

ON THE COMPARISON OF ENVIRONMENTAL LAW

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Introduction

Comparative law contributes to the education and knowledge of the lawyer in the same way as legal history and jurisprudence. Furthermore, comparative law most certainly entails a deeper understanding of the legal order as a social phenomenon. It is employed in preparation for legislative reform; in efforts at the harmonization and unification of law; in private international law; in the interpretation of international law; as well as in academic research. The methodological arguments for comparison have varied over the years, but today, an instrumental perspective of law in general, and comparative law specifically, hold strong positions. This is especially true for goal-oriented studies, which are both topical and common in the field of environmental law.

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With most environmental law stemming from European Union (EU) law and international conventions, it is difficult to find any article, report or monograph in this area that does not contain elements of comparison. Lawyers' petitions and investigations, governmental reports, handbooks, court rulings and other legal works frequently carry examples from other countries in support of the argumentation. Within the Nordic countries, this can also be seen in academic works on environmental law.

In light of the constant presence of comparative elements in modern environmental legal thinking and argumentation, one would have expected the debate on *comparative law as a method* to have been vivid over these past years in our particular field of research. Unfortunately, this is not the case. Those who ought to be taking the lead in such a debate — the legal researchers in environmental law — have remained surprisingly quiet on the methodological matters concerning comparative law. In our opinion, this is a general deficit in the legal discourse in our area. Furthermore, such a debate is distinctly necessary in order to make known the common misuse of comparative elements. All too often, such arguments have been shown to be misleading when scrutinized. This can be illustrated by the Swedish governmental report on the “four big predators.”¹ By way of analogy, the commission made reference to the Latvian lynx to show that increased hunting of wolves in Sweden would comply with article 16 of the habitats directive (92/43) provided it would be undertaken in accordance with a “management plan.” What the report omitted, however, was the fact that the Latvian lynx has a “favourable conservation status,” whereas wolves are critically endangered in Sweden.² Moreover, the commission asserted that such decisions could be made on a regional level; as such an order had been accepted by the European Court of Justice (ECJ) in the Finnish “wolf-case.”³ What the commission failed to state was that environmentalists in Finland could appeal regional decisions to the national level, whereas this is not — and was never proposed to be — the position in Sweden.

1. Report SOU 2007:89 from the Governmental Commission on the Management of Big Predators (December 4, 2007).

2. The entire population originates from four (4!) animals. See the reply from Uppsala Universitet 2008-05-27 (UFV 2008/11) to the remit on the commission report.

3. Case C-342/05 *Finnish wolf case*.

Viewed in this light, we believe that a debate on comparative law as a method for environmental legal research has become necessary. This article represents a first effort. Our aim is both to emphasize the research value of the method and to illustrate the challenges therein. This article is divided into three parts. In section 1, we submit general remarks on comparative method in legal research. We then proceed, in section 2, to illustrate certain difficulties that the comparatist might encounter in relation to how different legal systems, culture and perceptions might influence the notion of "law" in particular countries. Finally in section 3, we present our concluding remarks on methodological questions and the ambitions of comparative law.

Comparative Law as a Method for Legal Research

The Aim and Purpose of Comparative Law

There are many aims and uses of comparative studies.⁴ Often they have no aim or use at all, other than to provide ornamental, though often quite interesting, information. This can be attributed to the traditionally exclusive national scope of legal dogmatic study. A traditional task for legal research is the normative problem-solving activity based upon the positive law of one given legal system — a view founded on the traditional legal dogmatic doctrine — especially in its limitation to positive law in a given legal system.⁵

Normative problem-solving based upon internal positive law in a given legal system is admittedly an indispensable part of legal science, but there are other beneficial legal scientific approaches. The primary aim of comparative law research is knowledge; the same universal aim as that of legal research in general and of all science. Researchers do not need any immediate aim or purpose other than furthering knowledge and understanding in their particular areas of study, or for a specific problem or situation in general. Comparative law research increases the lawyer's ability both to understand and indirectly to manage the legal system. This understanding potentially

4. See, e.g., MICHAEL BOGDAN, *Jämförande juridik – vad, varför, hur?*, in MARKKU SUKSI (ED.): *JÄMFÖRANDE JURIDIK – VAD, VARFÖR, HUR?*, 2 (Åbo Akademi, 1996); and ANTERO JYRÄNKI, "Im fremden Spiegel" – *Tankar om jämförande rättsforskning*, in MARKKU SUKSI (ED.): *JÄMFÖRANDE JUR+IDIK – VAD, VARFÖR, HUR?*, 12 (Åbo Akademi, 1996).

5. STIG STRÖMHOLM, *Har den komparativa rätten en metod?*, in SVENSK JURISTTIDNING 456 (1972).

takes on both an internal and an external perspective of the legal system. It does so by looking at law as instrumental and studying functions in the normative context, instead of the regulations themselves of any given legal system. If one accepts that legal science represents not only the techniques of interpreting the texts, principles, rules and standards of a national system, but also the discovery of models for preventing or resolving social or other conflicts, then it becomes clear that comparative law research can provide a much richer range of model solutions than a legal science devoted to a single nation.⁶ The study of several ways of regulating situations in different systems may enable researchers to gain valuable knowledge, and, more importantly, to understand the relevant legal functions.

