

A legal perspective on climate change: how to cope with damage compensation

Status quo and perspectives for Austria

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Abstract

Under global climate change natural hazards became more frequent and more intensive. They trigger damaging, sometimes even catastrophic events and constitute the source of mass damages. In this paper the focus is on compensating the damages of victims of natural hazards and on compensation of property damages in particular. The status quo of damage compensation in Austria is to be analysed critically and new solutions are to be presented.

Keywords: catastrophic event, climate change, floods, law of compensation, natural hazard, single damaging event

1 Introduction

Due to its geographic location Austria has always been confronted with natural hazards such as floods, avalanches, landslides, debris flow, tempests, hail, and drought. Nevertheless we are presently dealing with a completely new dimension of natural hazards. Global climate change, unquestionably at least partly caused by mankind's interference with nature¹, has led to natural hazards impacting nature, people and their belongings much more strongly and increasing the overall amount of damages resulting from natural hazards in a rather unexpected way. Damaging events occur more frequently than they used to and the intervals between one and the other natural hazard-case seem to decrease significantly. Secondly natural hazards tend to produce mass damage up to the point of catastrophic dimensions. As the need for interdisciplinary research is obvious in this field, this paper will contribute the legal perspective to the discussion of climate change.

When dealing with natural hazards the Republic of Austria is confronted with three main objectives²: prevention, damage control and compensation. The following paper will focus on compensatory aspects of damages, specifically property damages caused by a single event or a catastrophic event triggered by specific natural

¹ www.acec.gv.at (23 08 2007); www.ipcc.ch (23 08 2007) Kerschner/Raschauer in RdU, 2007/1; Hlatky, Naturkatastrophen und deren Versicherung in Österreich, VR 2006, 202; Schleicher, Volkswirtschaftliche Auswirkungen des Klimawandels, VR 2002, 99f; Berz, Naturkatastrophen und Klimaänderung, VR 2001, 75ff

² Sinabell/Url, Versicherungen als effizientes Mittel zur Risikotragung von Naturgefahren, Studie des Österreichischen Instituts für Wirtschaftsforschung im Auftrag des Verbandes der Versicherungsunternehmen Österreichs (2006) 60

hazards. It is clear that looking for the reasons of natural catastrophes and methods to prevent them is of great importance³. However, a compensatory point of view has to be taken also: Long-term measures on climate protection tend to work best when combined with a sufficiently organised compensation mechanism.

Even though the Austrian legislative branch is relatively experienced in dealing with natural hazards, recent catastrophes have shown that legal rules on the topic need to be revised to provide satisfactory solutions for the future⁴. The main emphasis therefore lies on the description and discussion of the steps a victim needs to take in order to receive compensation and the most likely encountered problems: This paper will present the solutions developed in Austria and will also focus on the deficits and gaps of the existing compensation system. The analysis of given legal rules serves as a starting point for discussing alternative ideas in handling mass damages caused by natural hazards and thereby prepares for anticipated future damages.

2 Damage compensation: catastrophic event versus single damaging event

Mass damage resulting from climatic change can be caused by a certain number of single damaging events or by one catastrophic event⁵. In the first case, the damaging events, which do not necessarily occur at the same time, lead to a number of rather small damages to persons and property. In the second all the damage is caused by one catastrophic event. When it comes to compensating the damages resulting from natural hazards, a distinction has to be drawn between damages that have been inflicted by a “normal” single or by a catastrophic event, as the legal environment and insurance practice often treat damage compensation differently depending on the triggering event.

