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Foundations of the Conservation Right

Normative, economic and socio-legal justification of an affirmative real right: the faculty to conserve ecosystem assets

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Contents

1. Normative justification: an interest worthy of protection.....5
1.1 The interest theory.....5
1.2 Two moments of justification.....6
1.3 A right grounded in positive liberty.....7
1.4 The content of the faculty to conserve.....7
1.5 From the owner's liberty to the faculty to conserve.....8
2. Economic justification: conservation as wealth.....8
2.1 The Coase theorem and the function of law.....9
2.2 Property rules, liability rules and inalienability rules.....10
2.3 The proposal: a real right that reduces transaction costs.....10
2.4 Why new real rights and new goods emerge.....11
2.5 Real rights over differentiated attributes of goods.....12
2.6 Tragedy of the commons, tragedy of the anticommons and circulation of wealth.....13
2.6.1 The conservation right and Elinor Ostrom's theory of the commons.....13
2.6.2 The principle of circulation of wealth.....14
2.7 A faculty to conserve, not ownership of nature.....15
3. Socio-legal justification: a reflexive legal form.....17
3.1 The 2003 argument: a coupling between law and the other social spheres.....17
3.2 The regulatory trilemma of ecosystem conservation.....18
3.3 Legal forms and reflexive legal forms.....18
3.4 A new generation of environmental regulation.....20
4. Everyone can conserve: the three justifications and open titleholding.....20
Conclusions.....22
References.....23

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Foundations of the Conservation Right

Normative, economic and socio-legal justification of an affirmative real right: the faculty to conserve ecosystem assets

*This bulletin is part of the **commemorative series of five bulletins and five talks** on the YouTube channel **@todospuedenconservar**, published every Tuesday from November 10 to December 8, 2026, following the Masterclass «Derecho Real de Conservación: conmemorando 10 años de la Ley 20.930» [Conservation Right: commemorating 10 years of Law 20.930] at the Universidad de Chile (Tuesday, November 3). It accompanies the talk of Tuesday, November 17, «Philosophical, sociological and economic foundations».*

Bulletin 1 showed that, during the legislative process in the Senate, the Conservation Law Center (Fundación Centro de Derecho de Conservación) was instrumental in presenting the new legal definition and articles of the bill, by virtue of which the conservation right went from being conceived as a charge or easement[1] to being defined as an affirmative right, that is, as the **faculty to conserve** the **environmental patrimony of a property or certain attributes or functions thereof, attributes and functions that the law deems immovable** (arts. 2 and 3 of Law N° 20.930) and that we call *ecosystem assets*. Ecosystem assets are, thus, the attributes or functions of the environmental patrimony of a property that the law elevates to the category of immovable property and that may be the object of the conservation right. This second bulletin asks *why* the institution was designed in that way, that is, what its foundations are.

Three complementary justifications support the conservation right.

A **normative justification** (philosophical), grounded in rights and liberties, which makes it a robust institution of private law.

An **economic justification**, grounded in the reduction of transaction costs and in the emergence of new legal goods and new wealth.

And a **socio-legal justification** (sociological), grounded in the theory of reflexive legal forms, which explains how an affirmative right over ecosystem assets can address the regulatory trilemma of ecosystem conservation and make new sustainable social practices more probable.

Together, these three justifications explain why the conservation right was conceived as an **affirmative real right** —the faculty to conserve ecosystem assets— and not as a charge on the property or an easement.

[1] This is how the Parliamentary Motion and the bill approved by the Chamber of Deputies defined it (Bulletin No. 5823-07). See Bulletin 1 of this series.

Three justifications at a glance

Justification	Question	Central thesis	Theoretical foundations
Normative (philosophical) *An interest worthy of protection*	Is there an interest of persons sufficient to justify a right or faculty to conserve?	The right protects the interest in exclusively determining the conservation of environmental aspects of a thing, and makes possible a positive liberty exercised over such aspects.	Interest theory (Raz, Waldron, Penner); normative powers (Hohfeld); positive liberty (Berlin, Waldron). *Ubilla (2016b).*
Economic *Conservation as wealth*	Why create a new real right instead of continuing to use the existing real rights (i.e. ownership, easement)?	A real right over ecosystem assets reduces the transaction costs of the decision to conserve, delineates or delimits goods for their more efficient management, and allows the value of this limited real right to circulate autonomously.	Coase; Calabresi and Melamed; Demsetz; North; Barzel; Hardin; Rose; Heller. *Ubilla (2003).*
Socio-legal (sociological) *A reflexive legal form*	Can this legal form make conservation more probable in a complex, functionally differentiated society?	The legal form of the conservation right combines stabilized normative elements with highly variable factual-cognitive elements, and therefore has high reflexivity, or capacity for learning, adaptation and co-evolution. For example, by indicating the affirmative side of the distinction affirmative/restrictive right, the law internalizes in their original form the positive valuations of nature that come from science, ethics, aesthetics or culture and other social spheres.	Systems theory (Luhmann); reflexive law and regulatory trilemma (Teubner); laws of form (Spencer-Brown); theory of legal forms and reflexive legal forms (*Ubilla, 2016a, 2016b, 2024).*

The three justifications converge in the form of the right: a faculty to conserve (affirmative normative element) over ecosystem assets (new legal object).

1. Normative justification: an interest worthy of protection

The first question is why the law should protect those who wish to conserve a place. The conservation right is not an interventionist public policy instrument. Its justification lies in rights and liberties, and it is formulated from the internal perspective of law, on the basis of one of the most recognized contemporary theories of rights: Joseph Raz's interest theory, further developed with regard to property and real rights by Jeremy Waldron and James Penner.[2]

1.1 The interest theory

For Raz, a person holds a right when an aspect of his or her well-being —his or her interest— is a sufficient reason for holding another person to be under a duty.[3] Under this theory, rights do not logically entail duties: the interest is the reason that *justifies* the imposition of duties. A decisive feature for the conservation right follows from this: the theory is dynamic, since a change of circumstances may lead to the creation of new

[2] Ubilla Fuenzalida, J. (2016b). El derecho real de conservación: justificación normativa y socio-legal [The conservation right: normative and socio-legal justification]. *Revista de Derecho* (Universidad de Concepción), 240, 151–185, pp. 160–170. The interest theory belongs to the analytical tradition that takes the internal perspective of law as its starting point; on this perspective, Hart, H. L. A. (1961). *The Concept of Law*. Oxford University Press, pp. 89–90.

