Legal Principles and Mechanisms for Safeguarding Biodiversity


Safeguarding biodiversity as a core value
The legislative reform concerning fundamental rights that took place in Finland in the 1990s recognised that there are values associated with conserving nature that can no longer be recast as rights for individuals. More precisely, this relates to the viewpoints acknowledged in ecophilosophy about the intrinsic value of nature, which question the perception of nature as a resource – a concept inherited from the Age of Enlightenment. Today, efforts are being made to conserve nature not merely for the benefit of mankind but for the sake of nature itself. Biological diversity is acknowledged in the international community to have an intrinsic value alongside other values. From this viewpoint, the components of biodiversity, such as living organisms and their habitats, cannot be considered a freely exploitable natural resource, but should instead be seen as no more than objects for sustainable and sparing use. If the intrinsic value of nature is reincorporated into respect for life and for the self-realisation of living organisms, it will be the safeguarding of biodiversity, not its free exploitation, that will constitute the underlying objective or principle.

The notion developed in the Age of Enlightenment is also challenged by our awareness of the ecological limitations on the perpetuation of the human species, and our sense of responsibility for the living conditions of future generations. Concerns about the use of natural resources are not focused exclusively on destruction of the natural environment – after all, nature will continue to exist in one form or another – but also on degradation of the living conditions of existing and future generations of human beings. It is, in fact, nothing less than a question of human culture being ultimately dependent on nature and its ecosystems. Our use of natural resources today emphasises our collective responsibility for nature and its diversity, as well as the principle of sustainable development (especially ecological sustainability).
Safeguarding biological diversity can also be defended in terms of other value criteria, such as instrumental values: biological diversity includes an unknown quantity of as-yet undiscovered raw material reserves important for mankind, for instance various medicinal substances. Biodiversity could be viewed even as the most valuable natural resource of all. Most essential, however, is to recognise from these arguments that mankind and human societies have evolved to a point where we are now aware of the importance of safeguarding diversity in nature and at the same time are aware of the limitations of approaches that revert to interpersonal legal relationships. To achieve this safeguarding objective it is not necessary that the constituents of nature should be granted legal entity status in accordance with medieval concepts. On the other hand, neither can biodiversity and its component parts any longer be a freely exploitable natural resource corresponding to the notion developed in the Age of Enlightenment. A legal paradigm is required in which biodiversity, as an object worthy of safeguarding, is awarded different degrees of legal and other protection in order to survive amidst the pressures of consumer culture. Thus, a new challenge facing our legal culture is how human behaviour can be controlled to ensure that biodiversity is maintained for present and future generations and for the sake of nature itself.

**Safeguarding biodiversity as a legal objective**

The main objective of biodiversity law is to safeguard the living natural world and its variety, in other words to safeguard biological diversity. This involves due consideration of the relevant norms and facts and the above-mentioned values. *The safeguarding objective can be expressed in terms of the 1) conservation, 2) sustainable use and 3) non-degradation of biodiversity and its component parts.* These sub-objectives are, in fact, interconnected in many ways. For instance, the stated aims of the Nature Conservation Act (1096/1996) include both maintaining the diversity of nature and promoting the sustainable use of natural resources and the natural environment. Both aims may be set out alongside each other in practice, too, for example in the environmental impact assessment of projects and plans associated decision-making in the Natura 2000 areas.

An important distinction must be made between the objective of safeguarding biodiversity and, for instance, the objective of fair and equal distribution of the benefits derived from biological natural resources. The latter objective focuses on the legal relationships (rights and duties) between people (legal entities) in regard to natural resources and knowledge inherited from previous generations. *The safeguarding objective, on the other hand, focuses on the safeguarding relationship between people (legal entities) and nature (object) in a way that is legally relevant* (see Figure 1).
The safeguarding relationship
Conferring legal status on the objective of safeguarding biodiversity gives rise to two kinds of relations in legal protection: 1) biodiversity versus the individual, and 2) biodiversity versus government (as represented by public authorities). The place of the individual may also be taken by a body corporate. Acknowledging the existence of these two relations means that the objectives of safeguarding biodiversity can be assigned to safeguarding relationships so that the objectives can be achieved by using legal means to steer private individuals and public authorities (legal entities) towards acting responsibly in support of biodiversity. The existence of safeguarding relationships will strengthen and complement the provisions of section 20(1) of the Finnish Constitution (731/1999) on responsibility for the environment.

In a safeguarding relationship, biodiversity cannot be on an equal level with the other participants in the same way as is generally the case in relationships between legal entities. Both public authorities (e.g. regional environment centres) and private individuals (e.g. landowners and conservation bodies) have the right, under conditions laid down by law, to be heard in defence of the various constituents of nature. By increasing the awareness of safeguarding relations and by adapting them, it is possible to ensure that wider consideration is given to the objectives of biodiversity law and that these objectives can be implemented where necessary, for instance in legal situations where different interests are being compared.

