

Austrian (Natural-)Catastrophe Law

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A. Introduction

For a long time now in Austria there has been a developed system of regulations as regards natural catastrophes which, to a great extent, meets practical demands. However, in particular due to the division of competence between federal law and federal state law this system also raises significant problems. The *Institut für Umweltrecht* (IUR, *Institute for Environmental Law*) of the *Johannes Kepler University* (JKU) Linz took upon itself the task of examining the important areas of natural catastrophe law, namely prevention, defense, liability and insurability in a large-scale research study.¹ This country report is generally based on this study. In addition the questions posed by the rapporteur are taken into consideration.

B. Linguistic Definition: The Term »Catastrophe Damage« in Austrian Legal Terminology²

In Austria there is no generally accepted legal definition of the term »catastrophe« or even of the term »catastrophe damage« . Due to the organisation of Austria as a federal state (as regards both legislation and execution), the competence for catastrophe prevention and catas-

1 »Vorsorge, Abwehr, Haftung und Versicherung bei Naturkatastrophen«, published under the title *Kerschner* (ed), *Handbuch Naturkatastrophenrecht. Vorsorge – Abwehr – Haftung – Versicherung*, Verlag MANZ, Schriftenreihe Recht der Umwelt, Wien 2008.

2 See Question 1.

trophe rescue work is divided between the federal government and the provinces. Accordingly, many national laws and federal state laws refer to the area of »catastrophes«. It is, therefore, difficult to recognise a uniform term »catastrophe«.

In many cases, the following criteria are applied in order to define the term »catastrophe«:³

- ▶ the unusual extent of the danger or of the damage and
- ▶ the need for a co-ordinated deployment of powers which have to be drawn on in order to prevent or eliminate the danger or the damage.

Normally the term »natural catastrophe« is understood to encompass extensive danger faced by individuals or things (assets) as a result of events which have been triggered by elementary incidents.⁴

The term »catastrophe damage« is also used in a multiplicity of laws. As far as can be seen, however, the term is not clearly defined in any of these laws. § 78 *Allgemeines Verwaltungsverfahrensgesetz* (AVG, General Administrative Procedures Law), § 1 para 2 *Auslandskatastrophenfondsgesetz* (Foreign Catastrophe Fund Law) and several tax laws refer to »catastrophe damage« (in particular damage as a result of floods, landslides, debris flow and avalanches). Whether a differentiation is made in the respective laws between natural catastrophes (»event due to natural forces«) and other catastrophes caused by technical or other events (factory explosions, fires) depends on the purpose of the respective law.

Examples:

- ▶ The catastrophe protection laws of the federal states cover any event »which is apt to cause considerable damage to persons or property or damage to the environment and for whose prevention and control organised measures are necessary«.
- ▶ The danger zone planning according to Forestry Law (*Forstgesetz*, § 11 ForstG) exclusively concerns natural dangers caused by torrents or avalanches.
- ▶ The *Wasserbautenförderungsgesetz* (Promotion of Water Barriers Law) contains active and passive measures for the protection against floods with and without a »catastrophe character«.
- ▶ The *Katastrophenfondsgesetz* 1996 (»Catastrophe Fund Law«, respectively »Statute on a Fund for Catastrophes«) refers to »extraordinary

3 See, for example, Verena Adam, *Kommunales Katastrophenmanagement bei Hochwasser*, RFG 2008/3, 9 (9 f).

4 See, for example, Kerschner (ed), *Handbuch Naturkatastrophenrecht* (2008) 9.

[...] damage which occurred as a result of floods, landslides, torrents, avalanches, earthquakes, snow loads, hurricanes, rockslides and hail.«

- ▶ The *Wasserrechtsgesetz* 1959⁵ (WRG, Water Rights Law) does not regulate catastrophe events at all apparently, at least according to the judgement of the *Oberster Gerichtshof* (OGH, Supreme Court).⁶

In our opinion, in order to create a concept of legally relevant catastrophe damage, the criterion of »unusual degree of danger or damage« and the »co-ordinated deployment of powers which has to be undertaken for the prevention or the elimination of the damage or the danger« have to be regarded as significant. The event which caused the catastrophe is connected to the respective subject of the regulation.

