal concretization of claims, criteria for determining when mere interests vis-à-vis the public sector have "condensed" into legally protected claims. The criteria for this consolidation and the terminology used to describe it are inconsistent and contradictory. In order to clarify this terminology, it is particularly necessary to distinguish between the concepts of acquired rights, subjective rights under public law, and claims under public law.

c. In particular: acquired rights

60 The category of **acquired rights** is unclear, and the reasoning behind what counts as such regularly takes on "circular characteristics." The only thing that is clear is that acquired rights are those that claim a special dignity, a particularly outstanding permanence. According to the understanding represented here, this is to be seen in the fact that well-established rights are **resistant to legal change**, i.e., they remain in force even if the relevant legal framework changes. In contrast, the term "subjective rights under public law" is used below to refer to claims against the public authorities that are justiciable but do not otherwise have a particularly prominent status. The term "vested rights" is therefore used here in a narrow sense, while the term "subjective rights under public law" is used in a broad sense.

61 Different groups of vested rights have **different lines of reasoning**. In some cases, the protection of legitimate expectations is identified as their basis, in others their immutable character, i.e., their existence since time immemorial, before a modern constitutional order existed. In some cases, they are justified on the grounds that they are remnants of an order shaped by private law, but are now considered to be part of public law.

62 Is the special protection of acquired rights based on the guarantee of property or on good faith (Art. 5 para. 3 FC)? According to recent Federal Supreme Court case law, the **protection of good faith is "paramount,"** which, however, does little to clarify the matter. The advantage of good faith as a legal basis is that it offers better protection against changes in the law, since the guarantee of property rights only protects property within the framework of the applicable law. However, the question is of secondary importance as long as both legal bases protect the same thing, namely the value of investments once made, even against subsequent changes in the law. On the other hand, the unique feature of the guarantee of ownership, namely the guarantee of value (see above, n. 23 ff.), remains important in these cases and precisely with regard to this protective purpose. Wherever rights are nevertheless to be interfered with, their value must be compensated. Since it is not possible to draw a line between changes in the law that redefine property and those that interfere with property (see above, n. 40), the guarantee of property alone is not sufficient as a legal basis for rights that are resistant to changes in the law. On the one hand, good faith is required for the stability of legal changes and, on the other hand, the guarantee of property is required to secure the value in the event of deprivation.

63 An example of (supposedly) acquired rights that are a **remnant of private law** is the use of water power, which was originally granted to riparian owners as a right in rem but is now regarded as a public good. It is initially unclear why rights that were originally assigned to private law cannot also be modified by changes in the law. The idea behind such a private law relic is that it is attached to the property like an easement and therefore survives changes in the law. However, the Federal Supreme Court has since clarified that the assumption of such remnants conflicts with the principle of the inalienability of state sovereignty because, according to today's understanding, these are goods that belong to the public sphere and are therefore an aspect of state sovereignty. Such marital rights must therefore now be replaced by concessions that may not be granted for an indefinite period.

64 The replacement of such relics therefore takes place in two steps. First, control over these assets is classified as an aspect of public authority and the transfer of this control is therefore treated as a concession. Second, the transferability of such authority is limited in time. Once again, the Federal Supreme Court applies a **strongly economic perspective** by disregarding formal legal differences (is it a personal servitude or a special use concession?) and identifying the economic necessity of adequate investment protection as the (economic) rationale in both cases, thereby treating them as comparable in terms of content. Only within the framework of the protection of these investments does the Federal Supreme Court consider the special permanence of these rights to be justified. This two-stage transfer – from marital rights to concessions, which are then limited in time – is generally without compensation.

65 However, the narrow category of **vested rights** cannot be the only form of claims against the public authorities that fall within the scope of protection of the guarantee of property rights. It therefore seems reasonable to assign the relatively marginal subcategory of rights that are resistant to legal changes to the scope of protection of the guarantee of property, to designate them as well-established rights and thus to distinguish them clearly in terms of terminology, and to continue to search for the necessary "density" that property interests vis-à-vis the public authorities must have in order to be protected by fundamental rights.

d. In particular: property interests vis-à-vis the state

66 The question of the extent to which **property interests vis-à-vis the state** should be protected against state interference must be answered in the same way as the question of the extent to which property interests *per se* should be protected. Where these are assigned to the scope of protection

(see above, n. 57), this must also apply to property rights vis-à-vis the public authorities. The state is omnipresent in our lives, and the property claims we have against it are central to the autonomy, provision, and dignity functions of property. The practicality of the very broad scope of protection that this creates can be ensured by not imposing excessive restrictions. An example of this approach can be found in BGE 140 I 176, in which the introduction of a municipal tax on second homes led to a certain de facto pressure to use them for tourism. The Federal Supreme Court readily assumed that the guarantee of property was affected, but protected the municipality's action as a legitimate intervention to reduce demand for second homes and increase the utilization of existing homes.

67 Assets Claims against the state therefore fall within the scope of protection of the guarantee of property once they exist. Conversely, the guarantee of property does not **in principle confer any claim to positive state benefits**, in contrast to the right to emergency assistance (Art. 12 FC). On the other hand, the guarantee of property rights does – like all civil liberties – confer an indirect duty to protect, i.e. a duty to intervene where property is endangered by private individuals. However, case law on intervention – for example in cases of squatting – shows that such a duty to protect is only assumed on a subsidiary basis and with great restraint.

e. De facto interests

68 The last ambiguity discussed in depth here, which also goes back to the question of whether property is protected per se, concerns **de facto interests**, such as the interest in allowing traffic on the street where a gas station is located. Such interests are part of property, because where they are diminished, the person concerned is effectively poorer. However, factual interests are not protected by a specific legal title or a specific right of ownership. They are protected by law, if at all, by their attribution to the scope of protection of the guarantee of property rights. In this respect, the debate on the protection of factual interests has a circular aspect, because their attribution to the guarantee of property makes them more than merely factual interests, namely interests that are protected by fundamental rights – and in this respect also rights. Conversely, an interest cannot be part of the scope of protection of a fundamental right as long as it is only protected in fact and not also in law. For a long time, there was a conflict between case law and the majority of legal scholarship on this issue. Legal scholars argued that it was not so important whether an interest was legally protected or merely factual; what was more important was how essential the “freedom position” was for those affected by the interference. The Federal Supreme Court finally conceded that factual interests also fall within the scope of protection of the guarantee of property under certain circumstances. Once again, it rejected a legal distinction in favor of an economic approach. It therefore asks whether owners are “ultimately” affected in the same way as if their legal powers were restricted. Where this is the case, even an otherwise purely factual interest counts as property protected by fundamental rights. According to the Federal Supreme Court, however, this only applies to “certain” factual interests, namely those whose restriction has the effect of depriving someone of legal powers. The Federal Supreme Court thus adopts the requirement of legal doctrine: the decisive factor is how important a position of freedom is in practical terms. The problem here remains a mixing of the scope of protection and the conditions for intervention. The severity of the impact should be assessed in accordance with Art. 36 FC, not in the question of whether the scope of protection of the fundamental right is affected.

