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Sustainable Development as the Fundamental Principle of Europe's Environmental *Ius Commune*

1. Goals of the research

Environmental law professors M. Heldeveg, R. Seerden, and K. Deketelaere have in their article 'Public Environmental Law in Europe: A Comparative Search for a *Ius Commune*' analysed the common ground that can be found in the environmental law of different European states. They have discovered many common threads in the basic principles of states' environmental law, the legal methods of regulating environmental risks, and the standards regulating environmental proceedings. It is possible to conclude, based on these authors' analysis, that the environmental *europa ius commune* is framed by the sustainable development principle.

The goal of the present article is to analyse the legal content of the sustainable development principle. Conducting this type of research is based on the recognition that, even though the word combination 'sustainable development' can be found frequently in material produced over the last few decades in legal acts, policy documents, and scientific literature, the specification of the content of sustainable development (especially in the legal arena) is not at all unanimous. Often it is believed that in the case of sustainable development, one is dealing only with the foundation for the development of environmental policy, which is entirely lacking clearly specified legal substance. At the same time, the opinion continues to spread that sustainable development has become one of the modern principles of environmental law and that it's not just a political slogan. This opinion has been shared by the International Court of Justice in the Gabcikovo–Nagymaros case.¹ In this case, the court actually recognised the standard nature of the principle of sustainable development and 'the need to unite economic development with environmental protection'.

¹ Case Concerning the Gabcikovo–Nagymaros Project (*Hungary v. Slovakia*). Judgement of 25.09.1997. Available at: http://www.icj-cij.org/iccjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm (14.03.2005).

This article is composed of three sections — in the first, sustainable development as the guiding principle of environmental policy is discussed; in the second, the author presents his vision of what the legal status is of the nature of the principle of sustainable development; and in the third, the role of open proceedings in the realisation of sustainable development is investigated.

2. Sustainable development as the guiding principle of environmental policy

2.1. Development of environmental policy goals

Even though, in the case of environmental policy, this is quite a young area of policy, individual elements of environmental protection can be found even in the very distant past. The first appearances of environmental policy were related to the negative consequences of the urbanisation process. Even in sources of information dating from antiquity, one can read complaints regarding the stench in the air and the pollution of drinking water in cities. At the same time it should be noted that, naturally, this type of regulation in ancient times was not based upon the recognition of the need to preserve the environment but, rather, brought about, most likely, by social and economic factors.

The first time of environmental protection awareness can be labelled an indirect and utilitarian environmental era, which lasted from the Industrial Revolution until the 1960s. This environmental protection era was characterised by the following attributes. Informed regulation of the use of natural resources took place, even though the goal was not preserving (saving) natural resources but ensuring the availability of raw materials for industry.² An interesting provision was contained in the Weimar Republic Constitution, in which § 155 established the requirement for the intensive use of land and the essential natural resources the land contained.³ The above-mentioned provision clearly confirms that the use of natural resources was addressed only where raw materials were concerned. They were to be used as extensively as possible. The deforested areas of Western Europe reflect the results of this type of policy. Industrial pollution was governed by the same goal of unlimited economic development, which was supported by release of work, greater industrial freedom, and the freedom to choose one's trade. H. Hohman quotes the 1808 Prussian government's instructions, in which it was written that

'[...] the law and administration must be implemented in unison in order to transcend those conditions which prevent the complete and total realisation of the talent, skills and energy of citizens.'⁴

We now know that humans have used their talents, among other things, for the destruction of the environment and in the development of ever more effective methods of achieving this end.

In conclusion, it should be noted that during this phase of development in environmental policy, regulation was directed toward the improved stockpiling of natural resources, without taking into consideration the exhaustibility of these natural resources. In terms of pollution control, legal regulations were used to directly and indirectly compromise the health and security of the people, and uncertain risks were completely ignored.

The second period of environmental policy development began in the 1960s when the first laws directed at environmental protection began to be enacted in Europe and elsewhere.

This stage was characterised by the following attributes. Regulation was directed toward compensation for damage already caused by industry and for the removal or alleviation of direct and confirmed health and environmental hazards.⁵ Alongside the principle of direct hazard prevention developed the second principle of environmental law, the 'polluter pays' principle, which, in its original form, applied the theory of the adaptive capacity of the environment and foresaw that the burden of expenses and damages related to pollution control should be carried by the polluter.⁶ It would be even more accurate to call this period's 'polluter pays' principle the 'who pays pollutes' principle. It was discovered according to this line of rea-

² See Z. Plater. From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law. – *Loyola of Los Angeles Law Review* 1993–1994 (27), p. 1995.

³ See H. Hohman. Precautionary Legal Duties and Principles of Modern International Environmental Law. – *The Precautionary Principle: International Environmental Law Between Exploitation and Protection*. Graham and Trotman / Martinus Nijhoff 1994, p. 6.

⁴ *Ibid.*, p. 6.

⁵ See A. Kiss, D. Shelton. *Manual of European Environmental Law*. Cambridge University Press 1997, pp. 10–11.

⁶ See B. Yandle. Coase, Pigou, and Environmental Rights. *Who Owns the Environment?* P. Hill, R. Meinert (eds.). Rowman and Littlefield Publishers 1998, pp. 120–121.

soning that it was almost always possible to compensate for the consequences of pollution, while it was only important who paid.