[3] Raz, J. (1984). On the nature of rights. *Mind*, 93(370), 194–214, p. 195; Raz, J. (1984). Legal rights. *Oxford Journal of Legal Studies*, 4(1), 1–21, p. 5.

duties based on the same right.[4] As Waldron observes, this explains why property may justify, in different circumstances, different duties or institutional arrangements to protect it against different forms of interference.[5]

Waldron adds two relevant considerations: that freedom in the economic sphere is of extraordinary importance in the justification of property, and that, since the material environment is as important to human life as the political environment, the free control and arrangement of elements of that environment is as important as the traditional political liberties.[6] **Penner**, for his part, holds that the interest in property is "the interest in exclusively determining the use of things", an interest that forms part of our freedom to shape our lives.[7]

1.2 Two moments of justification

The normative justification of the conservation right must distinguish two moments.[8] The first is the justification of the **normative power** —in Hohfeld's sense— that the law grants to the owner and to a third party to create the right by mutual agreement.[9] The second is the justification of the **real right properly speaking**, that is, of the right to exercise the faculty to conserve, which is in turn the sufficient reason for the duties of the owner and of third parties.

> **Normative power to constitute the right.** It represents or protects "the interest of the parties in freely regulating the conservation of environmental aspects of one's own or another's immovable property".
>
> **Conservation right.** It is justified by "the interest in exclusively determining the conservation of environmental aspects of things on the basis of the concurrence of the wills of the holder of the right and the owner of the property".[10]

The justification of the normative power is not subject to any contingent fact: the legislator grants it from the outset. That of the real right, by contrast, presupposes a future contingent fact, the agreement of the parties, in line with Hart's distinction between general and special rights, as used by Waldron.[11]

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[4] Raz, "On the nature of rights", cit., pp. 199–200: "A change in circumstances may lead to the creation of new duties based on the old right. … This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of the nature and function of rights in political thought". See Ubilla (2016b), pp. 161–162.

[5] Waldron, J. (1988). *The Right to Private Property*. Oxford University Press, pp. 85–86.

[6] Waldron (1988), pp. 291, 294–295. See Ubilla (2016b), pp. 162–163.

[7] Penner, J. E. (1997). *The Idea of Property in Law*. Clarendon Press, p. 49: "The interest in property is the interest in exclusively determining the use of things". Penner refers to Raz, J. (1986). *The Morality of Freedom*. Oxford University Press, pp. 407–412. On exclusivity as a special position to set the agenda for the use of a thing, Katz, L. (2008). Exclusion and exclusivity in property law. *University of Toronto Law Journal*, 58(3), 275–315.

[8] Ubilla (2016b), pp. 164–165.

[9] Hohfeld, W. N. (1917). Fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal*, 26(8), 710–770. Hohfeld's categories can be understood as ways of protecting the interest, which allows a unitary concept of right to be maintained: Simmonds, N. E. (1998). Rights at the cutting edge. In M. H. Kramer, N. E. Simmonds and H. Steiner, *A Debate Over Rights*. Oxford University Press, p. 218.

[10] Ubilla (2016b), p. 164. Just as Penner explains property as the interest in exclusively determining the use of things, the conservation right protects an interest in exclusively determining their conservation. The interest may be non-patrimonial: what matters is that conservation can be valued, not that the holder's interest is economic.

[11] Hart, H. L. A. (1984). Are there any natural rights? In J. Waldron (Ed.), *Theories of Rights*. Oxford University Press, pp. 77–90, p. 84; Waldron (1988), p. 106. See Ubilla (2016b), pp. 164–165.

1.3 A right grounded in positive liberty

The liberty that justifies the conservation right is more than negative liberty, understood as the mere absence of external obstacles.[12] Following Waldron, something positive must come into existence: the independence, autonomy, self-assertion or recognition of the holder in relation to an environment, and participation in collective purposes.[13]

If we apply this to the context of a functionally differentiated society —that is, one organized into specialized spheres such as the economy, law, science or religion—, this individual liberty is understood in its relation to the different social spheres of meaning, as a plurality of "discursive liberties" —moral, aesthetic, religious, scientific, educational, among others—. In Teubner's terminology, the conservation right is also a "discursive right" in the private sphere.[14]

This justification is visible in the very form of the right. Through its central element, **the faculty to conserve**, the conservation right is structured around the action of its holder, making his or her positive liberty possible. As **Penner** observes, rights to do something are normative in a more important sense than those that only protect against the actions of others: they are permissive norms, typically used when the holder must weigh a variety of complex reasons before deciding how to act.[15] That is precisely the situation of those who conserve ecosystems. The affirmative character of the right, its grounding in the environmental interest and the autonomy of persons to set conservation criteria by voluntary agreement were repeatedly emphasized in the legislative history of Law N° 20.930.[16]

1.4 The content of the faculty to conserve

Property and real rights are a normative practice.[17] Like the faculties of use, enjoyment and disposition, the content of the faculty to conserve will be defined by practice, case law and legal scholarship. But part of it is already explicit: whoever holds the right also holds the means necessary to exercise it and may carry out the works indispensable for that purpose (arts. 828 and 829 of the Civil Code, applicable by virtue of art. 1 of the law), and "the owner may not prevent, hinder or impair the exercise of this right" (art. 6). Beyond what has been agreed, the faculty to conserve generally includes:[18]

- the right to prevent, repair or restore any deterioration of the environmental patrimony that is the object of the right;
- the right to relevant information on the state of that environmental patrimony;

[12] Berlin, I. (1969). *Four Essays on Liberty*. Oxford University Press, pp. 118 and 131: "The positive sense of the word liberty derives from the wish on the part of the individual to be his own master".

