LEGITIMATE EXPECTATIONS UNDER ARTICLE 1 OF PROTOCOL NO. 1
TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS
LEGITIMATE EXPECTATIONS
UNDER ARTICLE 1 OF
PROTOCOL NO. 1 TO THE
EUROPEAN CONVENTION
ON HUMAN RIGHTS

Maya Sigron
Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights

Maya Sigron

© 2014 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-222-8
D/2014/7849/64
NUR 828

This volume is based on a doctoral thesis approved by the University of Zurich on 3 October 2012.


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
To my parents and Thabo
ACKNOWLEDGMENTS

This book is the result of work and research that has been done at the University of Zurich and at the Council of Europe's institutions in Strasbourg between 2008 and 2012. It would not have been possible without the support of my supervisor Professor Dr iur. Helen Keller, Judge at the European Court of Human Rights. I owe Professor Keller my deepest gratitude for overseeing the work progress and for carefully reading the manuscript of the book. Furthermore, Professor Keller enabled me to gain valuable insight in the Council of Europe's work and provided support in various practical questions. I am very grateful for the supervision by Professor Keller, who was always both understanding and critical. I would also like to thank Professor Dr iur. Mark E. Villiger, Judge at the European Court of Human Rights, who pointed me to the topic of legitimate expectations.

A debt of gratitude is further owed to James Brannan of the Registry of the European Court of Human Rights for his linguistic revision of parts of the text. Special thanks goes also to the librarians at the library of the European Court of Human Rights. They allowed me to do valuable research in the library of the Court and kindly helped me to find my way in the archives.

I am indebted to many of my colleagues for supporting me. I would particularly like to thank Andri Cathomen, who supported me during this research-intense time and read the whole manuscript. I very much appreciated the discussions we had on the topic and the different approaches which he – being a mathematician – showed me. I am also deeply grateful to Thabo Beeler who read the manuscript and did his best to encourage me. I am further indebted to Magdalena Forowicz and Leena Grover for reading parts of the manuscript.

Gratitude is also owed to my family, who always supported and encouraged me in my research. I would like to thank especially my mother for reading the book with great interest and showing confidence in my work.

Finally, the thesis on which this book is based would not have been possible without the financial support of the University of Zurich. I am very grateful for the granting of a six-month Forschungskredit of the University of Zurich, which permitted me to work full time on my thesis.

Zurich, 19 August 2012

Maya Sigron
CONTENTS

Acknowledgments .......................................................... vii
Abbreviations ................................................................. xv

PART I. INTRODUCTION

Chapter 1. Introduction .................................................. 3

1. Research Questions ...................................................... 5
2. Research Method .......................................................... 6
3. Delimitation of Topic ..................................................... 8
4. Switzerland ............................................................... 9
5. Aim and Content .......................................................... 9

PART II. DOCTRINAL ASPECTS

Chapter 2. Protection of Property ...................................... 15

1. Historical and Philosophical Background ............................ 15
   1.1. Ancient Authors .................................................. 16
      1.1.1. Greek Philosophers ........................................ 16
      1.1.2. Romans ....................................................... 18
   1.2. Medieval Period .................................................. 19
   1.3. Modern Era ........................................................ 20
      1.3.1. Natural Law Theory: Grotius, Pufendorf and Locke ... 20
      1.3.2. Scottish Enlightenment: Hume and Smith ............... 22
      1.3.3. Kant and Hegel ............................................ 23
      1.3.4. Socialist Theories: Proudhon and Marx ................. 25
      1.3.5. Contemporary Theories: Rawls and Nozick ............. 26
      1.3.6. The Universal Declaration of Human Rights ........... 27
2. Article 1 of Protocol I to the ECHR .................................. 28
   2.1. History of Article 1 of Protocol I to the ECHR ............... 29
      2.1.1. Preparatory Work by the European Movement ............ 29
      2.1.2. Drafting Process .......................................... 30
      2.1.3. Adoption of the ECHR .................................... 35
      2.1.4. Drafting Process in View of Protocol I to the ECHR ... 35
2. Legitimate Expectations: Status Quo .................................................. 82
   2.1. The ECtHR’s Definition of ‘Legitimate Expectation’ ................. 82
   2.2. Evaluation of the Doctrine in Literature ............................... 86
       2.2.1. Claims, Assets and Legitimate Expectations ................. 86
       2.2.2. Foreseeability of Change ........................................... 90
       2.2.3. Legitimacy and Fair Balance ...................................... 91
       2.2.4. Reasonably Justified Reliance ..................................... 95
3. Appraisal ...................................................................................... 96