The third phase in the development of awareness in environmental policy, which began in the 1980s, is best described by the rise of the principle of sustainable development and the increase in support for this principle. Since that time, the principle has become the foundation for environmental policy in the European Union member states and many other countries.

2.2. Giving substance to the principle of sustainable development

An important milestone in the development of environmental policy occurred in 1972, when the United Nations Environmental Conference was held in Stockholm. Since then, people have been talking about the 'ecological' period in the development of mankind. In 1983 the Brundtland Commission was formed, with the goal of identifying global environmental problems and making suggestions about possible solutions to those problems. The results of the commission's three years of work can be found in the report 'Our Common Future'⁷ presented to the UN General Assembly. This document's main keyword is sustainable development — what is it; what is its importance to mankind; and what is the policy, social, and economic background of sustainable development? The Brundtland Commission defined the concept of sustainable development as a path of development that fulfils the current generation's needs and aspirations without placing in danger the similar interests of future generations. In other words, the basic principle that we cannot burden our children with our sins was applied.

Ensuring sustainable development is critical, because if this development is not achieved we will not be just placing our collective welfare in danger but will be imposing an even more hopeless future on our children and grandchildren. If the preservation of mankind itself is not in danger here, then at least the preservation of the quality of life of future generations is.

It is important to understand that even though in most cases the common understanding goes against sustainable development and economic progress, it is also true that just as economic progress is unthinkable without the preservation of natural resources and an environment worthy of humanity, environmental protection requiring large investments is impossible without economic development. Thus, it is important to find balanced solutions, without resorting to extremes.

The principle of sustainable development can be treated in a wider context. The principle of sustainable development affects the deep-seated interrelationship of mankind and the environment, and ensures the continued existence of both, encompassing in doing so aspects of philosophy and policy development.⁸ The principle deals with the re-evaluation of the growth model chosen by much of mankind during the time of the Industrial Revolution, in the 18th century. The previous sustainable development growth model kept an eye primarily on economic and industrial growth and the material well-being related to it. It was also this way when the rapid reconstruction of economies took place after the Second World War, followed by even more rapid growth, which brought with it large-scale environmental problems. By the beginning of the 1970s, a state had been reached where there was a need for awareness of environmental problems and a more sustainable-development-oriented model for nature needed to be chosen. In 1971, the well-known German social researcher R. Inglehart had already published the opinion that the economic growth that took place after World War II in the economically developed countries caused a transition from 'materialistic' or 'liberal' values to 'postmaterialistic' values.⁹ If materialistic values encompassed, above all else, economic considerations and direct personal security¹⁰, then the core of postmaterialistic values was made up of the non-material aspects of people's quality of life.¹¹ The environment undoubtedly falls within the area of concern of a value set emphasising non-materialistic quality of life, serving not just as the satisfier of people's material interests but also as the carrier of internal, non-material values. It goes without saying that such a shift in the scale of values in welfare states also expresses its influence in terms of which point of origin environmental values are judged from, which of them is placed in the foreground, how this affects interest directed toward the environment, and how the various values are weighed during decision-making.

⁷ Our Common Future. World Commission on Environment and Development, 1987.

⁸ See G. Orians. Economic Growth, the Environment, and Ethics. – Ecological Applications 1996 (6) 1, pp. 26–27.

⁹ See R. Inglehart. The Silent Revolution in Europe: Intergenerational Change in Postindustrial Societies. – American Political Science Review 1971 (65), pp. 991–1017.

¹⁰ See R. Inglehart, P. Abramson. Measuring Postmaterialism. – American Political Science Review 1999 (93), p. 665.

¹¹ See R. Inglehart, P. Abramson. Economic Security and Value Change. – American Political Science Review 1994 (88), pp. 337–339.

Sustainable development is also set as one of the more important goals of the European Union. Pursuant to Article I-3 (3) of the Treaty establishing a Constitution for Europe 'the Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment.'¹²

The sustainable development triangle is very clearly presented here. This consists of the fact that in making and implementing various types of policy-influencing decisions, economic and social considerations, as well as the high standard required for environmental protection, should be addressed. There must be balance among the three. Economic development and the resolution of social problems cannot occur at the expense of significant damage to the environment.

3. Sustainable development as the fundamental principle of environmental law

3.1. The idea of a sustainable state based on the rule of law

The well-known German jurist R. Alexy has stated that

'[...] internal security in a liberal state based on the rule of law is in the highest good of the central collective. Environmental protection defines this latest variant: an ecological state based on the rule of law [...].'¹³

So far, the recognition of an ecological state as the new historical result of a country's development has not been widespread in the literature. Alexy would rather cite an exception here. More often, the concept of a sustainable country or a sustainable state based on the rule of law is used in the context of sustainable development.¹⁴ A sustainable state is defined as a state that has recognised its responsibility for supporting sustainable development and its responsibility to reshape society in order to guarantee its continued survival. The tradition of the liberal state based on the rule of law negated any paternalistic welfare services from the government. The current high level of government attention to environmental protection in the implementation of sustainable development comes from the understanding that for the first time in the history of mankind, the threat of the Earth's surface becoming uninhabitable is real — if the current production and consumption model continues to be applied.¹⁵

Definitions of sustainable development as a legal principle are numerous, but the author of this article prefers to break sustainable development down into three components.