69 The fundamental right protection of factual interests primarily has the effect that, **in terms of procedural law**, it is possible to invoke the guarantee of property in cases where this would not have been possible previously. In the landmark decision that led to the recognition of factual interests as part of the scope of protection, this improves the procedural position of those seeking justice, but not the protection of their material interests. The same applies to a subsequent decision in which the Federal Court again confuses the question of interference with the intensity of the interference and

considers the fundamental right not to be affected because it lacks the necessary intensity. There are currently no examples from case law to suggest that factual interests are also better protected under substantive law against interference by the state.

f. Terminology

70 The broad interpretation of the scope of protection advocated here also helps to greatly simplify the terminology used in the literature to define the scope of protection: it is sufficient to refer to the **sum of a person's assets** in order to describe the material scope of protection afforded by the guarantee of property rights. In particular, it is unnecessary to distinguish between rights of disposal and rights of use on the one hand, or between rights and legal positions on the other, and finally between legal and (mere) factual interests that fall within the scope of protection of the guarantee of property. The concept of subjective rights also loses its importance (in the context of the scope of protection of the guarantee of property), because the quality of goods can only have something that is protected by subjective rights vis-à-vis third parties; since these rights themselves have economic value, i.e., are themselves goods, they also fall within the scope of protection of the guarantee of property.

g. Data

71 Does data fall within the scope of protection of the guarantee of property rights? Data is a clear example of the limitations of a guarantee of property rights, which remains closely linked to ownership of property. As economically important as data is, it is difficult to draw convincing analogies with property law. It is **intangible** and **non-rival** (use by A does not diminish the possibilities of use by B). Both characteristics make it relatively difficult to exclude someone from sharing data. They also make it much more difficult to assign data to a person as the economic owner than other goods. Several people may have overlapping rights of use. Finally, data is becoming less and less tied to a specific data carrier. The protection of the data carrier as a surrogate for the data that is actually to be protected under property law is therefore becoming increasingly impractical. The proposal to protect data in a manner as analogous as possible to property has therefore been largely criticized in the literature. The proposal to create an exclusion right for data vis-à-vis all other legal participants (*erga omnes*) and thus a right of control over data comparable to intellectual property law, a kind of data ownership *sui generis*, has also failed to gain acceptance. The literature remains correspondingly skeptical about the approach of assigning data to the scope of protection of the guarantee of property rights. A parliamentary initiative sought to enshrine the following in Article 13 FC (protection of privacy): "[...] Data are the property of the person concerned; they must be protected against misuse." The initiative was referred to the relevant committees but was rejected by the National Council. The completely revised Data Protection Act, which came into force on September 1, 2023, strengthens in some respects the rights of the persons to whom the data relate. However, it expressly refrains from introducing data ownership, among other things because such a provision would deviate too far from the rules in the EU and its member states, whose data protection legal framework has a major influence on Swiss law.

72 The example of data illustrates the sense of including assets within the scope of protection of the guarantee of property (see above, n. 52 ff.). This makes it possible to assign not the data itself, but **property rights *in* data** to the scope of protection of the guarantee of property. Where these exploitation rights arise from a contract, they are in any case subject to the guarantee of property rights, like other contractual claims. It is also possible for different persons to have different (but not mutually exclusive) rights in relation to the same data, all of which are subject to the guarantee of property rights. Data is therefore an instructive example of the extent to which economic goods are a product of the legal system. The goods that are economically relevant are not the data themselves, but

the *rights* to use data in one form or another. Data is often referred to as the "oil of the 21st century." But unlike oil, data is not an occupiable thing that provides energy regardless of the legal framework in which it is consumed; rather, the exploitation rights to data are a product of a specific legal system. Such assets, which can only come into existence through a legal system, are becoming increasingly important in a post-industrial, increasingly digitalized society. The scope of protection of the guarantee of property rights must take this development into account.

4. Animals

73 Although animals are no longer considered property (Art. 641a CC), they are still covered by the guarantee of property rights. Or more precisely: **the property rights relating to animals** fall within the material scope of the guarantee of property. In the case of pets, with which there is also an emotional relationship, the right to personal freedom (Art. 10 para. 2 FC) is likely to offer more effective protection against their removal and placement with third parties than the guarantee of property.

IV. INTERFERENCE WITH THE GUARANTEE OF PROPERTY (ART. 26 PARA. 2 FC)

74 The **most fundamental distinction** in the case of interference with constitutionally protected property is that **between formal and material interference**. In the case of formal expropriation, title to property or limited rights in rem are transferred (for example, a piece of land is expropriated or an easement is compulsorily established on it). In the case of substantive restrictions on property, however, *no formal* transaction takes place; instead, the bundle of rights associated with the property is reduced (for example, by restricting the buildability of a piece of land). Formal encroachments on property always constitute expropriation and must therefore always be fully compensated. In the case of material encroachments, however, this is only the case under specific qualifying conditions in which such an encroachment is equivalent to expropriation. The terms "expropriation-like interference" with property and "material expropriation" can therefore be used synonymously. If an interference remains below the "expropriation-like" threshold, it is a material interference but not yet a material expropriation.

A. Relationship between formal and material expropriation

75 The constitutional protection of property would benefit if the **importance of the distinction** between substantive and formal interference with property were greatly **relativized** and it were recognized that, from an economic point of view, substantive and formal interference with property have much more comparable effects than may appear to be the case from a legal perspective. This presupposes the observation that in both cases the public authorities appropriate factors of production that they need to achieve their objectives.

76 The Federal Court took some of the edge off this distinction by developing the concept of **expropriation-like interference with property** (or **material expropriation**) in creative case law. This is considered one of the most significant achievements of case law in the area of property rights. This innovation was adopted by the constitutional legislator when property rights were first enshrined in the Federal Constitution. It is now found in Art. 26 para. 2 FC, according to which "restrictions on property rights that are equivalent to expropriation shall be fully compensated."

1. Transaction of rights

77 Despite all the possible criticism, the distinction between formal and material expropriation remains **important in practice**. This is **due to the value guarantee** that applies in principle in the case of formal expropriation, but only in exceptional cases in the case of material interference with property. This special status of formal expropriation has not been without criticism. This special position is due, among other things, to the widespread implicit notion that formal expropriation involves a transfer of rights between a private individual and the state, whereas this is not the case with material interference with property. Karlen, for example, expressly refers to restrictions on property without deprivation of rights in the case of material interference with property. However, in our view, this is a misleading idea. This criticism can be illustrated by a concept of property that understands property as a bundle of subjective rights, sees the value of property in the sum of these rights of action, and regards these rights of action as factors of production. Factors of production are rights of action in the sense that they are a necessary prerequisite for a range of economically interesting activities. According to this concept of property, a transaction also takes place in the case of a material interference with property. A partial aspect is removed from the bundle of rights of the private individual and a partial aspect is added to the bundle of rights of the public authority.

