10.22199/issn.0718-9753-5232
DERECHO Revista Coquimbo
ISSN: 0718-9753 (En línea)
REVISTAS CIENTÍFICAS de la Universidad Católica del Norte. revistas.ucn.cl
https://ror.org/02akpm128

The conservation right in light of the legislative history of Law N° 20.930. General explanation of the origin, definition, differentiating elements, and legal nature of this new property right

El derecho real de conservación a la luz de la historia de la Ley N°20.930. Explicación general del origen, definición, elementos diferenciadores y naturaleza jurídica de este nuevo derecho real

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Abstract:
The origin, definition, differentiating elements and legal nature of the conservation right are presented here, in light of the contrast between two visions that faced each other in the legislative process; explaining the reasons why the law finally adopted the 'post-modern' vision, thus giving rise to a new affirmative real right different from the conservation easements or real covenants that are found in comparative law.

Keywords: property right; environment; conservation; environmental patrimony

Resumen:
Se presenta el origen, definición, elementos diferenciadores y naturaleza jurídica del derecho real de conservación, a la luz del contraste de dos visiones que se enfrentaron en el proceso legislativo, explicando las razones por las que la ley finalmente adoptó la visión ´post-moderna´ dando así origen a un nuevo derecho real afirmativo distinto de las servidumbres de conservación o ´real covenants´ que existen en el derecho comparado.

Palabras clave: derecho de propiedad; medio ambiente; conservación; patrimonio ambiental

Received: November 25, 2021 | Accepted: May 11, 2023

Introduction

The *Conservation Right* is a new property right established in Chile by Ley N°. 20.930 promulgated on June 10, 2016 (hereinafter the "Law").

The Law defines this new right as follows: "…un derecho real que consiste en la facultad de conservar el patrimonio ambiental de un predio o de ciertos atributos o funciones de éste" […a real right that consists in the faculty to conserve the environmental patrimony of a real estate or certain attributes or functions thereof] (art. 2).

This ´real right´ or ´ius in re´* is established through a voluntary agreement between the owner of the land and a third party interested in the conservation of the corresponding environmental patrimony or of specific attributes or functions of said patrimony**.

In a wide range of applications, this novel right may be applied for the preservation of ecosystems or habitats, as well as for conserving the unique "attributes" and "functions" of the corresponding environmental patrimony.

The conservation right introduces two noteworthy innovations in the realm of private law. Firstly, it establishes a new "faculty" within the real rights framework, known as the *faculty to conserve* or the *´ius conservandi*"´ (as stated in Ley N°. 20.930, 2016, art. 2). Secondly, it brings into existence new legal assets, namely the environmental patrimony and the corresponding attributes and functions of said patrimony (as outlined in Ley N°. 20.930, 2016, art. 2, 3).

An analysis of the legislative process of the Law will reveal the presence of two contrasting visions that were pitted against each other. Moreover, the rationale behind the ascendancy of one of these views, which overcame more than two millennia of legal heritage, can be elucidated.

This analysis will be fundamental to clarify various misunderstandings in doctrine and practical legal life.

This article has two primary objectives:

* Translation Note: A ´real right´ or ´ius in re´ in the civil law systems -also commonly referred to as a ´right in rem´- is a direct right in property that can be enforced against all third parties (erga omnes), and which broadly -but not exactly- corresponds to the notion of ´property interests´ of common law systems.

** Translation Note: The original notion in Spanish is denominated ´patrimonio ambiental´, which could be translated either as ´environmental heritage´ or as ´environmental patrimony´, but we have chosen the latter, because it preserves the original etymology of the words, and it is more adequate to the private law context.

Firstly, to provide clarity with respect to the origin, structure, and legal nature of this novel legal institution.

Secondly, to explicate the manner in which the legislative process underwent a radical shift from a traditional vision aimed at promoting the adoption of the 'conservation easements model' in Chile to a new, post-modern vision, that proposed the creation of a new affirmative real right, the conservation right[1]. The traditional vision was incorporated into the initial 'Bill of Law' as documented in Bulletin No. 5823-07, 2008, whereas the modern vision was realized via a comprehensive and structural revision of the Bill during the second legislative stage at the Senate. For the sake of brevity, I shall herein refer to the post-modern vision as the 'modern vision'.

1. General Background

1.1. Preliminary Considerations on the Contrast of Two Visions

The history of the Law shows us a radical contrast, which can be observed from the perspectives of both private law and biodiversity law, with relevant theoretical and practical implications.

The initial contrast in question can be located in Section 2 of the Bill, which is titled 'Antecedents of the Bill' and sheds light on the background of the legislative proposal. This section primarily refers to two 'antecedents' or 'sources' that provided the inspiration for the legislative draft. However, it is worth noting that these two antecedents presented divergent views. The first antecedent was the legislation of the United States of America on 'conservation easements,' which was the central idea embraced by the traditional vision. The second antecedent was an article that proposed the creation of the conservation right in 2003 (Ubilla Fuenzalida, 2003). This article proposed establishing a new affirmative and 'autonomous' property right and named it the 'real right of conservation' or the 'conservation right.' This idea was central to the modern vision.

The present article provides an overview of the key legislative developments that facilitated the transition from the traditional to the modern vision. In this regard, our attention will be directed towards the fundamental aspects of the Law, commencing with

[1] The term 'post-modern' is employed as equivalent to 'post-regulatory,' that is, following the non-regulatory policies of the liberal state and the regulatory policies of the welfare state. For further details, please refer to footnotes 12 and 15.

the *legal definition* of the conservation right, which underwent fundamental changes during the legislative process determining the final language -and structure- of the Law[2] .

However, to adequately understand the relevance of this contrast and thus understand the implications of the enacted Law, it is necessary to analyze and compare both visions from the perspectives of private law and biodiversity law.

1.2. The Contrast from the Civil Perspective

It is pertinent to highlight that the mentioned contrast of visions can be explained using the most fundamental and classic concepts of the theory of real rights or rights in rem of the civil law tradition. Thus, we will apply the classic conception of 'real rights' adopted by the Chilean Civil Code (2000, art. 577), which defines them as rights held over a 'thing' without reference to a specific person. This conception posits that every real right comprises two elements: a subject of law and an object of law, that is, a 'thing' or 'asset' over which the right is held. Furthermore, it is important to note that the subject or titleholder of the right must possess some right or normative power over the object of the right (Biondi, 2019, p. 31).

Therefore, it can be inferred that, from this perspective, real rights imply a right or normative power over a thing. In this sense, to comprehend any real right, it is crucial to understand the power or right that it entails (Biondi, 2019, p. 31). Based on these elements, a simple comparison can be drawn between the legal form of the conservation easement and the legal form of the new conservation right.

Thus, the *conservation easement* is a right or normative power, which takes the form of a *charge* or *burden*[3] [4], imposed on a *property or estate,* the object of the right[5].

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[2] As we shall see, the modern view was presented and promoted in the Senate by the Conservation Law Center of Chile (hereinafter "Conservation Law Center"), a think-tank that conducts legal research and legislative advisory in the area of biodiversity conservation (www.centroderechoconservacion.org).

[3] In this context, the terms "charge" or "burden" are used in the same way that they are used to define easements in the Civil Code (2000, art. 820). This means that they are used to determine the legal form of a real right. It is important to distinguish this use of the terms from the way they are used to characterize a real right as a limitation to the right of ownership. For example, article 732,2 of the Civil Code (2000) characterizes the usufruct right as such a limitation, but this definition and legal form are not that of a charge, burden, or restriction. Instead, the usufruct right is an affirmative real right that "consists of the faculty to enjoy" a thing (Civil Code, 2000, art. 764). A third sense, in which the term charge or burden is used, is the one referred to the notion of *'real obligation'*, that is, in terms of the *legal obligations that follow or are attached to an object or thing*, as occurs, for example, in trust property in the Civil Code (2000, art. 733, 1), and can also be found in the case of some legal effects of the conservation right in Ley N°. 20.930 (2016, art. 6). Based on these distinctions, it is possible to argue that the conservation right is *defined* as an affirmative real right that *consists of the faculty to conserve.* It should be noted that the structure of this definition coincides with that of the aforementioned article 764 of the *right of usufruct*, which structure we intentionally followed in the corresponding legislative proposal (Ubilla Fuenzalida, 2015) in order to give the conservation right an affirmative form and differentiate it from the restrictive form of the conservation easements. The conservation right can be *characterized* as a *limitation to the ownership right*, in

In contrast, the *conservation right,* is a right or normative power that takes the form of the *´faculty to conserve´,* which is exercised over an object that is *the environmental patrimony* of the property or the *attributes or functions of this patrimony.*

The legal definition of the conservation right, as finally approved in Article 2 of the enacted Law, exhibits a clear and direct structure between the normative power and its object. This structure, proposed in the second legislative stage at the Senate (Ubilla Fuenzalida, 2014), leaves no room for ambiguity with regard to the two essential elements of the conservation right. The grammatical structure of the definition unequivocally establishes that the faculty to conserve is exercised in relation to the environmental patrimony of a property or the attributes and functions of said patrimony.

This understanding regarding the elements and structure of the conservation right not only emanates from the definition of Article 2 of the Law but is also reflected in other articles,

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the same way that the usufruct is so characterized, and it can also be said to have *legal effects* that correspond to *real obligations* or to obligations of a *derecho real in faciendo -see note 5 below-*. We have explained elsewhere the importance of these distinctions from the perspective of Niklas Luhmann theory regarding legal forms and communication (Ubilla Fuenzalida, 2016a, pp. 207-240; Ubilla Fuenzalida, 2016b), from the perspective of the theory of Wesley N. Hohfeld on the different types of legal relations (i.e., rights, liberties, powers and immunities), and finally from the perspective of the theories of Joseph Raz, Jeremy Waldron and James Penner. The general conclusion is that although in both cases -easements and the conservation right- there is a set or bundle of rights identifiable as claims, liberties, powers and immunities (1) In the case of the conservation right, the faculty to conserve is a broader normative structure -that includes different incidents or rights- which, as such, provides flexibility in the face of complex and variable circumstances or factual situations; (2) The bundles of rights involved in each of these legal forms are structured or *´bundled as a whole´* by means of different legal forms. Thus while in the legal form of the conservation right the affirmative or active side of the form is *indicated (affirmative form),* in the legal form of the conservation easements, the negative or passive side of the form -relating to obligations or duties imposed on the ownership right- is *indicated (restrictive form).* Using Luhmann's theory, we have argued that these different forms have different ways of processing communication -and normative expectations- between law and other spheres of society -including the economy- (and, therefore, have different levels of social reflexivity). Thus, for example, the rights defined as charges are not recognized by the economy as an autonomous economic value, while rights that are defined as affirmative rights are recognized as such value. In this regard, see the theory of reflexive legal forms in Ubilla Fuenzalida (2016a, ch.7, 8-9).

[4] Article 6 of Ley N°. 20.930, that regulates the "effects" of the conservation right, provides that in order to achieve the conservation of the environmental patrimony ""las partes deberán acordar al menos una de las siguientes prohibiciones, restricciones u obligaciones: 1.- Restricción o prohibición de destinar el inmueble a uno o más determinados fines inmobiliarios, comerciales[…]; 2.- Obligación de hacerse cargo o de contratar servicios para la mantención, limpieza, descontaminación, reparación […]; 3.- Obligación de ejecutar o supervisar un plan de manejo …"[the parties must agree to one of the following prohibitions, restrictions or obligations: 1.- Restriction or prohibition to use the property for one or more specific real estate, commercial purpose (...); 2.- Obligation to take charge or hire services for maintenance, cleaning, decontamination, repair (...); 3.- Obligation to execute or supervise a management plan…]- It should be noted that in the case of number 1, an obligation does not arise for the holder of the conservation right, but only a charge for the owner of the property; regarding numbers 2 and 3, these can be flexibly established as obligations of either the owner -in which case we are dealing with a ´derecho real in faciendo´- (Castan Tobeñas , 1978, p.58), or of the holder of the conservation right -case in which we are before real obligations (De los Mozos, 1977).

[5] This structure is clearly applicable to both *appurtenant* (servidumbres prediales) and *easements ´in gross´* (servidumbres personales -that do not exist in the chilean legal system-). Regarding the evolution of the notion of servitude, see Ourliac and Malafosse (1963, p. 643); and Puig Peña (1976, p. 455).

such as Article 3 of the Law. The latter stipulates that the attributes or functions of the environmental patrimony of the property are considered immovable property by the law[6].

This provides a comprehensive analysis of the contrast between traditional easements and the new conservation right based on the classical theory of real rights. This analysis leads to the conclusion that the conservation right involves two fundamental innovations in civil law. Firstly, it creates a new *faculty or potestas* in the system of real rights: the faculty to conserve or ius conservandi. Secondly, it creates new objects of law or things, assets for the purpose of their conservation, which include the environmental patrimony of the property and the attributes and functions of said patrimony.

These innovations can be summed up by stating that the Law has created a new affirmative real right that is added to the rights of ownership, usufruct, and use. In this sense, affirmative real rights are defined by faculties or potestas, which are broad normative structures that traditionally include the faculties of use, enjoyment, and disposition, and now also include the faculty to conserve (Ubilla Fuenzalida, 2016a; 2016b; on the notion of faculties or potestas or right-faculties see; Guzmán Brito, 2003). Affirmative real rights are also defined by having their own object, which makes them autonomous. This means that they can circulate and be transferred autonomously without being ancillary to another real or personal right. In the case of the rights of ownership, usufruct, and use, the object of the right over which the faculties or powers are exercised is the immovable property or real estate. In contrast, in the case of the conservation right, the object over which the faculty to conserve is exercised is the environmental patrimony or the attributes or functions of said patrimony[7].

It can be argued that the faculty to conserve emerges as a reconfiguration of specific incidents of the faculties of use, enjoyment, and disposal of the ownership right. In other words, in the ownership right, we may already find several incidents that could be said to make up a 'right to conserve.' The reconfiguration and bundling of these incidents would give rise to the conservation right. In this regard, we refer to ´reconfiguration´ and not a mere ´dismemberment´ of incidents, because in the conservation right:

[6] Thus, the final paragraph of Article 3 reaffirms that such *attributes* and *functions* of the environmental patrimony are legally deemed immovable property.

[7] These ´things´ or ´assets´ are not objects of ownership but objects of the conservation right. The owner of the conservation right is not the owner of these assets but the owner of the conservation right - which object are these assets for the purposes of their conservation.

1. The right to conserve ceases to be a mere liberty of the owner (a mere 'liberty' or ´privilege´ in the Hohfeldian sense), becoming a right whose only and 'necessary' normative content is to 'conserve', and which has as a correlate the corresponding duties and charges on the real estate;
2. The right to conserve becomes autonomous, and is elevated to a right-faculty, that is, it is elevated and enhanced normatively (Penner, 2000, p.15);
3. The right to conserve is thereby referred to the legal notion of 'conservation' as defined by environmental law, by the express reference of Article 1 of the Law to Article 2 of Law No 19,300. This also entails a reference to the detailed regulatory framework of chilean environmental conservation law, whose fundamental basis is found in the Convention on Biological Diversity and its supplementary documents. A systematic interpretation of Ley N° 19.300 in conjunction with the Convention on Biological Diversity, allows us to conclude that, for the purposes of the Law, 'conservation' shall be understood as *ensuring the permanence* and *the regeneration capacity* of the environment (Ley N° 19.300, 1994, art. 2, b), and/or as the *maintenance* and *recovery* of the environment (Convention on Biological Diversity, 1993, art. 2 and 8).
4. It is only through the conservation right -that connects the notions of ´conservation´ and ´environmental patrimony´- that certain ´things´ or ´assets´ emerge as such into legal life -for their conservation- so that this right refers to assets that previously could only be considered as mere ´attributes of the property´ -many times not recognized to any effect by private law nor by law in general (and notably, not considered for purposes of compensation for damages or takings, Ubilla Fuenzalida, 2005).
5. Only through the conservation right, does the consideration of *the value of conservation* arise in the civil or private legal world, as a dimension of value that is different from those dimensions of value that derive from the use, enjoyment and disposal of goods. For this reason, it seems inappropriate to consider that the conservation right is a *real right of enjoyment* -as traditional private law theory in the civil law tradition may tend to classify it-, and rather it should be understood as a *sui generis real right* that refers to the value of environmental conservation (a value that we have called *reflexive or policontextural*, since it derives from different perspectives of observation of the value of nature in a functionally differentiated society, Ubilla, 2016a, Ch. 8). It should also be noted that, in environmental conservation law, the notion of 'conservation' is clearly distanced from the notion of 'use' (Convention on Biological Diversity, 1993, art 2 and 8).

Now, continuing with the analysis of the faculty to conserve or ius conservandi, it must be understood that, in the same way that it happens with other affirmative real rights, the *faculty to conserve* will include all the incidents or rights that are essential for exercising the conservation right.

Regarding the things or assets that are the object of the right, the definition of the conservation right, as originally proposed in Ubilla Fuenzalida (2014), introduced the notions of 'attributes' and 'functions' of the environmental patrimony. In this context, it was understood that 'attributes' are qualities of elements or components of the environmental patrimony considered in a non-functional manner, such as soil nutrients, soil structure and texture, alkalinity, or acidity, etc. In turn, 'functions ' were referred to the so-called ecosystem

functions as they arise from the 'Ecosystem Approach' adopted by the Convention on Biological Diversity ratified by Chile by Supreme Decree No.1963 (1995). These functions include the physic-chemical and biological processes that occur within the ecosystem to support terrestrial life. These functions include but are broader than the so-called 'ecosystem services', which are the ecosystem functions that are directly linked to human well-being (Kremen, 2005)[8].

We must add here -as we argued and was documented in the legislative process in the Senate- that these attributes and functions are predominantly of incorporeal or intangible nature[9].

It must be noted that these assets also have the three qualities traditionally considered necessary for an ´asset´ or ´thing´ to be deemed as such within the realm of private law. These three qualities are the following:

1. The first quality is that they must satisfy the interest of the title holder of the right. In this regard we follow the theory of interest of Joseph Raz, as further applied by Jeremy Waldron and James Penner (Ubilla Fuenzalida, 2016b), and we maintain that the interest that justifies the conservation right is "…el interés de las partes de normar libremente la conservación de aspectos ambientales de un inmueble…" […the interest of the parties to freely regulate the conservation of environmental aspects of a property…] (Ubilla 2016b, p.164). Additionally, with Biondo Biondi (2019, p. 24) it is worth emphasizing that the interest that underlies the conservation right can be of a non-patrimonial nature, and in this regard it should be noted that in the

[8] In this sense, the notion of 'service' involves an anthropocentric understanding and is generally linked to economic valuations. The notion of 'function', on the contrary, places human beings only as one of the components that co-exist in the ecosystem and considers functions that are not directly related to human well-being. It was precisely because of this breadth, and because of its connection to the Ecosystem Approach that these notions were proposed to integrate the definition. Ecosystem functions include functions such as CO2 capture or sequestration, regulation of watersheds, pollination, landscape function, etc. One of the most commonly used typologies of ecosystem functions -referred to ecosystem´s services- is the one contained in the Millennium Ecosystem Assessment, 2005, which distinguishes between: ´provision´ services, ´regulation´ services; socio-cultural services and, finally, ´support´ services.

[9] The chilean Civil Code (2000, art. 576) provides that incorporeal things are "those consisting of mere rights". This norm comes from the Institutes of Justiniano (Instituciones de Justiniano (2005, p. 81), and originally from the Institutes of Gayo, which establishes that incorporeal things are those *quae tangit non possum , qualia sunt ea, quae iure consistunt ...* (Gayo, 2017, p.87), whose meaning is different, as stated for example in the translation provided by Samper: "son las que no se pueden tocar, pues su consistencia proviene del derecho" [they are the ones that cannot be touched, because their consistency comes from the law]. When dealing with this issue, Roman law scholars normally cite Cicero's understanding (Watson, 1958, p.14) who distinguishes, on the one hand, things *quae sunt,* which are those *that cerni tangique possunt*, and on the other, the things *quae intelleguntur,* which are those *quae animo intellegi possunt* (Cicero , trans. in 2006, 5, 26), *that is, those that the soul can understand.* With this, Cicero also refers to the different ways in which a thing can be *individualized*, that is, according to whether this takes place through the senses or through the intellect. This is also applicable to complex things or aggregates of things, which because they are *res quae intelleguntur,* also become *incorporeal* under this distinction. In any case, as Biondi (2019) argues: "las res incorporales […], es una categoría abierta, que se desarrolla continuamente en conexión con el desenvolvimiento de la economía y de las relaciones jurídicas" [the incorporeal res..., is an open category, which is continuously developed in connection with the development of the economy and legal relations] (p.19). On the historical-philosophical relationship between the notion of incorporeality and intangibility see Guzman Brito (1995, p.140 and ss.).

traditional analysis of the ´patrimonial nature´ of things, one must distinguish, on the one hand, the *´patrimonial nature of the thing in itself´* and, on the other hand, the *´susceptibility of economic valuation´* of that thing, because in the latter case, it is not required that the owner's interest be properly of patrimonial nature (Biondi, 2019, p. 27);

2. The second quality is that they must be identifiable as an individual object and with some precision (Demolombe, 1866, p. 337). For his part, Castán Tobeñas (1978, p. 566) refers to the notion of ´autonomy´. In this regard, it should be noted that the ecosystem attributes and functions can be clearly individualized and observed by the methods of current science (Alcaraz-Segura et al., 2013), as is the case today with numerous ecosystem functions that are individualized and observed, as it happens with the carbon sequestration function; and
3. The third quality is that they must be susceptible of being subject to a normative faculty of the title holder -traditionally known as 'appropriability'-, which in the case of the conservation right is implemented through the faculty to conserve, and, more concretely, through management plans or management of the environmental patrimony of a property (Biondi, 2019, p. 25; Castán Tobeñas, 1978, p. 566).

Now, while the third paragraph of Article 3 of the Ley N°. 20.930 (2016) indicates that the attributes or functions of the environmental patrimony are legally deemed as immovable property, it is worth asking now, how should we understand the *environmental patrimony* itself. In this regard, as previously noted, Article 1 of the Law refers to the definitions contained in Article 2 of Law No. 19,300, which in letter b defines the *´Conservation of the environmental patrimony´*. On this basis, it is further understood -and it was so recognized in the legislative process of the Law- that the *environmental patrimony* is *the set of environmental components existing in a property or real estate*[10]. This understanding, therefore, refers us to the definition of *´environment´* contained in Article 2 of Ley N° 19.300 (1994), which establishes that the *environment* is:

> …el sistema global constituido por elementos naturales y artificiales de naturaleza física, química o biológica, socioculturales y sus interacciones, en permanente modificación por la acción humana o natural y que rige y condiciona la existencia y desarrollo de la vida en sus múltiples manifestaciones;
> […the global system made up of natural and artificial elements of a physical, chemical or biological, socio-cultural nature and their interactions, in permanent modification by human or natural action and which governs and conditions the existence and development of life in its multiple manifestations] (art. 2, ll)

Consequently, the environmental patrimony of a property or real estate must be understood as *the set of environmental components existing in a property, which correspond to natural and artificial elements of a physical, chemical, biological, or socio-cultural nature that govern the existence and development of life in its multiple manifestations*.

[10] Article 2 of the Law uses the verb 'conserve' -and not the corresponding noun- because, in this way it establishes the new *faculty to conserve*.

In other words, from the private law perspective, the environmental patrimony, as an object of the conservation right, is presented as a *whole complex of elements* that includes tangible and intangible assets. The environmental patrimony itself, as a complex whole, transcends the sum of the singular things that compose it. For this reason, it can be understood as a *universality* or *universitas*.

The fundamental Roman law source on this matter corresponds to Pomponio (Digest 41.3.30pr.), who distinguishes between *compound things* that result from the material union between several things (e.g., building, vessel) and *complexes of things* united by the same name (by an ideal bond) -although referring to homogeneous things- (e.g., flock, library). Regarding the latter, the term *universitas* is used, a term that derives from Ulpiano (Digest 7.1.70.3). In the late Middle Ages, ´Glossators´ distinguished between *universitas facti* and *universitas iuris* (Fernandez de Buján, 2014, p.327; Biondi, 2019, p. 110). Unlike the former, the universitas iuris also includes liabilities or obligations and must necessarily be created by law. What we say here refers to ´universalities´ in general, which is particularly applicable to *universitas facti*. According to Biondi (2019), the *universitas*

> …es una reunión no material […] sino ideal de una pluralidad de cosas homogéneas o heterogéneas, de modo que formen una entidad compleja, que transciende de las singulares cosas componentes, sujeta a una única denominación, y a un único régimen jurídico, aún dejando subsistente la individualidad práctica y jurídica de cada una de las cosas componentes. La universitas no es suma de singulares cosas, sino entidad trascendente, que las supera sin excluir que las singulares cosas puedan considerarse separadamente. La esencia jurídica de la universitas está precisamente en la coexistencia de la noción unitaria o, si se quiere, trascendental, con la noción atomística de las singulares cosas que la componen.
> […is not a material set (...) but an ideal one of a plurality of homogeneous or heterogeneous things, so that they form a complex entity, which transcends the singular component things, subject to a single denomination and a single legal regime, but still allowing for the consideration of the practical and legal individuality of each of the component things. The universitas is not the sum of singular things but a transcendent entity that surpasses them without excluding that the singular things can be considered separately. The legal essence of the universitas is precisely in the coexistence of the unitary or, if you like, transcendental notion, with the atomistic notion of the singular things that compose it] (p. 110).

Biondi (2019) adds that

> La noción jurídica de universitas no es fruto de especulaciones ni creación de la ciencia jurídica, sino que está ante todo deducida de la consideración social unitaria de algunos agregados, que en la vida común se consideran como unidad… [para luego sostener] Puesto que un complejo de elementos que tiene un determinado destino, satisface un interés distinto y jurídicamente relevante, se hace necesaria una consideración jurídica

> unitaria, que trascienda de la atomística. Se trata de unificación funcional más que estructural
> [The legal notion of universitas is not the result of speculation or creation of legal science, but is first and foremost deduced from the unitary social consideration of some aggregates, which in common life are considered as a unit... (and adds later) Since a complex of elements that has a certain destination, satisfies a different and legally relevant interest, a unitary legal consideration is necessary, which transcends the atomistic one. It is about functional rather than structural unification]. (p. 111)

Biondi (2019) finally argues that private autonomy determines, explicitly or implicitly, the scope and delimitation of the complex unit that constitutes a universality. Let's say, for our part, that the social practices -or social communication- shall gradually stabilize the unitary understanding of certain complex things, which does not necessarily require express legislative acts. In the case of the conservation right, the definition of Article 2 of the Law comes to refer explicitly to the environmental patrimony as the object on which the faculty to conserve is exercised, and this already implies a unitary treatment and a ´unitary denomination´ (´*uni nomini subiecta,´* Pomponio, in Justiniano, 1968, 41.3.30 pr.) which is also related to how the most diverse actors and social spheres recognize and understand the environmental patrimony, locally, regionally and even globally.

In this case, what allows the complex of elements to be considered a transcendent unit derives from the consideration or value assessment that society makes of the environmental patrimony. This set of complex and interdependent elements even come to form systems or ecosystems and, according to such social value assessment, deserve unitary consideration and treatment. It should be noted that this is consistent with the 'Ecosystem Approach' that is explicitly adopted in Ley N° 19.300 (1994, art. 2, la) and developed within the framework of the Convention on Biological Diversity.

Thus, in private law, the environmental patrimony should be deemed a *universitas facti* that includes corporeal and incorporeal things. For these purposes, the corporeal immovable property could consist of immovable assets ´by adherence´, such as plants and trees (Civil Code, 2000, art. 569), or even movable property, such as animals (Civil Code, 2000, art. 570, final paragraph). Intangible or incorporeal things include the attributes and functions of the environmental patrimony.

All these things must be understood under a unitary conception for the purposes of their conservation -which does not prevent individual things or assets, particularly tangible ones, from continuing to be at the same time the object of the faculties of the ownership right -even if limited by the conservation right. As a universality, the ´environmental

patrimony´ itself must be understood as an *incorporeal thing* -since it can only be understood by intelligence-[11]. And it must be understood as *immovable* since it is inseparable from real estate or immovable property.

All the above clearly shows the importance of understanding the contrast between the traditional and modern visions from a private law perspective. The doctrine has already made certain initial attempts in Peñailillo Arévalo (2019); Salah Abusleme (2017); Tapia Jara (2017), among others. However, the doctrine does not appear to discuss the differentiating elements of this new real right and has not discussed either the "faculty to conserve" or the new "things" that are the object of the right (Ley N°. 20.930, 2016, arts.2 and 3).

The proper understanding of the differentiating elements of this new institution would prevent the unnecessary confusion between the conservation right and other institutions of comparative law (i.e. the conservation easements found in the United States of America). Additionally, this would allow an adequate understanding of the scope of application of this new right, which due to the breadth of the notions of 'conservation' and 'environmental patrimony' as well as the notions of ´attributes´ and ´functions´ of the environmental patrimony, can be extended to the most diverse forms of conservation -beyond the establishment of protected areas- in the most varied territories or contexts.

This should also avoid an understanding of this new real right as a public policy regulatory instrument -in traditional terms- as its underlying rationale is not premised upon *interventionist environmental policy arguments.* In this regard, two forms of justification for the conservation right have been posited: a normative justification founded upon *arguments based on liberties or rights*, which confers upon this new right a robust foundation as a private law institution, and a socio-legal justification based on the post-regulatory rationality of reflexive law (Ubilla, 2016b)[12].

[11] See supra note 9.

[12] Conservation rights are not policy instruments and do not replace biodiversity conservation policies (Vid Infra Note 15). However, under a broader understanding of environmental regulation, the conservation right can be understood as a *fourth-generation post-modern regulatory policy instrument*, a reflexive legal instrument. This is because it is oriented towards making the incorporeal aspects of the environmental patrimony visible, making the emergence of new sustainable social practices more probable (Ubilla 2016a, ch.4 & 5). It is worth noting that the evolution of environmental law in the 20th century can be traced from the first-generation of traditional, interventionist tools that relied on command-and-control mechanisms to a second-generation of economic incentive instruments, and eventually to a third-generation of participatory and consensus mechanisms. There is a new wave of post-modern or post-regulatory instruments emerging, which marks the fourth generation of responsive or reflexive law. Scholars from various socio-legal backgrounds argue that the first three generations have limitations due to incorrect assumptions about the availability and processing capacity of social and ecological knowledge, as well as the linear causality between regulation and social change (Ubilla, 2016, ch. 4). These limitations form the foundation of what Günther Teubner describes as the "regulatory trilemma" or the failure of the law, which has become apparent in a range of environmental law areas, including biodiversity

The analysis of the history of the Law will allow us to understand that Chilean law created a new type of real right, a new institution of private law that innovates concerning a long legal tradition, adding a new *faculty* to the real rights system and changing our understanding of *immovable things* by incorporating the environmental patrimony and the attributes and functions of this patrimony within the horizon of private law.

However, the described contrast can also be approached from the perspective of its broad practical implications, highlighting the relevance of understanding the difference between traditional and modern visions even more clearly.

Thus, from a practical point of view, the contrast is expressed paradigmatically in the fact that whereas *conservation easements* are used only to establish charges on real estate or land to create the so-called protected areas -particularly private ones- ((Uniform preservation easement Act, 1981; Korngold, 1984; Korngold 2010; Brewer, 2003; Morisette, 2001)[13] *conservation rights* can be applied to the most diverse situations, in urban and rural

conservation (Ubilla, 2016a, ch. 5).To face these regulatory failures, legal sociology has proposed several post-regulatory approaches that assume that the direct and linear external control of society through law has reached its limit. These post-regulatory approaches propose the development of 'responsive' models, 'contextual,' and 'reflexive' strategies to deal with social complexity and uncertainty. Among these, the model of reflexive rationality developed by Günther Teubner stands out, which emphasizes the need to advance beyond the *formal rationality* of liberal state law as well as beyond the *material rationality* of welfare state law through the implementation of indirect mechanisms that facilitate communication between law and society (information and interference), to achieve a higher processing capacity of social and ecological complexity. Notwithstanding all the above, the conservation right can also be used to implement various specific public policies, directly by the state or by different public agencies, or indirectly by promoting its use by private entities with a view to achieving public policy objectives. See Ubilla Fuenzalida (2019) and cases at www.centroderechoconservacion.org. An important and serious mistake that derives from understanding the conservation right as an ´easement´, and/or as a ´first generation´ environmental regulation instrument (for the creation of protected areas), is to assume that the conservation standards developed for conservation easements should be directly applied in Chile (such as the standards that have been developed in the United States, that have been adopted by some Chilean private conservation associations). Regarding this, few comments: (One) Only in very limited cases can such standards serve as a ´reference´ -for certain private protected areas en Chile-, but not for many other uses of the conservation right that entail the conservation of the environmental patrimony but not the creation of a protected area; (Two) Even when intending to apply them to ´protected areas´, such standards do not take into account important aspects of Chilean law, such as the Convention on Biological Diversity (to which the U.S.A. is not a signatory); (Three) These standards grant an inadequate function to the so-called "guarantors" or "custodians" who should at most support the implementation of management plans but not become the titleholders of the conservation right. This could even generate ethical concerns because, in contrast to easements -that are legally only a ´burden´ or ´charge´-, the conservation right is a title to hold rights over the environmental patrimony or its attributes and/or functions, all of which are considered immovable property or assets under Chilean law. See also our note 37 below.

[13] The proposal to introduce the 'conservation easements model' contained in the original Bill was not based on a thorough analysis of the origin, weaknesses, and criticisms of this model. In this regard, see Gattuso (2008). Duncan (2015); Meiners and Bruce (2001), Merenlender (2004). Drawing on a socio-legal analysis, we have posited that conventional property rights and conservation easements present a regulatory trilemma (see note 18 and Ubilla Fuenzalida 2016a, ch. 4 & 5). One noteworthy critique pertains to certain key tenets of private law, specifically the inappropriate deployment of easements as a legal instrument for conservation or the establishment of protected zones in the United States. This is because, in accordance with traditional principles of common law, the proper private law institution for these purposes should have been the so-called 'covenants' or 'real covenants ', which are also real restrictions or charges on real estate. So Krasnowiecki and Paul (1961) argued: "The type of interest needed to accomplish open-space preservation is so unlike any easement and so like most

contexts, to preserve the attributes and functions of the environmental patrimony of the most diverse lands or estates, whether they are relevant to community or neighborhood life (green areas, urban gardens, heritage buildings, etc.). In the latter case, it is worth noting that conservation rights can interact with traditional neighborhood law, which has always been closely linked to real rights in *re aliena* -rights on third-party estates- (Justiniano, 1968, 8,5,8,5). See also Amunategui Perelló (2012).

The conservation right can be used for the conservation of the most diverse kinds of real estate related to the most diverse activities, and even with respect to intangible attributes or functions such as landscape, silence, environmental darkness -relevant to astronomical observation-, socio-cultural attributes or functions (for example, specific to indigenous sites), etc. Likewise, the conservation right can also be used for the conservation of the environmental patrimony of productive real estate (agricultural, forestry, viticulture, etc).

But the conservation right also involves a *new type of real right* in a more profound sense because it is a ´reflexive legal form´ that expresses or exemplifies a *new "reflexive" vision of private law* (Ubilla Fuenzalida, 2016a; 2016b). Thus, we have maintained, also in our proposals in the legislative process, that we are in the presence of a new type of property right in a more fundamental sense for the following reasons:

- First, the conservation right involves an understanding of *private interest* that goes beyond the traditional economic sphere by considering perspectives -or aspects of private interest- that derive from other social spheres such as the scientific, moral,

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restrictive covenants that one can expect the courts to treat them as covenants." (p. 194) and Korngold (1984) expressed: "conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements" (p.437). This refers to the great intensity of the possible restrictions that can derive from a conservation easement, which go much further than traditional easements -that do not substantially encumber the entire property-. This type of restriction deserved to be dealt with by means of ´real covenants´ as it happens in the United Kingdom. Korngold insinuates that this was the result of a political-legislative strategy to avoid the limitations that are imposed on ´covenants´, since according to the old adage "covenants are not favorites of the law", the use and duration of covenants would have been restricted (Korngold, 2004, p. 298). This is directly related to something that was also critical in the legislative process in Chile, which was precisely the discussion regarding the possibility of establishing perpetual conservation rights, and which was directly related to the idea that the ´conservation easement model´ proposed by the original Bill implied a serious obstacle to the ´free circulation of wealth´. Establishing a perpetual conservation easement would have contradicted the principle of 'free circulation of wealth' of continental civil law. But it is worth asking why this problem arose if general easements in continental civil law are by nature of indefinite duration. It arose precisely because the "conservation easement" does not properly correspond to an easement in the traditional sense. A review of the Civil Code of Chile (2000, art. 841) makes it possible to note that easements -in their different types- do not involve an effect as intense or significant as the effect that "conservation easements" would have; and, therefore, Chilean legislators considered that, in this case, there was indeed an obstacle to the circulation of wealth, and, for the same reason, they established a maximum duration of 40 years in the draft project that was approved by the lower house or Chamber of Deputies. The structural modifications carried out in the Senate -proposed in Ubilla Fuenzalida (2014; 2015)- were aimed at addressing this matter by adopting the ´modern vision´ of the conservation right.

religious, aesthetic, cultural, etc., insofar as these spheres generate normative expectations related to the conservation of the environment (Ubilla Fuenzalida, 2016b). In this sense, and in other words, it introduces a broad social and environmental vision into property law, which makes it possible -or increases the probabilities of- reconciling the public and the private interests[14].

- Second, and closely related to the first reason, it is the first real right whose *normative core* is related to normative orientations traditionally associated with the heteronomy of the social rather than to the autonomy of the individual (Ubilla Fuenzalida, 2016b). In this regard, it is worth noting that in traditional property rights -including, indeed, the ownership right- such social interests -at most- take on relevance in the *external contours* of legal forms -and through limitations and obligations-, as it happens with the *social function of property* (Ubilla Fuenzalida, 2016a; 2016b).
- Third, because it is the first real right that adequately represents the *affirmative form* of diverse social normative expectations regarding the value of biodiversity (i.e., normative expectations of ecological science, morals, religion, etc.) through an *affirmative legal form* (thus avoiding the distortion or inappropriate translation of such expectations through restrictive legal forms, such as easements or 'real covenants') (Ubilla Fuenzalida, 2016a; 2016b).
- Fourthly, it is a real right that, instead of being oriented to the use, enjoyment, or disposal of assets and to the exploitation of the corresponding resources, it is oriented to their conservation. The conservation right is not an ownership right over the environmental patrimony but rather a right to conserve such patrimony.
- Fifth, it is also a new type of real right since it is the first that should not be characterized by the idea of "exclusion" because the environmental patrimony and the intangible attributes and functions of this patrimony are openly accessible and of a non-rival enjoyment, thereby benefiting the entire community (Ubilla Fuenzalida, 2016a, ch. 9)[15]. In addition to this, it must be said that the conservation right, due to

[14] The legal design of the conservation right was based on the "theory of reflexive legal forms" proposed by this same author. This theory supplements Günther Teubner´s theory of reflexive law and is based on Spencer Brown's theory of forms and Niklas Luhmann's systems theory (Ubilla Fuenzalida, 2016b, ch. 7-8).

[15] Notwithstanding this, public policy reasons may recommend that the conservation of a specific environmental patrimony should fall under the sphere of public or state control. It is interesting to note that, in this case, it is also possible to establish conservation rights under public ownership -held by public agencies-. Additionally, in case that, for constitutional reasons or reasons of public policy, it is considered necessary that specific properties or certain elements of the environmental patrimony be declared as common property - or as "national property for public use" or "fiscal property" as the case may be-, it must still be resolved how these properties will be managed. It should be noted, however, that (i) it is mistaken to consider that the ecosystems or the ecosystem functions will be preserved by the mere non-intervention of human beings. Natural ecological processes, including climate change, desertification, and other local, regional, or global processes, generate a series of contingencies that may impact the sustainability of ecosystems. Therefore, such ecosystem functions require active and affirmative management. It should also be noted that one of the great challenges facing biodiversity sustainability is the generation of ecological knowledge (Aichi Target 19). However, knowledge can only emerge through complex social practices that involve various relevant stakeholders. The mere declaration of common good -which would correspond to a traditional first-generation regulatory strategy - does not appear to be in itself a legal structure that facilitates these social practices; (ii) in terms of regulatory policy, ecosystem functions need to be addressed in a differentiated manner according to the implications that each ecosystem function - and its chain links- may present concerning diverse social or productive practices. For this reason and purpose, diverse legal instruments should be considered, including quality standards, emission standards, management plans, impact assessments, environmental taxes, standards of care, etc. A binary and simplistic approach that resorts to the mere distinction between private property / common property excessively reduces both the

> the various possibilities of its object, can be applied in such a way that in the same real estate, there can be several conservation rights in place -public and/or private- over different attributes or functions of the environmental patrimony, thus facilitating the inclusion and collaboration between different interest groups or stakeholders, including also the public sector[16] [17].

All this relates to the idea that the conservation right brings with it a new vision of private law, a *reflexive socio-legal vision.* This vision understands the relationship between public and private interest as a reflexive continuum (that allows different combinations

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diversity of available instruments and the complexity of the social and ecosystems reality; and finally (iii) regarding a potential proposal to declare all ecosystem functions as common property, it is essential to note that among the ecosystem functions we find the *provision functions* that include the supply of natural resources and, therefore, such a declaration would imply an expropriation or taking of these assets -and of the faculties of enjoyment of the corresponding ownership rights-.

[16] It is in these last two senses that it can be said that the conservation right introduces a new way of understanding and tackling the well-known "tragedia de los comunes" [tragedy of the commons] (Ubilla Fuenzalida, 2016a, pp. 223-224). This tragedy has been traditionally addressed, first, only from the perspective of the tangible or productive aspects of real estate; second, only from the perspective of the use, enjoyment or exploitation of real estate (Hardin, 1968, p.1244; Barzel, 1997, p. 90); third, only under an all-or-nothing analysis of the existence of the ownership right -and not of other potential limited property rights- (Barzel, 1997, p. 90); and fourth, as Ostrom acknowledges, only from the binary perspective of the existence of ownership rights or state regulation -as the only alternatives- (Ostrom, 1990, pp. 13-14; Hardin, 1978, p. 314). Ostrom introduces the importance of agreements and cooperation, but her analysis continues starting from the context of the first two mentioned assumptions. The conservation right brings to the legal world (i) a new affirmative normative structure - which refers to 'conservation' and not to use, enjoyment, or disposition; and (ii) refers to the predominantly intangible aspects of real estate-; and for this reason it brings with it new and innumerable possibilities for cooperation between different stakeholders and social spheres, making possible the emergence of new social practices (Ubilla Fuenzalida, 2016a, p. 224), or institutional changes in the sense proposed by North (1990, p. 64 & 80).

[17] From an economic perspective, it should be noted that the affirmative -and socially reflexive- structure of the conservation right not only reduces the transaction costs of the decision to conserve (Ubilla Fuenzalida, 2003) but also makes it possible to recognize the economic value of the conservation of the environmental patrimony. In this regard, given potential concerns about 'propertization' of the environmental patrimony, it is worth mentioning that the conservation right (i) does not involve a traditional property right (use, enjoyment, and disposition) over the environmental patrimony but a new kind of real right that consists in the faculty to conserve such environmental patrimony; (ii) it is a right referred to the environmental patrimony, and its functions and attributes, which, unlike tangible assets, are openly accessible and generally of non-rival use or enjoyment. That is, this new right preserves and -legally- generates intangible assets that are economically public or common, depending on the case (Mankiw, 2017, p.193); (iii) it can coexist with general biodiversity conservation policy instruments and also enables and facilitates state agencies to hold title of conservation rights over all or part of the environmental patrimony or over certain functions or attributes thereof, in a private estate when public policy advises so; (iv) instead of reifying or 'commoditizing' the environmental patrimony, the conservation right 'de-commoditizes' the spaces because -in addition to existing different perspectives of social observation regarding the corresponding functions and attributes- these functions and attributes are always particular to each territory -unlike the commoditization that traditional property rights tend to generate (including easements) that create fungible assets and that, consequently, are subject to generalized contractual models and standards-; (v) Based on the foregoing, it is argued that in the case of the conservation right, instead of facing a potential colonization or reification by the economic sphere of other spheres of society, we are in a situation in which the other social spheres can expand their rationalities towards the economic sphere, providing it with a new social and ecological sense (Ubilla Fuenzalida, 2016a; Ubilla Fuenzalida, 2016b). Following Honneth's (2008) analysis of the reification processes, we argue that the conservation right, instead of triggering a 'forgetting' of the complex relationships between nature and human beings, makes possible practices of recognition of nature and of the intersubjective relationships of human beings that are part of the ecosystems (Honneth, 1995). In this sense, with Honneth (2008, pp. 9, 58, 75), we also maintain that economic language -which in any case is not the only one that the conservation right accommodates- does not involve in and of itself a necessary reification or alienation of social relationships. For example, models such as those of the "common good economy" are advancing today, presenting new ways of understanding economic relations, not as inherently involving the instrumentalization of human and social relations (Felber, 2012).

between public and private interest) and not as a simple binary relation between opposites (Ubilla Fuenzalida, 2015; 2016a; 2016b).

1.3. The Contrast from the Environmental or Biodiversity Conservation Perspective

From an environmental perspective, the contrast between the traditional and modern visions was also expressed in a contrast of regulatory approaches regarding biodiversity conservation. Briefly stated, on the one hand, the traditional vision focused on classic regulatory policies oriented towards the simple idea of promoting the creation of more protected areas and, on the other hand, the modern vision -as a reflexive law approach- focused on post-regulatory strategies oriented towards the facilitation of sustainable practices in the most diverse areas of social activity.

In the legislative discussion of the conservation right, the traditional vision focused solely on promoting the development of new protected areas -as we will see-, and it is from this point of view that it was understood that this new right was intended to supplement the public policy for biodiversity conservation by facilitating the creation of private protected areas.

For this purpose, the traditional view postulated that it was reasonable to directly apply or replicate an institution of a foreign legal system – and from a different legal tradition-without an analysis of its consistency with respect to the roman-civil tradition and without any reference to the weaknesses, limitations, and problems experienced by conservation easements in the legal system of the United States of America (Ubilla Fuenzalida, 2016a, p. 224).

Traditional regulatory approaches of environmental law and conservation law have been subject to all the limitations of traditional regulatory policies, which have resulted in systematic and repeated regulatory failures[18]. It should be noted that the instruments of this regulatory approach include traditional command and control instruments -prohibitive and

[18] This conclusion can be inferred from the reports disseminated by the governance bodies of the Convention on Biological Diversity and the Framework Convention on Climate Change. These reports document the dire environmental crisis that humanity confronts in the present era. Despite regulatory failures, legal analysis in the areas of legal theory and environmental law has yet to acknowledge them. Instead, traditional interventionist and market-based instruments are still relied upon, which are based on legal theories that do not consider potential social and ecological consequences. This is evident in the lack of socio-legal analysis within environmental regulation and constitutional environmental law. The focus remains on traditional public policy analysis without considering the effects and social consequences of regulations. The traditional approach only considers interventionism and the market, that is, between the traditional material and formal rationalities analyzed by Max Weber, neglecting post-modern approaches like 'reflexive rationality'.

imperative normative forms- and market mechanisms designed by the administrative authority -including tax instruments- among other regulatory mechanisms. That is, it includes first, second, and third-generation instruments.

In contrast, as we have said, the modern vision corresponds to a fourth-generation regulatory approach (See Ubilla Fuenzalida, 2016a, pp. 81-96; Teubner, Farmer and Murphy, 1994; Orts, 1995, p.1227; Gaines, 2003, p. 1). This means that the modern vision focused on a post-regulatory perspective that, based on the theory of complexity, is oriented towards generating reflexive learning processes between law and society, regarding the ecological environment, to increase the probability of generating a broader social change in different spheres of social life (Ubilla Fuenzalida, 2016a). To achieve this, we considered the diverse challenges posed by the Aichi Targets and the Strategic Plan of the Convention on Biological Diversity (CBD). These documents acknowledge a multifaceted scenario and advocate for widespread transformations in societal behaviors across various sectors, including agriculture, forestry, fishing, mining, commerce, consumption, urban life (including green spaces), rural communities, and beyond. Such changes must encompass all social activities that impact or rely on environmental resources, regardless of the type of land or property involved, and not solely focus on areas traditionally designated as protected.

It was from this perspective that the modern vision was presented and promoted in the Senate by the Conservation Law Center of Chile, which, from a socio-legal perspective, argued that the challenges of biodiversity conservation evidenced in the reports of the Convention on Biological Diversity (Ubilla Fuenzalida, 2016a, ch.4-5) appeared to derive from a more complex regulatory trilemma (Gunther Teubner, 1987)[19]. This called for a broader change in social practices, beyond the mere creation of protected areas, since it was confirmed that these areas did not produce broad changes in all the areas of social activity - that impact biodiversity in a widespread and irreversible manner[20].

[19] The notion of the ´regulatory trilemma´ was developed by Gunther Teubner. The first form of the trilemma is the '*indifference problem*' between law and society, expressed in (i) 'legal indifference', or inadequacy of legal instruments to translate social normative expectations; (ii) ´social indifference´, or inability of the social spheres to internalize the normative purposes of the legal system. The second form of the trilemma consists of the *´disintegration of society by law´*, that is, the destruction of the social fabric, for example, in the case of biodiversity law, through forced migrations that imply the relocation of people from their original habitat, which also involves the loss of ecological knowledge of multiple generations of inhabitants (Agrawal & Redford, 2009, p.1-10). The third form of the trilemma consists of the '*disintegration of law by society,*' that is, the instrumentalization or colonization of law by certain discourses or social spheres. We have analyzed how property rights and conservation easements produce or facilitate the three forms of the regulatory trilemma in the context of biodiversity conservation (Ubilla Fuenzalida, 2016a, ch.4-5).

[20] Joseph Sax (2011, p. 9) has referred to the creation of protected areas as a process of '*museification*' as well as a confession of the destructive use of nature and the inability to implement sustainable uses (Sax, 2011, pp.9.).

The modern vision, both from the private and environmental law perspectives, commenced from the understanding that the traditional property rights structures were associated with pre-modern extractive economies, which focused on the tangible aspects of real estate. Thus, the modern vision commenced from the understanding that it was necessary to re-conceive our relationship with real estate by considering the tangible and intangible elements of the environmental patrimony, to modify our diverse social practices - and not only our conservation practices in the strict or traditional sense.

It was under all these considerations that, through the legislative process, the Bill left behind its initial structure based on the traditional vision, undergoing integral and structural changes of form and substance to adopt the modern vision that ultimately prevailed, becoming Ley N°. 20.930 (2016) that created a new affirmative property right: the ´conservation right

2. History of the Law

2.1. Parliamentary Motion and Background of the Bill

The Bill was submitted on April 17, 2008, and originated in a parliamentary motion (Historia de la Ley N° 20.930, 2018, p. 3).

This Bill, in its section II, established the following:

> II. ANTECEDENTES DE LA INSTITUCIÓN Y NECESIDAD DE ESTA FIGURA EN CHILE.
>
> Como se señaló previamente, la institución del derecho real de conservación tiene su origen en el Derecho Comparado, particularmente en los Estados Unidos de América, donde se conoce como "conservation easement". Actualmente está también operando o en vías de implementación en otros países, incluyendo algunos de América Latina.
> En la doctrina chilena se ha definido al Derecho Real de Conservación como aquel 'derecho real que recae sobre un predio y que cede a favor de una persona natural o jurídica, que impone restricciones al ejercicio del dominio sobre el predio, y que eventualmente establece obligaciones de hacer al titular del predio o incluso al titular del derecho real, con el objeto de proteger o conservar, en distintos grados, los recursos naturales existentes en tal predio'
>
> [II. BACKGROUND OF THE INSTITUTION AND NEED FOR THIS INSTITUTION IN CHILE.
>
> As previously noted, the conservation right's institution originates in Comparative Law, particularly in the United States of America, where it is known as "conservation easement" It is currently also operating or in the process of being implemented in other countries, including some in Latin America. In the chilean doctrine, the Conservation Right has been defined as a 'real right that falls on a property and that transfers in favor of a natural or legal person, that imposes restrictions on the exercise of domain over the

> property, and that eventually establishes obligations to make the owner of the property or even the owner of the real right, to protect or conserve, in different degrees, the existing natural resources in said property']. (Historia de la Ley N° 20.930, 2018, p. 5)

This passage -as has been discussed earlier-, refers to two distinct sources or antecedents of the institution: on the one hand, to the ' conservation easements´[21] of the U.S.A. and, on the other, to the academic article that originally proposed the creation of the conservation right (Ubilla Fuenzalida, 2003). Although, the final definition of the conservation right was not yet fully developed in 2003, the cited article contained the seeds of the modern vision -the vision of an affirmative right-. Thus, as we have explained, these two antecedents held opposing views. In the following sections, we will see how these two divergent visions were confronted in the legislative process. This will also allow us to understand why the modern vision prevailed, comprehensively modifying the original Bill in the Second Constitutional Procedure at Senate[22].

It was precisely in the Second Constitutional Procedure at the Senate that a new definition for the conservation right (art. 2) and other necessary ´indications´ to modify the original Bill were proposed (Ubilla Fuenzalida, 2014; 2015). The new definition and other various changes made it possible to overcome numerous difficulties, particularly the one related to the greatest weakness of the draft approved by the Chamber of Deputies, which consisted of a limitation in the duration of the new right, established in a maximum term of 40 years.

The ensuing description of the legislative process shall center on the crucial milestones traversed by the Bill in its transformation from the traditional to the modern vision. The discussion shall primarily be oriented towards the changes that were made to the definition of the 'conservation right', as per art. 2 of the Bill (2008). As is commonly understood in the civil law tradition, a legal definition serves as the cornerstone for determining the central normative tenets of an institution and thereby forms the basis for interpreting all the provisions of the corresponding legislation.

First, it's worth noting how the Bill underwent a dramatic transformation during the legislative process. The initial parliamentary motion, which contained 23 articles (Historia de la Ley N° 20.930, 2018, p.8), underwent substantial changes, resulting in the final Law, which

[21]See supra note 13.
[22]See the comments in supra notes 3, 4 and 13. It should be noted that the Bill used the term ´conservation right´ as originally proposed in the article of 2003 (Ubilla Fuenzalida, 2003), even though the content of the Bill was that of a ´conservation easement´.

only included 13 articles. Interestingly, none of the final articles were present in the original Bill, and only one was included in the draft approved by the Chamber of Deputies (Article 1).

The original version of Article 2 was formulated as follows:

> El derecho real de conservación consiste en una limitación al dominio de un inmueble, que se constituye voluntariamente con la finalidad de contribuir a conservar el ambiente, en beneficio de la comunidad en su conjunto, cuyo ejercicio y protección quedan especialmente entregados a una persona jurídica determinada en calidad de titular, y en virtud de la cual se imponen ciertos gravámenes al bien raíz afectado.
> [The conservation right consists of a limitation to the right of ownership over a property, which is voluntarily established to contribute to preserve the environment, for the benefit of the community as a whole, whose exercise and protection are specially delivered to a specific legal entity as title holder, and by which certain burdens are imposed on the encumbered real estate]. (Historia de la Ley N° 20.930, 2018, p. 8)

The remaining provisions of the Bill above proposed a regulatory framework of a hybrid nature, amalgamating tenets of both private and public law. This included, but was not limited to, the following provisions:

1. A restriction regarding titleholders or ´authorized entities,´ that is, the type of entities or types of entities that would be recognized as potential title holders of the conservation right (i.e., public agencies, or foundations and non-for-profit corporations with an exclusive environmental purpose) (Historia de la Ley N° 20.930, 2018, art. 5);
2. A registry of authorized entities (Historia de la Ley N° 20.930, 2018, art. 6);
3. A list of ´charges´ entailed in the conservation right (Historia de la Ley N° 20.930, 2018, art. 7);
4. The need for authorization from the owner for the transfer of the right (Historia de la Ley N° 20.930, 2018, art. 13);
5. A ´prohibition of self-contracting´ (Historia de la Ley N° 20.930, 2018, art. 14);
6. A ´public legal action´ that allowed requesting the change of the owner or the termination of the right (Historia de la Ley N° 20.930, 2018, art. 15);
7. A prohibition to establish the right between related parties, among several other restrictive regulations.
8. A norm for the "penalization of fraud" (Historia de la Ley N° 20.930, 2018, art. 18);
9. Regulation for the transfer of rights to the Ministry of National Assets in case of dissolution or extinction of the authorized entity (Historia de la Ley N° 20.930, 2018, art. 19);
10. Regulation of the "termination of the legal existence of the parties" (Historia de la Ley N° 20.930, 2018, art. 21);
11. A norm to ´apply the regime of wild protected areas´ (Historia de la Ley N° 20.930, 2018, art. 22).

2.2. The First Constitutional Procedure

The Natural Resources Commission was the first to issue a report on the Bill (Historia de la Ley N° 20.930, 2018, p. 18). During the commission´s sessions, numerous public and private entities were involved, including ministerial representatives, representatives from

conservation organizations from Chile and the United States of America, and attorneys to these conservation entities.

Among various modifications, this commission approved a new text for Article 2 of the Bill establishing the following:

> El derecho real de conservación es aquel que se constituye de manera voluntaria por el propietario de un inmueble, en virtud del cual se establecen ciertos gravámenes en beneficio de la conservación ambiental, y cuyo ejercicio queda especialmente entregado a una persona jurídica determinada.
> Se denomina inmueble o bien raíz gravado a aquel sobre el cual recae el derecho real de conservación; y titular, a la persona jurídica distinta del dueño a la cual queda especialmente entregado el ejercicio del derecho.
> [The conservation right is constituted voluntarily by the owner of a property, by which certain charges are established for the benefit of environmental conservation, and whose exercise is specially granted to a specific legal person.
> The encumbered property is the one on which the conservation right is established, and the titleholder is the legal person other than the owner to whom the right is specially granted]. (Historia de la Ley N° 20.930, 2018, p. 34)

The new drafting placed the notion of "charge" or "burden" [23] at the center of the definition, and it was made explicit that this real right was a charge *on* real estate. In addition, it added that the holder of the right had to be a legal entity, and the original Article 5 only authorized certain legal entities to be such holders.

A second report was issued by the Constitutional Commission (Historia de la Ley N° 20.930, 2018, p. 60). This report highlights the participation of several public and private entities, including the General Secretary of the Presidency, the general coordinator of the National System of Protected Areas, the Institute of Ecology and Biodiversity of the University of Chile, a representative of Parks for Chile, the Head of the Department of Protected Areas of the Ministry of Environment, representatives of the Ministry of Mining, representative of the Ministry of Energy, representative of the NGO Así Conserva Chile, representative of the NGO The Nature Conservancy, independent lawyers and the professor of the Faculty of Law of the University of Concepción, Mr. Daniel Peñailillo.

Almost all the statements of the mentioned representatives referred to the need to legislate on the matter to facilitate the development of new private protected areas. In this context, there was repeated reference to the ´antecedents of the Bill,´ which included the environmental easements of the United States of America and the national doctrine (Ubilla Fuenzalida, 2003).

[23]Regarding the notion of ´charge´ or ´burden,´ see supra note 3.

On the other hand, from the perspective of private law, Professor Daniel Peñailillo made the following statement:

> … que el proyecto ensamblaba armónicamente con la generalidad de los conceptos e instituciones de los derechos reales del Libro II del Código Civil y con los artículos 5°, 6°, 7° y 19 N° 24 de la Constitución; no colisionaba con ninguna institución del ordenamiento jurídico propietario nacional y concretaba la proclama genérica del Estado de proteger el medio ambiente.
> […]
> Ante algunas consultas, se mostró partidario de dejar claramente establecido que solamente pueden ser titulares de este derecho personas jurídicas dedicadas a la protección del ambiente, finalidad que debe figurar en su estatuto
> [… that the draft is consistent with the general concepts and institutions of property rights found in Book II of the Civil Code and with articles 5, 6, 7 and 19 No. 24 of the Constitution; it does not contradict any institution of the national property rights system and implements the general principle that the State shall protect the environment.
> […]
> In response to some queries, he was in favor of establishing clearly that only legal persons dedicated to protecting the environment can be holders of this right. This purpose must appear in their by-laws...] (Historia de la Ley N° 20.930, 2018, p. 64)

Regarding Article 2 of the Bill, the Constitutional Commission proposed replacing the previous version for the following one:

> … definiciones. El derecho real de conservación es el que se constituye de manera voluntaria por el propietario de un inmueble sobre el mismo, en virtud del cual se establece uno o más de los gravámenes señalados en el artículo 7°, en beneficio de la conservación del patrimonio ambiental de acuerdo a la normativa vigente, y cuyo ejercicio queda especialmente entregado a una persona jurídica determinada.
> [… definitions. The conservation right is constituted voluntarily by the owner of a property, by which one or more of the charges indicated in Article 7 are established for the benefit of the conservation of the environmental patrimony, in accordance with applicable regulations, and whose exercise is specially granted to a specific legal entity] (Historia de la Ley N° 20.930, 2018, p. 78)

The third legislative report in the Chamber of Deputies was issued by the Finance Commission (Historia de la Ley N° 20.930, 2018, p. 126). This report discussed the incorporation of a special registry that would take record of all the legal entities authorized to become holders of the conservation right (the ´authorized entities´). To this end, it was proposed that Article 5 of the draft would establish the following:: "…las organizaciones interesadas en ser titulares de un derecho real de conservación deberían solicitar su incorporación al Registro que, para estos efectos, llevará el Ministerio del Medio Ambiente" [... organizations interested in being holders of a conservation right should request their

incorporation into the Registry that shall be kept by the Ministry of the Environment] (Historia de la Ley N° 20.930, 2018, p. 127)[24].

The fourth report, corresponding to the second legislative report of the Natural Resources Commission (Historia de la Ley N° 20.930, 2018, p. 142), proposed modifications to various articles of the draft commencing with the definition of article 2, which, in any case, maintained the original conception centered on the notion of charge or burden:

> El derecho real de conservación es el que se constituye de manera voluntaria por el propietario de un inmueble sobre el mismo, en virtud del cual se establece uno o más de los gravámenes señalados en el artículo 7°, en beneficio de la conservación del patrimonio ambiental de acuerdo a la normativa vigente, y cuyo ejercicio queda especialmente entregado a una persona jurídica determinada.
> [The conservation right is constituted voluntarily by the owner of a property, by which one or more of the charges indicated in article 7 are established, for the benefit of the conservation of environmental patrimony. according to current regulations, and whose exercise is specially granted to a specific legal entity]. (Historia de la Ley N° 20.930, 2018, p. 144)

However, this second report also introduced a significant modification to the draft by establishing a maximum duration of 40 years for the conservation right, eliminating the possibility of an ´indefinite duration´. During the legislative sessions, it was discussed that this modification was a direct consequence of the legal definition provided in Article 2, that stated that the establishment of "one or more charges" was essential to this new right. This, in other words, was the consequence of a definition that characterized this new right as an *easement* following the United States´ legal tradition. It was in this regard that the report indicated the following: "Además […] se reemplaza el plazo de 20 años por un mínimo de 15 y un máximo de 40; el plazo para inscribir el derecho es de sesenta días corridos…" [Furthermore (…) the term of 20 years is replaced by a minimum of 15 and a maximum of 40; The term to register the right is sixty calendar days...] (Historia de la Ley N° 20.930, 2018, p. 143).

Therefore, number 5 of Article 8, at that stage, established the following as one of the mentions of the contract: "El derecho real de conservación durará como mínimo quince años y como máximo cuarenta años…" [The conservation right will last for a minimum of fifteen years and a maximum of forty years...] (Historia de la Ley N° 20.930, 2018, p.149).

[24] As we later argued, this real right was being confused with the institution of "private protected areas". Such areas should be regulated by separate legislation, establishing special administrative and tax regimes.

This was a significant setback for the conservation organizations promoting the conservation easement model. This was due to the traditional view that centered the institution on the notion of ´charge´ or ´burden´. This view resulted in it being understood as a legal institution that *obstructed or hindered the circulation of wealth.* As a result, it was subject to the principle outlined in the Civil Code of Chile (2000), and explicitly in the legislative message, which limited any restrictions on the right of ownership, because they would: "…embarazan la circulación […] de los bienes" [...hinder the circulation (…) of wealth] (Civil Code, 2000, Message, p .6).

Based on this draft, the First Constitutional Procedure at the Chamber of Deputies was completed, and it was reported that the Bill had been approved through Official Letter No. 10321 on August 13, 2012 (Historia de la Ley N° 20.930, 2018, p. 169).

2.3. The Second Constitutional Procedure

The draft that resulted from the First Constitutional Procedure at the Chamber of Deputies had 16 articles. However, in the Second Constitutional Procedure at the Senate, all 16 articles except Article 1 were eliminated or replaced. In summary, four articles were eliminated, all the rest were replaced or substantially modified, and a new article 13 was added.

During the Second Legislative Procedure, a number of articles were eliminated, replaced or substantially modified. Article 2, which defined the conservation right, was completely replaced. Article 3, which outlined the characteristics of this right, was also fully replaced. Article 4, which pertained to the holders of this right, was completely replaced as well. Article 5, which referred to the "registry" for holders of the real conservation rights, was eliminated. Article 6, which previously pertained to the "constitutive contract," was fully modified and became Article 5 due to the elimination of the original Article 5. Articles 7 and 8, which related to the "mentions of the contract" and "registration," were also completely modified. Article 9, which referred to the transfer of the right, was fully replaced, eliminating the need for authorizations. Article 10, originally Article 14, which dealt with "modifications," was fully replaced. Article 12, which pertained to "conflicts of interest," was eliminated. Article 13, which referred to the "request for owner replacement," was also eliminated. Article 15, which related to the "priority of credits," was fully replaced and became Article 11 of the Law. Article 16, which dealt with the "termination of the real right of conservation," was fully replaced and became Article 12 of the Law. Finally, a new article, Article 13, was added to the Law. This article pertained to the dispute resolution procedure.

In the end, the Senate drafted 12 out of the final 13 articles of the Law. These articles did not include any of the provisions of the original Bill, and only one provision from the draft approved by the Chamber of Deputies. The provision was Article 1 on "Applicable Legislation".

In the Second Constitutional Process at the Senate, the Environment Commission issued the first report (Historia de la Ley N° 20.930, 2018, p.174). It was at this commission´s sessions that the modern vision of an affirmative real right was introduced.

The commission's sessions started with presentations from the Ministry of Environment, where the Minister Mrs. María Ignacia Benitez, emphasized the challenges in achieving the goals of the Convention on Biological Diversity in Chile (Historia de la Ley N° 20.930, 2018, p. 190). She also argued that:

> … constituye un instrumento coadyuvante de la política pública en la conservación del patrimonio ambiental, por ello, aseveró, el Ministerio del Medio Ambiente considera la iniciativa como una contribución para la gestión y financiamiento de proyectos de conservación privados.
> [… constitutes an instrument that contributes to the public policy related to the conservation of the environmental patrimony, for which reason, she asserted, the Ministry of the Environment considers the legal initiative as a contribution to the management and financing of private conservation projects]. (Historia de la Ley N° 20.930, 2018, p. 184)

At this stage of the discussion, Senator Antonio Horvath stated, among other things, the following:

> …recordó las distintas ópticas de la conservación, valorando el aporte ecológico y ambiental, pero sin desconocer la capacidad económica de generar riqueza, como puede ser la construcción de infraestructura turística en un sector aledaño a un sitio protegido.
> […] instó por la debida armonización de los intereses productivos y la conservación del patrimonio ambiental, evitando posiciones inconciliables que impidan el desarrollo de un área de la sociedad en desmedro de otra.
> […he recalled the different points of view regarding conservation, valuing the ecological and environmental contribution, but without ignoring the economic capacity to generate wealth, such as the construction of tourist infrastructure in a sector adjacent to a protected site.
> (…) urged a due harmonization of the conservation of environmental patrimony with productive interests, avoiding irreconcilable positions that prevent the development of one sector of social activity to the detriment of another]. (Historia de la Ley N° 20.930, 2018, p. 184)

Subsequently, in the aforementioned First Report of the Environment Commission, our participation was documented as follows:

> El Director del Centro de Derecho de Conservación, señor Jaime Ubilla, explicó, por su parte, que diversos informes emanados de la Convención de Biodiversidad (CBD) revelan que las metas establecidas para el [Plan Estratégico del] año 2010 no fueron cumplidas, principalmente, por dificultades en la implementación a nivel local, ya que no ha habido capacidad de generar procesos ciudadanos de iniciativas de conservación privada.
> […] surge la necesidad de establecer el derecho real de conservación, cuyos pilares básicos permiten dotar de eficiencia económica al sistema, pues para lograr la conservación de un ecosistema puntual, no es necesario adquirir todos los atributos del derecho de propiedad, reduciendo los costes de transacción.
> En segundo término, acotó, facilita la integración de diversos intereses porque sobre un mismo predio pueden coexistir diversos derechos reales de conservación, por ejemplo, graficó, la asociación de hoteleros de una zona lacustre puede interesarse en proteger el paisaje de predios colindantes pertenecientes a terceros […]. A su vez, […] una asociación de acuicultores aguas abajo que se beneficia por la capacidad de la cuenca [puede estar interesada en su conservación…] y una universidad podría pretender el acceso a la bio-prospección del mismo ecosistema […].
> De esta forma, aseguró, el sistema propuesto en el presente proyecto de ley puede generar reflexividad social y creación de conocimiento, es decir, que todos los integrantes de la comunidad co-participen en un ecosistema, en el ejemplo: los hoteleros, los acuicultores y la universidad, […] cofinanciando la conservación y acordando un plan de manejo del área protegida, sin privar al titular original del derecho de propiedad del dominio del bien raíz
> [The Director of the Conservation Law Center, Mr. Jaime Ubilla, explained that various reports issued by the Convention on Biological Diversity (CBD) reveal that the goals established for the [Strategic Plan of] 2010 were not met, mainly, due to difficulties in implementation at the local level, since there has been no capacity to generate social processes of private conservation initiatives.
> [...] it is necessary to establish the conservation right, whose basic pillars make it possible to provide the conservation system with economic efficiency, since by it, in order to achieve the conservation of a specific site, it is not necessary to acquire the ownership right of the corresponding real estate, and this involves a reduction of transaction costs of the decision to conserve.
> Secondly, he noted, it facilitates the integration of various interests because various conservation rights can coexist on the same real estate, in a way that, for instance, the hoteliers' association of a lake area may be interested in protecting the landscape of neighboring properties belonging to third parties. […]. In turn, […] a downstream fish farmers association that benefits from the basin's capacity may be interested in its conservation […and] a university could be interested in the bioprospecting of the corresponding ecosystem […].
> In this way, he assured, the system proposed in this bill can generate knowledge creation and social reflexivity, that is, that all members of the community co-participate in an ecosystem, as in the example: hoteliers, fish farmers and the university, […] co-financing the conservation and agreeing on a management plan for the protected area, without depriving the original owner of its ownership right on the real estate]. (Historia de la Ley N° 20.930, 2018, p. 185)

Subsequently, and on this same occasion, the following statements were documented laying the foundations for the subsequent adoption of the new definition (Article 2) to be proposed by the Conservation Law Center:

> El Director del Centro de Derecho de Conservación […], a su turno, compartió la inquietud de la Ministra del Medio Ambiente respecto a […] una modificación que habilite a las partes para acordar un derecho real de conservación de carácter indefinido […]
> porque a diferencia de los derechos reales [de servidumbre] establecidos en el Código Civil, el derecho real de conservación no tendría un carácter de gravamen, sino más bien, sería concebido como un [derecho afirmativo o] activo […] capaz de crear riqueza. En consecuencia, afirmó, no limitaría la circulación de los bienes, principio que inspiró el espíritu del Código Civil de limitar temporalmente los gravámenes, sino por el contrario, la promovería, justificando la capacidad de las partes para acordar un derecho temporalmente indefinido, sin perjuicio de gozar de un mecanismo de terminación anticipada de contrato
> [The Director of the Conservation Law Center (...), in turn, shared the concern of the Minister of the Environment regarding (...) a modification that enables the parties to agree on a conservation right of an indefinite duration (...)
> because unlike the real rights [of easement] established in the Civil Code, the conservation right would not have the nature of a ´charge´, but rather, it would be conceived as an [affirmative right] (…) capable of creating wealth. Consequently, he stated, it would not limit the circulation of wealth, a principle that inspired the spirit of the Civil Code to restrict the duration of charges, but on the contrary, it would promote it, justifying the ability of the parties to agree on conservation rights of indefinite duration, without prejudice of having in place early contract termination mechanisms] (Historia de la Ley N° 20.930, 2018, p. 187)

Asimismo, se dejó constancia de lo que sostuvimos respecto a la necesidad de modificar el enfoque y la mirada legislativa para esta nueva institución:

> … que la proposición del presente proyecto de ley se enmarca en un contexto internacional liderado, principalmente, por la Convención sobre la Diversidad Biológica (CDB), instrumento internacional de amplio consenso mundial.
> […]
> No obstante, alegó, a su juicio, el Plan Estratégico 2011-2020 [de la Convención de Diversidad Biológica] […] insiste en perfeccionar los mecanismos de implementación de la Convención, sin entender la necesidad de elaborar una nueva estrategia de carácter integral, que considere a los distintos sectores de la comunidad en torno a la conservación de la biodiversidad.
> Lamentablemente, añadió, a nivel global el Derecho ha sido incapaz de abordar la anterior problemática, porque si bien la Convención y las leyes a nivel nacional se han propuesto lograr tales objetivos, finalmente, no se alcanzan, evidenciando la existencia de una brecha entre marco normativo,[los] esfuerzos políticos y [la] realidad social, [el denominado] fracaso del derecho regulatorio que ha dado origen a nuevos modelos denominados post-regulatorios.
> A pesar de la riqueza dogmática de la Convención, precisó, cuando desciende a los sistemas normativos tradicionales de los países contratantes, específicamente, en materia de conservación in situ, aterriza en uno de los instrumentos más conservadores y rígidos que existen, el derecho de propiedad, entendido en su concepción tradicional, como un derecho absoluto, exclusivo y excluyente.
> Tal mecanismo, detalló, genera una estrategia binaria entre el dueño y los terceros no poseedores, surgiendo una de serie de problemas de difícil solución. Autores como

Elinor Ostrom, indicó, han intentado buscar una explicación proponiendo un sistema de gobernanza de los bienes comunes.
[…]
En un breve análisis económico del derecho real de conservación, aseveró, se puede apreciar un comportamiento más eficiente de la institución propuesta en la presente iniciativa legal, que el uso del concepto del derecho de propiedad y otros derechos reales tradicionales [i.e. servidumbres].
Crear un derecho específico, sostuvo, capaz de capturar intangibles, y a su vez, [capaz de] habilitar sobre el mismo espacio la existencia de distintos titulares que interactúan y financian [la conservación] del predio, le permite al propietario mantener el dominio sobre el inmueble, reduciendo los costos de transacción y generando financiamiento desde los diversos ámbitos beneficiados por los servicios ecosistémicos del lugar (sectores productivos, de investigación, conservación, turismo, etc.).
[…] aunque la economía parte del supuesto equivocado de existencia de información, el análisis sociológico, en cambio, aborda estos problemas complejos desde un ámbito multidimensional que exige el diseño de un derecho flexible […]. Para crear tal flexibilidad, continuó, era necesario alinear el lenguaje económico con los discursos sociales provenientes del área turística, ecológica o agrícola, donde se [observa o] refleja el derecho [sobre el patrimonio ambiental] como [algo valioso] […] y no como un gravamen, liberándolo [así] de la limitación temporal del Código Civil porque [a través de él] no se impide la circulación de la riqueza, sino por el contrario, se crea [y facilita].
[…] el derecho real de conservación motiva la cooperación e interacción de distintos sujetos en un mismo espacio territorial […], posibilitando la comunicación del conocimiento y la creación de nuevas posibilidades de uso sustentable […] cooperación que permite el financiar la conservación y no sólo extraer recursos naturales [… that the proposal of this bill is framed in an international context led, mainly, by the Convention on Biological Diversity (CBD), an international legal instrument with a broad global consensus.
[…]
However, he alleged, in his opinion, the 2011-2020 Strategic Plan [of the CBD] (…) insists on perfecting the mechanisms for implementing the Convention, without understanding the need to develop a new comprehensive strategy that considers the different sectors of the community around the conservation of biodiversity.
Unfortunately, he added, at a global level the legal system has been unable to address the aforementioned problem, because although the Convention and the laws at the national level have proposed to achieve such objectives, in the end, they are not achieved, evidencing the gap between the normative framework, [the] political efforts and [the] social reality, [the so-called] failure of regulatory law that has given rise to new models called post-regulatory.
Despite the dogmatic richness of the Convention, he explained, when it is implemented in the traditional regulatory systems of the contracting countries, specifically, in terms of in-situ conservation, it lands in one of the most conservative and rigid instruments that exist, the right of ownership, understood in its traditional conception, as an absolute, exclusive and excluding right.
Such a mechanism, he explained, generates a binary strategy between the owner and the non-possessing third parties, giving rise to a series of problems that are difficult to solve. Authors such as Elinor Ostrom, he indicated, have tried to tackle this challenge by proposing a system of governance of the commons.
(…)

> In a brief economic analysis of the conservation right, he asserted, a more efficient performance of the institution proposed can be appreciated, than the use of the ownership right and other traditional real rights [i.e. easements].
> Creating a specific right, he maintained, capable of capturing intangibles, and in turn, [capable of] enabling the existence of different titleholders who interact and finance [the conservation] of the property over the same space, allows the owner to maintain control over the real estate, reducing transaction costs and generating financing from the various areas benefited by the ecosystem services of the site (productive sectors, research, conservation, tourism, etc.).
> (...) although economics starts from the wrong assumption of the existence of information, sociological analysis, on the other hand, addresses these complex problems from a multidimensional perspective that requires the design of a flexible law (...). To create such flexibility, he continued, it was necessary to align the economic language with the social discourses coming from the tourist, ecological or agricultural area, where the right [over environmental patrimony] is [observed or] reflected as [something valuable] (...) and not as a ´charge´ or restriction, thereby freeing it from the duration restriction of the Civil Code because [through it] the circulation of wealth is not prevented, but rather, it is created [and facilitated].
> (...) the conservation right motivates the cooperation and interaction of different stakeholders in the same territorial space (...), enabling the communication of knowledge and the creation of new possibilities for sustainable use (...) cooperation that allows for the financing of conservation and not just for the extraction of natural resources]. (Historia de la Ley N° 20.930, 2018, pp. 187-189)

Next, the Director of Así Conserva Chile AG, Mr. Diego Urrejola, made a presentation reviewing the state of progress of the conservation initiatives within his association and stressed the importance of promoting sustainable projects, "…en conjunto con distintas personas naturales y/o jurídicas interesadas en conservación de la biodiversidad, desarrollo económico e integración de la comunidad" [...in conjunction with different natural and/or legal persons interested in biodiversity conservation, economic development, and community integration. (Historia de la Ley N° 20.930, 2018, p. 189)

Subsequently, on May 7, 2014, in Session 15 of the Environment and National Assets Commission, the Bill was discussed and submitted to a general vote.

On that occasion, the Secretary-General, Mr. Labbe, indicated the following:

> El objetivo de la iniciativa es fomentar y desarrollar la participación del sector privado en la conservación y la protección ambiental, estableciendo el derecho real de conservación […] destinado a preservar el medio ambiente mediante limitaciones o gravámenes al dominio del bien raíz afectado
> [The purpose of the legal initiative is to promote and develop the participation of the private sector in conservation and environmental protection, establishing the conservation right (...) aimed at preserving the environment through limitations or charges on the ownership of the affected real estate]. (Historia de la Ley N° 20.930, 2018, p. 197)

As can be seen, the constant emphasis throughout the legislative process was on the promotion of private protected areas. Given this, the Conservation Law Center emphasized that beyond private conservation -related to the creation of private protected areas-, it was necessary to create a legal instrument that would be applicable to social activities of different kinds in order to manage the environmental patrimony, and which would also be applicable by the State to implement public initiatives of various kinds, without the limitations of traditional legal strategies.

Among the various statements that took place in this session, one of the most comprehensive ones was that of Senator Carlos Montes, who summarized the foundations of the initiative as it was originally conceived in the Chamber of Deputies, stating, among other things, the following:

> Los recursos estatales para los desafíos de conservación ambiental son limitados. Existen, además, áreas protegidas privadas que se han ido generando y consolidando en forma creciente. Es factible y deseable, por tanto, alentar la iniciativa privada en la materia a través de la creación de nuevos instrumentos que la fomenten, estimulen y faciliten.
> [State resources for environmental conservation are limited. There are also private protected areas that have been increasingly created and consolidated. It is feasible and desirable, therefore, to encourage private initiative on the matter through the creation of new instruments that promote, stimulate, and facilitate it]. (Historia de la Ley N° 20.930, 2018, p. 201)

It should also be noted that on that occasion, in Session 15 of the Environment and National Assets Commission of the Senate, on May 7, 2014, the modern vision introduced by the Conservation Law Center was cited on two occasions, both by Senator Horvath (History of Law No. 20.930, 2018, pp.199-200) and by Senator Navarro (History of Law No. 20.930, 2018, pp. 207-209).

The draft was then approved, and June 9, 2014 was set as the deadline for the submission of ´indications´ to the draft (draft change proposals). Within this period for the presentation of indications, the Conservation Law Center presented its proposal for indications to Senators Horvath and Urresti (this proposal was embodied in Ubilla Fuenzalida, 2014)

Later, in the Second Report of the Constitutional Commission, dated November 19, 2015, various statements were documented, from the Ministry of the Environment, the Third Environmental Court of Valdivia, academics from the Catholic University of Chile, the Conservation Law Center, the National Library of the Congress, and from various non-for-profit organizations. In most of these statements, it was possible to notice a common

argument consisting in the understanding that the conservation right was simply an instrument for the creation of private protected areas[25].

In this Second Report of the Constitutional Commission, the modification proposals presented by Senators Urresti and Horvath were documented, and both senators presented the same text that corresponded to the proposal of the Conservation Law Center (Ubilla Fuenzalida, 2014). As a result, both Senators proposed a new drafting of Article 2 as follows:

> Artículo 2°.- Definiciones. El derecho real de conservación es el que consiste en la facultad de conservar el patrimonio ambiental de un predio o de ciertos atributos o funciones de tal patrimonio ambiental, y que se constituye de manera voluntaria por el propietario, en beneficio de una persona jurídica determinada
> [Article 2.- Definitions. The conservation right consists in the faculty to conserve the environmental patrimony of a real estate or of certain attributes or functions of such environmental patrimony, which is established voluntarily by the owner, for the benefit of a determined legal entity] (Historia de la Ley N° 20.930, 2018, pp. 220 & 268; Ubilla Fuenzalida, 2014, p. 2)

Then, our subsequent statement was documented as follows:

> … que más allá de cómo se estructure esta definición, parece esencial que se haga referencia a la facultad de conservar, porque todos los derechos reales [afirmativos] se definen en torno a facultades. Agregó que la facultad de conservar versa [se ejercerá] sobre distintas funciones que tienen los ecosistemas, las que permitirán que sobre un mismo predio puedan convivir diversos derechos reales de conservación.
> [… that regardless of how this definition is structured, it seems essential that reference be made to the faculty to conserve, because all [affirmative] real rights are defined around ´faculties´. It added that the faculty to conserve [will be exercised] on different functions that ecosystems have, which will allow different conservation rights to coexist on the same property] (Historia de la Ley N° 20.930, 2018, p. 270)

Likewise, we stated that the conservation right "…no surge como una necesidad de transplantar a nuestro medio una institución Norteamericana, sino que emana de la tradición civilista y se orienta a ser concebido como un derecho real [afirmativo] activo…" [...does not arise as a need to transplant a North American institution to our environment but emanates from the civil law tradition and is oriented to be conceived as an active (affirmative) real right...] (Historia de la Ley N° 20.930, 2018, p. 240).

Regarding the ´indications´ to Article 2, Senator Larraín, adopting the proposed definition, suggested:

> … dividir la definición en dos partes. La primera parte debería decir: 'El derecho de conservación es un derecho real que consiste en la facultad de conservar el patrimonio

[25] This was also the focus of Mr. Francisco Solis, that provided information and statistics on private conservation initiatives in Chile (Historia de la Ley N° 20.930, 2018, p. 228).

> ambiental de un predio o de ciertos atributos de éste'. Y la segunda, 'Este derecho se constituye voluntariamente por el propietario del predio en beneficio de una persona jurídica determinada'
> [...split the definition into two parts. The first part should read: 'The right of conservation is a real right that consists in the faculty to conserve the environmental patrimony of a real estate or of certain attributes of it.' And the second, 'This right is constituted voluntarily by the owner of the property for the benefit of a specific legal person.'] (Historia de la Ley N° 20.930, 2018, p. 270)

In short, the commission approved the new wording of Article 2 based on the indications presented by Senators Urresti and Horvath. This new wording of the definition of the conservation right, became the final one of Ley N°. 20.930, with a minor adjustment related to the *holder* of the right that was also proposed by the Conservation Law Center (Historia de la Ley N° 20.930, 2018, p. 302). In the same way, our proposal submitted concerning Article 3, paragraph third, was approved as follows: "Para los efectos de la presente ley, los atributos o funciones del patrimonio ambiental del predio se considerarán inmuebles" [For the purposes of this law, the attributes or functions of the environmental patrimony of the property will be considered immovable property] (Historia de la Ley N° 20.930, 2018, p. 303).

Subsequently, the other indications to all the articles of the draft Law were reviewed. For reasons of space, we will only refer to the indications to Article 4 relating to the titleholders of the conservation right, and to number 5 of Article 8 relating to the duration of the conservation right. In this regard, the following wording was proposed: "Artículo 4°.- Titular. Toda persona podrá ser titular del derecho real de conservación" [Article 4.- Holder. Any person may be the titleholder of the conservation right] (Historia de la Ley N° 20.930, 2018, p. 277).

In relation to this point, at the commission, we offered and committed to the presentation of a report on the matter: "…Anunció que presentaría un documento en el que se explicarán sistemáticamente las ventajas que ofrece esta alternativa…" […He announced that he would present a document in which the advantages offered by this alternative will be systematically explained...] (Historia de la Ley N° 20.930, 2018, p. 277)[26].

The document thus offered was delivered to Senator Urresti (Historia de la Ley N° 20.930, 2018, p. 278; document embodied in Ubilla Fuenzalida, 2015), and it was also fully added to the Second Report of the Constitutional Commission. Among the reasons or

[26] Regarding the point, the lawyer from the Ministry of the Environment, Ms. Lorna Puschel, observed that the limitation of the titleholders ensured compliance with the purpose of the institution, otherwise any incentive that may be developed in the future by the State would be associated with additional requirements.

justifications included in this report for expanding the titleholder category, we find the following: (1) it involves a normative design consistent with the property rights system, in which traditional property rights -which serve precisely the exploitation of natural resources- do not have such a limitation for their titleholder; (2) that the notion of "faculty to conserve" is broad and goes beyond the notion of In-Situ Conservation of Biodiversity and can be widely applied to urban or rural sites, and to all types of sustainable activities; (3) that it is an institution widely consistent with private and public interests, where in those purely private spheres (i.e. non-priority sites, projects for which the State does not grant subsidies or fiscal benefits), it is not justified to impose limitations under the rationality of public law; (4) it is a separate institution from private protected areas; (5) it involves a design consistent with individual liberties -avoiding legal monopolies of conservation organizations-; (6) efficient regulatory design reducing the transaction costs of the decision to conserve at all levels, also in poor municipalities with fewer green areas; (7) regulatory design that enables its use at the urban level (squares, parks or recreational areas, etc.); (8) facilitates a broad use for other public policies; (9) promotes its application to diverse sustainable social practices; (10) it makes it fully available to different sectors and social spheres; and others.

Then, the following was recorded: "Analizados los argumentos proporcionados por el Profesor Ubilla a favor de la ampliación de la titularidad del derecho real en estudio, el Honorable Senador señor Larraín manifestó que los compartía" [After analyzing the arguments provided by Professor Ubilla in favor of expanding the titleholder of the real right under study, the Honorable Senator Mr. Larraín stated that he shared them] (Historia de la Ley N° 20.930, 2018, p. 281)

In the occasion, Senator Felipe Harboe questioned the proposed breadth of the titleholder of the conservation right. In this regard, we expressed, among other things, that considering that the faculties of use and enjoyment (of the rights of 'usufruct' and ´ownership´) were historically linked to the exploitation of natural resources, and considering that these rights had had no limitations as to their titleholder, it did not seem reasonable to place such limitations on the conservation right, which by its nature would be linked to the development of sustainable activities. Limitations of this type would affect the most disadvantaged citizens by preventing them from using the institution precisely to solve problems such as those related to the quality of urban life and access to green areas. It also seemed to us that this restriction would not be justified from the perspective of the principles of constitutional freedom and equality. Likewise, we addressed the concerns of Senator Felipe Harboe relating to the potential misuse of the institution, to which we

explained that regarding this potential misuse, there are already well-established legal institutions that prevent and tackle those practices. We also stated that, in any case, it is not adequate to legislate from the consideration of abnormal circumstances or the potential illegitimate activities of a few. After this, the new wording of the article was voted in favor, which became the final wording. The final wording was as follows: "Artículo 4.- Titulares. Toda persona natural o jurídica, pública o privada, podrá ser titular del derecho real de conservación" [Article 4.- Holders. Any natural or legal person, public or private, may be the titleholder of the conservation right] (Historia de la Ley N° 20.930, 2018, p. 282)[27].

Subsequently, the indication proposed by the Centro de Derecho de Conservación [Conservation Law Center] regarding the duration of the conservation right referred to in numeral 5 of Article 8 of the Bill was addressed (Ubilla Fuenzalida, 2014). This proposal was transformed into the indications presented by Senators Urresti (Indication 17), and Horvath (Indication 18), which, therefore, had the same wording: "5.- El derecho real de conservación durará como mínimo 15 años. Las partes podrán acordar una duración perpetua, y" [5.- The conservation right will last at least 15 years. The parties may agree to a perpetual duration, and] (Historia de la Ley N° 20.930, 2018, p. 288).

In this regard, and in line with what had already been stated in previous sessions, we stated the following:

> … el derecho real de conservación busca asir ciertos [elementos] intangibles que los otros derechos reales no han logrado capturar. Se trata, dijo, de valorizar una nueva riqueza, que se ha denominado capital natural, la cual, siguiendo el principio de circulación de la riqueza, puede generar nuevos mercados.
> […]
> Propuso que por tratarse de una institución situada en el ámbito del derecho privado, la duración del derecho real de conservación quede entregada al arbitrio de las partes"
> [… the conservation right seeks to grasp certain intangible (elements) that the other rights in rem have failed to capture. It is a question, he said, of valuing a new wealth, which has been called natural capital, which, following the principle of wealth circulation, can generate new markets.
> (…)
> He proposed that, because it is an institution located in the sphere of private law, the duration of the conservation right shall be left to the discretion of the parties]. (Historia de la Ley N° 20.930, 2018, p. 290).

[27] It should be noted that in this discussion it was also established that the titleholder of the conservation right would be called simply "titleholder", taking distance from the tradition of conservation easements where terminology such as "custodian" or "guarantor organizations" is used, terminology that unduly confuses the role of management support with the role of titleholder of the right. Since the conservation right has its own object, that is, the environmental patrimony and the functions and attributes of said patrimony -which are legally considered as immovable property- it appears to be highly problematic to generate confusion between the role of advisor for the implementation and/or certification of management plans and the role titleholder of the right.

Regarding the point, the conclusion was as follows:

> En consecuencia, las indicaciones números 17 y 18 fueron aprobadas con modificaciones, para los efectos de acoger las enmiendas recién explicadas. Este acuerdo contó con el parecer favorable de la unanimidad de los miembros de la Comisión, Honorables Senadores señores Araya, De Urresti, Espina, Harboe y Larraín. [Consequently, indications numbers 17 and 18 were approved with modifications, to accept the amendments just explained. This agreement had the unanimous favorable opinion of the members of the Commission, Honorable Senators Araya, De Urresti, Espina, Harboe and Larraín]. (Historia de la Ley N° 20.930, 2018, p. 291)

The final wording of number 5 of Article 8 was established as follows: "5.- La duración del derecho real de conservación, si la hubiere" [5.- The duration of the conservation right, if any] (Historia de la Ley N° 20.930, 2018, p. 329).

Subsequently, other indications proposed by the Conservation Law Center concerning the remaining articles were addressed, among which outstand those related to article 6 referring to the ´effects´, those related to article 11 referring to the ´priority of rights´, and those related to Article 12 referred to the "termination" of the right in rem.

Then, the legislative process advanced to the Second Report of the Environment Commission, dated April 13, 2016, where very minor changes were made. In the corresponding sessions, on behalf of the Conservation Law Center, we stated the following:

> …que de aprobarse el proyecto de ley, Chile sería pionero en conformar una estructura de derecho privado con estas características. Históricamente, apuntó, los derechos reales se orientaban a facilitar la circulación de la riqueza, […] se entendía que la generación de riqueza se relacionaba solamente con la extracción de recursos naturales tradicionales.
> […] el enfoque hoy es concebir como riqueza la conservación del [patrimonio ambiental] y no como gravamen, concepción de la cual se derivan diversas consecuencias al regular este nuevo derecho.
> Señaló que […] el derecho real de conservación se asimila más al usufructo que a la servidumbre porque captura jurídicamente un valor [afirmativo] o activo…
> [... that if the bill is approved, Chile would be a pioneer in creating a private law structure with these characteristics. Historically, he pointed out, real rights were oriented to facilitate the circulation of wealth, (...) it was understood that the generation of wealth was related only to the extraction of traditional natural resources.
> (...) the focus today is to conceive the conservation of (environmental patrimony) as wealth and not as a burden or charge, a conception from which various consequences derive when regulating this new right.
> He pointed out that (…) the conservation right more closely resembles the right of usufruct than the easement because it legally captures an (affirmative) or active value …]. (Historia de la Ley N° 20.930, 2018, p. 316)

In the following session, Senator Urresti who, together with Senator Horvath, led this significant change of vision in the legislative process, stated:

> … que en el derecho civil no se ha creado un derecho real en los últimos dos milenios, aseverando que la creación de este Derecho Real de Conservación, captura y pone en valor […] [elementos] que el actual ordenamiento jurídico no considera, tales como la belleza escénica, la calidad del aire, los servicios ecosistémicos y otros.
> Precisó que la facultad de conservar versa sobre distintas funciones que tienen los ecosistemas, permitiendo que sobre un mismo predio puedan convivir diversos derechos reales de conservación.
> […]
> Señaló que el Derecho Real de Conservación es un instrumento jurídico que permite la conservación, que no constituye gravamen, sino que se considera como un derecho afirmativo o activo.0
> [... that in civil law no real right has been created in the last two millennia, asserting that the creation of this Conservation Right, captures and values (...) (elements) that the current legal system does not consider, such as scenic beauty, air quality, ecosystem services and others.
> He specified that the faculty to conserve deals with different functions that ecosystems have, allowing different conservation rights to coexist on the same property.
> (…)
> He pointed out that the Conservation Right is a legal instrument that allows conservation, which does not constitute a charge or burden, but is considered as an affirmative or active right]. (Historia de la Ley N° 20.930, 2018, p. 316).

Immediately afterward, we were given the floor again, and we stated:

> …que el derecho real de conservación que se instituye, posibilitará la [delineación] […] de múltiples elementos que los derechos reales romanos no permitían considerar, y en tal sentido puede aplicarse en diversos niveles e intensidades para establecer prácticas sustentables, como asimismo para mantener ciertas cualidades del entorno de un bien […]
> Afirmó que el derecho real que se crea, permite conservar elementos intangibles, ya que la definición de medio ambiente de la letra ll) del artículo 2° de la ley N° 19.300, sobre Bases Generales del Medio Ambiente, es amplísima, toda vez que incluye elementos artificiales y culturales también.
> […that the conservation right that is created, will enable the (delineation) (…) of multiple elements that the Roman law real rights did not consider, and, in this sense, it can be applied at different levels and intensities to establish sustainable practices, as well as to maintain certain qualities of the environment of a real estate (…)
> He affirmed that the real right that is created hereby allows for the conservation of intangible elements, because the definition of the environment in letter ll) of article 2 of Law No. 19,300 Environmental Framework Law, is very broad since it includes artificial and cultural elements as well] (Historia de la Ley N° 20.930, 2018, pp. 316-317)

For his part, the Honorable Senator Mr. Horvath stated:

> … valoró la creación del derecho real de conservación, ya que este es un atributo del bien raíz, notando que esta nueva institución otorga mayor estabilidad que otros

> instrumentos de carácter administrativo, que en cualquier momento pueden ser revertidos por la autoridad que dictó la norma.
> [… valued the creation of the conservation right, since this is an attribute of the real estate, noting that this new institution grants more stability than other administrative instruments, which can be reverted at any time by the authority that issued the norm. (Historia de la Ley N° 20.930, 2018, pp. 317-318)

In response to a query from the Senator himself, the Director of the Conservation Law Center, Mr. Ubilla, stated:

> …este nuevo derecho real, se diferencia de los demás derechos reales, en el hecho que es el primero que genera o hace posible la cooperación […]
> Esta cooperación se traduce en que este derecho puede constituirse por distintos sujetos sobre el mismo espacio, […] puesto que la conservación de unos y otros genera beneficios cruzados, se crea una interacción que deriva en un círculo virtuoso de cooperación social.
> […] Este modelo se le ha denominado 'derecho reflexivo', puesto que permite la reflexión entre todos los discursos sociales….
> [... this new real right, differs from the other real rights, in the fact that it is the first that generates or makes cooperation possible (...)
> This cooperation translates into the fact that this right can be constituted by different subjects over the same space, (…) since the conservation by different actors generates cross-benefits, creating an interaction that leads to a virtuous circle of social cooperation.
> (…) This model has been called 'reflexive law', since it allows for the reflection [a reflexive interaction] between all social discourses …]. (Historia de la Ley N° 20.930, 2018, pp. 316-319)

And then, we added that the State can also use this right:

> … como una mejor alternativa a la de la expropiación, para los efectos de conservar, ya que los costos estratégicos actuales de la expropiación son muy elevados […]
> Refirió que a nivel urbano […] puede utilizarse en distintas comunas para rescatar sitios eriazos […] en las que el Estado o las comunas carecen de recursos para expropiar predios y hacer nuevos parques…
> [… as a better alternative to expropriation, for the purposes of conservation, since the current strategic costs of expropriation are very high (…)
> He mentioned that at the urban level(...) it can be used in different municipalities to rescue empty sites (...) in which the State or the municipalities lack the resources to expropriate land and make new parks...] (Historia de la Ley N° 20.930, 2018, p. 319).

> También […] permite difuminar el poder a [y entre] los ciudadanos y a los cuerpos intermedios, permitiendo así una ciudadanía más activa en la conservación, máxime si observamos que nuestro país es aún débil asociativamente, afirmando que […] facilitará la cooperación.
> […] la crisis post moderna, global y social, a nivel regulatorio, es una crisis de conocimiento, afirmando que hoy el Estado no está en condiciones de saber qué hay que regular [ni cómo hacerlo], y es por ello que el Plan Estratégico para la Diversidad Biológica 2011-2020 y las Metas de Aichi buscan promover la cooperación, de manera que a partir de aquélla surja el nuevo conocimiento.

> [It also (…) allows the dissemination of power to (and between) citizens and intermediate bodies, thus allowing a more active citizenry in conservation, especially if we observe that our country is still weak in terms of social associations initiatives, stating that (…) it will facilitate cooperation.
> (...) the post-modern, global and social crisis, at the regulatory level, is a crisis of knowledge, affirming that today the State is not in a position to know what to regulate (or how to do it), and this is why the Strategic Plan for Biological Diversity 2011-2020 and the Aichi Targets seek to promote cooperation to facilitate the emergence of new knowledge]. (Historia de la Ley N° 20.930, 2018, p. 320)

2.4. Approval in Particular and Third Constitutional Procedure

Finally, in the 14th Session of May 10, 2016, the Senate proceeded to approve the Bill in particular, and later, in the Third Constitutional Procedure, it was unanimously approved to be definitively enacted as law on June 10 of the same year entering into force on June 25, 2016.

General comments and Conclusions

The conservation right is a new private law institution that differs from conservation easements -and from other restrictive real rights such as the 'real covenants' of common law- in two central aspects: it is firstly an affirmative real right defined by a broad normative power, the faculty to conserve; and, secondly, it has its own object: the environmental patrimony or its functions and attributes.

Future legal studies should consider these differentiating elements to develop a systematic and coherent understanding of Ley N°. 20.930.

The original proposal (Ubilla 2003) and the proposals for the final wording of the Law (Ubilla 2014, 2015) responded to a challenge that went beyond the idea of facilitating or making possible the creation of nature-protected areas. The challenge was to facilitate the unfolding of new social practices in the most diverse areas of social activity. This called for the development of a new kind of real right that referred not only to nature in general but also to the most varied attributes and functions of the environmental patrimony that are relevant to the most diverse social activities. In other words, the focus was not on 'biodiversity conservation' in the traditional or restricted sense but on incorporating the consideration of the tangible and intangible elements of the environment into private law and law in general.

This effort meant moving away from more than 2,000 years of legal tradition, a

tradition that shaped property rights on the basis of extractive economic structures, a tradition that only considered the tangible aspects of real estate.

The new vision received special and favorable consideration because, under it, not only the conservation of the environmental patrimony but also the legal recognition of the different dimensions of value of said patrimony from diverse social perspectives would be possible.

In this sense, through the new vision, we have hoped that the conservation right will gradually facilitate social processes in which the various spheres of society, including the economy, will generate processes of interaction, reciprocal observation, and learning, giving rise to adaptive practices capable of generating long-term environmental sustainability (Ubilla 2016a; 2016b).

Likewise, it is expected that this new vision will bring about the emergence of social processes that, instead of provoking a reification of social relations -or a 'forgetting' of the complex relations between nature and the human being- will make possible practices of recognition of nature and of the intersubjective relationships of human beings as entities integrated into ecosystems, thereby increasing the chances of generating a sustainable society.

Finally, this new understanding is consistent with public policies that promote the development of public or private protected areas because conservation rights can be used to support their development, improvement, and expansion. However, as we have explained, this new right has an aspiration that goes beyond the idea of creating protected areas and aims to facilitate the sustainable management of the most diverse environmental elements linked to the most diverse territories, contexts, and social activities.

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To cite this article according to APA 7th edition.

Ubilla Fuenzalida, J. (2023). El derecho real de conservación a la luz de la historia de la Ley N°20.930. Explicación general del origen, definición, elementos diferenciadores y naturaleza jurídica de este nuevo derecho real. *Revista de derecho (Coquimbo. En línea), 30*: e5232. https://doi.org/10.22199/issn.0718-9753-5232