Firstly, sustainable development is related to the precautionary principle, which is one of the two foremost modern principles of environmental law, second to the principle of sustainable development.

Secondly, sustainable development is defined in the above-mentioned Brundtland Commission report¹⁶ as a development path that responds to the current generation's needs and aspirations without placing in danger the similar interests of future generations. Therefore, the principle of sustainable development is related to 'intergenerational equity'.

Thirdly, the fourth principle of the 1992 Rio declaration, ratified by the UN Environment and Development Conference in Rio de Janeiro, requires that, in order for sustainable development to be achieved, environmental protection be included in all development processes. Also, article 6¹⁷ of the Treaty establishing the European Community provides that

'[...] the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

¹² Available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/et/oj/2004/c_310/c_31020041216et00110040.pdf (12.08.2005).

¹³ R. Alexy. Kollisioon ja kaalumine kui põhiõiguste dogmaatika põhiprobleemid (Conflict and consideration as the primary dogmatic problems in fundamental rights). – *Juridica* 2001/1, p. 8 (in Estonian).

¹⁴ See *The Law of Sustainable Development. General Principles*. Luxembourg: Office for Official Publications of the European Communities 2000, p. 41; J. Wolf. *Developmental and Environmental Responsibilities of the 'Rechtsstaat'*, pp. 3–7. The latter is available at: <http://www.puk.ac.za/lawper/1999-1/wolf.doc> (12.03.2005).

¹⁵ See *The Law of Sustainable Development (Note 14)*, p. 41.

¹⁶ It was the final report: *Our Common Future (Note 7)*, presented by the World Commission on Environment and Development, established by the United Nations General Assembly in 1983.

¹⁷ The integration principle was included in the treaty in 1987 with the Single European Act. See also L. Krämer. *E. C. Treaty and Environmental Law*. Sweet & Maxwell 1998, p. 71.

Therefore, the principle of sustainable development is related to integration requirements, pursuant to which environmental considerations must be taken into account in the implementation of all other policies.

Next I will address the components of the principle of sustainable development individually.

3.2. Sustainable development and the precautionary principle

One of the most widely recognised German scholars of the precautionary principle, S. Boehmer-Christiansen has treated the precautionary principle as one of the most important methods used in creating the principle of sustainable development, which places the responsibility for the protection of the natural foundation of life for current and future generations with the government and gives government the right to intervene in the structure of the liberal consumption society with its short-term perspective. In Germany the precautionary principle was recognised, above all else, as the state's legal basis for an active environmental policy.^{*18} The author of this article has reached the same conclusion, that the precautionary principle is indeed one of the more important cornerstones in the implementation of the sustainable development model. The precautionary principle has developed into the conceptual core of environmental law, and its most substantive feature is the creation of a safety coefficient for the preservation of the natural foundation of life.^{*19} The goal of the precautionary principle is different when compared to other legislation or principles protecting the lives of people. The difference stems from the highest good protected by the precautionary principle (the habitability of the Earth's surface), which is, in the most direct and broadest sense, existential.

The primary reason for the precautionary principle coming to the forefront was a loss of faith in the environmental theory of the 'assimilative capacity approach'. The cited theory is supported by three prerequisites. Firstly, a certain level of pollution-causing agents in the environment does not cause any noticeable damage to the environment, including the various ways in which it is used. Secondly, the environment has a high level of resistance and regenerative ability. Third of all, the environment's regenerative ability can be quantitatively determined and knowledgeably used.^{*20} Therefore, in the case of application of this theory, the ability of science to adequately predict and determine risks to the environment and to develop technical solutions to eliminate the risks, including the environment's ability to resist pollution, is monitored and utilised. If this approach is successful, there is always sufficient time remaining for action. Unfortunately, practice has shown that, too often, scientific understanding of the harmful effects of certain activities or substances comes too late. It often takes scientists years to process actual conditions and to explain and debate their causative mechanisms. The precautionary principle is a method for acting in situations where science is uncertain, where an objective appraisal of the situation and reasonable suspicion are applied.^{*21} The principle takes into consideration the fact that a lack of evidence regarding the cause of damage does not mean in any way that the occurrence of damage has been averted.^{*22}

The precautionary principle and sustainable development are also related in the language of several international policy documents. I will provide only two examples. In the Bergen Ministerial Declaration for Sustainable Development in the ECE Region (1990) it is written:

'In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty [...] cannot be a reason for postponing measures.'^{*23}

The Ministerial Declaration of the Second World Climate Conference (1990) draws attention to the fact that

'in order to achieve sustainable development in every country and to meet the needs of present and future generations, precautionary measures to control climate change must be applied [...]. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [...] measures to prevent [...].'^{*24}

¹⁸ See S. Boehmer-Christiansen. *The Precautionary Principle in Germany: Enabling Government. – Interpreting the Precautionary Principle.* T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, p. 55.

¹⁹ See T. O'Riordan, J. Cameron, A. Jordan. *The Evolution of the Precautionary Principle. – Reinterpreting the Precautionary Principle.* T. O'Riordan, J. Cameron, A. Jordan (eds.). Cameron May 2001, pp. 19–20.