78 The difference between a formal and a material intervention therefore does not lie in the fact that a transaction takes place in one case and not in the other, but in the fact that the transaction is more complex in the case of a material intervention. In this case, a partial right is not simply transferred from A to B, but B **B acquires the possibility of preventing what A was previously allowed to do**. The partial right is thus transformed into its correlate in the transaction. Where, for example, there was previously a right to cause a certain emission, after the transaction the state has the power to prevent it, etc. However, the subjective rights and their aspect as factors of production have not simply vanished into thin air. What was previously a prerequisite for a certain type of private economic activity (for example, the right to cause an emission) is now a competence of the public authorities to prevent activities of that type and thus pursue a public interest (for example, the protection of the environment). Production factors are also needed to produce this (public) good. The rights newly acquired by the public authorities through their intervention in property constitute these production factors. Without the transfer of these rights of action, the public authorities would lack this prerequisite for satisfying a public good.

2. Special case of state liability?

79 In isolated cases, the literature argues that material expropriation should be regarded as a **special case of state liability** rather than a special case of expropriation. This is primarily because compensation is a constitutive element of formal expropriation, i.e., a prerequisite for it to be lawful; the lawfulness of material expropriation, on the other hand, is assessed independently of compensation, which is its consequence, not its prerequisite. However, this position cannot ignore the fact that the constituent elements of substantive expropriation are much more closely aligned with formal expropriation than with state liability. It has clearly been modeled by the Federal Supreme Court on formal expropriation and not on state liability. The above considerations also show that the reason for substantive expropriation (as in the case of formal expropriation) is the acquisition by the public authorities of goods they need to fulfill their tasks, and not compensation for damage (as in the case of state liability).

3. The role of the legal basis and democratic legitimacy

80 Expropriation laws also play an important role in distinguishing between substantive and formal interference with property. At the federal level, Art. 5 EntG specifies the type of property that may be subject to expropriation. In the example of expropriation of defensive rights under neighbor law (see below, n. 87 ff.), it is decisive that the property of the defensive rights is explicitly mentioned in Art. 5 EntG. The boundary between a formal and a material restriction of ownership can therefore also be drawn by **explicitly mentioning** certain aspects of ownership (as opposed to others) **in the law**. The Federal Supreme Court states on this point:

"Whether an encroachment on property is to be regarded and treated as formal or material expropriation is therefore determined primarily by whether the expropriation law applies and whether the rights claimed for a work in the public interest must be acquired in formal expropriation proceedings (...)."

81 This distinction gives the distinction between formal and material expropriation a component of **democratic legitimacy**. The degree of democratic legitimacy results in the following cascade order:

- Where a law redefines property, no interference with it is assumed.
- Where a law or plan creates a basis for a specific interference with property, a substantive restriction of property is assumed.
- Where only an expropriation law serves as the basis for the interference, only the formal expropriation of corresponding valuable rights can be considered.

The less concrete or direct the democratic legitimacy for a restriction of property is, the greater the protection of the owners in principle, in the sense that formal expropriation is assumed and thus the value guarantee and the other protective mechanisms of the expropriation procedure apply.

82 The strong orientation of formal expropriation towards the categories of the Expropriation Act also means that various situations in which property is taken away by the state do not constitute formal expropriation. This applies, for example, to **requisitioning** (Art. 80 para. 3 of the Military Act, MG, and Art. 58 of the Civil Protection Act, BZG), **confiscation**, and **land redistribution**. Although they may give rise to claims for compensation, they are treated, if at all, only as material interference with property. In these cases, the payment of compensation is a consequence, not a prerequisite for an interference with property.

B. Formal expropriation

83 Formal expropriation is **a qualified restriction of property**. However, it is not primarily the intensity of the interference that qualifies it as such, but rather formal elements that lead to additional constitutive conditions for the interference. The following elements are mentioned in legal doctrine:

- Deprivation of a property right;
- By unilateral sovereign act;
- In a special procedure;
- To fulfill a specific public task.

This results in the additional condition of full compensation, which is constitutive for formal expropriation. According to the bundle of rights approach outlined above (n. 77 f.), the difference between a formal and a material restriction of ownership is not the transfer of a property right from private individuals to the public sector. Nor does the difference lie in the purpose of fulfilling a public

task. Both are also the case in the context of a material restriction of ownership. At most, the public task to be fulfilled is more specific in the case of formal intervention (it concerns the construction of precisely this section of a road, etc.), but this is only a gradual distinction. The difference therefore lies primarily in the fact that formal expropriation involves a **special procedure** in which property must be acquired, and that this procedure may be based on an expropriation law or other specific **expropriation provision**.

84 Formal expropriation can **not only** be used to deprive someone of ownership of property and other (limited) **rights in rem**, but also of legal positions, mandatory rights and acquired rights under public law that derive from ownership of property. There are therefore certain material interests that are so formalized that they are considered components of constitutionally protected property and must be withdrawn in a special procedure in return for full compensation, while others can be removed without compensation up to the intensity limit of expropriation-like restrictions on property (see n. 104 ff. below), provided that the requirements of Art. 36 FC are met. The gradual difference between interests that are considered so entrenched that they can only be withdrawn through formal expropriation and those whose withdrawal is only considered a material interference shows that there is no qualitative difference between formal and material interference with property, but only a gradual one.

85 Insofar as it does not concern rights but rather property, formal expropriation serves primarily to acquire land. Accordingly, federal law – unlike the law of individual cantons – does not provide for the expropriation of movable property.

86 In the case of formal expropriation, full **compensation** is a **constitutive prerequisite** for expropriation. In the case of material expropriation, however, it is the consequence of an intervention.

1. Practically important constellation of formal expropriation I: neighbors' rights of defense

87 In the case of expropriation of neighbors' rights of defense, the neighbors of a public work that causes excessive emissions (e.g., an airport or a road) are deprived of the **possibility of bringing an action under private law to have the disturbance stopped** (Art. 679 and 684 CC). This is considered a variant of formal expropriation. It is mainly used for traffic noise caused by public works, but can in principle be applied to all impacts, including intangible ones. Neighbors are defined as anyone affected by an immission, even if the affected properties are several kilometers away from the public work. It is sufficient that the immission is a consequence of the use of the public work. A change in the technological framework and thus in the group of people affected by immissions therefore also means a change in the group of "neighbors" and the updating of defensive rights that did not previously exist because there was no interference between the two properties in question.

88 As is typical for formal expropriation, a previously existing defensive right against the state is replaced by a right to compensation. The guarantee of continued existence is replaced by a guarantee of value. However, the withdrawal of neighbors' rights of defense is only compensated if additional, high, and flexible requirements are met. These criteria are the **lack of predictability** of the excessive impact, **its specificity**, and **the severity** of the **damage** caused by it (see below for these criteria).