[13] Waldron (1988), pp. 299–305 and 313. For example, the right may provide security and independence to the holder, by recognizing a power to influence the environmental attributes of a given environment, or recognize his or her free will to participate in the conservation of that environment and in the arrangement of relations with third parties regarding it. Ubilla (2016b), p. 165, n. 57.

[14] Teubner, G. (2000). Contracting worlds: The many autonomies of private law. *Social & Legal Studies*, 9(3), 399–417, p. 413. See Ubilla (2016b), p. 166.

[15] Penner (1997), p. 15. See Ubilla (2016b), pp. 166–167.

[16] Ubilla (2016b), p. 167, referring to the Second Report of the Committee on Constitution, Legislation, Justice and Regulations of the Senate (Bulletin No. 5823-07, 2015), in BCN, *Historia de la Ley N° 20.930*, and to Ubilla Fuenzalida, J. (2014). *Propuesta de Indicaciones al Proyecto de Ley del Derecho Real de Conservación* [Proposed amendments to the conservation right bill]. Conservation Law Center, June 9, 2014. These arguments were put forward to justify the drafting proposal submitted by Jaime Ubilla, in his capacity as Executive Director of the Conservation Law Center.

[17] Penner (1997), pp. 128 and 137; Ubilla (2016b), p. 167.

[18] Ubilla (2016b), p. 168. This was the content given to the faculty to conserve in the first conservation right constituted in Chile, granted by La Bella Eco-Aldea SpA by public deed of July 18, 2016 and registered with the Real Estate Registrar (Conservador de Bienes Raíces) of Linares on July 25 of the same year (ibid., n. 66).

- the right to carry out periodic audits of the conserved environmental patrimony; and
- the right of access to the property in accordance with the rules agreed by the parties.

The owner's duties are set out in article 6 alternatively, not cumulatively —restrictions, obligations to do, or a management plan—, which shows how the right can justify different contents according to the circumstances and the interest of the parties, in full coherence with the dynamic character of the interest theory. The duty of third parties derives from the *erga omnes* character (enforceable against all) of every real right —Penner's "obligation *in rem*"—, whose scope will also be progressively constructed by social practice.[19]

1.5 From the owner's liberty to the faculty to conserve

Ownership already contains incidents that amount to a "right to conserve". The conservation right reconfigures them and groups them into something new:[20]

1. The owner's mere liberty to conserve (a privilege, in Hohfeld's sense) becomes a right whose sole and necessary content is to conserve, with correlative duties over the property.
2. That right becomes autonomous and is elevated to a faculty or *potestas*: the *ius conservandi*, or faculty to conserve.
3. "Conservation" takes its meaning from environmental law: ensuring the permanence and regeneration capacity of the components of the environment (art. 2(b) of Law N° 19.300) and the maintenance and recovery of ecosystems and species (art. 2 of the Convention on Biological Diversity).
4. Goods that were mere attributes of a property —invisible to private law— emerge as new legal goods —ecosystem assets— for the purposes of their conservation (art. 3, para. 3).
5. The value of conservation enters private law as a dimension of value distinct from use, enjoyment and disposition. The conservation right is, therefore, a *sui generis* real right, not a right of enjoyment.

2. Economic justification: conservation as wealth

The second question is why it is advisable to create a new real right, instead of purchasing the property, expropriating it or regulating it. The economic argument in favour of the conservation right was first developed in the 2003 article that proposed and named the institution, published in the first issue of the *Revista de Derecho Ambiental* of the Universidad de Chile.[21] Its central claim was that "an effective and efficient regulatory system of private conservation should include the creation of the legal figure of the conservation right", and that this figure found two theoretical bases: a sociological one and an economic one.[22] Drawing on neo-institutional theory and the analysis of *property rights* —an expression that in

[19] Ubilla (2016b), pp. 169–170. The term "charges" (gravámenes) in article 6 may be understood in the sense of real obligations, as used by the Civil Code in arts. 658, 732 No. 1, 1093, 1188 and 1338, among others. Penner (1997), pp. 128, 137 and 142.

[20] Ubilla (2016b), p. 168, n. 65: the faculty to conserve is not a new faculty of ownership; certain bundles of rights of ownership —generally belonging to the faculty of disposition, such as the right to conserve or restore one's own thing— have been brought together to typify a new faculty that gives rise to a separate and autonomous right granted to a third party.

[21] Ubilla (2003). La conservación privada de la biodiversidad y el derecho real de conservación. Consideraciones desde la teoría social de sistemas y el análisis económico del derecho [Private conservation of biodiversity and the conservation right: considerations from social systems theory and the economic analysis of law]. *Revista de Derecho Ambiental* (Universidad de Chile), 1, 72–96. Even then the term "right" was preferred to that of "easement", "because it reflects the 'value' of the goods over which it is constituted and not only the benefit received by the holder of the right" (p. 73, n. 9).

[22] Ubilla (2003), p. 80.

economics designates any right over the attributes of a good, and not only ownership, and which in this section corresponds to what civil law calls "real rights"—, the article held that its establishment (i) reduces transaction costs between owners and those interested in conservation, in order to reach agreements aimed at conserving the natural attributes of goods; and (ii) makes possible the creation of real rights that identify and delimit natural attributes which lack private-law representation in the market and which, therefore, in economic terms are in the "public domain", exposed to capture in the well-known "tragedy of the commons".[23] The same analysis also made it possible to show the compatibility of the new right with the principle of circulation of wealth of the Civil Code.