PART III. ANALYSIS

Chapter 5. Basis for Legitimate Expectations ................................. 101

1. Judicial Decisions ................................................................. 103
   1.1. Author of Decision ........................................................... 104
   1.2. Content of Decision .......................................................... 104
   1.3. Final and Enforceable Judicial Decisions ............................. 106
       1.3.1. Final Decisions Not Deciding the Claim ......................... 106
       1.3.2. Sufficiently Established Claims ..................................... 107
       1.3.3. Example: Judgment Debts ............................................ 108
       1.3.4. Non-Enforcement or Quashing ..................................... 111
   1.4. Non-Final Judicial Decisions and Pending Claims ................ 113
       1.4.1. Non-Final Decisions ..................................................... 113
       1.4.2. Pending Claims ............................................................ 113
   1.5. Combination with Other Bases ........................................... 116
   1.6. Summary ....................................................................... 116
2. Administrative and Parliamentary Decisions ............................. 117
3. Case-Law .............................................................................. 119
   3.1. Source ........................................................................... 120
   3.2. Content .......................................................................... 122
   3.3. Combination with Other Bases ........................................... 125
   3.4. Summary ....................................................................... 126
4. Legal Provisions ................................................................. 127
   4.1. Applicability Ratione Temporis ....................................... 127
   4.2. Applicability Ratione Personae et Materiae ......................... 129
   4.3. Statutory Conditions ....................................................... 129
   4.4. Author .......................................................................... 133
   4.5. Content .......................................................................... 134
   4.6. Unclear Legal Provisions ................................................ 136
   4.7. Legal Principles ............................................................. 137
   4.8. Combination with Other Bases ........................................... 138
   4.9. Summary ....................................................................... 139
5. Registers and Zoning Plans .................................................... 139
<table>
<thead>
<tr>
<th>Chapter 6. Confidence, Detriment and Fair Balance</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Confidence</td>
<td>165</td>
</tr>
<tr>
<td>1.1. Knowledge</td>
<td>166</td>
</tr>
<tr>
<td>1.1.1. Foreseeability of Change</td>
<td>166</td>
</tr>
<tr>
<td>1.1.2. Good Faith</td>
<td>171</td>
</tr>
<tr>
<td>1.2. Conduct of Parties</td>
<td>172</td>
</tr>
<tr>
<td>1.3. Uncertainty</td>
<td>175</td>
</tr>
<tr>
<td>2. External Manifestation</td>
<td>175</td>
</tr>
<tr>
<td>2.1. Material Detriment</td>
<td>177</td>
</tr>
<tr>
<td>2.2. Moral Detriment</td>
<td>180</td>
</tr>
<tr>
<td>3. Balancing of Interests</td>
<td>182</td>
</tr>
<tr>
<td>4. Nature of Protection</td>
<td>185</td>
</tr>
<tr>
<td>5. Appraisal</td>
<td>186</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 7. Functions and Differentiations</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Implications for Claims and 'Assets'</td>
<td>189</td>
</tr>
<tr>
<td>1.1. Two-Stage Approach</td>
<td>190</td>
</tr>
<tr>
<td>1.2. Nature of the Claim</td>
<td>191</td>
</tr>
<tr>
<td>1.3. Connection Between 'Assets' and Legitimate Expectations</td>
<td>193</td>
</tr>
<tr>
<td>1.4. Omission of Reference to the Doctrine of Legitimate Expectations</td>
<td>194</td>
</tr>
</tbody>
</table>
2. Implications for the Definition of ‘Possession’ ........................................ 196
3. Implications for the Fair Balance Test ................................................... 197
4. Implications in Other Contexts Under P1–1 ........................................... 200
5. Legitimate Expectations and Other Concepts ......................................... 200
   5.1. Use of Legitimate Expectations with Other ECHR Articles .............. 201
   5.2. Legitimate Expectations Under P1–1 and Article 6 §1 ECHR .......... 202
      5.2.1. Scope of Application of P1–1 and Article 6 §1 ECHR .......... 202
      5.2.2. Connection of Complaints Under P1–1 and Article 6 §1 ECHR .. 203
      5.2.3. Article 6 §1 ECHR as a Basis ............................................. 205
      5.2.4. Legitimate Expectations Under Article 6 §1 ECHR ............ 206
      5.2.5. Summary ................................................................. 206
   5.3. Relationship Between Legitimate Expectations and Vested Rights .... 206
   5.4. Relationship Between Legitimate Expectations and Judgment Debts .... 208
6. Appraisal .............................................................................................. 209