89 In the case of immissions caused by **construction work** on public works, the conditions for compensation applicable under civil law are applied analogously. In the case of construction work, civil law also only provides for a claim for compensation and not for injunctive relief (see Art. 679a CC). This means that the criteria of specificity and severity of the damage do not apply in this case.

a. Predictability, specificity, and severity

90 Where a person acquired a piece of land at a time when it was already **foreseeable** that a public work would be carried out in the future that would impair the value of the land, the Federal Supreme Court does not consider this to be an interference with property rights that gives rise to compensation. For neighbors of national airports, the criterion of unpredictability is only met if they acquired their property before 1961 (or if the property has only passed into their possession since then by inheritance).

91 The requirement of **specificity** of the impact is met if the emissions reach an intensity that exceeds what is customary and reasonable. The "emission limits set out in federal environmental protection legislation" regularly serve as a reference point for this specificity.

92 The criterion of the **severity of the damage** asks what impairment is actually and causally caused by the specific nature of the emission on the property in question. It is only fulfilled if the damage affects a certain percentage of the total value of the property. Where, for example, a property can only be used for commercial or agricultural purposes, even a specific impact may not cause significant damage. The Federal Supreme Court has rejected the idea of setting a fixed percentage limit for damage in relation to the total value as impracticable.

93 The point at which these three criteria are deemed to be met (and encroachments are therefore to be regarded as expropriation subject to full compensation) must necessarily be determined by drawing a **more or less arbitrary line**. From this point downwards (a fixed altitude for overflights, a decibel limit, etc.), the restriction of property changes from "formal" to 'material' and from "fully compensable" to "to be accepted without compensation." Expropriating authorities have occasionally pointed to the "proximity and similarity" between material encroachments on property and the formal expropriation of neighbors' defensive rights in order to set the threshold for the severity of the damage relatively high. The Federal Supreme Court, on the other hand, has upheld the difference between these constellations and thus also the principle of full compensation for the expropriation of defensive rights. At the same time, however, it also upheld the criterion that these are only decisive once the damage reaches a certain level of severity. In doing so, it set the threshold for compensation lower than in the case of material expropriation, but nevertheless consolidated the proximity and similarity to expropriation-like restrictions on property.

94 This compromise solution, which seems strange at first glance, can be explained from an economic perspective. The expropriation of neighbors' defensive rights involves replacing a claim to injunctive relief with a claim to compensation, thereby overcoming a veto position against the fulfillment of public tasks and replacing it with a claim to compensation. In other words, it is a matter of significantly **reducing the transaction costs** for the transfer of production factors from private individuals to the public sector, and thus reducing the costs of fulfilling public tasks.

b. Compulsory easement?

95 The Federal Supreme Court is of the opinion that the expropriation of neighboring rights constitutes the **compulsory establishment of an easement**, i.e., the formal withdrawal of a right in rem. This easement takes two forms:

96 The first form concerns special cases in which aircraft fly so low and so directly over a property that physical intrusion into the property itself (into the air column belonging to the property) is assumed. This is the case, for example, when overflights not only cause noise but also other emissions such as air turbulence that tears off roof tiles, falling chunks of ice, the smell of kerosene, or vibrations. In

such cases, the easement is based on tolerance of physical intrusion into the property. Accordingly, the criteria of foreseeability, specificity, and severity are not required in this constellation.

97 In the second form, the overflight is less low or direct, so that noise is the significant immission. In such cases, the easement is based on a waiver of the neighbor's rights of defense. Some legal scholars believe that this second form of a compulsory easement is a **problematic fiction**. Civil law claims for defense cannot be asserted against the sovereign community (the situation is different in the case of a work that is part of the financial assets of the public sector). In essence, this is a material expropriation. This is supported by the fact that compensation is not paid for the full value of the expropriated right, but rather for the difference between the value before and after the harmful effect arose, and that compensation in this context is a consequence, not a prerequisite, for the withdrawal of rights. Another thing that's not typical of formal expropriation is that it happens through a real act, not through a legal act like it usually does. Finally, there's no transfer of rights to the expropriator, the public sector.

98 As the above explanations (n. 77 f.) have shown, this last point is not convincing. By expropriating a defensive right, the public authority has **acquired a right to interfere and thus a factor of production** to fulfill a public task. However, this view also leads to a blurring of the boundaries between formal and material interference with property. In any case, the Federal Supreme Court has adhered to its “dogmatically not entirely uncontroversial” construction of the compulsory establishment of an easement. It can base this on Art. 5 EntG, which explicitly mentions neighbors' defensive rights (albeit in addition to rights in rem) as a possible object of expropriation.

c. Scope of the value guarantee

99 As in other contexts of expropriation law, there is a tendency in the expropriation of defensive rights under neighbor law to refrain from compensating for the interference because the public authorities would **otherwise only be able to perform a public task with difficulty**. For example, it was argued early on that the constant increase in motor vehicles required the construction or widening of roads. If the public authorities had to compensate residents for the damage caused, they would in most cases be financially unable to provide this infrastructure service.

100 The argument that the public authorities would no longer be able to perform a task if they had to compensate for the associated negative external effects is problematic. An important aspect of the guarantee of value as a special component of the guarantee of property rights is precisely that it requires the public authorities to **price in** the **external effects** of their activities or infrastructure (see n. 111). If it is pointed out that the public sector would no longer be able to perform a task if it had to internalize the external effects, this indicates that the overall social benefit of the activity in question is questionable and that it is therefore an activity of the public sector which, if effectively internalized, would have to be discontinued.

101 **Real replacement benefits** in the form of construction measures (e.g., noise protection measures) can both reduce the damage and protect the residents of the affected property. Where possible, such measures must also be ordered in expropriation proceedings even if they have not been requested. More recently, the Federal Supreme Court has explicitly established the principle that scarce public funds should be used to prevent emissions at source or, secondarily, for passive protection at the point of immission (e.g. through noise protection measures). Distributing money to individual landowners is not an effective means of dealing with the widespread emissions of public works.

2. Practically important constellation of formal expropriation II: vested rights

102 Vested rights – despite all the uncertainty surrounding them (see above, n. 60) – are characterized by the fact that they can in principle **only be withdrawn in a formal expropriation**. This means that full compensation is owed if their "substance" is interfered with. This understanding is reflected in the law, for example in Art. 43 para. 2 of the Water Rights Act (WRG), which provides that "once granted, the right of use [...] may only be withdrawn or reduced for reasons of public welfare and in return for full compensation."

103 Recently, an important group of acquired rights – **marital rights** to environmental resources such as water – have been deprived of a large part of their protective effect because they are treated in the same way as concessions (see n. 63 f. for details). As a result, this case law represents a shift from formal expropriation to material restriction of ownership. What were previously well-established rights are now special rights of use granted for a limited period. This rolls back the protective effect of the value guarantee.

C. Material expropriation

104 Material expropriation differs from formal expropriation in that the acquisition of a property right is not the aim of the state action, but rather a **secondary consequence** of a public action aimed at a different goal. According to the concept advocated here, however, a right of value is nevertheless transferred to the public sector (see above, n. 77).