Functional Methodology

A comparative study entails, first of all, identifying a common character, a *tertium comparationis*, of the objects compared in the different legal systems. This requirement is imperative for all comparisons. A popular example states that one could compare the weight and shape of an apple and a hand grenade, but not really their taste or nutritional value. Such a comparison would not clarify any relevant problems or arrive at any meaningful answers.⁷

The researcher may here be prone to set out to study the black letter law of the chosen legal systems. The relevant legislation is then approached with the legal terms as a starting point, rather than starting with those legal and social problems that first resulted in the regulation and terminology. This can be treacherous. The terminology might not exist in the other system. The problem may be viewed and solved in an entirely different manner and in a different part of the legal system concerned. This is where functional methodology⁸ comes in. The central point of this methodology is to lift the research from a study of rules to a study of functions. Hence, it is the problem that the regulations are directed at that is to be studied. The researcher does not look to common terminology or areas of legislation, but seeks comparative functions in the different systems. The common func-

6. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (3d ed., trans., Tony Weir, Clarendon Press, 1998).

7. BOGDAN, *supra* note 4, at 6f.

8. Authoritatively described in ZWEIGERT & KÖTZ, *supra* note 6.

tion, is the *tertium comparationis* of comparative jurisprudence.⁹

Functionality is the basic methodological principle that determines the choice of laws to be compared, the scope of the undertaking and the creation of a system of comparative law. This idea rests upon the belief that all legal systems face essentially the same problems and solve them by quite different means, but often with similar results. This belief is in turn founded upon a view of law as being instrumental and not having a self-contained value or purpose. Law is a system of instruments used to implement and enforce legal political goals and wishes and to resolve conflicts and solve problems in society. Different rules and regulations exist in national legal systems and the social contexts often differ, but the situations and the problems that the legal systems are set to solve and regulate are broadly similar. The question to which any comparative study is devoted is thus posed in functional terms in order to avoid one's vision being clouded by concepts inherent in that person's own national system. This perspective can also be seen in modern environmental law methodology. Another advantage of this method is that the research and subsequent discussion elevates the subject, from a study of different regulations, to a more instrumental and principal level and, thereby, to a higher level of abstraction with its analysis of functional counterparts.

Critical Reflection

It is, however, important when applying the functional approach to exercise a degree of humility in relation to the fact that one is comparing different legal systems, and in some sense always comparing apples and oranges (or hand grenades). Accordingly, the researcher had best take on a healthy scepticism throughout the study.¹⁰ A critical reflection of one's methodology is always important. The functional comparative method can be criticized as oversimplifying legal structures and discourses, and it can easily lead to the comparatist presuming too much in terms of similarities in the legal systematic functions.

It is rightly argued that neither lawyers nor the law can rise

9. BOGDAN, *supra* note 4, at 7; and Ole Lando, *Kort inføring i komparative ret, JURIST OG ØKONOMFORUNDETS FORLAG*, 87ff (1986); see also John C. Reitz, *How to Do Comparative Law*, 46 *AMERICAN JOURNAL OF COMPARATIVE LAW* 622 (1998), for comment on this point of departure.

10. Reitz, *supra* note 9, at 622, available at <http://www.heinonline>.

above themselves — by making themselves “transcendent,” for they are inevitably related to their culture.¹¹ They are not only connected, but melded together. Law is an amalgam of a multitude of cultural aspects. Even when legislators on different levels have tried in different ways to harmonize legislation, or to introduce a foreign legal construction, it will inevitably be reformulated within the local legal culture.¹² Thus, an understanding of law can never be extricated from its cultural, historical and political context - and the contextual excursions into non-legal study materials are never sufficient safeguards for this problem.

This criticism is most relevant, and we believe that the comparatist must always bear it in mind. However, we do not assert that this should be taken so seriously as to suggest that comparative law or the functional method cannot be done. As a working method and practical approach the functional approach is most useful. But the comparatist has to think carefully about what he or she can really understand from the studies and how to make use of the results. The comparatist should be aware of the singularity of law and its unbreakable connection to the cultural context, but may embrace this cultural dynamic to refresh the legal discourse nationally and internationally. The pluralistic understanding and meaning of what looks the same in black letter law and may very well have the same origin (often in international conventions and EU law) may be particularly fruitful in giving life to legal theory and practice.

The Comparative Study

Introduction: “How to”

In this section, a comparative study method and disposition will be suggested. The purpose of this presentation is not to provide a manual for all comparative law studies or to define different projects as being comparative or not. Rather, this is an illustration of how one tackles a comparative project. It may, however, be stated very basically that a comparative law study entails the study and comparison

11. See, e.g., Pierre Legrand, *Paradoxically Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631 (2005); Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517 (2006); Pierre Legrand, *How to Compare Now, Legal Studies*, 16 J. SOC’Y LEGAL SCHOLARS 236 (1996); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN L. REV. 12 (1998).