Regarding personal injury compensation there seems to be no major difference in compensation depending on the cause (small or catastrophic event), as the state financed social security covers the compensation for personal injury in most cases.⁶ Private insurance contracts (e.g. life, health, or accident insurance) may also cover parts of the damage.⁷

³ <http://umwelt.lebensministerium.at/article/articleview/55599/1/1467> (23 08 2007)

⁴ Hlatky, Naturkatastrophen und deren Versicherung in Österreich, VR 2006, 202

⁵ For a definition of „mass damage“ see Von Bar, Empfehlen sich gesetzgeberische Maßnahmen zur rechtlichen Bewältigung der Haftung für Massenschäden? Gutachten A zum 62. Deutschen Juristentag (1998) 9, H Koch/Willingmann, Großschäden und ihre Abwicklung – Einführung in ein interdisziplinäres Forschungsprojekt in H Koch/Willingmann, Großschäden – Complex Damages (1998) 13; H Koch, Großschäden und ihre Bewältigung: Haftungsgrundsätze, Verfahrensökonomie oder Entrechtlichung, in Münchner Rück, 6. Internationales Haftpflichtforum München 2002, http://www.munichre.com/publications/302-03341_de.pdf (23 08 2007), 37

⁶ 97.8% of the Austrian population are covered by social security; Hauptverband der österreichischen Sozialversicherungsträger, Die österreichische Sozialversicherung in Zahlen 17 2006, 13, <http://www.sozialversicherung.at/mediaDB/114072.PDF> (23 08 2007). See also for the importance of social security Magnus, The Impact of Social Security Law on Tort Law (2003) Rz 36

⁷ IUR/ÖWAV (Hrsg), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 142f; see also Hinghofer-Szalkay/B.A. Koch, Financial Compensation for Victims of Catastrophes in Austria in Faure/Hartlief, Financial Compensation for Victims of Catastrophes (2006) Rz 38ff, 75ff. Nevertheless, victims of catastrophes may

When compensating property damages voluntary government action i.e. government sponsored compensation as well as private insurance practices are key features to be coordinated.

2.1 Single events: compensation and problems therewith

The statute establishing the Austrian Fund for Catastrophes⁸ provides for compensation for damages resulting from catastrophic events. Distinguishing between single small damaging events and catastrophic events is essential when it comes to compensation. Compensation out of the fund is only granted if property damage results from a catastrophic event such as a flood, land subsidence, avalanche, earthquake, winter storm/hurricane, hail or debris avalanche.⁹ The statute provides that certain amounts of resources administered by the fund are to be given to the respectable public body coping with disaster management. Those bodies not only administer financial grants for those suffering from exceptional damage but also finance the restoration of infrastructure in general and for rebuilding the infrastructure.¹⁰ The statute explicitly states that the purpose of the fund (which is basically financed via taxes¹¹) is to provide financial means for preventing and compensating damages resulting from catastrophic events.¹² Therefore the statute provides for compensation of damages resulting from catastrophic events only – catastrophic being defined as exceptionally big and with widespread effect (and therefore bigger than single damaging events) and not occurring on a regular basis.¹³

As a consequence, the catastrophic nature of an event is a major requirement for receiving compensation out of the fund. The driving force for passing this law was the idea of national solidarity to provide for compensation for damages resulting from catastrophic and non-foreseeable natural hazards.¹⁴ Therefore for victims of single damaging events the main source of compensation are private insurance contracts, whereas for victims of catastrophes problems may arise in relation to property damages covered by private insurance (such as household insurance, third party liability insurance and legal expenses insurance) – as to be discussed in the following.¹⁵

encounter specific problems when claiming compensation for damages caused by catastrophic events – as is to be discussed below

⁸ As established by Austrian statute: Bundesgesetz über die Maßnahmen und zur Vorbeugung und Beseitigung von Katastrophenschäden (Katastrophenfondsgesetz 1996 – KatFG 1996), BGBl 201/1996