²⁰ C. Barton. *The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and As a Common Law Doctrine. – The Harvard Environmental Law Review* 1998 (22), p. 512.

²¹ See M. MacGarvin. *Precaution, Science and the Sin of Hubris. – Interpreting the Precautionary Principle.* T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, pp. 73–74.

²² See E. Fisher. *Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community. – Maastricht Journal of European and Comparative Law* 2002 (3) 1, p. 9.

²³ *Ibid.*, p. 431.

²⁴ *Ibid.*, p. 475.

Therefore, it can be claimed that in order for sustainable development to be achieved, the obvious environmental threats, along with those that are obscured by scientific uncertainty, must be assessed.

3.3. Sustainable development and intergenerational equity

In his lectures addressing the history of environmental law, S. Westerlund, environmental law professor at Uppsala University, has claimed environmental law to be the historical cradle of neighbourhood rights. The legal control of environmental problems (non-scientific) was present in ancient Roman times via neighbourhood rights, which prevented a landowner from using his land in a manner that would cause excessive damage to his neighbour — for instance, in the directing of his wastewater onto a neighbour's land. The 20th century saw the addition of transnational rights to this: rights that do not permit states to allow activities within their territory that may cause cross-border environmental damage to their neighbours. The sustainable development paradigm adds intergenerational neighbour relations and requires that today's actions and decisions not cause harm to the interests of future generations.

Decisions based on the environment may have very long-term and unforeseen consequences. Perhaps one of the more vivid examples is nuclear power, especially the question of leftover nuclear waste. Nuclear waste remains potentially hazardous for tens of thousands of years, which is, without doubt, longer than the life span of the current generation. It is crystal clear that nobody can guarantee safety for such a long period of time.^{*25} However, does this mean that the potential for harm occurring in the future can be completely ignored? Probably not.

The movement of intergenerational relations to the forefront of consideration is found not only in the wording of the sustainable development model but elsewhere as well — for instance, in subsection five of the preamble to the Treaty establishing a Constitution for Europe, speaking of 'awareness of their responsibilities toward future generations and the Earth', and in the preamble to the Estonian Constitution where it is stated that the state shall 'provide security for the social progress and general benefit of present and future generations'. Intergenerational relations have also been mentioned in several environmental conventions. The final section of the preamble of the 1992 Convention on Biological Diversity establishes that the states participating in the convention have decided to 'conserve and sustainably use biological diversity for the benefit of present and future generations'. In Article 3 (1) of the 1992 Convention on Climate Change, it is established that 'parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity'. The final example is exceptional because, if the question of intergenerational equity is typically addressed in preambles, then here it is inserted directly into the convention's main text.^{*26} The example of the Convention on Climate Change very clearly brings to the foreground the question of what the legal content of intergenerational equity is, and how many aspects of it are related to the law or to ethics.^{*27}

In the literature, the main argument concerns whether the rights of future generations should be taken into consideration in intergenerational relations or whether we are dealing only with our responsibility to take into consideration the interests of future generations.^{*28} In other words, can we discuss only the collective interests of future generations, or can we address, by contrast, their protected collective rights? E. Weiss finds that taking the rights of future generations into consideration has become a standard of international common law. The majority of authors^{*29}, though, including this author, do not share this opinion. One must agree with W. Beckerman, who finds that subjects not yet in existence cannot possess any rights.^{*30} This does not mean, in any way, that environmental law does not possess any mechanisms the main goal of which is the passing of the planet Earth, in good condition, to future generations. I have concluded that in

²⁵ See R. Attfield. *Environmental Ethics and Intergenerational Equity*. – *Inquiry* 1998 (41), pp. 208–209; K. Arrow. *Intergenerational Equity and the Rate of Discount in Long-Term Social Investment*, p. 2. Available at: <http://www-econ.stanford.edu/faculty/workp./swp97005.pdf> (14.10.2005).

²⁶ There are authors who believe that the intergenerational element is contained in conventions governing the protection of human rights. See E. Weiss. *Our Rights and Obligations to Future Generations for the Environment*. – *American Journal of International Law* 1990 (84) 1, pp. 198–207.

²⁷ See A. D'Amato. *Do We Owe a Duty to Future Generations to Preserve the Global Environment?* – *American Journal of International Law* 1990 (84) 1, pp. 190–198.

²⁸ See L. Gundling. *Our Responsibility to Future Generations*. – *American Journal of International Law* 1990 (84) 1, pp. 210–211; J. Gaba. *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*. – *Columbia Journal of Environmental Law* 1999 (24), pp. 255–253.

²⁹ See also P. Barres. *Advocacy, Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on 'Beyond Fairness to Future Generations'*. – *Tulane Environmental Law Journal* 1998 (11), pp. 433–434.