The importance of different safeguarding relationships will grow as adverse impacts on biodiversity increase. Chapter 2 of the Environmental Impact Assessment Procedure Act (468/1994), for example, allows very extensive participation, during which the parties (general public, experts, authorities) that can potentially safeguard the constituents of nature can present their views and provide statements on such matters as the damaging effects on nature of the proposed project. On the other hand, the granting of an individual exemption to species protection under section 48(2) of the Nature Conservation Act does not necessarily require any public participation at all; instead, the law prescribes that the safeguarding of the species in question is the job of the authorities that grant these exemptions, that is to say the regional environment centres.

A further reason for building safeguarding relationships is that in practice a public authority or other body can find itself playing a dual role, for instance as both user and protector of biological natural
resources. In these cases, the authority or body should aim to safeguard biodiversity by paying special attention to sustainability of use and to conservation viewpoints. In malfeasance situations associated with the dual role of public authorities or in other potential malpractices, the opportunity for individuals or bodies corporate to use their right to be heard in defence of biodiversity will be a useful addition to the safeguarding afforded by the nation’s environmental administration. The creation of a biodiversity-safeguarding relationship between, on the one hand, the different sections of society and, on the other, the diverse constituents of nature is therefore not only possible but also essential.

A safeguarding relationship will, through specified principles for example, ensure that the sub-objectives for safeguarding biodiversity are firmly bound into the legal sphere and will help in recognising conflicts of interest concerning biodiversity in the decision-making process. The safeguarding relationship can be consciously incorporated into existing legal instruments, such as licensing systems, alongside norms that define legal relationships and legal protection of traditional legal entities. Through greater awareness of the safeguarding relationship, other mechanisms aimed at safeguarding biodiversity can also be developed, such as strategies and standards (see Figure 2). The principles concerning the safeguarding of biodiversity are discussed in more detail below, followed by an examination of the safeguarding mechanisms.

**Safeguarding principles**

Safeguarding principles are needed in order to achieve the objectives of biodiversity law. With these principles, the aim is to influence human behaviour in the same way as with other guiding principles of environmental law. *However, the principles for safeguarding biodiversity focus above all on the safeguarding relationship and not on the arrangement of legal relationships between legal entities.* Depending on their regulatory status, safeguarding principles will be existing or newly established legal principles that can be used to influence both the development of legislation and decision-making that is based on flexible provisions. Before they are approved and become established, the safeguarding principles could serve as moral guidance, but only when they become legal principles can they be conferred a meaning that is binding in the sense of a legal norm.

Once international and national guiding principles of environmental law have been amended and supplemented to transform them into safeguarding principles of biodiversity law, the objectives of biodiversity law will form a basis for interpretation. The principle of sustainable development, for
example, can be reshaped under such an interpretation as follows: “Development must take biodiversity into account and must be ecologically sustainable, so that due consideration is given not only to the needs and hopes of present generations but also future generations.”

The principles of biodiversity law can be used to direct decision-making by public authorities at the same time as the principles of administrative law, because the respective objects of safeguarding in each case are rooted in different relations (see Figure 3). While the principles of biodiversity law safeguard biological diversity from the harmful actions of public authorities and individuals, the principles of administrative law protect the private individual from malfeasance by public authorities. In general terms, conflicts should not then occur between these sets of principles. Some decision-making criteria would, however, change from their present form if and when safeguarding principles start to be applied simultaneously with administrative law principles. Principles safeguarding biodiversity could be used in decision-making 1) for interpreting flexible norms and 2) as ‘analogy keys’ for filling normative gaps. In the latter case, caution would need to be observed, because the intention is not to regulate for every single shortcoming.

**Safeguarding mechanisms**

Mechanisms for safeguarding biodiversity can be divided into strategies, instruments and standards. In practice, these mechanisms are interconnected in different ways. In the theoretical model, each has a distinct function of its own.

*Strategies* are programmes for drafting or interpreting legislation for the purpose of adapting certain environmental, economic and other policy requirements to become part of the legal system. As tools for implementing policy, strategies set a ‘framework’ for legal guidance. Strategies are used to operationalise the objectives, in this case for safeguarding biodiversity, in different activities. Strategies will not normally include legal norms whose application could force another goal-oriented body into engaging in actions that accord with those norms or with the socially desirable state of affairs underlying them. Therefore, in addition to the strategies, what is needed for their implementation are instruments containing flexible legal provisions and, for instance, standards that turn these provisions into something concrete.

Legal *instruments* for safeguarding biodiversity are more varied mechanisms than the standards. They are used to guide human behaviour in a direction consistent with the objectives set in the
strategies. They can also be very neutral mechanisms for harmonising different interests. Common to the instruments examined is that they are legal instruments, or at least are anchored in legislation in various ways. Instruments can, in fact, be described as clusters of norms that include, in approximate terms, both procedural and substantive norms. Instruments are not, however, composed only of norms; instead, non-judicial elements that are connected with an instrument may also be used in the associated decision-making or at an earlier stage (see Figure 4). Instruments can be classified in various ways. The classification used in the study is as follows: 1) informative instruments, 2) administrative instruments, 3) financial instruments, 4) agreements as instruments and 5) combinations of these.