105 For encroachments on property that are considered material, the **principle applies that they must be accepted without compensation**. The value guarantee therefore plays no role in this constellation. The prerequisites and consequences of an encroachment are comparable to those for other civil liberties (see below, n. 127 ff.).

106 Case law has developed **two exceptions** to this principle of no compensation, which are referred to as expropriation-like encroachments on property or material expropriation. According to the established case law of the Federal Supreme Court, these constellations exist

"if an owner is prohibited from using his real property in the manner he has used it in the past or in a manner he can reasonably expect to use it in the future, or if such use is particularly severely restricted because he is deprived of an essential right arising from ownership (first variant of material expropriation). If the interference is less far-reaching, a restriction of ownership may, in exceptional cases, be equivalent to expropriation if a single or a few property owners are affected to such an extent that their sacrifice appears unreasonable in relation to the general public and would be incompatible with the principle of equality before the law if no compensation were paid (...)."

This passage from the Federal Supreme Court is known as the **"Barret formula."** This formula was developed from the Barret decision of 1965. Following a period of fluctuating case law on material expropriation, this formula has remained unchanged since its establishment in the 1970s.

107 According to Dubey, this formula and subsequent case law give rise to **two positive and two negative criteria** that must be cumulatively fulfilled for material expropriation to exist. The positive criteria (related to the criteria for formal expropriation of neighbors' defensive rights, see above, n. 87 ff.) are the severity of the restriction and the actual damage incurred. The two negative criteria are that the intervention is not motivated by police considerations (such interventions are generally acceptable without compensation) and that it does not constitute a legal concretization or redefinition of property. In the latter case, the material scope of protection of property is redefined. In this respect, there is not even an interference with the scope of protection.

1. Positive criteria

108 The necessary **severity of** the damage can be achieved in **two different constellations**, either through the particularly severe restriction of a property right or through the special sacrifice (for this term, see immediately below, n. 111), i.e. by the severity of the interference in relation to other owners in a comparable situation, in other words, when a component of legal equality is added to the restriction of property.

109 However, there is no material expropriation if owners are only theoretically affected in their future possible rights of use. A restriction must be imposed on **actual use that is currently exercised or likely to occur in the near future**. The typical case for this last constellation is the withdrawal of the possibility of building on land that is already ready for development.

110 The threshold for material expropriation is set high. According to the Federal Supreme Court, it is only reached when the essential possibilities of use flowing from ownership are removed. This is typically the case when building on the land is made completely impossible. On the other hand, even serious restrictions on the possibilities of use are not treated as expropriation if an economically reasonable use of the property in question remains possible. The decisive factor is not the difference between the potential return without the restriction in question and the actual return, but whether economically viable use remains possible at all. Rezoning and even zoning out therefore do not generally constitute expropriation, provided that economically viable use remains possible.

111 The function of the second constellation, that of the **special sacrifice**, is not easy to grasp. On the one hand, there are hardly any cases in practice in which the existence of a special sacrifice has been recognized. The legal construct therefore primarily has a dogmatic function. However, it is not entirely clear *what* dogmatic function it fulfills. The mixing of the value guarantee, which is a unique feature of the guarantee of ownership (see above, n. 26), with elements of legal equality does little to contribute to dogmatic clarity. In isolated cases, the literature argues that the lower threshold for the value guarantee to apply fulfills a pricing function for external effects caused by state action. Because individual affected parties, unlike large interest groups, are unable to organize politically and achieve internalization through political channels (e.g., through subsidies that could offset the burden), they must be compensated as expropriated parties so that the public sector must price in the costs of its actions. The concept of special sacrifice is therefore primarily a guiding principle. It is a warning that the compensation threshold is reached more quickly, at least in theory, when those affected are treated unequally.

112 One of the rare cases in which the Federal Supreme Court has actually recognized a special sacrifice constellation is the construction of flood protection measures, for which the canton acquired private land, among other things with the aim of improving the usability of other private land. Another situation that is repeatedly mentioned as a possibility for special sacrifice is **monument protection**, where a particularly worthy object is placed under protection as an example and the owners of this object must therefore make a sacrifice for the general public.

2. Negative criteria

113 Even where these positive criteria are met, a restriction of property rights must be **accepted without compensation** if a) the intervention is carried out for police reasons and b) it is not treated as an intervention but as a rewriting of the scope of ownership.

a. No compensation for police interventions

114 The first negative criterion for the existence of material expropriation is the police motivation for an intervention. Legal doctrine has repeatedly criticized this principle, which is why the Federal Supreme Court has severely restricted it in the further development of its case law. Thus, only those restrictions that are necessary within the meaning of the principle of proportionality to avert an imminent danger are acceptable without compensation, but not orders that go further. Finally, case law has

"reserved three possible exceptions to the principle of no compensation for restrictions on property rights of a police nature in the narrow sense. These are: cases of a building ban imposed not only for police reasons but also for reasons of spatial planning, the case of a ban on an existing use, and the case in which the creation of a protection zone results in the rezoning of land ready for development or roughly developed land or is equivalent to such rezoning."

115 The question of compensation for police interventions may also arise in the context of **confiscation** (see Art. 69ff. SCC; Art. 376ff. CrimPC or Art. 31 para. 1 Weapons Act), which is considered a material interference with property. This question arises in any case if the confiscation is not intended to have an additional punitive character. Here, the principle of proportionality requires that the mildest possible means be chosen. This means that where confiscated items can in principle be sold, they must be sold and the proceeds handed over to the original owner. This may be the case, for example, with illegally acquired weapons that can, under certain circumstances, be sold legally.

116 One problem with not compensating for police-motivated interventions is that it is often unclear how **police purposes can be distinguished from other purposes**, and that a police purpose is often only one of several purposes, for example in the case of forest clearances or water protection regulations. If the restriction on use primarily serves to protect the property owners themselves (e.g., a building ban in an avalanche zone or in forest buffer zones), no material restriction on property is assumed. This also applies if the danger comes from third parties. In this case, claims for damages against them are possible. Where, on the other hand, the police-motivated restriction serves to protect a public work (e.g., the water supply of a municipality), it is to be treated as any other material interference with property, even if it is directed against the disturber.

117 This differentiated practice has also been criticized in legal scholarship. Some suggest abandoning the distinction between police and non-police purposes and instead asking whether the interference serves to protect the affected owners themselves or third parties. Others want to prevent compensation in the first instance when it comes to protection against natural hazards or hazards emanating from the property itself. Here, too, the question arises as to whether it would not be more sensible and simpler to treat state action that serves to avert an immediate and serious danger as a concretization rather than a restriction of property. This is because actions that pose a serious threat to public property – whether to the owners or to third parties – have never been part of the bundle of rights protected as property. In this respect, state action merely clarifies what was already the case. It would then be working with a **fiction** that the corresponding rights of action were, strictly speaking, never part of the bundle of rights known as “property.” This fiction would then be comparable to that applied when zone regulations compliant with federal law were first created (see n. 121).

b. No redefinition of the content of ownership

118 Material restrictions on property can take a variety of forms of state action: through individual, concrete acts of law enforcement, through real acts or through a zoning and land use plan, and finally through legislation. The Federal Supreme Court has a strong tendency (and in this respect follows the

theory of immanence) to treat restrictions on property through legislation **not as encroachments but as redefinitions** of the content of property. It thus expresses the view that restrictions on the rights of action arising from property (and even more so interventions tantamount to expropriation) through legislation are only recognized as encroachments on the guarantee of property in exceptional cases. These exceptions again concern particularly unequally distributed effects of regulations that hit individual owners particularly hard.