12. Teubner, *supra* note 11, at 11-12.

of more than one legal system. The mere study of foreign legal systems does not a comparative study make.

Starting Out

A comparative study begins with the posing of a problem, a set of questions, or a working hypothesis, and choosing the legal systems to be studied. The study should begin with the identification and study of the functions of the relevant topic area, rather than studying different ways of regulating the same problem. In this phase, shortcomings, problems or even contra-productiveness can be identified or at least suspected.

The choice of legal systems to be studied and compared in a comparative research project must be guided both by the subject and the aims of the project. In environmental law, there is a common goal and interest of mankind to reach and maintain a sustainable development. There are also accepted principles of environmental law and policy, such as the “polluters pay” principle and the precautionary principle. This means that there is common ground. There are, therefore, immense possibilities for the comparison of different regulatory means of meeting the challenges set by these common goals and principles, and how they are implemented and enforced within the context of different legal cultures. Choosing legal systems with similar environmental goals and regulations but different legal cultures, in terms of legal history, tradition and style, can be very beneficial.

The Country Studies

A fundamental prerequisite for a meaningful comparative study involves acquiring correct, relevant and updated materials on the legal regulations and functions to be compared.¹³ The researcher must consider carefully what materials are accessible and give the most relevant and accurate description of the legal system concerned. The terminology must be carefully investigated since one cannot assume that it is identical to that of the researcher’s own country.

Legal research should be based upon primary sources such as legislation and case law. These sources must be thoroughly investigated and understood. But it is not sufficient merely to study the leg-

13. MICHAEL BOGDAN, *KOMPARATIV RÄTTSKUNSKAP*, 39 (2d ed. Nordstedts Juridik AB, 2003).

isolation of a country. In this context one should consider that to gain access to the real meaning and content — the validity — of the law, one must consider the actual functioning of the normative system within the context of a cultural tradition, society's use of the norm.¹⁴ It is, accordingly, difficult to obtain relevant information on the functions of the foreign solution if one focuses only on black letter law in traditional sources of law. Foreign legislation, court decisions, preparatory works, and other sources of law, should be read and employed in the same way as in the country of origin, to provide as truthful and realistic a view as possible of the particular foreign system. To find this view of the law, however, it is also often necessary to make use of descriptions of the system found in documents such as handbooks, information published by the authorities, non-precedential decisions from courts and various authorities. These untraditional sources provide an insight into how the domestic lawyers, researchers and practitioners understand the relevant system, its structure, sources and functions; what the critical voices are arguing and how the debate is proceeding.¹⁵

Also, non-legal norms can be of importance, as the law does not always describe fully the realities of society. People also subject themselves to rules other than legal ones. Attitudes toward the legal order and specific legal rules differ. The legal system is a social phenomenon and it expresses only one aspect of social life. Not until other aspects of society are brought into the study does it become possible to see the role that the legal regulation plays and how it works in practice.¹⁶ This wide scope of gathering data for a research project can be overwhelming and naturally delimitation is crucial. The principle of functionality will have to guide the researcher in the process of evaluating which deeper excursions into the non-legal context are of interest.

Language is an important factor when studying foreign legal materials.¹⁷ It is important when gathering material to realize one's limitations in relation to such difficulties as getting at the real meaning in translating the message contained in a legal text, in describing

14. JAAKKO HUSA, *Vertaileva oikeustiede ja voimassaoleva oikeus – Eräitä juomioita valtiosääntöoikeudellisen oikeusvertailun näkökulmasta*, in MARKKU SUKSI (red), *JÄMFÖRANDE JURIDIK – VAD, VARFÖR, HUR?*, 86ff (Åbo Akademi, 1996).

15. Lando, *supra* note 9, at 90f; and BOGDAN, *supra* note 13, at 41f.

16. BOGDAN, *supra* note 13, at 52.

17. JYRÄNKI, *supra* note 4, 11 and 21f; BOGDAN, *supra* note 13, at 39f.

and analyzing the foreign legal system, and in presenting the results. Translated materials are generally comparable to secondary sources, and the researcher must be constantly aware of the possibility of damage done to the meaning and substance of legal terms and systematic functions by translation. This is also the case when the researcher studies materials in the original language and also when in direct contact with foreign colleagues.¹⁸

Finally, after having grasped all the challenges of understanding the foreign legal system and the functions thereof, the study results may be presented in country reports. Here, the relevant functions of each of the systems studied are presented in the context of their own legal orders.¹⁹

Comparison

After all the hard work of studying the different foreign legal systems, it is sadly necessary to say that this work, however essential for comparative research, is not in itself comparative research, but merely a preliminary step. The essence of comparative law is the comparison, that is, placing comparable legal elements in different legal orders side by side and investigating and describing their similarities and differences.²⁰