⁹ § 3 Z 1 KatFG 1996

¹⁰ § 3 Z 1 KatFG 1996; § 3 Z 3 lit a KatFG 1996

¹¹ § 2 KatFG 1996

¹² § 1 Abs 1 KatFG 1996

¹³ AB 493 BlgNR 16 GP 1

¹⁴ EB zu 188 BlgNR 10 GP3

¹⁵ IUR/ÖWAV (Hrsg), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 142f See also Hinghofer-Szalkay/B A Koch, Financial Compensation for Victims of Catastrophes in Austria in Faure/Hartlief, Financial Compensation for Victims of Catastrophes (2006) Rz 38ff, 75ff The insurance for storm damages also covers damages from storm, hail, landslide and avalanche See Allgemeine Bedingungen für die Sturmversicherung (ASTB 2001); see also Allgemeine Bedingungen für die Versicherung zusätzlicher Gefahren zur Sachversicherung (AECB 2001), which are published as an example für insurance provisions by the Versicherungsverband Österreich (VVO)

2.2 Catastrophic events: prevention and damage control

When dealing with prevention of and damage control after catastrophes the statutes of the “Länder”¹⁶ on the subject of state organised support and management of catastrophic situations provide detailed information on how to be prepared for catastrophes, mention defence strategies and show strategies to avoid catastrophic events.¹⁷ Moreover, there are numerous ex post regulations in place: The impact of catastrophes shall be confined to the minimum reacting in the best way according to each individual situation.¹⁸ Furthermore, the Länder statutes contain regulations on providing victims with shelter, food as well as medical and psychological support; property damages are to be eased and compensated.¹⁹

2.3 Catastrophic events: compensation and problems therewith

In recent years, the biggest catastrophic events on Austrian territory were the floods of 2002 and 2005. Therefore those examples are used to demonstrate accurate problems since recent catastrophic events have shown that existing regulations and insurance conditions lead to unsatisfactory compensations for victims of catastrophes. For the victims of the catastrophic floods of 2002 and 2005, compensation out of private insurance contracts was a relatively minor factor. Few Austrians had sufficient private insurance coverage (which may be due to the fact that hardly any efficient coverage is offered on the insurance market) and so, the conditions under which compensation for property damages is granted in the case of catastrophic events are much harsher than in non-catastrophic cases: most insurance contracts bar compensation for damages resulting from catastrophic events such as floods. Furthermore, home owners’ insurance and insurance on building contracts mostly

and which provide coverage for damage resulting from flood, landslide, earthquake, and land subsidence

¹⁶ Compare Gesetz vom 8 Februar 2006 über das Katastrophenmanagement in Tirol (Tiroler Katastrophenmanagementgesetz), LGBl Nr 33/2006; Gesetz vom 18 November 1985 über die Abwehr und Bekämpfung von Katastrophen (Katastrophenhilfegesetz) des Burgenlandes, LGBl Nr 5/1986 idGF; Gesetz vom 26 Juni 1980 über Maßnahmen zur Bekämpfung von Katastrophenfolgen (Kärntner Katastrophenhilfegesetz – K-KHG), LGBl Nr 66/1980 idGF; NÖ Katastrophenhilfegesetz (NÖ KHG), LGBl 25/73 idGF; Gesetz vom 23 Oktober 1974 über die Abwehr und Bekämpfung von Katastrophen (Katastrophenhilfegesetz) des Landes Salzburg, LGBl Nr 3/1975 idGF; Gesetz vom 16 März 1999 über die Abwehr und Bekämpfung von Katastrophen (Steiermärkisches Katastrophenschutzgesetz), LGBl Nr 62/1999 idGF; Gesetz über die Hilfe in Katastrophenfällen (Katastrophenhilfegesetz) des Landes Vorarlberg, LGBl Nr 47/1979 idGF; Gesetz über Maßnahmen zur Bewältigung von Katastrophen, Großschadensereignissen und komplexen Schadensereignissen sowie die Einrichtung eines Krisenmanagements (Wiener Katastrophenhilfe- und Krisenmanagementgesetz – W-KKG), LGBl 60/2003