2.1 The Coase theorem and the function of law

In "The Problem of Social Cost", Ronald Coase argued that the agents involved in a problem of external effects, understood as a problem of a reciprocal nature, can negotiate an efficient solution if two conditions are met: a precise initial assignment of rights and zero transaction costs.[24] Once those assumptions are fulfilled, the parties would reach the most efficient agreement whatever the initial assignment of rights, although —as Calabresi and Melamed point out— the resulting allocation of resources will depend on the initial distribution of wealth.[25]

But Coase himself acknowledges that the assumption of zero transaction costs is unrealistic, since almost every market transaction entails them.[26] With positive transaction costs, a new arrangement of rights will only take place when the increase in the value of production exceeds the costs of that arrangement plus the transaction costs, and the initial allocation of rights made by the legal system then becomes decisive. From this the 2003 article derives the function of law on which the whole proposal is based:

> In a scenario of positive transaction costs, the function of law would consist in: **(i) creating and clearly delimiting the rights** of the agents involved in a problem of reciprocal effects; **(ii) implementing mechanisms that reduce transaction costs**; and (iii) where the reduction of costs does not make an efficient transaction possible, establishing the arrangement of rights that results in the most efficient allocation of resources.[27]

The conservation right responds to the first two functions. It creates a new right over goods that had no legal representation —the attributes or functions of the environmental patrimony— and does so through a standardized form that reduces the transaction costs of the decision to conserve.

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[23] Ubilla (2003), pp. 81–82. On neo-institutional economics and *property rights*: Mercuro, N. and Medema, S. G. (1997). *Economics and the Law: From Posner to Post-Modernism*. Princeton University Press, ch. 5; North, D. C. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge University Press; Furubotn, E. G. and Richter, R. (2000). *Institutions and Economic Theory: The Contribution of the New Institutional Economics*. University of Michigan Press. Alchian summarizes it thus: "the question of economics, or of how prices should be determined, is the question of how property rights should be defined and exchanged, and on what terms": Alchian, A. A. (1967). *Pricing and Society*. Occasional Papers No. 17. Institute of Economic Affairs, cited in Furubotn and Richter (2000), p. 72.

[24] Coase, R. H. (1960). The problem of social cost. *Journal of Law and Economics*, 3, 1–44, secs. II and IV. In contrast to Pigou, for whom negative externalities arise when social cost exceeds private cost (Pigou, A. C. (1920). *The Economics of Welfare*. Macmillan), Coase poses the question in reciprocal terms: should A be allowed to harm B, or should B be allowed to harm A? See Ubilla (2003), p. 82, nn. 39–41.

[25] Calabresi, G. and Melamed, A. D. (1972). Property rules, liability rules, and inalienability: One view of the cathedral. *Harvard Law Review*, 85(6), 1089–1128. See Ubilla (2003), p. 83, n. 44.

[26] Coase (1960), sec. VI ("The cost of market transactions taken into account"). Barzel defines transaction costs as "the costs associated with the transfer, capture, and protection of rights": Barzel, Y. (1997). *Economic Analysis of Property Rights* (2nd ed.). Cambridge University Press, p. 4. They include the costs of identifying the counterparty and the ownership of the relevant right, obtaining information on the consequences of alternative decisions and identifying the most suitable contractual mechanism. Ubilla (2003), p. 83, n. 43.

[27] Ubilla (2003), p. 83.

2.2 Property rules, liability rules and inalienability rules

Calabresi and Melamed showed that the State must decide not only which party to protect, but also by what means: through **property rules** (the entitlement can only be removed by voluntary agreement, at the price set by its holder), **liability rules** (whoever affects it must pay compensation in an amount set by a State body) or **inalienability rules** (transfer is not permitted).[28] Property rules are used when transaction costs do not prevent negotiation, or when it is known who the *cheapest cost avoider* is, that is, who can avoid the harm at the lowest cost. There is a shift towards liability rules when the latter is unknown, or when the market valuation of the entitlement is unavailable or too expensive compared with a collective valuation; and towards inalienability when transactions generate significant costs for third parties or involve irreplaceable or non-monetizable values.[29]

Applied to a property of irreplaceable ecological value, whose commercial exploitation would have a social cost far greater than its benefit, this scheme leads to a dead end. Transaction costs —for example, the *hold out* of an owner who raises the price exorbitantly— may prevent its purchase by the State or the community.[30] A property rule in favour of the State, or a prohibition on exploitation, would be treated in our law as a partial expropriation of ownership, that is, again as a liability rule requiring a collective valuation and compensation. The conservation of a private property would thus involve the expropriation of rights, with high fiscal, administrative and judicial costs, and private conservation could only be spoken of in a weak sense.[31]

2.3 The proposal: a real right that reduces transaction costs

The theoretical innovation of the 2003 article consisted in noting that property rules and the resulting real rights "can be conceived not only as a way of establishing the efficient arrangement of rights, but also as a mechanism for reducing transaction costs".[32] The transaction costs that make a property rule inefficient can be reduced through the creation of special real rights or through the division or dismemberment of rights into different bundles. A real right can thus be conceived over those bundles of ownership that relate to the conservation of the property, a right that the owner could constitute in favour of whoever is willing to acquire it. "This enables private third parties to obtain the conservation attributes of the right without having to acquire all the rights over the property. In other words, this reduces transaction costs for private third parties".[33]

> **The 2003 proposal.** (a) A system for the designation and public declaration of priority areas; (b) the legal figure of a conservation right that the owner may transfer to third parties (property rule); (c) incentives and disincentives

[28] Calabresi and Melamed (1972), p. 1092. See Ubilla (2003), pp. 83–84, nn. 46–48. In environmental law, the characteristic inalienability mechanism is the prohibition of certain substances or activities, or their regulation through emission standards and registration, reporting or impact assessment requirements.

[29] Calabresi and Melamed (1972), pp. 1096–1097 (*cheapest cost avoider*), 1106–1110 (liability rules) and 1111–1115 (inalienability). Ubilla (2003), pp. 84–86.

[30] Calabresi and Melamed (1972), pp. 1106–1107. With expropriation the *hold out* problem disappears (whoever should sell at a certain price takes the opportunity to demand a higher one) and, if the value is imposed through taxes, so does that of the *freeloader*. Ubilla (2003), p. 85, n. 55.

[31] Ubilla (2003), pp. 86–87. A popular action allowing any person to prevent exploitation would be an implausible inalienability rule given the incipient development of subjective environmental rights, strongly confronted with ownership and with very high judicial costs (ibid., p. 86, n. 63).

[32] Ubilla (2003), p. 87.