Notably, the process of comparison at this stage involves adopting a new point of view with which to consider all the different solutions. The objective country report gives a portrayal of the legal solution of the reported system, but does so with the perspective from within that system. When the comparison begins, each of the solutions should be freed from the context of its own system and, before evaluation can take place, set within the context of all the solutions from the other jurisdictions under investigation. Here, too, the researcher should follow the principle of functionality; the solutions found in the different legal systems must be cut loose from their conceptual context and stripped of their own national doctrinal overtones so that they may be seen only in the light of their function, as an attempt to satisfy a particular legal need.²¹ If this is accomplished differently within different systems, the comparatist may investigate the

18. BOGDAN, *supra* note 13, at 40.

19. ZWEIGERT & KÖTZ, *supra* note 6, at 43f.

20. BOGDAN, *supra* note 13, at 56.

21. ZWEIGERT & KÖTZ, *supra* note 6, at 44.

reasons why. By searching for plausible explanations, those factors that influence the structure, development and content of a particular legal system are illuminated. These are, for example, the economic and political systems, political ideology, history, geography and demographic factors.²² Here, the researcher might venture to build a system based upon the comparison. This involves systemizing the functional parts of the investigated problem and the legal situation, and sorting the results of the comparison and, perhaps, also experiences of, and reasons for, differences and similarities in the way solutions are reached. Interesting scientific results can be presented in a valuable and “scientific” manner by way of such a construction of a system, according to the functional role of the different solutions.²³ The elevation of the study from the regulations of all countries to functional parts of a system will hopefully reveal itself, and this may in turn lead to a wider knowledge and deeper understanding of the area of law and of the specific issues studied.

Normative Analysis

After making a comparison, it is often of interest to ask which of the presented solutions is the most effective or best in some other aspect. This might also enhance the scientific value and interest of the study.²⁴ At this stage of the study, the different solutions identified in the compared legal systems are evaluated in relation to one another. However, the comparative evaluation is not necessary in a comparative study, and the absence thereof does not necessarily mean that the study is purely descriptive or does not include a legal scientific analysis.

A delicate task in this part of the study is to choose appropriate criteria for the critical comparative evaluation. It is futile to try to find an uncontroversial criterion for evaluating legal orders and regulations. However, if the legal political aims are the same for the compared solutions, as they generally are in environmental law, the effectiveness in reaching them can be stated as a general criterion. The problem will involve working out a more detailed and tangible criterion to be used as a measurement in the actual evaluation. Having come this far, one must be aware of the fact that effectiveness is not

22. BOGDAN, *supra* note 13, at 66ff.

23. ZWEIGERT & KÖTZ, *supra* note 6, at 44f.

24. BOGDAN, *supra* note 13, at 73; ZWEIGERT & KÖTZ, *supra* note 6, at 46.

easily defined nor identified and legislative aims are generally part of a larger, immensely more complicated picture. Accordingly, it will be difficult to see and compare the full picture of the legal political aims. In addition, it is quite complicated to measure the degree of effectiveness. Conducting practical studies of the actual results in nature of one or another instrument is not easily achieved by the legal researcher. The focus will have to be on a legal systematic effectiveness, since this is the only area where the researcher can claim to make any scientific progress. The theories and challenges of the concept of effectiveness is then, of course, an intrinsically difficult concept, which should be critically examined, but this is not the place for such a discussion.

And now, finally, the comparative study may proceed to the stage of normative analysis and *de lege ferenda* discussion within its "own" legal system. Here, the comparatist argues, as does any other lawyer, for the best solution to a legal problem, but with additional sources from foreign legal systems, and from the functional understanding gained by the comparison per se. This is where, we argue, the vast potential of comparative analysis lies. It is, however, crucial to remember that the study and comparison of foreign systems contains very weak, if any, normative argument.²⁵ Such normative character can only be gained through the criteria of the evaluation as described above, presented clearly and applied faithfully. Otherwise, there is a risk of stating merely a personal ethical or political view, rather than scientific arguments. Drawing one's normative arguments from the study of foreign legal systems is always an exceedingly complicated and risky undertaking.

Legal Culture

Introduction

As described in section one, it is a complicated undertaking to gain a deep understanding of the legal situation of another country. But it can also be just as difficult to understand the legal situation in one's own country. Beside the provision itself, preparatory works and case law, and other factors, play a role in the formation of a legal situation. "Soft regulation," administrative practice, hidden procedural aspects, the organization of the courts and administration, vol-

25. Reitz, *supra* note 9, at 624.

untary agreements in society — all can be important in its understanding. The fact that so many factors decide the meaning of law does not, however, prevent our trying to get a clear picture of our own legislation.

Let us, therefore, approach comparative studies with the same bold attitude. We must, however, be aware of the fact that often we can only gain a shallow understanding of foreign legal orders. As stated earlier, this is mainly because of factors other than plain differences in black letter law. One of these is the legal culture; the traditional, religious, economic and social contexts that form the basis for the understanding of a rule. In the following sections, we wish to illustrate this by some examples that we have experienced in our comparative efforts.