¹⁷ Compare § 1 Tiroler Katastrophenmanagementgesetz; § 1 Katastrophenhilfegesetz Burgenland; § 1 Abs 1 K-KHG; § 3 NÖ Katastrophenhilfegesetz; § 1 Abs 2 Katastrophenhilfegesetz Salzburg; § 1 lit b Vorarlberger Katastrophenhilfegesetz; § 1 Abs 1 Katastrophenschutzgesetz Steiermark; § 1 W-KKG

¹⁸ For instance § 2 Abs 3 lit b Tiroler Katastrophenmanagementgesetz

¹⁹ § 2 Abs 5 Tiroler Katastrophenmanagementgesetz Dividing time lapses into the period before the catastrophic event, the catastrophic event itself and the period after the catastrophic event Sinabell/Url, Versicherungen als effizientes Mittel zur Risikotragung von Naturgefahren, Studie des Österreichischen Instituts für Wirtschaftsforschung im Auftrag des Verbandes der Versicherungsunternehmen Österreichs (2006) 5ff Further IUR/ÖWAV (eds), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 77ff

provide coverage only up to a certain limit.²⁰ Moreover, many insurance companies cap overall compensation available for all victims of each damaging event.²¹

What needs to be pointed out is that victims holding private insurance contracts that actually foresaw some kind of compensation have to declare what they received out of such private insurance when applying for compensation to the public fund for catastrophes. As a result the amount of compensation out of the funds is reduced by the amount granted by the insurance company. This government practice certainly has a negative impact on victims' attitudes towards preparing for catastrophes and compensation: If one decides not to rely on the government alone and therefore to pay premiums for private insurance, he is "punished" by being granted less compensation out of the fund. Victims therefore lack any real incentive for investing in private insurance and rather rely on state compensation.²² However, in this context it needs to be stressed that victims of catastrophes do not have a legally guaranteed right to receive compensation from the fund (the regional regulations state that there is no legal claim for compensation) and are therefore put in the position of having to ask for help without any legal guarantee rather than being able to claim compensation.²³

For victims of catastrophes government sponsored payments are the main source of compensation. Victims applying for compensation out of the fund have to notify the official authorities of the precise amount of damage suffered.²⁴ Payments out of the fund have to be made according to each region's regulation on damage compensation for damage due to flooding.²⁵ In 2002 and 2005, the regional governments granted compensation between 30 and 50% of the actual damage incurred by the

²⁰ Compare Versicherung <http://www.vvo.at/index.php?/content/view/239/204/> (23 08 2007) See Ederer, Die Grenzen der Versicherbarkeit in der Sachversicherung, VR 2005, 29

²¹ See for the amounts covered <http://www.vvo.at/index.php?/content/view/239/204/> (23 08 2007)

²² See Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 11, 14

²³ IUR/ÖWAV (eds), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 148 Explicitly: Richtlinie des Landes Niederösterreich für die Gewährung von Beihilfen zur Behebung von Katastrophenschäden, Land Niederösterreich, <http://www.noegv.at/service/lf/lf3/Download/Richtlinien.pdf> (23 08 2007), Nr 9; Richtlinien betreffend Katastrophenschäden im Vermögen physischer und juristischer Personen, Amt der Steiermärkischen Landesregierung, http://www.agrar.steiermark.at/cms/dokumente/10178137_12722299/63dbdbed/schadr_pdf (23 08 2007), Nr I 3 2 1 Compare Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 11ff

²⁴ Compare Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 11

²⁵ Richtlinien für die Gewährung einer finanziellen Beihilfe des Landes zur Behebung von Katastrophenschäden im Vermögen natürlicher und juristischer Personen mit der Ausnahme von Gebietskörperschaften, http://www.salzburg.gv.at/kathilfe_richtlinien (23 08 2007); Richtlinie für die Vergabe von Elementarschadensbeihilfen (Katastrophenfondsgesetz 1996), http://www.oogv.at/cps/rde/xbcr/SID-3DCFCFC3-EA464154/ooe/Richtlin_Katfonds.pdf (23 08 2007); Richtlinien für die Gewährung von Beihilfen zur Behebung von Elementarschäden, <http://www.vorarlberg.at/pdf/richtlinieelementarschade.pdf> (23 08 2007); Richtlinie des Landes Niederösterreich für die Gewährung von Beihilfen zur Behebung von Katastrophenschäden, Land Niederösterreich, <http://www.noegv.at/service/lf/lf3/Download/Richtlinien.pdf> (23 08 2007); Richtlinien betreffend Katastrophenschäden im Vermögen physischer und juristischer Personen, Amt der Steiermärkischen Landesregierung, <http://www.agrar.steiermark.at/cms/dokumente/10032540/4978797b/schadr.pdf> (23 08 2007)

