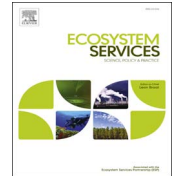




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How do ecosystem services perform in enforceable law? Potentials and pitfalls within regional and national integration

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ABSTRACT

Ecosystem services have constituted a highly discussed topic especially since the Millennium Ecosystem Assessment. This is in particular valid for the literature in environmental sciences and related economic sciences. The topic has gained less attention in other social sciences and up until now legal scholars have hardly taken up the issue for an in-depth analysis. Moreover in the legal practice the term has not played any substantial role apart from its inclusion in soft law documents that lack concrete and effective implementation including enforcement mechanisms.

This paper addresses the issue of inclusion of the term *ecosystem services* in legislative documents with such mechanisms. Starting from a neutral position, it discusses the potentials and pitfalls of such an inclusion in the light of the ongoing contradictory discourse about the concept of ecosystem services.

This is done by an in-depth review of existing academic literature as well as by empirical quantitative research on EU-law, and by a case study. This case study concerns the on-going assessment of the inclusion of the term ecosystem services into a binding legal act of regional integration on the example of the Regulation of the European Union (EU) on Invasive Alien species. The analysis also covers primary data derived from questionnaires and interviews completed by a wide range of stakeholders from two member states of the EU.

The results provide an overview of opportunities and challenges of the inclusion of the term ecosystem services in this particular context of binding and enforceable regional integration law based also on a practical example. The ongoing implementation of this EU-Regulation can provide a blueprint for similar situations of coordinated legislative procedures between different levels of law-making and its implementation including enforcement. These situations can occur beyond a nation's borders or within.

Similar research has not been implemented yet according to the knowledge of the authors. Therefore, the results of this contribution provide innovative insights into an ongoing legislative procedure with binding rules on ecosystem services and useful hints for similar other prospective attempts worldwide.

1. Introduction

The term “ecosystem services” (ES) has been discussed widely since the late 70 s (see e.g. Gomez-Baggethun et al., 2010; Peterson et al., 2010) and was defined for example by the Millennium Ecosystem Assessment (MEA, 2005 p. V) as “the benefits people obtain from ecosystems” (for an overview on other definitions see e.g. Braat and De Groot (2012) and in general on the ongoing discussion see e.g. Schröter et al., 2014; Silvertown, 2015). The mainly scholarly dialogue has taken place especially in environmental and related economic sciences but less in other social sciences, and in particular legal scholars have hardly concentrated on the issue (Mauerhofer, this Special Issue). Law researchers have also pointed out that ES as a term has rarely found entrance into legislation (see e.g. Mauerhofer, this Special Issue, Pasten et al., this Special Issue,

Stepniewska et al., this Special Issue). In the event that the term has overcome this hurdle, questions of its further implementation and enforcement are of particular interest. This is especially the case for multilevel legal systems of regional integration with enforcement mechanisms such as in the European Union. Because here, in the event that the term is integrated in the higher level rule (e.g. the EU-rule), the transposition and/or direct application of the term at the lower, national level are controlled by these mechanisms (Mauerhofer, 2008; Mueller, 2011). This is in particular of interest when the national level has a different structure such as in more centralized or more federal states.

Thus, the following questions are assessed in this paper:

1. How is the term ES implemented within EU-regional integration law in enforceable legislation?

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2. How are enforceable ES-clauses within the EU-Invasive Alien Species (IAS)-Regulation nationally perceived among different stakeholders

- a. for the competence distribution in the future regarding Biodiversity and related ES within a federal (Austria) and a centralized country (Romania)?
- b. for the future work of these stakeholders?

The following chapter describes the wider research context, the European and country-specific background as well as the different methods of the assessment. Afterwards the results are presented in the order of the methods applied. Then, an overall discussion of the results follows and finally conclusions are drawn.

2. Background and methodology

This paper is based on a much broader research project which focused on the national and subnational competence distribution in the two countries Austria and Romania and its influence on the whole implementation of this regional IAS-Regulation. In the following, only those methods used and results gained are presented which have a particular context to and relevance for ES.

2.1. Background

Prior to the description of the two countries selected, a brief information on the European Union is provided.