Different Legal Perceptions

The first example concerns *different perceptions* of an issue, namely the “legal nature” of liability for damages to the environment per se. In Sweden, this type of liability is regulated exclusively by public law remedies.²⁶ The legal basis for the authority’s demand on the polluter is found in specific provisions in administrative law. Also, the question of whether the authority in question may recover costs from the polluter if it undertakes investigations or remedial work is exclusively regulated in such provisions.

However, in other countries there is a private (tort) law perspective on liability issues. The state/authority is regarded as an injured party in a tort law manner in relation to the polluter. The underlying philosophy is that the environmental authorities have a right to be compensated for damage caused by unlawful acts infringing on their interests. This standpoint has not only been taken in relation to state-owned or state-administered property, but extends to other interests that the legislator has commissioned the authority to protect. In several countries, this perspective has been exercised in relation to contaminated land, where the environmental authority’s ability to recover costs is based upon tort law.

Public law and private law perspectives may provide entirely different answers to important questions such as the legal basis for li-

26. However, there is some interesting case law where the state has been awarded damages for endangered species that have been hunted illegally (see the Swedish Supreme Court’s judgement in case NJA 1995 s. 249).

ability and time limits. An important question relates to what happens when public law provisions do not cover a certain situation. In the public law countries, the answer can be that the authority concerned never recovers the money. In contrast, in some of the countries that have private law traditions combined with modern environmental legislation, the authorities have a right to choose between the instruments. In The Netherlands, for example, the choice of which law to employ can be made freely, so long as the use of the private law remedies does not interfere in an unacceptable way with the public law system (“*twee weegenleer*” or “the two-road doctrine”).²⁷

It is hard to find any evident explanations as to why the perspective differs between the legal systems. Sweden/Finland and the United Kingdom are typical public law systems, while the Netherlands and Belgium provide examples of private law thinking.²⁸ An explanation could be that the latter perspective is stronger in those countries where the state owns or controls the groundwater, which is the most common order on the European continent. When the authority remediates groundwater from contamination, it has a civil law claim against the polluter. Another explanation can be that the authorities in countries without a strong tradition of public law in the environmental area have instead become more dependent on private law remedies. There are also examples, such as Denmark, where culpability and time limits pursuant to tort law are complementary conditions for public law liability that have been established by the general courts.²⁹

Be that as it may, some of the effects of the differing perspectives can be studied using rule-oriented methods of comparative law. But as it is a question of legal culture and perspective, some of the consequences are impossible to grasp with such a method. For many controversial issues, no answers are to be found in explicit provisions or comments in preparatory works or handbooks, and they are never

27. G. Betlem, *CIVIL LIABILITY FOR TRANSFRONTIER POLLUTION* 334ff (Graham & Trotman/Martinus Nijhoff, 1993) (Chapter 6:3).

28. When René Seerden and Kurt Deketelare edited the anthology *Legal aspects of soil pollution and decontamination, in THE EU MEMBER STATES AND THE UNITED STATES*, (Intersentia Uitgevers, Antwerpen 2000), the portion addressing cost-recovery had the heading “Civil aspects on soil contamination,” even for the public law countries. The only explanation for this is that the editors were concentrating on their own traditions.

29. For many years, *Ellen Margrethe Basse* has been the fiercest critic of this phenomenon in Danish case law.

clarified by administrative practice or case law.

Traditions

A related problem arises when studying an instrument of environmental law that is heavily influenced by *national traditions*. This dilemma is illustrated by the example of “environmental permits.” Such permits have old traditions for administrative control of hazardous and polluting activities. At the same time, important unification of national environmental legislation is driven by the requirements for permits through EU directives. The modern permit regime can be said to have three main functions. Firstly, the permit is an authorization beforehand to carry out an activity under certain conditions to protect the environment, the natural resources and the surrounding neighborhood. Secondly, the decision-making procedure entails an important democratic aspect. All interests and the public concerned should have their say on the issue of approval. Finally, the permit also provides economic security for the permit holder, meaning that additional conditions cannot be demanded unless under specific circumstances.

When the modern, EU-regulated permit regime encounters national traditions, interesting differences can be noticed among the Member States. These differences obviously have little to do with the black letter law. On the face of it, the permit regimes often look similar. Instead, the differences are due to systematic approaches, such as whether the permit is regarded as imposing a right or a duty on the applicant. Of great importance also is whether the permit procedure is looked upon as an affair exclusively between the applicant and the decision-making authority, or as an integrated procedure between all parties affected by the activity.