victim. The region financed 40% of the amount granted to the victims, the federal government the remaining 60%.²⁶

3 Climate change: legal status quo and need for change

3.1 State fund

State funded compensation after a catastrophic event clearly reflects the wish to grant support one economically destroyed region. Nevertheless the fairness of being compensated by the state in the case of catastrophic but not in the case of a “normal” damaging event should be put under special scrutiny, especially when the legislator argues with the principle of solidarity.²⁷ The requirement of an event being catastrophic seems understandable only if backed by the argument that opening compensation for small damaging events the financial burden for the state would become even heavier. Nevertheless, opening compensation from the fund for catastrophes to victims of small single damaging events (occurring on a “regular” basis and not exceptionally big or with widespread effect) as well could be a reasonable solution. As a consequence, compensation from fund money would have to be handled in a much more restrictive way: Compensation could be reduced to basic compensation in all cases of natural hazards, meaning that each victim of a natural hazard is awarded a certain sum, whether or not the damaging event was catastrophic as such. In cases of particular needs higher sums could be awarded.

This solution for damages resulting from single damaging events can be backed also considering damages resulting from a catastrophic event. Even though the Austrian status quo regarding damage compensation, which can be best characterised as an interplay between state financed compensation and compensation from private insurance contracts, has been said to be a successful concept, reform is needed: Even though payments from the funds can be and were distributed rather generously after recent catastrophic events they only covered parts of the victims’ damages.²⁸ Furthermore, due to the state’s budgetary constraints a public fund cannot be the primary source of compensation but needs to supplement other sources. One example is that in 2002 and 2005 special ex post statutes²⁹ were passed allowing extra government-sponsored compensation for the victims of the floods and for regional measures to prevent catastrophic damages from spreading and causing consequential damages.³⁰ In this context it was proposed to reduce the available payments from the fund and to increase the availability of compensation out of private insurance. New regulations on compensation, e.g. not compensating victims with 30–50% of

²⁶ See Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 10f

²⁷ Compare Magnus, Financial Compensation for Victims of Catastrophes in Germany, in Faure/Hartlief, Financial Compensation for Victims of Catastrophes (2006) Rz 1

²⁸ See Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 10f

²⁹ HWG 2002, BGBl I 155/2002

³⁰ §§ 2, 3, 4 HWG 2002

the damage incurred but providing them with a certain standard sum of compensation, could be considered. State involvement could be reduced to basic compensation and to cases of particular needs, which would go along with the concept of solidarity advocated when introducing the fund for catastrophes.³¹ Reorganising state payments would lead to greater demand for insurance coverage on the market. As a consequence insurance companies would be faced with more demand for coverage on part of potential victims and could be more open to offer better conditions for coverage for damages of natural hazards.³² This solution would lead to a better combination of legally guaranteed compensation out of an insurance contract and minimum state compensation based on the idea of solidarity.

3.2 State action and liability

The state could focus on preventive measures, such as not granting building permits in flood (or other natural hazards) prone areas, actively informing and warning people about the danger of natural hazards and advising them to buy insurance coverage.³³ And in fact the state is already going down that road: After the floods of 2002 and 2005, a risk zoning system for natural hazards (especially flood risks) called *HORA*³⁴, was established providing maps outlining where risks are likely to realise every 30, 100 or 200 years. These maps are available online.³⁵ *HORA* makes it easier for insurance companies to calculate risks. Also the state has the possibility to use the information when granting building permits. Besides that the state also actively participates in providing information for the public on risks of natural hazards.