[33] Ubilla (2003), p. 88. Transaction costs can also be "reduced" through compensation by means of economic incentives for negotiation, directed at whoever constitutes or acquires the right, largely avoiding the phenomena of *hold out* and *freeload*. Calabresi and Melamed refer to taxes on activities that produce externalities as liability rules; the same logic applies to incentives (ibid., p. 88, n. 64).

> leading the owner and third parties to negotiate its constitution (liability and inalienability rules); and (d) incentives to properly manage and monitor the property and to create knowledge about its ecological attributes, which are those that generate environmental services and greater economic self-sustainability.[34]

In practical terms, the real right makes it possible to achieve the conservation objective at a lower cost, without acquiring all the faculties of ownership; it exists *erga omnes* and follows future owners; it is transferable; it allows the owner to continue with the use, enjoyment and disposition compatible with conservation, including sustainable economic activities; it gives the owner an additional source of financing; and it entrusts the holder of the right with monitoring and controlling the state of the property's biodiversity.[35] A standardized real right, registered once and enforceable against successive owners, replaces fragile contracts that bind only the parties, and protects the conservation interest with a property rule and not merely with an action for damages after the harm has occurred.[36]

2.4 Why new real rights and new goods emerge

Real rights normally form when the value of goods increases, and this happens when resources become scarce, that is, when the tragedy of the commons has occurred or is occurring.[37] Demsetz showed that real rights emerge to internalize externalities when the gains from internalization exceed the costs of defining and enforcing them.[38] North explains that changes in relative prices or relative scarcity lead to the creation of real rights when it becomes worthwhile to incur the costs of developing them.[39] And Barzel teaches that rights do not attach to goods as a whole, but to their attributes; that, since delimiting each attribute is costly, valuable attributes always remain in the "public domain", exposed to capture; and that, as their value increases, people invest in delimiting and capturing them.[40]

Ownership of land captures its productive attributes —cultivating, building, harvesting, selling—, but leaves unassigned the attributes and functions of its environmental patrimony, in Barzel's economic public domain. For a long time this did not matter. Today the relative scarcity of those goods —biodiversity, water regulation, carbon storage, landscape— has changed radically, and with it their value. In North's and Demsetz's terms, it has become worthwhile to define rights over them. Law N° 20.930 does exactly that: by deeming the attributes or functions of the environmental patrimony of the property to be immovable (art. 3, para. 3), it incorporates a new class of goods into private law: ecosystem assets. As was argued before the Constitution Committee of the Senate, the conservation right seeks "to value a new wealth called natural capital, which, following the principle of circulation of wealth, can generate new markets".[41]

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[34] Ubilla (2003), p. 89.

[35] Ubilla (2003), p. 80. This source of financing is additional to the State's tax or financial incentives and to the income derived from the property's environmental services (ibid., n. 30).

[36] On the standardization of real rights as a mechanism for reducing measurement and information costs: Merrill, T. W. and Smith, H. E. (2000). Optimal standardization in the law of property: The numerus clausus principle. *Yale Law Journal*, 110(1), 1–70, p. 24 ff.; Calabresi and Melamed (1972), p. 1092.

[37] Ubilla (2003), p. 90.

[38] Demsetz, H. (1967). Toward a theory of property rights. *American Economic Review*, 57(2), 347–359, p. 350.

[39] North (1990), p. 51. See also Furubotn and Richter (2000), p. 105. Ubilla (2003), p. 90, n. 68.

[40] Barzel (1997), pp. 3–7, 103–104. Ubilla (2003), p. 90, n. 69.

[41] BCN, *Historia de la Ley N° 20.930*, § 2.4, Report of the Constitution Committee, pp. 290–291. On natural capital, Hawken, P., Lovins, A. and Lovins, L. H. (1999). *Natural Capitalism: Creating the Next Industrial Revolution*. Little, Brown and Company, p. 9 ff., cited in Ubilla (2003), p. 81, n. 36. See also Ubilla (2016b), pp. 175–176.

There is an additional point that classical theory overlooked. Demsetz's argument shows how ownership internalizes negative externalities: the owner who overexploits his or her own pasture bears the cost. But the benefits of conservation are *positive* externalities that flow to neighbours and society, and ownership of land does not internalize them; it may even push the owner to convert valuable ecosystems to more profitable uses. These goods, predominantly intangible, are economically public or common goods, whose characteristic failure is not overexploitation but underprovision.[42] The conservation right fills that gap: it creates a person with an interest in ensuring the provision of those positive externalities, and with the legal means to do so.

2.5 Real rights over differentiated attributes of goods

The economic theory of real rights (*property rights*) applies the Coase theorem to the different attributes of goods: different agents will be willing to appropriate different attributes according to their better position to take advantage of them.[43] According to Barzel, "the greater a party's propensity to affect the income a given asset can generate, the greater the share of ownership that party should assume".[44] The efficient allocation of attributes thus leads to the emergence of different rights over the same good. The holder of the conservation right and the owner concur in different bundles of rights, with differentiated faculties and responsibilities; the arrangement between them must be consistent with the ability of each to affect the value of the good and of the ecosystem services it generates.[45] The law consequently allows these goods to be allocated to whoever is in the best position to conserve them —a foundation, a community, a company, a public body— while the owner retains the productive attributes of the land (art. 4: "any natural or legal person, public or private, may be the holder of the conservation right"; see section 4).

The 2003 article also explained why this allocation should be made through a real right and not through personal rights. The latter are more unstable: they do not attach to the goods, they are not necessarily enforceable *erga omnes* or freely transferable, and they are subject to grounds for termination and to a restricted duration, which discourages long-term efforts. For areas of ecological value, "the stable and direct relationship with the good, its enforceability *erga omnes* and transferability […] are essential to achieve a stable conservation status and to encourage the generation of new knowledge and new strategies of sustainable use".[46]

2.6 Tragedy of the commons, tragedy of the anticommons and circulation of wealth

The conservation of areas of ecological interest can also be analysed as a "tragedy of the commons". Hardin showed that, under open access, each agent overexploits the resource because the negative impact is shared among all while the benefit is exclusively his or her own, and proposed two remedies: the creation of

[42] Samuelson, P. A. (1954). The pure theory of public expenditure. *Review of Economics and Statistics*, 36(4), 387–389; Olson, M. (1965). *The Logic of Collective Action*. Harvard University Press. On option and existence values: Krutilla, J. V. (1967). Conservation reconsidered. *American Economic Review*, 57(4), 777–786; Dasgupta, P. (2021). *The Economics of Biodiversity: The Dasgupta Review*. HM Treasury.