In some systems, the applicant cannot use the permit decision so long as it is not finally decided. In those systems, an appeal postpones the permit, unless the permit body specifically decides otherwise. In other systems, the doctrine of “favorable administrative decisions” is prevalent, meaning that the applicant can proceed with the permitted activity despite the fact that the decision is challenged by appeal. In those systems, it is up to the party challenging the permit decision to convince the appeal tribunal or court that the decision should be suspended. Sometimes, the challenger has to post bond to ensure that the operator does not suffer any economic damage from delay if the

decision is upheld. The United Kingdom is an example of such a system. One must not forget that the final result of the famous case of *Lappel Bank* was a pyrrhic victory for the environmentalists. While winning a glorious victory in the ECJ, the parking lot was nevertheless built in the protected area!³⁰

Additionally, the legal effect of the permit differs from one country to another, despite the fact that the national rules all implement the EU directives in the environmental area. For example, when it comes to updating, the possibilities cannot only be judged from the provisions as such, but must also be seen in the light of the national apprehension of the permit. In some systems one cannot diverge too far from the original scope of the permit — or the “Grundslagt” (basis) as the Dutch say — irrespective of the demands of EU law. Evidently, such an aspect is of great importance for what is considered to be the law of those systems.³¹

Furthermore, it is difficult to explain in applying only rule-oriented methods of comparative law, the fact that in some Member States the authorities are quite keen to initiate updating, while in others they are extremely reluctant. The explanation is to be found in organizational, social and economic factors. Tendencies of corporatism are hard to pinpoint, but are obviously of great importance - as are the possibilities of challenging the authority's passivity by legal means.

In summary, while the requirements of black letter law concerning permits can appear to be identical from one country to another, the factual results can differ in many respects. In fact, the national permit regimes of public and environmental law are most interesting for those wishing to study *anything but* black letter law. Swedish traditions on water law and the still living sub-culture of the abolished water courts illustrate this clearly. Here, one can find peculiarities such as “implied conditions,” voluntary permits, cases pending for more than thirty years and other phenomena that are difficult to conceive for anyone coming from a different legal context.

30. Case C-44/95, *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds (Lappel Bank)*, 1996 ECR I-03805. The Royal Society for the Protection of Birds refused to pay cross-undertakings in damages in awaiting the preliminary ruling from the ECJ.

31. Teubner, *supra* note 11.

The Public Interest

Another difference among the legal cultures in Europe is the varying viewpoints on who *represents the public interest*. In some countries, the authorities are traditionally the sole defenders of the public interest in relation to a good environment. Consequently, there is little room for environmental, non-governmental organizations (NGOs) in decision-making procedures. This is, for example, the traditional situation in Germany. Here, organizations in most cases cannot take legal action merely in the capacity as owner of property or as the representative for concerned individuals. Traditionally, the situation is similar in Sweden. However, the Swedish system has been expanded with the introduction of the Environmental Code and the implementation of the Aarhus Convention. Today, environmental NGOs can appeal some decisions according to the Code. But this possibility is open only to organizations with 2,000 members or more, which, in effect, excludes all organizations except two or three of nationwide character. Established NGOs in Sweden's neighbouring countries, Denmark and Norway, have more expansive rights, as do most other European countries. Some countries use the technique of listing and registering those NGOs authorized to make environmental challenges. France and Austria are examples of this order, which generally excludes local groups and ad hoc groups from standing. However, as a general rule, the openness of these systems is established not by legislation, but by case law. The United Kingdom and the Netherlands — where access to justice for organizations is particularly wide — are examples of countries, which give standing to both ad hoc groups and very small organizations so long as the group is defending an environmental interest according to its statutes and previous activities.

Hence, it is clear that attitudes in different jurisdictions vary with regard to NGOs in terms of the types of organization allowed to take legal action. Differences also exist as to what kinds of decision can be challenged by them by way of appeal or judicial review. Finally, there are significant differences with regard to whether NGOs have recourse to civil law and criminal law instruments to protect the public interest. This is, of course, problematic from an Aarhus Convention perspective, and also in relation to the effective implementa-

tion of EU law. But this remains a topic to be discussed elsewhere.³² Based upon the subject of this contribution, one must say that there are no specific comparative challenges to describe and discuss the position of environmental NGOs in different countries. The debate is wide open and many reports and articles have been written on the matter.³³ But when it comes to judging the *systematic effects* of these differences, we encounter methodological problems. We might assume that the activities of the operators and authorities are influenced by access to justice for third parties, but we really do not know. We can further assume that the actions of major environmental NGOs such as SNM³⁴ toward the regional environmental authorities of the Netherlands have had a cathartic effect on the willingness to initiate updating of permits for industrial activities, since the passivity of the authorities is challengeable by way of judicial review. Moreover, we can only assume that this is the reason why there is such an appalling difference compared with Sweden where such possibilities do not exist (and updating activities are virtually non-existent). The same goes for controversial issues such as the speed of decision-making procedures ("better regulation") versus the importance of public approval ("environmental justice"). And still, any comparative discussion, for example, on the implementation of international conventions or effectiveness of EU law, is at risk of being meaningless if such factors are not considered.

Enforcement

Enforcement of environmental law is another example of where

32. See, e.g., J. DARPÖ, *Justice through environmental courts?*, in ENVIRONMENTAL LAW AND JUSTICE (Jonas Ebbesson ed. to be published by Cambridge University Press).