Chapter 8. Insufficient Basis and Other Shortcomings ............................. 211
1. Rights not Provided by P1–1 ................................................................. 212
2. Hope .................................................................................................... 214
   2.1. Difference Between a Hope and a Legitimate Expectation .......... 215
   2.2. Examples ..................................................................................... 215
   2.3. Keeping a Hope Alive by the Authorities .................................... 218
   2.4. Summary ..................................................................................... 218
3. Insufficient Basis for a Legitimate Expectation ..................................... 219
   3.1. Non-Fulfilment of Necessary Conditions .................................. 219
      3.1.1. Competence to Decide ....................................................... 219
      3.1.2. Conditional Claim ............................................................. 220
      3.1.3. Disputable Conditions ....................................................... 222
      3.1.4. Interference Pendente Conditione .................................... 224
      3.1.5. Summary ......................................................................... 225
   3.2. No Final and Enforceable Decisions .......................................... 226
   3.3. No Legal Provision or Case-Law ............................................... 227
   3.4. Interpretation and Application of Domestic Law ...................... 230
   3.5. Non-Official Acts and Political Statements .............................. 231
   3.6. Genuine Dispute or Arguable Claim ........................................... 233
4. Lack of Sufficient Evidence ................................................................. 233
5. Determination of Sufficiently Established Claim Not Necessary ............ 234
6. Appraisal .............................................................................................. 234
PART IV. SWITZERLAND AND P1–1

Chapter 9. Switzerland, P1–1 and the Protection of Legitimate Expectations ........................................... 239

1. Non-Ratification of Protocol I by Switzerland ........................................... 239
2. Protection of Property under the ECHR .................................................. 241
3. Protection of Legitimate Expectations under the ECHR ............................ 242
4. Protection of Property in Switzerland ..................................................... 243
   4.1. Property as a Basic Right ................................................................. 244
   4.2. Notion of Property ........................................................................... 244
5. Protection of Legitimate Expectations in Switzerland ............................... 245
6. Changes to be Expected After the Ratification of Protocol I ..................... 249

PART V. CONCLUSION

Chapter 10. Conclusion .............................................................................. 253

1. Definition ................................................................................................. 253
   1.1. Hypothesis in Kopecký v. Slovakia .................................................... 254
      1.1.1. Basis ......................................................................................... 254
      1.1.2. Confidence .............................................................................. 255
      1.1.3. Detriment .............................................................................. 256
   1.2. Functions ......................................................................................... 256
   1.3. Underlying Principles ...................................................................... 257
   1.4. Impact on the Definition of 'Possession' ............................................. 257
2. Inconsistencies ......................................................................................... 259
   2.1. Formal Inconsistencies .................................................................... 259
   2.2. Content-Related Inconsistencies ...................................................... 260
3. Future Improvements ............................................................................ 262
   3.1. Necessity of Differentiations and Precise Formulations ..................... 262
   3.2. Necessity of Clear Content ................................................................ 263

Annex I ........................................................................................................... 265
Annex II ........................................................................................................ 269