119 Cases in which the powers of owners are restricted by general abstract state action to such an extent that a restriction equivalent to expropriation would have to be assumed are usually mitigated by **transitional periods, exemptions, and similar measures**. The Federal Supreme Court recognizes these as compensatory measures to mitigate the severity of a restriction on property rights. The protection of investments already made (which can be derived from both the guarantee of property rights and the protection of good faith) is also relevant in such cases and may justify placing those who already carry out a certain activity in a better position than those who only wish to do so. In particular, generally binding restrictions on property that are based on the Federal Constitution or federal laws are predominantly regarded as a redefinition of the content of property and must therefore be accepted without compensation insofar as they do not constitute an encroachment on the scope of protection. However, it is not entirely clear (and also logically impossible to clarify, see above, n. 40) in which cases a change in the legal situation is treated as an encroachment on property and in which cases as a rewriting of property. For example, the Federal Supreme Court appears to treat a ban on slot machines, a limitation on livestock numbers (and thus the operational futility of larger livestock buildings) and, most recently, a ban on electric heating as encroachments on property (to be accepted without compensation), but the ban on second homes as a rewriting of property.

120 A special and practically important form of rewriting property has recently been introduced by case law in relation to **water rights**, which play a particularly important role in the context of hydroelectric power generation. Due to the otherwise unpredictable size of compensation claims against the public sector, a special feature applies here in that the renovation of existing power plants only had to be carried out to the extent that the public sector did not yet have to pay compensation for material expropriation (so-called renovation up to the compensation limit in accordance with Art. 80 para. 1 of the Water Protection Act, GschG). In addition, until recently, there was the legal concept of marital and therefore well-established water rights. If these were withdrawn, this was only possible as formal expropriation and therefore with full compensation. In BGE 145 II 140, the Federal Supreme Court has now largely abolished the protective effect of marital water rights (see above, n. 113).

121 **Interference through planning:** Between material interference with property through legislation and interference through individual, specific application of the law or real acts lies material interference through a land use or zoning plan. In practice, this is an important distinction because almost the entire value of a property depends on whether it can be built on. The entry into force of the Spatial Planning Act (RPG) in 1980 forced municipalities to significantly reduce their building zones and thus to rezone many properties. In this situation, the fiction was used that the creation of a new zoning plan that complied with federal law meant non-zoning if it did not allocate land to a building zone, even if the land could have been built on under the old zoning plan. However, if a plot of land is no longer designated as building land in a subsequent revision of the zoning regulations, this is generally considered to be a **rezoning** and may therefore be subject to compensation. This also applies if this (renewed) adjustment of the zoning regulations is determined by federal land use regulations and is the reason why a further reduction of building zones is necessary, for example because the population has not developed as predicted in demographic terms or because the building zone capacity has been increased through densification. Rezoning also occurs if a property is located in a building zone that complies with the new land law but is subject to a building ban due to a

planning measure. A partial restriction of the possibility of development is referred to as **downgrading**.

122 **Non-zoning:** Non-zoning is regarded as a concretization of ownership and not as an encroachment on ownership. This is only deviated from in very special cases, for example if the owner

"owns buildable or roughly developed land that is covered by a [general sewerage project] GKP that complies with water protection law, and if he has already incurred considerable costs for the development and construction of his land, whereby these conditions must generally be met cumulatively. Furthermore, other special considerations relating to the protection of legitimate expectations may be so significant that a property would have had to be zoned under certain circumstances. A zoning requirement may also be affirmed if the property in question is located in a largely built-up area (Art. 15 lit. a RPG). Such circumstances could possibly have necessitated zoning, so that the owner could have expected with a high degree of probability on the relevant date that he would be able to develop his land on his own (...)."

Cases in which non-zoning constitutes an encroachment on property usually concern plots of land in a special location which, although largely built-up or located in a built-up area, are to be kept free for one or other public interest, such as wedges between a traffic axis and a body of water. Non-zoning may also include classification in a zone where any development is effectively impossible (e.g., in a zone for buildings in the municipal interest).

123 In the case of both the curtailment of property rights by legislation and by planning, material expropriation is therefore only recognized in practice in cases where it affects individual owners in a particularly significant way and where legal equality also plays a role. It is in the nature of legislation that it rarely, or at least much less typically than a land use or zoning plan, creates such special sacrifices because it is more general and abstract (the land use or zoning plan lies between the general-abstract and individual-concrete forms of administrative action) and therefore tends to affect all those concerned equally. It is therefore **difficult to find cases** in which a **restriction of ownership equivalent to expropriation through legislation** has been recognized. An older example may illustrate the exceptional nature of such constellations: a private archaeological collection, which was practically unique in its kind, was subject to restrictions on disposal under the cantonal cultural property law. The Federal Supreme Court considered that this constituted material expropriation (based on special sacrifice, among other things). Apart from such rare cases, compensation for restrictions on property rights equivalent to expropriation has hardly played a role in practice outside of spatial planning law.

124 **Value capture:** The counterpart to material expropriation is value capture by the community. This comes into consideration when land has increased significantly in value as a result of planning measures. A large part of the value of land ownership is socially produced, i.e., it would not exist if the community had not taken action, made plans, and established infrastructure and a legal system. While this applies to all forms of property, the effect is particularly striking (and particularly easy to measure) in the case of changes in value resulting from spatial planning on land.

125 It is therefore also in this context that the federal government has established a **set of instruments for capturing** added value created by planning measures (Art. 5 para. 1 RPG). With the revision of the Spatial Planning Act in 2012, these requirements were specified and tightened (Art. 5 para. 1^{bis}-1^{sexies} Spatial Planning Act). The added value of significant planning advantages must be skimmed off with a levy of at least 20%. The levy is not payable immediately, but only when the land is developed or sold (Art. 5 para. 1^{bis} RPG). The proceeds from the value capture are to be used primarily to compensate for material expropriations resulting from spatial planning (Art. 5 para. 1^{ter} RPG). A cantonal regulation

that prohibits municipalities from skimming off the added value of further planning measures (such as rezoning and reclassification) is contrary to federal law, as it prevents municipalities from skimming off added value in a legally equitable manner. Exemptions of CHF 50,000 also violate the principle of equality before the law (the Federal Supreme Court assumes a guideline value of CHF 30,000 for the admissibility of such exemptions). As long as the canton does not exercise its power to skim off added value, it cannot prevent the municipalities from exercising this power themselves.