33. See, e.g., N. de Sadeleer, G. Roller & M. Dross: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS AND THE ROLE OF THE NGOS (Europa Law Publishing, Groningen 2005); European Environmental Bureau (EEB), *How far has the EU applied the Aarhus Convention?*, (Oct 2007). The European Commission carried out a study last summer on the implementation of article 9.3 of the Aarhus Convention on access to justice in 25 of the Member States, Summary report on the inventory of the EU Member States' measures on access to justice in environmental matters, Milieu Environmental Law and Policy, Bryssel 2007. The report is published on the website of the Commission, available at http://ec.europa.eu/environment/aarhus/study_access.htm.

34. Stichting Natuur en Milieu, The Netherlands Society for Nature and the Environment. See Natuur & Milieu, <http://www2.natuurenmilieu.nl/home> (last visited Nov. 16, 2010).

systematic differences between European countries cannot easily be studied in their entirety by employing only rule-oriented methods of comparative law. Differences in emphasis exist in relation to administrative, private and criminal enforcement, and this emphasis is principally a national issue. In the Nordic countries, enforcement mainly rests upon administrative law. The environmental authorities have an arsenal of instruments at their disposal, such as orders, undertaking measures on behalf of the addressee, administrative fines (*astreinte*) and semi-criminal instruments such as sanction fees.

In other countries, the environmental authorities work primarily with criminal sanctions. This is, for example, the case in Spain. In the United Kingdom also, the enforcement of environmental law, to a great extent, is focused upon criminal law measures. Requirements for permits are often formulated as exemptions from prohibitions and their application has been subject to a rich and lengthy case law. Furthermore, criminal liability is described as being "strict," although with exemptions.³⁵ It is also a criminal offense to contravene an administrative order. The most "exotic" feature, however, is perhaps the fact that the Attorney General plays an inconspicuous role when it comes to environmental offenses, as both individuals and environmental authorities can prosecute.

Most prosecutions in the United Kingdom are brought by the Environmental Agency through its "prosecution offices," and this activity is considered to be a normal part of its supervisory activities. Private prosecutions are not that common, but they have been known to occur. The individual does not have to show any sufficient interest in the matter, and the possibility of receiving legal aid is quite good. One can therefore suggest that the mere possibility of private actions can put pressure on the authorities to prosecute, especially given that the decision *not to* can be challenged by way of judicial review.

As with access to justice, there have been only a few studies on the systematic differences concerning enforcement of environmental law,³⁶ and even fewer on the effects of the different systems. We do

35. In fact, we would rather describe the criminal liability as "systematic," meaning a duty to maintain the systems for operation and control in such a fashion that even unexpected events can be avoided.

36. However, see CRIMINAL PENALTIES IN EU MEMBER STATES' ENVIRONMENTAL LAW (Faure, M.G. & Heine, G. Metro (eds.) Maastricht European Institute for Transnational Legal Research, 2002), available at http://ec.europa.eu/environment/crime/pdf/criminal_penalties1.pdf.

not know much about the effectiveness of administrative instruments, compared with civil and criminal ones. We can only make assumptions that the sky-high levels of penalties in the United Kingdom have a greater deterrent effect on operators, encouraging them to “keep on the right side of the law,” compared with their competitors in other countries with their far more modest sanctions.³⁷ With rule-oriented methods of comparative law, perhaps we can examine how access to criminal sanctions varies from one position in the Finnish region of Åland, where *only* the environmental authority has the competence to *notify* the police of an environmental offense, to that of the opposite position in Spain, where *all members of the public* can *prosecute*, that is, “*actio popularis*” in criminal matters. However, it is a much more complicated task to study the entirety of the system. Taken together, perhaps the Swedish environmental authorities are just as active and successful, using orders and administrative fines, as their English counterparts are employing criminal enforcement. In such a comparison, the functional method can be useful as a practical approach.

Comparative Law in the Environmental Area

The Need for a Realistic Ambition in Comparative Law

Viewed in light of the “legal culture” described in Parts 1 and 2, one might wonder whether different national systems can be usefully compared in a legal, scientifically relevant manner. It may be doubted whether a foreign researcher could attain the knowledge required for such a study. In any event, such a task would be immensely time-consuming and overwhelming. The researcher is expected to study vast amounts of legal material as well as non-legal contexts, such as political history, in order to understand properly the role of the legal functions to be investigated.³⁸

However, in our view it is a matter of ambition. One must take a realistic perspective on comparative legal research. By this we mean that comparative law *makes it possible to see one's own legal order with*

37. An all-time high sanction in the United Kingdom a couple of years ago was £750,000 *plus* costs for the technical evidence in the Howe case. B. JONES & N. PARPORTH, ENVIRONMENTAL LIABILITIES 253 (Shaw & Sons, 2004). Another famous case is that of Anglian Water, which was brought by a private individual, a Mr. Hart, whose success (£250,000 in fines plus costs) was a great embarrassment for the Environmental Agency (GOVERNMENT SUGGESTS “VOLUNTARY” INITIAL RECYCLING TARGETS FOR ELVS, 54 (ENDS Report 326 March 2002), p. 54), *available at* <http://www.endsreport.com/8559/voluntary-targets-mooted-for-elvs>.