[43] Ubilla (2003), p. 91. Following Barzel, *property rights* are an economic notion consisting of the ability to consume the services of an asset directly or indirectly through exchange: Barzel (1997), p. 4 ff.; Furubotn and Richter (2000), p. 76.

[44] Barzel (1997), p. 9 (translated in Ubilla, 2003, p. 92). The same comparative advantages lead different parties to assume more responsibility for the associated variability, that is, more economic risk, which also involves a possibility of gain: Barzel (1997), p. 55.

[45] Ubilla (2003), p. 92.

[46] Ubilla (2003), pp. 92–93. As Carol Rose observes, "property rights of course have the advantage of encouraging people to take care of the resources under their control": Rose, C. M. (1997). Property rights and responsibilities. In M. R. Chertow and D. C. Esty (Eds.), *Thinking Ecologically: The Next Generation of Environmental Policy*. Yale University Press, p. 50. Barzel adds that delimiting a right generates knowledge about the attributes of goods and that, the greater that knowledge, the lower the costs of defending or transferring it: Barzel (1997), pp. 3–7.

property rights or "coercive laws"; Posner proposes the same.[47] In the case of ecosystems, the "common" element is given by the global value of certain attributes of the goods subject to ownership —the irreplaceable value of certain species, CO_2 capture—, which as such do not form part of the individual property of the landowner. But that global aspect is inseparable from a private patrimonial value (trees are also timber), so that any regulation seeking to prevent their excessive exploitation will tend to cross the limits of ownership and to involve an expropriation.[48] Hence the conservation right is not a right over common goods, but an affirmative real right over the ecosystem assets of the property; and it is this right, together with the other incentives and disincentives proposed in 2003, that avoids the tragedy of the commons, at a lower cost than total expropriation and by creating a management structure that generates self-sustainability and knowledge.[49]

2.6.1 The conservation right and Elinor Ostrom's theory of the commons

The most influential response to Hardin comes from Elinor Ostrom. In *Governing the Commons* (1990) she showed that communities of users of forests, fisheries, grasslands and irrigation systems have governed their resources for centuries through their own institutions, without resorting either to the market or to Leviathan, and criticized public policy for seeing private property and state regulation as the only alternatives.[50] She also identified design principles of those institutions —among them, clearly defined boundaries, rules adapted to local conditions, monitoring and state recognition of the right to organize—[51] and, with later work, developed the notion of polycentric governance[52] and disaggregated property into a bundle of rights (access, withdrawal, management, exclusion and alienation).[53]

The conservation right shares that starting point, but it is not an application of Ostrom's theory; it is a different way of understanding and solving the tragedy of the commons. Ostrom's analysis remains anchored in two assumptions of the traditional view, from which the conservation right departs:

- **Tangible resources.** Ostrom studies resources whose units are subtractable: the fish caught or the water extracted by one user is no longer available to another. The conservation right, by contrast, attaches to ecosystem assets, predominantly intangible, of open access and non-rival enjoyment; it is therefore not characterized by exclusion.
- **Use, enjoyment or exploitation.** The institutions Ostrom studies solve a problem of appropriation —how much, when and who extracts—, and even the bundle of rights she proposes is organized

[47] Hardin, G. (1968). The tragedy of the commons. *Science*, 162(3859), 1243–1248; Posner, R. A. (1992). *Economic Analysis of Law* (4th ed.). Little, Brown and Company, p. 36. Ubilla (2003), p. 89, nn. 65–66. The "coercive laws" correspond to Calabresi and Melamed's liability and inalienability rules.

[48] Ubilla (2003), pp. 89–90. On the boundary between property and the *commons* as a field of state action without expropriation, Heller, M. A. (1999). The boundaries of private property. *Yale Law Journal*, 108(6), 1163–1223; by contrast, Epstein, R. A. (1985). *Takings: Private Property and the Power of Eminent Domain*. Harvard University Press.

[49] Ubilla (2003), p. 90. Rose, following Ostrom, notes that Hardin's alternatives are limited and that there are "hybrid" strategies, such as common property regimes and tradable emission permits: Rose, C. M. (1999). Expanding the choices for the global commons: Comparing newfangled tradable allowance schemes to old-fashioned common property regimes. *Duke Environmental Law & Policy Forum*, 10(1), 45–72; Ostrom, E. (1990). *Governing the Commons*. Cambridge University Press. The 2003 proposal is also a strategy combining different types of rules (Ubilla, 2003, p. 91).

[50] Ostrom (1990), pp. 13–14.

[51] Ostrom (1990), p. 90.

[52] Ostrom, E. (2010). Beyond markets and states: Polycentric governance of complex economic systems. *American Economic Review*, 100(3), 641–672.

[53] Schlager, E. and Ostrom, E. (1992). Property-rights regimes and natural resources: A conceptual analysis. *Land Economics*, 68(3), 249–262.

around extraction. The conservation right is neither a right to extract nor a right to regulate extraction, but a limited real right to conserve, which does not imply the propertization of nature.

This difference has institutional consequences. Cooperation no longer arises only in bounded communities of users who share a resource, but among actors and social spheres that do not necessarily exploit it. Thus, the conservation right channels, within private law, several of Ostrom's principles: the constitutive title defines the boundaries; the contract adapts the obligations to each territory; the holder takes on monitoring; and the plurality of holders over the same property configures polycentric governance. But, unlike the institutions Ostrom studied, it does not depend on the State tolerating self-organization: it is a legal form expressly recognized by the legal system, with registry enforceability and effects against successive owners of the property.