Standards are an inseparable part of the guidance for biodiversity law. Standards traditionally include binding regulations that can be both numeric and verbal, and they add detail to the flexible, instrument-based guidance on decision-making or other actions. Using such standards, decision-making could actually be made more consistent and its predictability improved, because efforts would be made in individual cases to implement the objectives of biodiversity law and private legal protection. Degradation of biodiversity could also be prevented using traditional standards of environmental protection law and related target and guideline values.

Standards can also be used in biodiversity conservation or, more precisely, conservation of biological natural resources, and in their sustainable use. However, nature would first need to be standardised; that is to say, standards would have to be used to set limiting values for decision-making on biodiversity, and these values would be scientifically researched and based on environmental facts. In practice, standardisation could occur with the aid of, for example, the concept of favourable conservation status of a species.

**Development prospects**

A legal system that safeguards biodiversity would not simply focus on interpersonal legal relationships but would also take the living natural world (and its ecosystems) into consideration as objects for legal protection. This would give rise to different safeguarding relationships between legal entities and the various constituents of nature. The successful functioning of safeguarding relationships should not, however, be dependent on the personal interests of any legal entity in any particular situation.
Safeguarding nature and its diversity is generally perceived as being in the public interest and something which public authorities defend using their right to be heard. Indirectly, however, the different constituents of the living natural world can also be protected in connection with private interests. For example, a neighbour may oppose a project on the grounds of common nature conservation values, although his real interest might be in protecting his land from any harm or disturbance caused by the proposed project. However, this *dichotomy of interest* must not be allowed to hinder the safeguarding of biodiversity. Furthermore, in situations in which a private individual sincerely wishes to promote nature conservation, he should be given the chance to present his views on a project that would be considerably damaging to nature, regardless of his private interest in the matter. Only in this way can biodiversity be afforded sufficient protection in situations where a public authority does not, for one reason or another, pursue nature conservation interests (as part of its duties in the public interest, under the traditional dichotomy). Erosion of the dichotomy of interest is discussed below in the light of an example of interpretation concerning the new Act on Administration and Governance (434/2003), which enters into force at the start of 2004.

Recognition of the safeguarding relationship opens up a new interpretation of section 41(1) of the Act on Administration and Governance concerning the reserving of opportunities to participate. The provision in question states: “If the decision on a matter could have a marked impact on the living environment, work or other circumstances of parties other than the interested parties, the authorities must reserve such persons the opportunity to obtain information on the background to the discussion of the matter and the objectives, and to state their views on the matter.” It was not the intention of this provision to weaken any of the criteria for submitting notification on pendency under section 13(1) of the Administrative Procedure Act (598/1982): “If the decision on a matter could have a marked impact across a broad area or on the circumstances of a large number of people, the pending nature of the matter must be publicly declared.”

The first of the discretionary criteria in section 13(1) referred to above, namely “the decision on a matter could have a marked impact across a broad area”, *enables the biodiversity-safeguarding relationship to be taken into account without any connection to potential interested parties* in so far as the effects are understood to represent a significant environmental impact across a broad area. On this basis, the various parties should be able to present their views on the matter in the area of probable environmental impact, regardless of how the decision would affect the circumstances of the parties in question and regardless of any private interest in the matter.
The wording of section 41(1) of the Act on Administration and Governance may prove to be problematic in situations where reserving the opportunity to participate is necessary purely on the grounds of a significant environmental impact and above all for safeguarding biodiversity. Any problems may be resolved only by abandoning the dichotomy of interest or, more precisely, by interpreting the provision in question 1) in accordance with section 20(2) of the Finnish Constitution, that is, taking into account everyone’s opportunity as a citizen or as non-governmental organisations to influence decision-making that affects their living environment, and 2) especially when, in these cases, the decision on a matter could have a marked environmental impact across a broad area, regardless of whether or not the citizen or non-governmental organisation concerned has a private interest in the matter. Otherwise, no relationship can be established between biodiversity and these parties that would safeguard nature for its own sake or for future generations (or merely in the public interest, under the traditional dichotomy).

Acceptance of the safeguarding relationship should not mean the discarding of people’s traditional fundamental rights or legal protection viewpoints, but instead the creation of mechanisms for safeguarding biodiversity that complement these. Development of a legal system that is ecologically more sustainable than the present one will require re-evaluation of legal principles and mechanisms, as well as considerable development work requiring more than a single study. It is nevertheless reassuring to know that biological diversity can – if the will exists – be safeguarded through legal principles and mechanisms.