³⁰ See W. Beckerman. *The Precautionary Principle and Our Obligations to Future Generations*. – *Rethinking Risk and the Precautionary Principle*. J. Morris (ed.). Butterworth & Heinemann 2000, p. 47.

intergenerational relations the responsible party is the state, which has to take into consideration the long-term perspective, which also encompasses the interests of future generations, in the drafting of legislation, as well as in implementing laws. In the German Constitution there is a provision (§ 20a) that requires the state to protect 'the natural foundation of life'. It is crystal clear that this refers to life in the long-term sense.^{*31} It is believed that a global convention establishing the basic environmental obligations of states in terms of future generations is necessary.^{*32}

This begs the question of what those obligations for states, directed towards the future, should be. In an often-used argument, the question is presented of who really knows what the future generation's values and interests will be. Nobody knows for sure, and this is why I believe that among the requirements directed towards the future, the most important for future generations is the conservation of options.^{*33} Above all else, this means that in making decisions directed towards the future, the safety coefficient stemming from uncertainty must be taken into consideration; in other words, the precautionary principle must be applied. Environmental decisions and activities with long-term consequences depend, foremost, on the reserves of natural resources and diversity, as well as on the outcome of global environmental problems, on the resolution of which rests Earth's habitability. Even here we can find connections between sustainable development and the precautionary principle. A primary task of the precautionary principle is the preservation of buffer zones in the environment, with the goal of not approaching the environment's tolerance limit, let alone exceeding it. This safety coefficient is necessary, above all else, because the environment's tolerance limit is difficult to specify and judge. A good example here is § 5 of the Estonia's Sustainable Development Act^{*34}, which divides reserves of renewable resources into critical reserves and usable reserves and establishes that the size of critical reserves is determined by the Government of the Republic, taking into consideration the uncertainty of future reserves. Here, the law refers to the need to consider the ability of science to determine the precise extent of critical reserves and the need to take into consideration additional reserves in order to ensure the availability of resources for future generations.

It can be fairly confidently stated that nearly all of the more important conventions in this field, such as the those for the preservation of biological diversity, the preservation of the ocean environment, predicting climate change, ozone layer preservation, and the handling of hazardous materials, all follow the sustainable development principle (and the precautionary principle)^{*35} and make it a goal to not leave Earth in worse condition than that in which the current generation received it. The influence of the conventions also reaches internal state laws.

3.4. Incorporation of sustainable development and environmental considerations in other fields (the integration principle)^{*36}

As an introduction, it is necessary to provide a reminder of Article 6^{*37} of the above-mentioned Treaty establishing the European Community, which establishes that:

'[...] the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principles of sustainable development.'

The requirement for integration is not met with the same strength in any of the other political fields in the European Union. Also, in Article 37^{*38} of the Charter of Fundamental Rights of the European Union it is prescribed that:

³¹ This is the place to remind the reader once again about the void that exists in Estonian Constitution § 53. This provision requires everybody to 'preserve life and the natural environment'. In the context of the Constitution, this does not directly mean the state. See R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental rights in Estonia's Constitution). – *Juridica* special edition 2001, pp. 29–30 (in Estonian).

³² See L. Gundling. *Our Responsibility to Future Generations*. – *American Journal of International Law* 1990 (84) 1, p. 212.

³³ See G. Supanich. *The Legal Basis of Intergenerational Responsibility: An Alternative View — the Sense of Intergenerational Identity*. – *Yearbook of International Environmental Law* 1992 (3), pp. 95–96; C. Redgwell. *Intergenerational Trust and Environmental Protection*. Manchester: Juris Publishing 1999, p. 77.

³⁴ *Säästva arengu seadus* (Sustainable Development Act). – RT I 1995, 31, 384 (in Estonian).

³⁵ See P. Birnie, A. Boyle. *International Law and the Environment*. Oxford University Press 2002, pp. 88–89.

³⁶ This concerns outside integration. In addition to this, there is talk about the internal integration of environmental law, which is related, above all else, to integrated environmental permits and the incorporation and codification of environmental law. See J. Zöttl. *Towards Integrated Protection of the Environment in Germany?* – *Journal of Environmental Law* 2000 (12) 3, pp. 284–285.

³⁷ The integration principle was entered in the treaty in 1987 with the Single European Act. See also L. Krämer (Note 17), p. 71.

³⁸ For more information about this article, see F. Ermacora. *The Right to a Clean Environment in the Constitution of the European Union*. – *The European Convention and the Future of European Environmental Law*. J. Jans (ed.). Groningen: Europa Law Publishing 2003, pp. 29–42.

'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'³⁹

In this article, the integration principle is discussed, along with its relation to sustainable development (and also the precautionary principle), primarily in the European Union context.⁴⁰

One of the most distinguished scholars of EU environmental law, J. Jans, believes the requirement for the integration of environmental considerations into the Treaty establishing the European Community to be the most important provision concerning the environment.⁴¹ I agree with this completely and find that Article 6 of the Treaty on European Union, along with Article 37 of the Charter of Fundamental Rights of the European Union, gives environmental protection a whole new meaning in the European Union context. This means that now there is no longer any area of policy (including law) influencing the environment where environmental concerns do not have to be taken into consideration. For all such fields, environmental protection has become 'personal', not as it was before, when environmental protection was considered to be, along with the environment, the responsibility of institutions whose job it was to deal directly with the environment.⁴² With the aid of the integration principle, entry of environmental considerations into nearly all fields of human activity is occurring. This tendency is sometimes called ecological modernisation, which follows the idea that economic and social development are not allowed to be, and should not be, a cause of environmental damage. In certain cases, economic and social development may bring with them an improvement in the quality of the environment.⁴³

What is the legal content of the integration principle? This question is still sufficiently open-ended. For instance, J. Jans finds that it is not entirely clear what should be included in other policies, to what extent, and whether this falls under the jurisdiction of the European Courts.⁴⁴ In the framework of the theme in question, the above-mentioned questions are just as important.