In sum, the conservation right goes a step beyond Ostrom: it shifts the problem from the appropriation of tangible resources to the conservation of non-rival intangible values, and thus opens new possibilities of cooperation and of institutional change in North's sense.[54]

2.6.2 The principle of circulation of wealth

The division of rights nevertheless has a limit: Heller's “tragedy of the anticommons”, which occurs when rights over the same good become so fragmented that their holders obstruct one another.[55] The law prevents it through restrictions on subdivision, the *numerus clausus* of real rights —the rule according to which only the law can create them— and limitations on the duration of encumbrances. According to Rudden, the *numerus clausus* is explained because the dispersion of rights over a good generates problems of *hold out* and *free ride*, that is, the refusal of a holder to give way except at an excessive price and the taking of benefits without contributing to the costs.[56] Thus, when the Message of the Civil Code prohibits successive usufructs and fideicommissa “because both hinder circulation and cool the spirit of conservation and improvement, which gives life and movement to industry”, what it seeks is to prevent inefficient fragmentations of ownership. It follows that the principle of circulation of wealth does not entail an absolute prohibition on creating new real rights: its foundation is efficiency, and every efficient division of rights is justified precisely by virtue of that circulation.[57]

Barzel adds that even restrictions “serve to make the right clearer, thereby increasing its value, even though superficially they may seem to reduce its value”. In the case of the conservation right, it will be precisely its existence that gives the property the status of an area of secured ecological value, facilitating the presentation in the market of the environmental services it generates.[58] This reasoning had concrete legislative consequences. The Chamber of Deputies, conceiving the right as a charge that hindered circulation, had set a maximum term of forty years; the Senate, understanding that it was an affirmative

[54] North (1990), pp. 64 and 80.

[55] Heller, M. A. (1998). The tragedy of the anticommons: Property in the transition from Marx to markets. *Harvard Law Review*, 111(3), 621–688; Heller (1999), p. 1196. Ubilla (2003), p. 93.

[56] Rudden, B. (1987). Economic theory v. property law: The numerus clausus problem. In J. Eekelaar and J. Bell (Eds.), *Oxford Essays in Jurisprudence: Third Series*. Clarendon Press, pp. 239–263, cited in Heller (1999), p. 1178.

[57] Message of the Civil Code of the Republic of Chile (1855); Ubilla (2003), pp. 93–94. The administration of goods under divided ownership requires organization, so that the different holders do not attempt to capture attributes not expressly assigned to anyone: Barzel (1997), p. 57. On statutes that benefit and bind many owners by reducing the costs of separate negotiations, Epstein, R. A. (1988). Covenants and constitutions. *Cornell Law Review*, 73, 906–927 (Ubilla, 2003, p. 94, n. 85).

[58] Barzel (1997), p. 127; Ubilla (2003), p. 94.

right over new goods —ecosystem assets— that creates new wealth, eliminated that limit. The law declares it transferable, transmissible and "of indefinite duration, unless the parties agree otherwise" (art. 3).[59]

The difference also has an accounting dimension. Restrictive real rights are generally not recorded as autonomous accounting assets and, when they are, their valuation is restricted to the payments made. Affirmative real rights, by contrast, are recorded autonomously and are subject to valuations linked to the underlying goods or attributes, appreciating over time together with them.[60] For this reason, the conservation right makes it possible to measure and finance management plans —for example, with the methodologies of the Natural Capital Protocol— and makes possible the development of a new sector, the natural capital economy.[61]

2.7 A faculty to conserve, not ownership of nature

Market-based conservation has faced a powerful critique: that property rights over nature enclose what was common, render it fungible, crowd out non-economic motivations and allow the economy to colonize other spheres of life.[62] These objections are directed against property understood as ownership: the power to use, exploit, exclude and dispose. The conservation right is a different structure, and therefore they do not reach it in the same way.[63]

Objection to property over nature	Why it does not reach the conservation right
Appropriation and enclosure	**Ius conservandi.** The holder does not acquire a right to use, extract or dispose of the ecosystem assets, but only the faculty to conserve them: it is a right *to* conserve ecosystem assets, not a property right *over* them. It confers management without withdrawal, a position absent from the classical typology of rights over resources.[64]
Exclusion	**Ecosystem assets – open access and non-rival use.** It is not defined by exclusion. Whoever conserves the regulating function of a watershed does not exclude downstream users from clean water; whoever conserves a landscape cannot prevent others from seeing it. The conserved ecosystem assets, predominantly intangible, remain open-access and, in general, of non-rival use or enjoyment.
Dispossession	**Coexistence with ownership.** The owner keeps the property and continues to use it, subject only to the agreed charges. The right adds a layer; it does not replace an owner.[65]

[59] See Bulletin 1 of this series, §§ 2 to 4; Ubilla (2016b), p. 176, n. 97: the creation of new wealth made it possible to understand that this was an affirmative real right to which the principle prohibiting perpetual restrictions did not apply.

[60] Ubilla (2016b), pp. 178–179, n. 105.

[61] Ubilla (2016b), p. 176. As early as 2003 it was observed that the conservation right appeared to be the most suitable mechanism to demonstrate that carbon sinks of forestry or agricultural projects are permanently subject to the restrictions that guarantee the capture projected from the baseline: Ubilla (2003), p. 79.

[62] Polanyi, K. (1944). *The Great Transformation*. Farrar & Rinehart; McAfee, K. (1999). Selling nature to save it? Biodiversity and green developmentalism. *Environment and Planning D*, 17(2), 133–154; Castree, N. (2003). Commodifying what nature? *Progress in Human Geography*, 27(3), 273–297; Sullivan, S. (2013). Banking nature? The spectacular financialisation of environmental conservation. *Antipode*, 45(1), 198–217.

[63] Ubilla, J. (2026a). *Beyond Enclosure and Leviathan: The Conservation Right as a New Institutional Answer to the Tragedy of the Commons*. Working Paper, Conservation Law Center; Ubilla, J. (2026b). *Conserving Without Commodifying: The Conservation Right, the Economic Value of Nature and the Problem of Reification*. Working Paper, Conservation Law Center.

[64] Schlager and Ostrom (1992).