38. JYRÄNKI, *supra* note 4, at 11.

new eyes, from a new perspective and at some distance. In this way, one can gain a better understanding of the function and value of old and well-known legal phenomena within one's legal system. This makes it possible to evaluate this legal order without being bound by certain legal solutions that for other, more nationally limited lawyers, appear self-evident and indispensable, their not having experienced other functional measures to solve similar legal problems. This openness to other solutions is not only especially important in legislative work, but also in other situations where the lawyer works *de lege ferenda* – for example, in research. Rather than guessing and speculating, one can study the vast experience accumulated in other legal orders, using other measures and instruments to meet legal demands and solve legal problems.

The main task for comparative law, as in all research, is to further knowledge in a certain topic and area. The perspective and the material basis that the study of functions in different legal systems provides can be most beneficial to such an endeavour. It presents new perspectives and angles that can remove obstacles in the system. When a legal problem seems to have stagnated in its own system, a glimpse in a foreign mirror can impart a new perspective.

Comparing Environmental Law

There are no principal aims associated with comparative law, in the same way that there are none in science in general, other than the pursuit of knowledge. However, there are specific tasks that comparative law may fulfill in this instrumental view and methodology. This entails a kind of indirect use of foreign sources of law and is especially useful when the black letter law, i.e., the legislation and the rules and norms seem similar on the surface. This is often the case in European environmental law, through the influence of EU law and other international institutions of environmental law and policy. Such an approach can have a freeing effect on the analysis of legal norms, interpretations, theories and practices that seems absolute, given, or trapped in deadlock.

In environmental law, there is a universal goal and a common interest of mankind; sustainable development. We should, however, remind ourselves that as researchers of law we do not compare the environment or environmental goals. Instead, we compare the legal solutions of environmental problems within different legal systems,

and their functionality in reaching environmental objectives. We are, thus, studying legal constructions: the legal instruments, their potential, their difficulties and effectiveness within their functions. It may well be argued here that the instrumental view of law is oversimplified, but it serves as firm ground for comparative and environmental law research. The functional principle is functional, also in an environmental law context.

Advice to the Comparatist: Be Honest and Open-Minded

The legal researcher in environmental law must be honest with his or her ambition. Obviously, there is a substantial difference between a compliance study on the implementation of EU legislation in an area, compared with merely the comparison of a minor issue between two or three countries with related legal systems and legal perspectives. We think it is important that the comparatist, from the very beginning, openly declare the goal of the comparison and remain honest with regard to the risks and pitfalls associated with the method employed in a specific case. Furthermore, the comparatist must not exaggerate the advantages of foreign solutions simply because he or she is thrilled by their novelty. Be skeptical, and expect and confront problems at all times.

Furthermore, set the goals of the study in a perspective such that the work does not rest entirely on the correct interpretation of certain parts of the foreign terminology. Adjust your method to the scope of the study and try to refine the comparison with functional elements. Employing a casuistic method is helpful. There are also other methodological countermeasures that may help in the difficulties of studying foreign legal orders. After an initial period of studying traditional sources of law, it is fruitful to undertake in-depth interviews with lawyers in the particular country to be studied. It is, however, of great importance that such interviews be conducted after the comparatist has already acquired substantial knowledge of the system in question, otherwise it can result in a waste of time. In a way, the ideal is to know the black letter law better than the person to be interviewed. It is also important that interviews be conducted with all manner of subjects — with those from administration and industry, with advocates, representatives of NGOs and, of course, with different legal scientists. Not all interviews will, at first, seem fruitful. But it is from small pieces of information that a body of knowledge is formed. Finally, it

is crucial that the comparatist work with quality assurance. In our opinion, this is best achieved by communicating the written study with the interview subjects and others in a mutual language. In that phase of the study, it might also be helpful to use complementary questionnaires. One must, however, be aware that any such effort is quite time-consuming. Taken together, the introductory period of studying more or less traditional sources of law, the visit to the country in question and the interviews with different participants, and finally, the exchange of ideas over a written document, might well form interesting “food for thought” in the comparison with one’s own legal system.

Concluding Remarks

The challenges are many and varied for the environmental law comparatist, and it might be questioned whether any researcher could meet them all. It is, nonetheless, important to state a methodological ideal. This helps the comparatist take the correct perspective and exercise the care that is the essence of comparative jurisprudence. In the end, the researcher will have to present his or her results in a manner that reflects the ultimate humility of all the risks inherent in this process. Writers have repeatedly stressed the pitfalls and dangers of comparative method. We find that in the end it is neither possible, nor even interesting, to list them all or to avoid them all. One just has to be aware of the risks. One must be alert, and not lack courage, and perhaps remind oneself of that most apt of quotations applicable to Nordic environmental law research: “Damn the torpedoes! Full steam ahead!”³⁹

39. Originally used by Admiral *Farragut* in the battle of New Orleans in 1862.