Bibliography ............................................................................................... 281
List of Materials .......................................................................................... 289
Table of Cases ............................................................................................. 291
ABBREVIATIONS

A.  Auflage (edition)
a.M.  am Main
AJP  Aktuelle Juristische Praxis
All ER  All England Law Reports
Appl.  Application
BBl  Bundesblatt (Federal Gazette)
BC  before Christ
BGBl.  Bundesgesetzblatt (Federal Law Gazette)
BGE  Bundesgerichtsentscheid (Decision of the Swiss Federal Supreme Court)
BVerfGE  Bundesverfassungsgericht (Federal Constitutional Court)
BVerwGE  Bundesverwaltungsgericht (Federal Administrative Court)
c.  contre (versus)
Cam. L. J.  Cambridge Law Journal
CCPR  International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171, entry into force on 23 March 1976, ratified by 167 states (status as of 6 August 2012)
CETS  Council of Europe Treaty Series
cf.  confer (compare)
cit.  cited
Civ  Civil
CJEC  Court of Justice of the European Communities
D.R.  Decisions and Reports
dir.  direction
Doc.  Document
E.  Erwägung (consideration)
e.g.  exempli gratia (for example)
ECHR  Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, CETS 005,
entry into force on 3 September 1953, ratified by 47 states (status as of 22 December 2011)

ECJ Court of Justice of the European Union
ECtHR European Court of Human Rights
ed. edition
éd. édition
ed(s). editor(s)
EJIL European Journal of International Law
et seq. et sequens (and the following one)
et sqq. et sequentes (and the following)
et. al. et alii (and others)
Eur. Publ. Law European Public Law
EWCA England and Wales Court of Appeal
fn. footnote
G.A. General Assembly
GG Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 23 May 1949 [BGBl. P. 1], last modified by the law of 21 July 2010 [BGBl. I S. 944])
Hrsg. Herausgeber (editors)
hrg. herausgegeben (edited)
HUDOC Online database containing the case-law of the European Convention on Human Rights
Id. Idem (same)
incl. including
iur. iuris
Jud. Rev. Judicial Review
JuS Juristische Schulung
L.G.D.J. Librairie juridique de référence
L.J. Law Journal
L.Q.R. Law Quarterly Review
lit. litera (letter)
MLR Modern Law Review
n. note
NJW Neue Juristische Wochenschrift
No. Number
Nos. Numbers
P.L. Public Law
P1–1 Article 1 of Protocol I to the ECHR
P1–2 Article 2 of Protocol I to the ECHR
P1–3 Article 3 of Protocol I to the ECHR
Prol. Prologue
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q.B.</td>
<td>Queen’s Bench Division</td>
</tr>
<tr>
<td>RDTH</td>
<td>Revue trimesterielle des droits de l’homme</td>
</tr>
<tr>
<td>Res.</td>
<td>Resolution</td>
</tr>
<tr>
<td>S.</td>
<td>Seite (page)</td>
</tr>
<tr>
<td>SJZ</td>
<td>Schweizerische Juristen-Zeitung</td>
</tr>
<tr>
<td>SR</td>
<td>Systematic Compilation of Federal Law</td>
</tr>
<tr>
<td>Swiss Civil Code</td>
<td>Swiss Civil Code of 10 December 1907, SR 210</td>
</tr>
<tr>
<td>Swiss Constitution</td>
<td>Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101</td>
</tr>
<tr>
<td>U.N.</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>v.</td>
<td>versus</td>
</tr>
<tr>
<td>v. Chr.</td>
<td>vor Christus (before Christ)</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
<tr>
<td>Vol.</td>
<td>Volume</td>
</tr>
<tr>
<td>W.L.R.</td>
<td>Weekly Law Reports</td>
</tr>
<tr>
<td>ZaöRV</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
</tr>
<tr>
<td>ZBI</td>
<td>Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht</td>
</tr>
<tr>
<td>ZGB</td>
<td>Schweizerisches Zivilgesetzbuch (Swiss Civil Code of 10 December 1907, SR 210)</td>
</tr>
</tbody>
</table>