The question regarding what should be integrated into other policies can be answered in the following manner. In keeping with the principle of sustainable development, the first thing that should enter into policies in other fields should be the requirement for the use of the precautionary method in the event of scientific uncertainty. One of the last is one of the primary legal means by which environmental protection and sustainable development are supported at an advanced level. The principle of sustainable development also presumes the taking into consideration of elements obscured by uncertainty during decision-making and selective implementation of the precautionary principle. Putting precaution into practice is a beneficial administrative task, allowing for setting of ambitious environmental goals in such a manner that substantiating their legitimacy does not require proof of potential environmental damage until the end, or association of a value with the damage's costs.⁴⁵

4. The role of open proceedings in the implementation of the sustainable development triangle

On the basis of the above, it can be claimed that the implementation of the sustainable development principle requires the precautionary principle to be used in the event of environmental risks obscured by scientific uncertainty in the course of taking into consideration future generations during decision-making and keeping in mind environmental considerations in all of the fields of human activity that significantly affect the environment. This type of convergence brings with it risks in the economic and social spheres and may also occasion new environmental risks. A typical example is the development of hydropower and the building of dams, resulting in the flooding of large areas, in order to reduce the amount of greenhouse gases released into the atmosphere. In this instance, one environmental problem may be replaced by another — a loss of biological diversity. Even the development of nuclear power brings, along with environmental pres-

³⁹ The exact same is repeated in Article II-37 of the draft Treaty establishing a Constitution for Europe.

⁴⁰ See also European Commission Communication on Environmental Integration. – *Journal of Environmental Law* 1999 (11) 1, pp. 221–227.

⁴¹ See J. Jans. *European Environmental Law*. Kluwer Law International 1999, p. 25.

⁴² See M. Faure. *The Harmonisation, Codification and Integration of Environmental Law: A Search for Definitions*. – *European Environmental Law Review*, June 2000, p. 178.

⁴³ See J. Hertin, F. Berkhout. *Ecological Modernisation and EU Environmental Policy Integration*, pp. 2–3. Available at: <http://www.au.dk/~cesamat/ecolo-papers.html> (12.03.2005).

⁴⁴ J. Jans. *European Environmental Law*. Groningen: Europa Law Publishing 2000, pp. 18–23.

⁴⁵ See S. Boehmer-Christiansen. *The Precautionary Principle in Germany: Enabling Government*. – *Interpreting the Precautionary Principle*. T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, p. 55.

ervation (reduction in the greenhouse effect), the threat of catastrophic accidents and the extremely serious problem of nuclear waste. There are many other, similar examples.

Environmental decisions are always unique and unlike any other type. This is due to the uniqueness of environmental impact and the scientific uncertainty obscuring it, and includes the — typically irrational and unpredictable — public reaction. Even environment-related interests may differ from person to person.

During the implementation of the sustainable development principle, problems related to the bases for and the legitimacy of decisions made always arise.^{*46} In an uncertain situation, proof regarding the suitability, necessity, extent, and moderation of methods may be absent. It should also be noted that decisions regarding the implementation of the principle cannot be based entirely on facts. Therefore, it is believed that the primary method for alleviating legitimacy problems is the use of open proceedings in decision-making, in which all persons and interests affected are included.

The goal of environmental decision-making is not the legitimisation of decisions through proceedings alone, but also the ensuring of a better-quality decision.^{*47} Active public recruitment brings with it additional information, which ensures, through deliberation, higher-quality decisions as well as greater justification and acceptability. As mentioned above, environmental decisions are not made based solely on the facts. When they are made, differing interests and values must be taken into consideration. The more that people directly or indirectly affected by the decision are included, the more adequate the presentation of differing views and values related to the environment becomes. It should also be taken into consideration that the courts may review discretion regarding environmental decisions. The Estonian Supreme Court has taken the position in the case^{*48} of Jämejala Park that

‘the court may also interfere in the exercise of the right of discretion when the decision falls within the limits of the right of discretion but disagreements occur in regard to the rationality of the decision. Dealing with discretionary flaws occurs especially in instances where the administrative organ has applied prohibited considerations or left some important aspect unrecognised.’

The Supreme Court found in this case that social and economic factors had been given too great a weight in comparison with environmental influences and that this, in itself, forms a significant discretionary flaw. It can be claimed that if, as a result of the public not being included, some interests are not represented and important interests or values are disregarded, then the legality of the content of the decision falls under suspicion. In other words, if potentially hazardous conditions obscured by scientific uncertainty but related to environmental or health hazards remain unnoticed, this is most likely because of a discretionary error.