3. Summary

126 In all important conflicts of use in which the public authorities have restricted property rights in order to moderate these conflicts, the **courts** have responded by **developing concepts** that allow the scope of the value guarantee to be severely restricted. This applies in particular to land and water. Examples of such innovations in case law include the fiction that land has never been zoned, the rewriting of ownership, the replacement of perpetual rights with temporary rights, and the principle of no compensation for police interventions. However, this flexibility of a principle of full compensation that is laid down in the constitution is not unique to restrictions on material property. In conflicts of use that are primarily resolved by means of formal expropriation (such as dealing with traffic noise, see above, n. 87), similar techniques have been developed (for example, the predictability of the impairment of property) that greatly restrict the range of constellations in which compensation is payable. What is striking in this respect is the variety of instruments that have been developed to limit the scope of the **value guarantee**.

D. Conditions for intervention

127 In principle, the guarantee of property is a classic freedom right that can be restricted in accordance with the general conditions set out in Art. 36 FC. The following remarks are limited to those aspects in which the conditions for intervention in the guarantee of property differ from the general conditions set out in Art. 36 FC.

1. Legal basis

128 The **difference between a serious and a minor interference** with property is primarily relevant because only in the former case is a legal basis in the formal sense required. Otherwise, a legal basis in the material sense is sufficient, i.e., a general abstract basis which, in turn, may be based on a delegation norm in a law in the formal sense. It should be noted that the requirements for a serious interference and for an obligation to pay compensation are not identical.

129 Whether a sufficient legal basis exists is a question of federal law and, as such, a question that the Federal Supreme Court examines with **unrestricted jurisdiction** (as it does the question of proportionality and the permissible public interest).

130 A typical scenario involving interference with the guarantee of property rights is interference based on **building and zoning regulations**. These are considered a legal basis in the formal sense if they have been adopted by the voters and are themselves based on a cantonal law.

131 The Federal Supreme Court has recognized a **serious interference** with the guarantee of property in the following situations:

- when real property is compulsorily expropriated, or
- when the previous use is made impossible or severely restricted.

- The transfer of a small part of the property (e.g., for a riverside path) also constitutes a serious encroachment, but not the clearing of a stream that runs across the property, which, although it leads to construction work and a change in vegetation, does not alter the buildability of the property.
- The exercise of a right of first refusal also constitutes a serious encroachment.

These case groups were developed on the basis of questions relating to real property, but can also be applied analogously to other property rights that fall within the scope of protection of the guarantee of ownership.

132 As a rule of thumb, interference is only **minor** if a plan, legal provision, or act of law does not prohibit the development of a property per se, but rather defines the type of development that is possible, such as prohibiting development right up to the property line, and in general also when a building line is specified. If the distance regulation restricts the use of the property more severely, for example by making it impossible to fully utilize the floor area ratio, this may also constitute a serious interference. A minor interference also exists if the community can determine 15% of the tenants for properties it subsidizes, or if a certain proportion of a property must be reserved for a specific purpose (e.g., residential use).

133 The guarantee of ownership places a special requirement on the legal basis: it must also specify **which community is competent for expropriation**. The legal basis must specify, for example, whether only the canton or also the municipalities are authorized to expropriate. Which public authority expropriates may also have an impact on the severity of the interference, because this may determine, for example, whether real compensation or monetary compensation is possible.

2. Public interest

134 The Federal Supreme Court assumes that, in principle, **any public interest** may be considered grounds for interference with property, provided that it is not purely fiscal in nature. This practice is criticized in legal literature from two different perspectives. On the one hand, it is considered too generous, such that the guarantee of property loses its limiting function vis-à-vis the legislature. On the other hand, the fundamental exclusion of fiscal interests is criticized as no longer appropriate.

135 What constitutes **fiscal interests** in the case of interference with property cannot be answered in isolation from the scope of protection of the guarantee of property rights. If the assets themselves or the sum of the property rights constitute the scope of protection of the guarantee of property rights, then it follows that taxation also constitutes an interference with property rights. Insofar as taxation is primarily carried out for fiscal reasons and must be carried out for such reasons, it would be unrealistic not to include it among the permissible public interests. This argument already applies because the Federal Supreme Court treats confiscatory taxation as an interference with property. The above (n. 52 ff.) has shown how weighty the reasons are for including assets within the scope of protection of the guarantee of property. However, this also means that a more differentiated solution must be found than simply declaring fiscal interests to be inadmissible in principle. It would therefore make more sense to exclude fiscal interests from those measures of intervention that serve to secure fiscal interests and comply with the principles of taxation. Typically, a fiscal interest will only be relevant for interventions in property as such, not for interventions in specific assets (e.g., a particular piece of land). Fiscal interests are therefore inadmissible in any case for expropriations (in the formal sense).

136 Furthermore, it is unclear according to which criteria **permissible and impermissible public interests could be distinguished**. This applies in any case where the public interest is not aimed at

abolishing the institution of property and the decentralization of production factors (guarantee of institutions, above, n. 27 ff.). Where courts substitute their judgment on the appropriateness of public interests for that of the legislature, they must in any case do so with the utmost restraint. Greater protection for property than that afforded by the public interest is therefore to be expected from the principle of proportionality (see below, n. 139 ff.). The more doubtful the public interest in an intervention, the more likely it is that its proportionality will be called into question. The same applies to the guarantee of institutions (see above, n. 27 ff.): the more a public interest leads not only to an intervention in, but to an actual undermining of the institution of private property, the more likely it is that the guarantee of institutions will apply.

137 It is undisputed that with the increase in public interests due to new scarcity relations (e.g., with regard to resources used to protect the climate), the **basis for an interference** with property **also increases**.

138 At the **time** of the interference with property, a public interest must still exist. It must still be possible to pursue this interest in a meaningful way through the interference with property.

3. Proportionality

139 Although the Federal Supreme Court freely reviews proportionality, it imposes a certain degree of restraint on itself where the intervening authority has its own discretion or where local circumstances are decisive for assessing proportionality.

140 The Federal Supreme Court does not impose **excessively high requirements** on proportionality. Cases in which it has rejected an encroachment on property on grounds of disproportion are relatively rare.

141 The **balancing of** public and private interests is **restricted** to the extent that a federal law or the Constitution itself anticipates the outcome of such a balancing. An example of this is the protection of moors of particular beauty and national importance (Art. 78 para. 5 FC). Once a plot of land has been included in the inventory of these moors, there is no longer any possibility of weighing up the interests of protection against private interests in use.