In all contexts mentioned, the *precautionary principle* is significant. However, with regard to this, the differing aims dominate: The prevention of danger (excluding known danger as, for example, in the case of operating facilities, notorious avalanche events, annual floods, etc) is accompanied by the prevention of risk. Risk prevention itself is extremely weakly developed in Austrian natural catastrophe law. The legislator seems to rely on the principle that the catastrophe risk can affect anyone (§ 1311 *Allgemeines Bürgerliches Gesetzbuch* [ABGB], Civil Code) and, in the area of risk, gives »precedence« to individual prevention. This may be based on economic grounds but this is, in our opinion, not fully justified: how should an individual minimise something which not even the community can »stave off« ? The discussion regarding the causes and effects of climate change also shows that the evidence that »purely natural phenomena« are at work is no longer true when one takes into account global industrialisation and the global character of environmental problems. In addition, the use of mountainous regions can cause, for example, avalanches.

Already due to the above is the community, as a beneficiary of risky activities, including the risk of natural catastrophes, required to establish prevention measures.

5 BGBl 1959/215, last amendment by BGBl I 2006/123.

6 OGH 24.6.2005, 1 Ob 285/04z – Kamptal; OGH 16.5.2006, 1 Ob 63/06f – Steyr; compare *Wagner*, *Aktuelles Umweltprivatrecht* in: *IUR/ÖWAV* (ed), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2008, 34.

C. Prevention⁷

In view of the *frequency of natural catastrophes*, it is recognised that the *prevention of damage* is far less expensive than the remedying of the consequences of natural catastrophes whether or not they are caused by global warming. For Austrian law, the basis study »Prevention, Defense, Liability and Insurance in the Event of Catastrophes« of the IUR of the JKU Linz, arrived at the following conclusions:

I. Creation of an integrated Catastrophe Prevention Concept⁸

Effective prevention of natural catastrophes can only occur through cooperation of the *various actors* (state/private/insurance) on the one hand and the *various instruments* (eg active and passive protection measures, private protection of property and catastrophe management) on the other hand. As already mentioned, the local community cannot be completely relieved of its responsibilities on the basis of possible accumulated causalities. A clearer division of tasks between the actors and instruments concerned is required. This means:

1. Division of Prevention Responsibility between State and Private Entities

The obligations of the State and private entities to act in the prevention of natural catastrophes have to be classified. The ECtHR,⁹ in its decision »*Budayeva v Russia*«,¹⁰ affirmed states' duties of protection in order to protect life and health in the event of natural catastrophes. The ECtHR deduced from Art 2 European Convention on Human Rights (ECHR),¹¹ that states have to guarantee a legal framework as regards the prevention of natural catastrophes (in concreto: mudslide) and the defense in the event of a catastrophe. It is still open whether this view is also valid for

7 For more details, *Wagner* in: *Kerschner* (ed), *Handbuch Naturkatastrophenrecht* 11 ff.

8 For more details, *Wagner* in: *Kerschner* (ed), *Handbuch Naturkatastrophenrecht* 19 f, 80 f.

9 European Court of Human Rights.

10 EGMR 20.3.2008, RdU 2008/88 with comment by *Wagner*; see also *Schöpfer*, *Ahndung von Naturkatastrophen durch den EGMR*, RdU 2009, 184.

11 European Convention on Human Rights.

the basic right to property (Art 1 1. ZPMRK). Concerning the division of responsibilities between state and private entities, this has to be oriented towards the material adequacy. As such, for example, for passive protection measures and active large-scale protection, the local community can likely better deal with this (for instance, by means of regional planning measures or by promoting flood protection constructions alongside rivers, etc). It appears that the operational measures to prevent catastrophes and the prevention of catastrophes in terms of building law tend to be rather the obligation of the private user.

2. The Priority of Passive Preventive Measures over Active Measures

The aim of passive protection measures is to avoid danger by means of forward planning. The priority of passive protection measures over active measures (dams, timbering, etc) has not been universally positioned as a normative principle in the Austrian legal system up till now. However, this appears desirable since regional planning should be oriented towards the natural conditions rather than the natural conditions being oriented towards regional planning needs: living near a stretch of water is only a pleasure as long as there are no catastrophic floods. A discussion regarding responsibility »after the event« does not make much sense. Every other perspective ultimately meets the limits of the affordability of catastrophe prevention.

3. Expansion and Reconciliation of Active Preventive Measures as a Supplement to and in Conjunction with Passive Measures

If the danger cannot be avoided, for example due to the lack of settlement area, active protection is needed (for instance, flood protection dams, avalanche barriers, etc could be considered).

This will be described in detail: