

Codification of Environmental Law.

Major Challenges and Options

On 21 and 22 February 1995, an international conference dedicated to the issues of codification of environmental law took place in Ghent.¹ The reports presented at the conference showed that many European countries have undertaken major reorganisation of environmental law. The common feature in the reorganisation process is the codification of environmental law. According to the conference reports, environmental law is being codified in Sweden², the Flanders³ and Walloon regions⁴, Germany⁵, Netherlands⁶, Denmark⁷, and France.⁸ The list could be continued with *e.g.* Poland, where the respective draft was submitted to the government in 1997.

One should not forget that the repeatedly used English term “codification” is not in full accordance with the traditional approach to the concept of codification in the continental European legal tradition.

Every student of the Faculty of Law knows that codification means the collection of all legal material regulating one area of law into a single code.⁹ The German *Creifelds Rechtswörterbuch* defines codification as the collection of legal norms in an area of law into a comprehensive code. This is supplemented by the principle that codification should comprehensively regulate one area of law and exclude other sources of law.¹⁰

¹ The conference was triggered by submission of the Draft Decree on Environmental Policy to the government of Flanders by the inter-university committee set up for reorganisation of the Flemish environmental law.

² The Environmental Code. A Summary of the Government Bill on the Environmental Code. Stockholm: Ministry of the Environment, 1998.

³ See H. Bocken. The Inter-university Commission for the Revision of Environmental Law in the Flemish Region: Objectives and Procedures. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 3–10.

⁴ See M. Paques. Codification of Environmental Law in Walloon. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 51–70.

⁵ See M. Koepfer. On the Codification of German Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 87–100.

⁶ See P. Gilhuis. Experience and Perspectives with Regards to the Codification of Environmental Law in the Netherlands. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 101–114.

⁷ See P. Pagh. Experience of and Plans for the Codification of Environmental Law in Denmark. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 143–156.

⁸ See G. J. Martin. French Experience of the codification of Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 115–126.

⁹ R. Narits. *Õiguse Entsüklopeedia* (Encyclopaedia of Law). Tallinn: Õigusteabe AS Juura, 1995, p. 27.

¹⁰ *Rechtswörterbuch*. H. Kauffmann, K. Weber (Hrsg.). 14. Aufl., München: Beck, 1997, p. 713.

English dictionaries, however, usually define the word “codify” as follows – if you codify something, you arrange it according to a system, so that all the rules and procedures are clearly stated.^{*11} Black’s Law Dictionary defines “codification” as follows: “the process of collecting and arranging systematically, usually by subject, the laws of a state or country, or the rules and regulations covering a particular area or subject of law or practice”.^{*12} In English, we can thus even talk about the codification of billiard rules.

The problem becomes even more complicated when we include the French term “*codification a droit constant*”, meaning thematic systemisation of legal norms contained in various legal acts without changing the essence of the norms.^{*13}

So, in English terminology, the concept of codification includes what is understood as incorporation in continental Europe.

In Estonia, codification is defined as “the creation of a systemised, summarised and common code that does not contain discrepancies and seeks for exhaustive regulation of one or several areas of law as intended by the legislator for regulative purposes”.^{*14} Incorporation is the collection of existing legal norms, although it can be systematic and even seek to eliminate discrepancies.^{*15} The main difference between codification and incorporation is the innovative nature of the former – codification is modification.^{*16}

Literature distinguishes between “authentic” codification and “consolidation-codification” (or “simple” codification). The former pertains to renewal of substantive law while the latter only pertains to inventory and classification of the existing law.^{*17}

It can thus be said that the attempts of most European countries to reorganise environmental law are related to systemising the existing law or incorporating environmental law. Codification of environmental law in the exact sense of the word takes place in Sweden^{*18}, Flanders and Germany. Estonia with its first attempt to substantially reform environmental law has now also added itself to this list of countries.

Another characteristic feature of codification is its exhaustiveness and, as was mentioned, the exclusion of other sources of law. The environmental code can probably never meet these criteria, as environmental law consists of a multitude of technical norms, standards and lists of hazardous substances and activities, the inclusion of which into a single code is not possible mainly due to the volume of such norms and standards, but also because the technical norms are often amended and replaced to adjust to new scientific and technical achievements and make environmental quality requirements stricter.

The discussion on codification of environmental law should focus on the following main issues:

- a) Why is the codification of environmental law necessary and what are its benefits?
- b) What goal to set for the codification of environmental law?
- c) What should the scope of the environmental code be?
- d) What are the dangers of codification of environmental law?

Answers to these questions form the conceptual basis for the environmental code and enable to develop a methodology for preparation of the draft code and identify the structural and essential cornerstones (main principles) of the future code. The reports presented at the above conference were also largely dedicated to these issues.^{*19}

The following is an attempt to answer the above questions in view of the current situation and future outlook of the Estonian environmental law.

What are the reasons for codification of environmental law and what are the benefits for Estonia?

¹¹ Collins Cobuild English Language Dictionary. London, 1990, p. 263.

¹² Black’s Law Dictionary. Sixth edition. St. Paul, 1990.

¹³ Environmental code: draft (*Umweltgesetzbuch – UGB*). – Ministry for the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany (ed.) Prepared by the Independent Expert Commission on the Environmental Code at the Ministry for the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany. Berlin: D&H, 1998, p. 42.

¹⁴ M. Luts. Kodifikatsioon ja õigusreform (Codification and Legal Reform). – Eesti kriminaalõiguse arenguteedest. Artiklite kogumik (On Developments in Estonian Criminal Law. Compilation of Articles). Ed. J. Sootak. Tartu: Juristide Täienduskeskus, 1997, p. 58.

¹⁵ *Ibid.*, pp. 59

¹⁶ S. Golab. Theorie et Technique de la Codification. Melanges del Vecchio, p. 296.

¹⁷ See G. J. Martin, p. 116.

¹⁸ The environmental code of Sweden – *Miljöbalk* – entered into force on 1 January 1999.

¹⁹ See e.g. E. Rehinder. Points of Reference for a Codification of National Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 157–166.

1. The present Estonian environmental legislation is made up of a large number of legal acts adopted at different times and often based on different principles. The activities of a specific person – “the polluter” – that affect the quality of the environment are usually regulated by several different legal acts.^{*20} If there is no connection between those acts, it is difficult for performers of activities, public administrators and supervisory and court bodies to get an overview of the regulating structure.

2. As said, the problem is not only the clumsiness of the system of environmental legislation, but also its conflicting nature. Sometimes each legal act separately is adequate for achieving its goal, but together with other acts it becomes vague or the simultaneous application of the norms of different acts turns out to be impossible.^{*21} The existence of such conflicts has not been fully revealed in our legal order yet, because environmental legal practice (court practice) is rather modest and superficial.

3. The development of environmental law, as any other area of law, should be based on certain fundamental principles. Such fundamental principles have an indispensable systemising and organising effect. Unfortunately, the present course of development of legal control of environmental risks does not point to the existence of such a fundamental legal basis. Many basic principles of environmental law have so far been formulated as political rather than legal categories.^{*22}

4. Environmental law is a branch of law at the touching point of public law and private law. The historical development of environmental law suggests that the discipline of law in its archaic form originates from private law, namely from law of adjoining properties, the institute of property law. Later, regulation concerning pollution control caused a sharp turn toward public law. Regulation in public law is mainly expressed in direct regulation, *i.e.* restrictions, prohibitions and obligations, and it is realised with the direct intermediation of the state. Assessment of the situation in our existing legal order shows that public law regulation dominates by 90–95%. Developed countries are known to have tried to find new, flexible means of controlling environmental risks.^{*23} This is best revealed in the attempt to employ market mechanisms and apply the respective economic stimuli and antistimuli in the control of environmental risks. The above change is chiefly caused by two reasons. Firstly, direct orders, prohibitions and restrictions have proved to be ineffective in many cases. Secondly, the application of direct means of regulation requires large public expenditure. The advantage of private law methods (such as those related to consumer protection and civil liability) is that control of environmental risks is effected by exercising the subjective rights of persons (injured parties) in private law. The experience of other countries shows that the risk of environmental civil liability can be an effective means of forcing industrial enterprises to identify the environmental impacts of their activity and take precautionary measures to prevent or minimise pollution and thus their potential liability.^{*24} This does by no means imply that environmental law should in future become fully private law. It should find the equilibrium between private and public law regulation and eliminate the present disproportion between those two elements. In conclusion, it should again be stressed that the goal is not to exclude different methods or attach too great importance to any of them, but to combine them appropriately.^{*25} Environmental protection is and will remain a chiefly public law area, while private law has to be employed better than before to prevent environmental damage. Environmental protection cannot be extracted from the context of market economy. A basis for finding an adequate combination of regulation methods should be the principle requiring as little as possible disturbance of spontaneous market mechanisms and the application of direct regulation means particularly in those areas where market mechanisms “fail”.

²⁰ For example, the oil shale industry has to take account of regulations concerning pollution of ambient air, use and protection of subsoil and ground water, waste requirements, pollution charges, charges for the right of use of natural resources, etc.

²¹ The multiplicity of types of charges for the use of the environment is a good example. There are currently seven types of such charges, beginning from charges for the right to use natural resources and pollution charges, and ending with mandatory insurance under the Chemicals Act. The system lacks the necessary consistency and common grounds.

²² See *e.g.* of *Säästva arengu seadus* (Sustainable Development Act) § 3 (2) (Riigi Teataja (the State Gazette) I 1995, 31, 384): “The freedom to dispose of one’s property and be a trader shall be restricted on grounds of the need to protect nature as the common heritage of mankind and national wealth”, or § 3 (3) of the same Act: “Diminishing pollution of the natural environment and the use of natural resources in quantities that preserve the natural balance are the basic requirements for economic activities”.

²³ See *e.g.* the V Environmental Programme of the European Union – Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development – A European Community programme of policy and action in relation to the environment and sustainable development. Official Journal No. C 138, 17/05/1993 pp. 0001–0004.

²⁴ Liability for Environmental Damage. Washington, 1995, pp. 8.

²⁵ R. V. Percival *et al.* Environmental Regulation. Law, Science and Policy. Boston: Little, Brown and Company, 1996, pp. 131–138.

5. In the 1990s, a shift from sectorial protection of the environment to the protection of the environment as a whole took place.^{*26} The environmental risk control system effective in Estonia is structured by areas of environmental protection – nature conservation, protection of the aquatic environment, protection of ambient air, etc. The environmental code allows to unify different areas where necessary and create links between different regulations. The focus of regulation of environmental protection should be reoriented from the former sectorial approach to environmentally hazardous activities, products, substances and organisms; the aim of regulation should be overall control of impacts on the environment as a whole.

6. The success of environmental law largely depends on the integration of environmental protection considerations in other policies and areas of law. Article 6 of the Treaty Establishing the European Community stresses that environmental protection requirements must be integrated into the definition and implementation of other Community policies specified in article 3, particularly in view of the promotion of sustainable development. This is a major environmental definition of the EC Treaty and it is subjected to the control of the Court of Justice.^{*27} A primary task of the environmental code is to contribute to this integration. It has to be ensured that environmental protection requirements are taken account of in environmentally sensitive areas such as energy, agriculture, tourism, etc.

7. The preparation of an environmental code ensures the stability essential for environmental law. Environmental law is quite a young area of law and its development has been uneven. At times, it has been tried to quickly react to issues that have deserved special public attention, or to follow the periodically changing fashion trends of environmental law. There have been periods in the development of environmental law when excessive importance was attached to certain means of regulation (on account of other means), such as “command and control” means, environmental civil liability^{*28} and, lately, economic means and deregulation. Time has shown that dedication to single, currently fashionable means of regulation has not justified itself. Environmental law is a discipline of law that has an important socio-political component. Different development periods have been characterised by the different placement of environmental protection among policy priorities; periods of remarkable political support have been replaced with periods when environmental protection is seen as an obstacle to economic development and environmental regulation is softened.^{*29} Preparation of the Environmental Code alleviates the effect of political instability to environmental protection.

8. Many of the activities that may have a substantial impact on the environment seem to be not quite adequately regulated now. Examples are port, railway and road construction, as well as the energy sector. The environmental code enables similar basic environmental requirements to be applied to all activities that affect the environment.

9. Environmental regulation has so far focused on large stationary sources of pollution, and has been successful in that respect. Now is the time to switch to solving the environmental problems caused by many small sources that are negligible separately but whose cumulative effect constitutes a substantial risk – such as pollution from agriculture or road transport. Handling these pollution problems requires new solutions by combining various means of regulation – norms, planning of land use, pollution charges, etc. The environmental law system created by the environmental code contributes to such combined solutions.

The options for setting the goal for restructuring environmental law are the following^{*30}:

- to limit the incorporation of the existing law, covering the transposition of EC law and international environmental law;
- incorporation on the level of the highest present standards, *i.e.* to adjust the uneven environmental requirements of different sectors of environmental protection at a high level;
- to restructure environmental law in depth – to create essentially new law.

As we saw, different countries have taken different paths. The choice probably depends mainly on two factors:

- firstly, how a country is satisfied with the presently applicable law, and

²⁶ The best example of this approach is Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. Official Journal L 257, 10/10/1996, pp. 0026–0040.

²⁷ L. Krämer. EC Environmental Law. Fourth Edition. London: Sweet & Maxwell, 2000, pp. 14–15.

²⁸ M.-L. Larson. The Law of Environmental Damage. Liability and Reparation. Kluwer Law International & Norstedts Juridik, 1999, pp. 22–23.

²⁹ There has been much debate lately in Estonia to stop the rise of the singularly low pollution charges. The argument is the need to preserve the competitiveness of our economy, especially oil shale energy.

³⁰ See E. Reh binder, pp. 161–162.

- secondly, the placement of environmental issues in the policy priorities of the state.

Considering the shortcomings of our environmental law as mentioned above, we apparently have to choose the last of the three options, *i.e.* codification in its literal meaning. The task is thus to create new content, not just to adjust the existing structure.

It has to be kept in mind in the codification of the Estonian environmental law that although this area of law has made relatively fast development in our conditions in the recent times, the legal system of environmental risk control in Estonia is still rather primitive when compared to those of countries of developed environmental law.

The development of modern environmental law can be divided into three stages (generations). The division is rather conditional as the time scale is too short for making far-reaching conclusions – hardly 30 years.^{*31} The following division is based on the environmental protection ideology that dominated during different periods and the respective legal means and priorities of environmental risk control.

Environmental law of the first generation was orientated not so much to preventing environmental damage, but to indemnification for the consequences of environmentally harmful activities and the domination of direct regulation in public law (administrative law).

The second generation sources set the target at prevention of environmental damage and the application of suitable precautionary measures, integral protection of all components and factors of the environment, improvement of the former administrative regulation and its partial replacement with various economic stimuli and antistimuli, the pollution trading and means of informing the consumer.

The introductory sources of the third generation of environmental law include the Aarhus Convention.^{*32} This stage is characterised by the addition of a new, “personal” dimension to the legal control mechanism of environmental risks. Environmental protection is more than ever before switched to the sphere of private goods. The condition (quality) of the environment was earlier always viewed as a public good. By using the rights defined in the Convention, a person (owner of immovable property, consumer, nongovernment environmental organisation, etc.) can, through enforcing their subjective rights (right to information, right to participate in decision-making or the right of access to justice), not only protect their private interests, but also protect public interest, *i.e.* a clean environment. A clean environment is all the more a public interest considering that the consequences of pollution usually concern not only individuals or their property, but the general public in the affected area, country, or even in the world.

The implementation of environmental policy in the 1990s has more than earlier concentrated on various market mechanisms that more or less rely on the choices of consumers in the market and the market signals behind those choices. Such regulation mechanisms based on consumer behaviour are known to be effective only if the consumer is adequately informed and aware to take environmentally favourable decisions.^{*33} The rights defined in the Aarhus Convention can thus be said to contribute to ensuring the effect of other regulation methods, or even constitute the essential preconditions for these.^{*34}

Environmental protection through the subjective rights of persons is also reasonable in the context of law and economics, as the goals of environmental law and policy can be achieved with smaller public expenditure, *e.g.* by saving on account of state supervision.

The importance of the Aarhus Convention is certainly not limited to the area of environmental protection – the Convention has a much broader function. The goal is to contribute to the implementation of open society principles and to ensure possibilities to control the activities of the state, local governments, and persons in private law who perform public functions. Exercising the rights defined in the Convention increases the responsibility of competent agencies and other person in decision-making, while the decisions made this way are clearer and better understandable as appropriate for open society. The greater awareness of the public and the possibility to participate in decision-making contribute to the implementation of the basic principle of today's environmental law, which requires the full integration of environmental considerations to all policies and decisions on all levels.

³¹ Today's environmental law is considered to have begun in 1972 when the UN Environment Conference was held in Stockholm.

³² Convention on access to information, public participation in decision-making and access to justice in environmental matters. Aarhus, 25 June 1998.

³³ See R. V. Percival *et al.*, p. 133.

³⁴ J. H. Jans. *European Environmental Law*. Kluwer Law International, 1995, p. 288.

The keyword for the third generation of environmental law is thus “the right to a clean environment”. It should be mentioned that many countries made reservations when signing the Aarhus Convention, since the essence and content of the right to a clean environment is not quite unanimously interpreted. The complexity of the problems is illustrated by the fact that even Germany, a country with a high level of environmental protection, had (and has) serious problems joining the Convention.^{*35}

When we assess the placement of Estonian environmental law in this development scheme of global environmental law, the following basic conclusion can be made. The environmental law applicable in Estonia largely fits to the context of the environmental law of the first generation. The “command and control” method of solving environmental problems dominates in Estonia. However, harmonisation of the Estonian environmental law with that of the EC has by now added some features of environmental law of the II generation, such as guidance from the precautionary principle and the goal of achieving integral protection of the environment instead of the former sectorial regulation.^{*36}

The third main question asked in the discussion on codification of environmental law concerns the scope of application of the environmental code.

Mainly two problems arise here.

- Firstly, as opposed to the majority of other countries, regulation of the use of natural resources – forest use, fishing, hunting, excavation of mineral resources, water use, etc. – is included in the scope of environmental law in Estonia. It would be correct not to give up this approach. In this respect, Estonia would even set a positive example for other countries, since the inclusion of nature use in the scope of environmental protection is a precondition for the protection of the environment as a whole – especially in view of sustainable development.
- Secondly, the requirement to integrate environmental protection requirements to all other policy areas (and areas of law) raises the problem of the relations of the environmental code with other areas of law, including other codes. It has to be decided whether all environmental regulation in areas such as agriculture, energy or transport should be contained in the environmental code or included in the legislation regulating the respective area. One could agree with the authors who support the idea that the codification of environmental law should not be too “imperialistic”.^{*37} It would be reasonable to include all basic environmental regulation in substantive law in the environmental code, but to leave or include in legislation regulating specific areas the norms referring to appropriate environmental requirements specified in the code.

The risks related to codification should also be taken into account in the preparation of the environmental code. The main risks are:

- The above-mentioned stability achieved by codification may, in certain cases, become an obstacle to the further development of environmental law and to rapid reaction to new environmental risks. If the system being created becomes too rigid, the inclusion of new components in it will be difficult.
- The partial replacement of the former particular and sectorial environmental requirements with abstract and largely generalised environmental norms and normative principles may cause problems in the interpretation and application of environmental law. The problem is partly psychological, as people are used to very specific and technical requirements in this area.
- The rapid but chaotic development of EC environmental law (presuming that Estonia will become a member of the EU) may bring confusion to the national codified system of environmental law.^{*38}

Another question that arises in Estonia in the context of codification of environmental law concerns the time span of the process and the organisational aspects of drafting the code. The experience of other countries shows that it will be a time consuming and complicated work. The same process has lasted more than 10 years in Germany.^{*39}

Estonia now clearly lacks preconditions for the preparation and enforcement of the entire environmental code at once, which means that gradual preparation and enforcement is unavoidable. One of the lacking preconditions is the uneven development of different areas of environmental protection in Estonia. Some

³⁵ See e.g. Environmental groups meet German minister on refusal to sign new convention. Available: <http://www.mem.dk/aarhus-conference/NGO/groups.htm> (28 April 2000).

³⁶ The two main expressions of this development are the draft law on environmental impact assessment and environmental auditing and the draft law on integrated pollution prevention and control. In computer network. Available at: <http://www.envir.ee>.

³⁷ See e.g. E. Rehbinder, p. 163.

³⁸ *Ibid.*, pp. 160–161.

³⁹ Environmental code (Note 13), pp. 57–58.

areas are still in the formative stage, while others are already on the level of development required for codification or are nearing this level. The codification of environmental law is a new quantitative stage in the development of environmental law and it has to rely on a firm foundation and prior development. Besides, a gradual approach is also justified by the scarcity of intellectual resources. Similar methods are known to have been used in Estonia in other areas of law, particularly in the preparation of the Civil Code, and they have proved to be successful. Gradual approach to the reformation of environmental law has been used in many other countries.^{*40} But besides its positive aspects, the lengthy process of preparation of the environmental code also has its negative sides – such as the possible political changes and the fact that the parts of environmental code already prepared in the spirit of legal innovation will be applicable together with the “old-fashioned” legislation, which may cause complicated legal conflicts.

The provisional structure of the Estonian environmental code has now been completed. Working groups have been set up – one to prepare the General Part of the Environmental Code Act and the other to prepare the Nature Conservation Act of the Environmental Code. The first working group has prepared a provisional draft version of the Act that has been distributed for wider discussion.

The task of the General Part of the Environmental Code Act is to set out the general principles of environmental law, including to define the scope of application of the environmental code and the goals of environmental protection, and to define the basic principles of environmental law, the fundamental rights and duties of persons in the protection of the environment, the bases for management of the environmental protection and the system of legal means of environmental risk control. The General Part Act thus defines the legal framework for environmental law and policy and is the basis for further systemisation and codification of environmental law.

In the structure and content of the General Part of the Environmental Code Act, the components should be pointed out where the goal of codification – renewal of the existing law – is the most apparent. These components are:

- formulation of the environmental rights and duties of persons;
- legal defining of the basic concepts of environmental law;
- providing the bases for organisation of environmental protection;
- defining the economic instruments of environmental protection.

In setting out environmental rights, the draft General Part of the Environmental Code takes guidance from the principles of the Aarhus Convention. The main rights set out in the draft Act are the right to live in an undamaged environment that meets the norms and the right to require the discontinuation, termination, and adjustment to norms of activities that impair the condition of the environment (rights to a clean environment), the right to receive information on the condition of the environment, natural resources, and factors that may have an impact on the environment (the right to environmental information), and the right to be involved in making decisions that may have a significant impact on the environment and to participate in drafting general legislation concerning the environment through environmental organisations (right to participate). In the preamble to the Aarhus Convention (indent 7), the right to a clean environment is defined as follows: “every person has the right to live in an environment adequate to his or her health and well-being”. The definition is rather vague and can be interpreted in many ways. The common theoretical position is that the right to a clean environment is a right to which no clearly defined duty of any specific person can be *a priori* linked. In this respect, the right to a clean environment is similar to the right to work, which does not imply the obligation of any specific employer to employ any person (naturally, the right to be free of discrimination has to be taken into account here). The author of this article cannot fully agree to the above position concerning the right to a clean environment. Section 53 of our Constitution says: “Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law.” It is very likely that the right to a clean environment and the duty to avoid causing damage can conflict within a single legal relationship. There is also the general duty of a country (especially a member country of the EU) to ensure a high level of environmental protection and to establish the relevant legal, financial and institutional guarantees.^{*41}

One of the goals in the preparation of the draft General Part of Environmental Code Act was to formulate the basic duties of persons concerning the environment, including the duty to be informed of the potential

⁴⁰ See P. Gilhuis, pp. 101–102.

⁴¹ Article 2 of the Treaty Establishing the European Community stipulates “a high level of protection and improvement of the quality of the environment” as one of the main tasks of the Community (and thus its member states).

environmental impact of certain activities or using certain substances, the duty to choose for their activities the most environmentally suitable place, the duty to take precautionary measures and the duty to use the best possible technology. These duties apply to all persons who plan or carry out activities that have a significant impact on the environment. Such an approach enables the supplementation of the single duties specified in the present specific laws by general rules of acting that define the limits of human activities in view of environmental protection interests.

The lack of legal definitions for many basic concepts of environmental law in the currently applicable legislation is very obvious and is apparently a source of conflicts. The concepts are defined in the draft General Part Act from the practical rather than the theoretical aspect (taking into account the needs related to application of the act). For example, it is practical to define the concept of "environment" from the aspect of the scope of application of the Act, and not to provide a scientific definition. The concept of environment is defined by the same method used in property law to define the scope of immovable property.^{*42} The environment is defined as an integral system functioning in the cumulative effect of various natural resources and environmental factors, the separation of the components of which is artificial and unreasonable in respect of environmental protection. The former definitions of the concept of the environment are deficient namely because they try to list the various components of the environment.^{*43} The physical scope of the environment is determined by the scope of public interest in controlling environmental risks. The scope of public interest that the state has to consider in establishing regulations is in turn determined by the goal to protect the environment as a whole on a high level and by the principles of sustainable development as laid down in international^{*44} and national law.

The draft law defines the use of the environment not only as the use of natural resources, but also as the pollution and impairment of the environment. The disposal of contaminants and waste in the environment and other affecting activities are also defined as use of the environment. The concepts of pollution and impairment of the environment are based on analogies from various international conventions (such as the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area^{*45}). Pollution of the environment is defined as the release of substances or energy (*i.e.* practically any objects or effects) into the environment that damage the environment and/or human health through the environment, or cause the risk of such damage. The last definition, causing risk, arises directly from the precautionary principle. Pollution of the environment also includes activities that result in the violation of the environmental rights of other persons, such as damage caused to fishers through destruction of fish resources by pollution of water, or damage caused by damaging the aesthetic values of the environment. While environmental pollution is mostly related to the release of substances or energy in the environment, impairment of the environment includes activities such as forest cutting, altering of landscape, damaging or removal of soil, etc. Estonia has adopted the principle that in theory, the disposal of any waste of human activity can be viewed as environmental pollution. Thus, environmental pollution cannot always be *a priori* prohibited or condemned, otherwise economic activities would be completely impossible. However, the environment may be polluted, as a rule, only when holding an appropriate permit and in accordance with the conditions prescribed in it. Environmental permits are naturally not required if the environmental impact of an activity is negligible.

Our poor administrative capacity has been pointed out in the negotiations between Estonia and the European Union. It is necessary not only to provide a normative framework that complies with the EC law, but also to ensure the actual implementation of environmental requirements through an effective environmental management system. Organisation of the environmental protection system should be based on the social partnership principle that requires the active participation of all sectors of the society, especially the state, local governments and enterprises.

The organisation of environmental protection is ensured in the General Part of the Environmental Code Act by:

⁴² Asjaõigusseadus (Law of Property Act) § 127 – Riigi Teataja (the State Gazette) I 1993, 39, 590.

⁴³ See *e.g.* Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano, 21.06.1993) Article 2 (10).

⁴⁴ Article 3 of the Convention on Biological Diversity (Rio de Janeiro 1992) defines the general principle: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

⁴⁵ Convention on the Protection of the Marine Environment of the Baltic Sea Area – Riigi Teataja (the State Gazette) II 1995, 11, 57.