E. Consequences of interference with property

142 As shown above (n. 106 ff.), at least in the context of material interference with property, the line between interference without compensation and expropriation with full compensation can only be drawn by means of casuistry, and can probably only be drawn in this way. The fact that “reasonable” or partial compensation for interference with property is not permissible leads, in the context of material expropriation, to a very rough **“pricing”** of the price for interference. The price is 0% up to a certain intensity limit and then 100% of the value to be expropriated. In the case of formal expropriation, it is always 100%, even for minor interventions. However, reference has been made above to various techniques developed in case law (n. 126) to reduce the scope of the value guarantee. The prerequisite or legal consequence of expropriation, namely that full compensation must be paid, must be seen in the light of this restriction.

1. The concept of full compensation

143 **Full compensation** means that the expropriation must not result in **either an advantage or a disadvantage** for the expropriated person. They must be placed in the same financial position as if the intervention had never taken place. The expropriated person is obliged to take reasonable steps to reduce the damage caused by the expropriation. The Federal Supreme Court has unlimited

jurisdiction to determine whether the compensation paid corresponds to the full value of the expropriated property. If only part of a property or several economically related properties are expropriated, compensation must also be paid for the **reduction** in the market value of the remaining part (for proceedings under federal law: Art. 19 lit. b EntG). The **inconvenience**, i.e. the additional expenses arising from the expropriation (moving costs and the like), are also part of the full compensation. If a company is expropriated, the question of compensation for **lost profits** also arises, and in particular the question of how long this compensation must be paid before it is possible to engage in another profitable activity. The Federal Supreme Court therefore generally limits compensation for profits to a certain period of time, unless, in exceptional cases, it is not permissible to take up a new gainful activity or it is foreseeable that the same profits cannot be achieved in the future.

144 In expropriation proceedings based on the Expropriation Act, the full value must be compensated, but no more than the full value. Federal law does not provide for an **"involuntary surcharge"**; such a surcharge may therefore not be paid in proceedings governed by federal law. This does not prevent the cantons from paying a higher amount than the actual damage under their own expropriation law in certain circumstances. However, such additional payments must be compatible with the other guarantees of the Constitution, in particular the principle of equality before the law, with which they may conflict. Federal law also does not preclude the cantons from providing compensation for material interference with property that does not yet amount to expropriation.

2. Form and assessment of compensation

145 As a rule, **compensation is paid in cash**. Art. 26 para. 2 FC only grants a claim to cash payments. However, the law may provide for compensation in kind or benefits in kind (see, for example, Art. 18 EntG). Under certain circumstances, it may be appropriate and possible to supplement cash payments with benefits in kind (e.g. in the case of noise abatement measures). In the case of formal expropriations, the appraisal commission must decide on the form of compensation.

146 The **assessment of compensation** can in principle be carried out using an objective or a subjective method. The objective method determines the market value of an item, while the subjective method determines the (economic) value that a deprived asset has for the expropriated person (income value). The method that is more favorable to the affected party must be chosen; a combination of the two methods is generally not permitted. The subjective method is particularly appropriate in cases where the value of the continued use of an asset for the expropriated person (viewed objectively) is higher than the sum of money that could be obtained by selling the property, or in other words, if the income from continued use is greater than what could be obtained by selling it on the market. This is the case, for example, when non-relocatable businesses are closed down. The term "subjective damage" is criticized by some legal scholars as misleading, because it could be understood to include the emotional attachment of those affected or mere expectations or hopes. However, this is not the case. The subjective method (like the objective method) merely asks for the monetary value of an item, even if this is determined differently, namely according to the value of its continued use rather than its value upon sale.

147 There are various methods for **estimating the value** of the expropriated item. The expropriating authority has considerable flexibility in applying these methods and combining them. The combination of different methods serves to validate the respective appraisal results. Priority is given to the **comparison method**, in which the value of a property is determined on the basis of market prices for comparable properties. The comparison method is used to determine the market value to be paid in compensation according to the objective method. The market value is the hypothetical

proceeds that could have been obtained for the expropriated property in a sale on the open market. Other methods may be necessary in special situations, particularly if it is not possible to determine comparable prices. For example, the **income approach** is primarily suitable for properties that are held to generate income, while the **real value approach** is primarily suitable for owner-occupied residential property. The **location class method** "is based on the finding, obtained through systematic evaluation of numerous estimates, that the value of land is related to both the total value of a property and the annual rental income in a specific ratio that is the same for all properties in the same location." It is based on the "consideration that land *as a whole* ultimately only has as much value as it allows for economic use." The Federal Supreme Court urges greater caution with the location class method than with other methods because the profitability considerations on which it is based are partly outdated and even small differences in the initial parameters lead to widely scattered results. Particularly in the case of more complex works that affect a large number of people, have very different effects, and generate added value in addition to reduced value, the value of the expropriated property can be determined using a **statistical-empirical method** developed specifically for this problem. For example, the Federal Supreme Court has protected complex models based on large amounts of data for calculating the reduction in value caused by aircraft noise, which were developed for the area surrounding Zurich Airport, as a valuation method.

148 Even if these methods cannot be transferred *telles quelles* to the context of **material expropriation**, they are also applied mutatis mutandis in this case.

149 With regard to the **time of assessment**, a distinction must be made between formal and material expropriation. In the first case, compensation is a constitutive element of expropriation, in the second case it is its consequence (see above, n. 83). In this respect, case law assumes that, in the case of formal expropriation, the right to full compensation is only taken into account if the valuation date is close to the date on which the right was actually withdrawn. In the case of material expropriation, the decisive date is generally the date on which the measure restricting ownership takes effect. However, intertemporal issues may also arise in the case of material expropriation, particularly in protracted proceedings in the course of which the value of land, for example, may change significantly.

V. OUTLOOK

150 Property is "the framework that society erects to structure conflicts over the things we all want." Seen in this light, property has no compelling connection to physical objects, but rather concerns all economically valuable and scarce goods, including intangible goods and those provided by the public sector. Conflicts over these goods change as scarcity conditions change. If the guarantee of property is to retain its function and create new creative power for the future, it must develop a protective function for new, increasingly important goods, even if these can hardly be treated in the same way as tangible property. It must also be able to provide an **answer** to **newly emerging conflicts over scarcity**.

151 In practice, the guarantee of property rights has proven to be extremely flexible when it comes to restricting the scope of action associated with property in favor of public interests, especially in distribution conflicts over environmental resources. On this front, the guarantee of property rights seems well equipped to deal with **upcoming distribution conflicts**, especially those related to climate protection. The guarantee of property rights has proven to be much less flexible in the opposite direction, namely where it is not a matter of taking into account newly emerging public needs, but rather newly emerging private protection needs, in particular protecting functional equivalents to property rights and, in particular, land ownership. This primarily concerns participation rights in public institutions, which are often a prerequisite for material autonomy and security and

which are granted and withdrawn, for example, through migration law or social security law. It is on this front that innovation and new creative courage seem necessary if the guarantee of property is to retain its function of mediating autonomy and security under changed technological and economic conditions. A central element of this progress would be a skeptical reassessment of the sharp distinction between formal and material interference with property. This distinction, which originates in the world of property law, is becoming increasingly implausible in a situation where property is playing an increasingly smaller role relative to other goods.

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