As seen above, the sustainable development principle foresees that in all types of decisions affecting the environment, in addition to economic and social factors, environmental considerations must be taken into account. At the same time, consideration of economic and social situations usually occurs automatically and ‘naturally’, while the environment is often forgotten. Powerful examples are the Saaremaa deep harbour and the previously mentioned Jämejala Park cases, where fiscal advantages and employment were given priority. In both cases (as many times before), environmental concerns were clearly secondary to the developers’ wishes. Environmental considerations were taken into account later, thanks entirely to the involvement of the public, who represented previously ignored environmental protection interests and the worth of the environment.

Over the course of history, the principles of open proceedings have gone through major changes. Beginning in the 1970s, the need for the participation of the public in the decision-making process began to be recognised. Much of the change was due to the activity of the environmental protection movement. In the beginning, active public participation was passive. The public was informed and included in the later stages of proceedings, when all of the important decisions had already been made. Justifiably, F. Lynn describes this as the ‘right-to-hear-what-has-already-been-decided’ approach.^{*49} The modern position demands that the public be included for the proceedings in their entirety.^{*50}

Estonian law guarantees open proceedings in the environmental decision-making process. General provisions regulating open proceedings are listed in the third paragraph of the Administrative Procedure Act.^{*51}

⁴⁶ See E. Fisher. *The Precautionary Principle As a Legal Standard for Public Decision-Making: The Role of Judicial and Merits Review in Ensuring Reasoned Deliberation. – Perspectives on the Precautionary Principle.* R. Harding, E. Fisher (eds.). Federation Press 1999, p. 90.

⁴⁷ See E. Fisher, R. Harding. *The Precautionary Principle in Australia: From Aspiration to Practice? – Reinterpreting the Precautionary Principle.* T. O’Riordan, J. Cameron, A. Jordan (eds.). Cameron May 2001, pp. 224–225.

⁴⁸ ALCSCd 3-3-1-54-03. – RT III 2003, 31, 317 (in Estonian).

⁴⁹ See F. Lynn. *Public Participation in Risk Management Decisions: The Right to Define, the Right to Know, and the Right to Act. – Risk: Issues in Health and Safety* 1990 (1), pp. 95–96.

⁵⁰ See also R. Rick, R. Griffin, S. Friedman. *Introduction: The Challenge of Risk Communication in a Democratic Society. – Risk: Health, Safety and Environment* 1999 (10), pp. 189–196.

⁵¹ *Haldusmenetluse seadus (Administrative Procedure Act).* – RT I 2001, 58, 354 (in Estonian).

In the case of environmental proceedings, openness is prescribed for the stage of assessing the effects on the environment and for when all of the more important environmental permits are issued. Unfortunately, in the case of the more important environmental laws, the particulars of open proceedings are regulated separately. I find that there is no basis for such variation. Differences appear between fields in the form of the following approaches. In some instances, notification is given in connection with the receipt of permit requests; in a second field, notice is given of the approval of a request for proceedings; and in a third field, notification is provided of the beginning of the proceedings. Only for certain instances are there provisions for regulating the contents of notifications, and even these vary. In some instances, there are provisions determining who has the right to present objections (this differs), and this type of regulation is missing altogether in other cases. The grounds for holding public proceedings are regulated differently. In one case, the openness is stated as necessary in order to make the right decisions and to balance opposing interests. In another instance, the goal cited is protection of persons to whom the issuance of a pollution permit may cause property damage or another form of damage to their interests. In one instance, the requirements concerning the contents of a notification of the issuance of permits are completely unregulated, while this is regulated in another instance, but once again differently. I believe these differences should be disregarded during the process of codification of Estonian environmental laws, and what follows should be taken into consideration.

The inclusion of affected individuals is critical for the protection of their rights and to ensure the right of recourse to a court of law in the future. It is the opinion of the author of this article that in order to determine the identities of affected persons and to include them in the proceedings for a cardinaly important permit (or assessment of environmental effects), a preliminary notice should be directed toward the public — a notice of the beginning of the assessment of planning or environmental effects and a notice of the environmental permit being accepted for proceedings. This must contain elements that allow persons to associate their rights and interests (or general environmental protection interests) with the activity for which permission is being sought. In the case of environmental decisions, the circle of affected persons is usually very wide.⁵² In the environmental field, the notification directed to the public must contain preliminary assessments regarding the possible type and extent of effects. There are usually no such requirements under Estonian law for the content of preliminary notices. Requirements concerning the content of notices are instead prescribed in the Water Act⁵³ and in the Integrated Pollution Prevention and Control Act.⁵⁴ If the notification concerning the beginning of the proceedings is very laconic, it does not fulfil its goal, which is the identification of the affected persons and their invitation to participate in the public proceedings.

The Estonian Supreme Court has emphasised the need to ensure the timely and effective notification of people regarding decisions that could affect the status of the environment. The Supreme Court has, in the case⁵⁵ of the Pirita protected area, noted:

‘[P]ursuant to the principles of democracy and good administrative practices, the body must provide greater public notification than prescribed by law, if it is foreseen that any of the channels approved by law for notification are not sufficient to ensure that the notice actually reaches the interested parties and that an additional notice does not bring with it any unreasonable costs. Otherwise, the actual realisation of the right to object would not be ensured. This requirement applies especially in the case of environmental decisions. Currently, this principle is expressed by Article 6 (9) of the Aarhus Convention, according to which the appropriate procedure must be used for notification of the general public [...].’