Furthermore it has to be mentioned that the state can be held liable in certain cases in which it neglects its duty to protect its citizens from certain dangers. This duty can apply in cases of single damaging events as in cases of catastrophic events. In the context of the catastrophic floodings few actions were filed and the Austrian Supreme Court (OGH) has only held the state liable in one case: The state had negligently granted a building permit in an area that was prone to be flooded.³⁶

³¹ Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 14f

³² Compare Kunreuther, Mitigating Disaster Losses through Insurance, Journal of Risk and Uncertainty, 1996, 171ff

³³ Hinghofer-Szalkay, Der Katastrophenfonds als Ersatzquelle für Hochwasserschäden im Privatvermögen, RdU 2007, 14

³⁴ http://gis.lebensministerium.at/eHORA/frames/index.php?PHPSESSID=67c5c4a2fc4ed051eb2934c0d94c4bdb&gui_id=eHORA_Kartei2 (23 08 2007)

³⁵ <http://www.lebensministerium.at/article/articleview/47386/1/13523> (23 08 2007); See Hlatky, Naturkatastrophen und deren Versicherung in Österreich, VR 2006, 205; Sinabell/Url, Versicherungen als effizientes Mittel zur Risikotragung von Naturgefahren, Studie des Österreichischen Instituts für Wirtschaftsforschung im Auftrag des Verbandes der Versicherungsunternehmen Österreichs (2006) 43ff See also IUR/ÖWAV (eds), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 147f referring to <http://www.hochwasserrisiko.at> (23 08 2007)

³⁶ OGH 28 11 2006, 1 Ob 178/06t, bbl 2007/64, 66 = Zak 2007/164, 96 = Zak 2007/638, 364 (Hinghofer-Szalkay) = RdU 2007/112, 211 (Kleewein) See IUR/ÖWAV (eds), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 127ff Further IUR/ÖWAV (eds), Jahrbuch des österreichischen und europäischen Umweltrechts 2007, 134 ff

4 Summary

Experience in Austria shows that mass damages resulting from natural hazards occur more frequently and tend to cause even larger damages. Therefore the aspect of damages compensation deserves special attention and careful reflection. Natural hazards have been of particular interest in politics and discussed heavily in international research groups, also by legal scholars.³⁷ This paper focused on a legal perspective on climate change and its consequences, namely that of compensating damages resulting from natural hazards. A special focus was set on the compensation of property damages of individual victims. In both occasions, of single damaging events and catastrophic events resulting from climatic change, the need for reform seems to be evident when considering the compensation possibilities and procedures.

It was argued that when it comes to compensating damages resulting from natural hazards, the amount of compensation awarded differs depending on whether the damages arose out of cases of single events or resulted from catastrophic events. Victims of single events do not benefit from special regulations set up for victims of catastrophic damages and are therefore not granted extra compensation if damaged by natural hazards.

Regarding damages resulting from a catastrophic event a different set of problems has been encountered: State involvement in compensation is predominant, but not exercised in an optimum way; in the case of a recent catastrophic event (floods of 2002 and 2005), special statutes had to be passed to grant the victims the necessary compensation. The private insurance market has not been able to offer sufficient possibilities for compensation. Hence potential victims rely on state funds for sufficient compensation money. It was argued that in future less state involvement in the compensation process should be advocated. Therefore, it was pointed out that compensation out of the fund should not so much focus on events being catastrophic, but should provide basic compensation to all victims of natural hazards, especially to those who have particular needs.

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³⁷ See the publications of the European Center of Tort and Insurance Law und Research Unit for European Tort Law of the Austrian Academy of Sciences and especially Faure/Hartlief, *Financial Compensation for Victims of Catastrophes* (2006) Rz 1

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