1. outlining the development of all areas of life; the basic instruments here are strategies, development plans, projects and programmes. These are the main means of implementing the integration principle;
2. defining the scope of use of the environment; this is effected through environmental permits, licences, type approvals and conformity certificates on the basis of the principle that the environment may be used only under the right of use;
3. preserving natural heritage through providing state protection to species, habitats, single natural objects, landscapes or cultural heritage and ensuring such protection;
4. improving the quality of the environment through regulating activities that have an impact on the environment and through prognosis and assessment of such impacts. It means the establishment of environmental protection quotas and supervision and enforcement of their implementation;
5. accounting for natural resources, the aim of which is to collect reliable information on environmental condition and to plan and implement environmental protection measures on that basis.

Economic instruments play a larger role than ever among the environmental protection measures in the 1990s.^{*46} As mentioned above, there are several reasons for this. The objective is to promote environmentally sustainable production and consumption by using various economic stimuli and antistimuli and the requirement to convert the external expenses on the use and pollution of natural resources into internal expenses (to internalise the externalities).^{*47}

The General Part of the Environmental Code Act provides for the following economic means:

1. Loans and subsidies – in accordance with the principle of limitation of state aid and by requiring that state aid may not cause arbitrary, disproportionate or discriminating distortion of competition.
2. Guarantees for compensating for environmental damage – the purpose of which is to prevent environmental damage and ensure compensation for damage or the performance of other mandatory activities.
3. Insurance against environmental risks – including the scope of mandatory insurance.
4. Charges for use of the environment – the aim is to implement the “polluter pays” principle and thus to contribute to the means of sustainable use of the environment and prevention of damage.
5. Means of informing the consumer – such as the ecolabel, certification, conformity verification of products.
6. Compensation for damage caused by environmental protection limitations – this contributes to the effective application of environmental protection measures and alleviates the social strain brought about by control of environmental risks.

When discussing the goal of the General Part of the Environmental Code Act, we cannot ignore the problems of transposition of the EC environmental law to our legal order. The EC environmental law (the main source of which are directives) does not replace national law, but acts through it. Therefore, national law has to be organised for adequate adoption of the EC law – discrepancies, repetitions and gaps need to be eliminated. The harmonisation process requires the passing of a large number of new legal acts in a relatively short time. This cannot be achieved without a framework law on environmental protection that would provide a framework for such mass production of legal acts. The draft provides for many fundamental principles of EC environmental law – the “polluter pays” principle, the precautionary principle, the best possible technology principle, etc. – that absolutely need to be taken into account in the transfer of the goals and requirements of single directives to our legal order.

The General Part of the Environmental Code Act defines the environment as national wealth to which the requirement of sustainable use applies. Many international conventions go even further and regard natural resources as the common heritage of mankind.^{*48} This principle is the basis for subjecting private interests to public interests and for the establishment and implementation of related restrictions. Proceeding from the principles of international law, every country has sovereignty to use its environment, but must avoid from damaging the interests of other countries (the common interests of mankind). The establishment of environmental regulation is thus not only the right of a country, but also an international duty.

A frequently asked question in Estonia is whether the establishment of high environmental requirements in view of Estonia’s liberal economic policy is an advantage or a disadvantage to our enterprises, and thus our society. It is obvious that the codification of environmental law is unfavourable for activities (including

⁴⁶ A. Kiss, D. Shelton. *Manual of European Environmental Law*. Cambridge University Press, 1997, pp. 127–128.

⁴⁷ See A. Reinvald. *Keskonnaseisundi reguleerimine majandusmeetoditega* (Environmental Regulation by Economic Methods). Tartu, 1992, pp. 7–9.

⁴⁸ See A. Kiss, D. Shelton. *International Environmental Law*. Transnational Publishers, Inc. & Graham & Trotman, 1991, pp. 9–18.

economic activities) that do not comply with internationally accepted environmental requirements. The General Part of the Environmental Code Act is guided by the principle that economic development cannot take place on account of environmental condition and human health. In the long term, the establishment of strict environmental requirements will certainly have an organising, *i.e.* positive effect on our economy and competitiveness in the world market.