On administrative matter 3-3-1-56-02⁵⁶, the Supreme Court has added:

‘the Supreme Court [...] finds that based on grounds of humanity, in a state based on the rule of law, effective legal protection, and the principle of good governance, each person who may be affected by the conscientious carrying out of administrative duties that may limit his or her rights must be included in the administrative proceeding. In taking into consideration these constitutional principles, better informing of the body is ensured, the body is forced during the decision-making process to consider the interests of persons, and the quality level of the content of the administrative decision is raised. The hearing for the person affected also has procedural value, because a body making judgments by default treats the person as a procedural object and not as a citizen with legal rights.’

The primary conclusion, in the opinion of the author, is that civilians must actively participate in decision-making regarding environmental and health protection, because these decisions affect the interests of not

⁵² See also M. English. Who Are the Stakeholders in Environmental Risk Decisions? How Should They Be Involved? – Risk: Health, Safety and Environment 2000 (11), pp. 243–254.

⁵³ Veeseadus (Water Act). – RT I 1994, 40, 655 (in Estonian).

⁵⁴ Integrated Pollution Prevention and Control Act. – RT I 2001, 85, 512 (in Estonian).

⁵⁵ ALCSCr 3-3-1-31-03. – RT III 2003, 18, 167 (in Estonian).

⁵⁶ ALCSCr 3-3/1-56-02. – RT III 2002, 25, 283 (in Estonian).

just the current generation but future generations as well, and that during the decision-making process people's concerns regarding uncertain but possible dangers must be taken into consideration.

Proceedings in the environmental field are characterised by the complexity of solvable questions, the scope of the right of discretion, the unspecified weight of legal decisions, and typically also the interaction of unspecified legal decisions with the right of discretion. Therefore, adherence to procedural provisions and proof of claims in these proceedings is especially important.^{*57} In many cases, open proceedings are the only means ensuring that environmental considerations are taken into account.^{*58} I believe that the participation of the public in the making of sensitive decisions regarding implementation of the sustainable development principle is such a critical requirement for the proceedings that any violations of this should *a priori* be considered critical and potentially influencing of the decision, the end result of which may bring with it the cancellation of the decision.

The openness of the proceedings is not solely an important condition of the national decision-making process. It also has international aspects. Prominently rising to the forefront has been the public's participation in the development and implementation of globalisation and trade policy in the framework of the World Trade Organization (hereinafter 'WTO'). Up to now, this has been a closed process between governments, to which the public has had no access. Only non-governmental organisations are ensured participation, but even these to a very limited extent.^{*59}

It is frequently alleged that there is a lack of democracy and a distancing of the decision-making institutions from the people of the European Union. A basis for such criticism does exist, but the situation in the European Union is most assuredly better than that in the WTO. I find that this is one of the reasons for the European Union's support for the more radical sustainable development methods being more extensive and persistent in this context.

5. Summary

In conclusion, it can be claimed that sustainable development, as one of the guiding principles of contemporary environmental policy, has also developed into one of the fundamental principles of environmental law, with a clearly defined legal content. In the opinion of the author of this article, the principle of sustainable development can be reduced, in a legal sense, to three components. Firstly, sustainable development is bound to the precautionary principle, which is the second most important of the contemporary principles of environmental law (the first being the principle of sustainable development). The precautionary principle also requires the control of those environmental risks that are obscured by scientific uncertainty, and its essential characteristic is the creation of a safety coefficient for the preservation of the natural foundation of life, which is one of the requisites for sustainable development.

Secondly, sustainable development is defined in the above-mentioned Brundtland Commission report^{*60} as a type of development that fulfils the current generation's needs and aspirations without endangering the similar interests of future generations. Therefore, the principle of sustainable development is related to 'intergenerational equity'. In terms of intergenerational relations, the responsible party is the state, which has to take into consideration a long-term perspective, encompassing the interests of future generations, in the drafting of legislation as well as in implementing laws.

Third, required by the fourth principle of the Rio Declaration, ratified by the UN Conference on Environment and Development, which took place in Rio de Janeiro in 1992, as well as Article 6 of the Treaty establishing the European Community, is that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development processes and ensure that economic as well as social development does not occur at the expense of the environment. The implementation of the sustainable development triangle often plays a decisive role in open proceedings. The goal of environmental decision-making is not only the legitimisation of decisions through proceedings but also ensuring the better quality of decisions.^{*61} Active public participation brings with it additional information, which supports better consideration and thus better-quality decisions, as well as justification and acceptability.

⁵⁷ J. Tickner. A Map Towards Precautionary Decision-Making. – Protecting Public Health and the Environment: Implementing the Precautionary Principle. C. Raffensperger, J. Tickner (eds.). Island Press 1999, pp. 175–176.

⁵⁸ E. Fisher. Is the Precautionary Principle Justiciable? – Journal of Environmental Law 2001 (13) 3, p. 319.

⁵⁹ See S. Gaines. International Trade, Environmental Protection and Development As a Sustainable Development Triangle. – Review of EC and International Environmental Law 2002 (11) 3, pp. 270–272.

⁶⁰ See Notes 7 and 16.

⁶¹ See E. Fisher, R. Harding (Note 47), pp. 224–225.