2.1.1. European Union

The European Union as a regional integration organization is based on predecessor organizations founded in 1957 and was repeatedly reorganized since then (Dinan, 2014). Nowadays, it has 28 Member States (MS) and covers an area of 4407 million km² with a total population, as of 2016, of about 510 million people (Eurostat, 2017a, 2017b). The EU globally constitutes the regional integration organization with the most extensive legal framework binding in different ways for MS and including supranational judicial enforcement mechanisms, in particular the Court of Justice of the EU (CJEU) and the Court (of 1st instance) (see e.g. for more details Chalmers et al., 2014; Craig and De Burca, 2015).

2.1.2. Brief national background on Austria and Romania

Austria is a member of the EU since 1995 and located in central Europe, land-locked with a population of about 8 million people and a size of about 83.000 km². Romania joined the European Union more recently in 2007 with an area and a population both about three times larger than Austria and much more centralized organizational and normative preconditions for the implementations of norms related to ES in comparison to the federal structure of Austria (Table 1).

These different preconditions have shaped the distribution of competences and administrative structures that are now relevant for the implementation of the IAS-Regulation, also with regards to ES.

Within this organizational and normative structure, the Member States Austria and Romania are free to use their existing distribution of competences and administrative structures or to modify them regarding the implementation of the supranational law of the European Union.

2.1.3. Rationales for the choice of countries

Such as already mentioned, both countries are Member States of the European Union¹ (Treaties - EUR-Lex, 2017) and they must implement the IAS Regulation which is – as all EU-Regulations –

entirely binding and directly applicable in all Member States (Art. 288 Treaty of the European Union).

Thus, the two states are good examples of units with different organizational systems which face the same challenges in terms of application of a binding norm containing a supranational enforceable obligation towards ES.

This study focuses its results on the mobilization of the implementation of the IAS Regulation with all its mandatory implications. The experience of the experts and of other stakeholders from the two countries can also be taken as a case study that emphasises the rich, real-world context in which phenomena occur. The theory-building process unfolds via recursive cycling between the case data, emerging theory, and later, via extant literature (Eisenhardt and Graebner, 2007). There are few studies which consider arguments for the prevention and management of IAS on a national or supranational level (Heink et al., 2016).

A further argument in favor of the choice for the two Member States is the geographical location of the two countries. Romania lies at “the edge” of the European Union, a border region to non-EU countries, with access to the Black Sea and hence to Asia Minor. Austria is centrally located in the EU, surrounded mostly by EU-countries, except Switzerland.

2.2. Methodology

In general, the in-depth literature review was implemented and empirical data was collected in the two member states of the EU mentioned, namely Austria and Romania.

2.2.1. Literature review

A literature search was executed in the two largest electronic databases Scopus and Web of Knowledge by using the terms “ecosystem services”, “invasive species”, “invasive alien species”, “European Union”, “EU”, “law” and “legal” in different combinations to mainly find journal and preceding papers. These terms were considered the most important ones to support the analysis. Furthermore, a similar search of latest book titles and within edited volumes was undertaken at major environmental law publishers (e.g. Routledge, Edward Elgar, Oxford University Press, Cambridge University Press) in order to find contributions (monographs, book chapters related to invasive alien species) to the recent IAS-Regulation. Additionally, the terms were also searched for through Google and Amazon with the same reasoning.

2.2.2. Quantitative and qualitative analysis of data from EU-database regarding term “ES”

Primary data gathering related to the first research question took place using the database Eur-Lex² of the European Union where the term “Ecosystem Services” was inserted into the search mask. The results were assessed for binding and enforceable norms addressing the Member States of the EU and the only valid results, the IAS-Regulation was then selected for further empirical methods applied at the Member State level such as described in the following.

2.2.3. Stakeholders involved in questionnaires and interviews

At the Member State level, the current study used questionnaires and interviews in both countries for numerous stakeholders. The stakeholders came from public authorities and agencies, companies, the science sector and the civil society including NGOs. Questionnaires were completed between June 10th and October 19th, 2015 and interviews were held between June 16th and December 14th, 2015 (for more details see Appendix 1).

Respondents indicated a wide range of areas of competences (see for details Appendix 2). Austrian respondents gave information about their personal working area, by choosing competence areas from Austria that are under the different competences of the federal state

¹ Romania through The Treaty of Accession of the Republic of Bulgaria and Romania (2005) - OJ L 157, 21.6.2005/CELEX nr. 12005S/TXT and Austria through Treaty of Accession of Austria, Finland and Sweden (1994) – OJ C 241, 29.08.1994.

² <http://eur-lex.europa.eu/en/index.htm> (assessed at 25th June 2016).

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