[65] Smith, H. E. (2000). Semicommon property rights and scattering in the open fields. *Journal of Legal Studies*, 29(1), 131–169; Dagan, H. and Heller, M. A. (2001). The liberal commons. *Yale Law Journal*, 110(4), 549–623.

Objection to property over nature	Why it does not reach the conservation right
Fungibility and abstraction	**No homogenization – no commodification.** The conserved attributes and functions are always specific to each territory. Two conservation rights are never interchangeable like two tons of grain: the right singularizes places instead of homogenizing and commodifying them.[66]
Everyone can conserve	**Broad titleholding – interest – local interest.** Any person, public or private, may be the holder. The State itself may be the holder over a private property, and the right coexists with protected areas and environmental regulation.
Colonization of other spheres by the economy	**Other social spheres influence the economy and the law.** The direction is reversed: what is conserved is defined by ecology, science and the communities that value a place, and economic transactions take their meaning from that conservation purpose.[67]
Fragility in the face of other interests –	**Ecosystem assets and a layer of legal protection.** It creates a layer of legal protection. With the emergence of ecosystem assets —the attributes and functions of the environmental patrimony, which the law deems immovable—, these acquire their own legal relevance and a holder who can assert it against environmental damage, expropriations and statutory easements, which must take them into account and, where appropriate, compensate them.[68]

Applying, moreover, Axel Honneth's theory, we can argue that the conservation right does not involve reification or commodification in a deeper sense. For Honneth, reification does not simply consist in attributing economic value to something, but in a "forgetfulness of recognition": the prior recognition that makes possible our relationship with others and with the world is lost from view, so that persons and things come to be perceived as mere objects, detached from the relationships and meanings that give them sense. With respect to nature, reification consists in ceasing to attend to the multiple meanings that objects have for other persons.[69]

The conservation right operates in the opposite direction. Instead of triggering a "forgetfulness" of the complex relationships between nature and human beings, it makes possible practices of recognition of nature and of the intersubjective relationships of the human beings who form part of ecosystems.[70] Its object, ecosystem assets, is defined precisely by the meanings that different social spheres attribute to a place: ecology, science, aesthetics, spirituality or the community. And since those goods are always specific to each territory, the conservation right "de-commoditizes" spaces, instead of turning them into fungible goods subject to generalized contractual models and standards, as traditional real rights, including easements, tend to do. Thus, instead of a colonization or reification of the other social spheres by the economic sphere, it is the other spheres that expand their rationalities towards the economy, providing it with new social and ecological meaning.[71]

[66] Kopytoff, I. (1986). The cultural biography of things: Commoditization as process. In A. Appadurai (Ed.), *The Social Life of Things*. Cambridge University Press, pp. 64–91.

[67] Zelizer, V. A. (1994). *The Social Meaning of Money*. Basic Books; Honneth, A. (2008). *Reification: A New Look at an Old Idea*. Oxford University Press.

[68] Art. 3, para. 3, of Law N° 20.930. On standing in the action for environmental damage, see art. 54 of Law N° 19.300.

[69] Honneth (2008), pp. 9, 58 and 75.

[70] Honneth, A. (1995). *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Polity Press. See Ubilla (2023), p. 17, n. 17.

[71] Ubilla (2016a); Ubilla (2016b); Ubilla (2023), p. 17, n. 17; Ubilla (2026b).

With Honneth we further argue that economic language —which in any case is not the only one that the conservation right accommodates— does not in itself entail a necessary reification or alienation of social relations.[72] Models such as the "economy for the common good" show that economic relations can be understood without instrumentalizing human and social relations.[73] The economic value that the conservation right makes it possible to recognize does not replace the other valuations of nature: it depends on them and takes its meaning from them.

3. Socio-legal justification: a reflexive legal form

The third justification observes the conservation right from the perspective of society and not only of the individual. Its question is not only whether the parties have an interest worthy of protection, but whether this legal form can make conservation more probable in a complex society. The argument was already put forward in 2003, developed in the doctoral thesis and in the 2016 article, and reached its general theoretical form in "Legal Forms and Reflexive Legal Forms: A New Approach to Reflexive Law" (*Soziale Systeme*, 2024).[74]

3.1 The 2003 argument: a coupling between law and the other social spheres

From the perspective of social systems theory, the 2003 article argued that the creation of the conservation right would correspond to the creation of a mechanism within private law that would facilitate "structural coupling" or "interference" between law and the other social subsystems —economy, politics, morality, science, education— and organizations. Specifically, the right would make it possible "for the 'observations' of science regarding the value of certain priority areas to be incorporated into the private-law descriptions of goods", and for the market to give economic value to the corresponding natural attributes; its operation would generate greater knowledge about environmental services, which would allow those values or "natural capital" to be internalized in economic language and would give rise to "the emergence of new legal transactions in respect of them".[75] Teubner, for his part, recognizes that the descriptions of economic analysis serve as descriptions of the "co-variation" of the legal and economic systems, which explains the complementarity of both justifications.[76]

3.2 The regulatory trilemma of ecosystem conservation

The research that led to the current definition began by analysing the regulatory strategy with which Chile implemented the Convention on Biological Diversity: the creation of protected areas through a combination

[72] Honneth (2008), pp. 9, 58 and 75; Ubilla (2023), p. 17, n. 17.

[73] Felber, C. (2012). *La economía del bien común* [The economy for the common good]. Deusto.

[74] Ubilla (2003), pp. 80–81; Ubilla Fuenzalida, J. (2016a). *Reflexive Law and Reflexive Property Rights: Tackling the Regulatory Trilemma of Ecosystems Conservation* [Doctoral thesis, The University of Edinburgh]. Edinburgh Research Archive, http://hdl.handle.net/1842/22860; Ubilla (2016b), pp. 170–179; Ubilla, J. (2024). Legal forms and reflexive legal forms: A new approach to reflexive law. *Soziale Systeme*, 29(1–2), 268–310.

[75] Ubilla (2003), p. 81. On reflexive law: Teubner, G. (1983). Substantive and reflexive elements in modern law. *Law & Society Review*, 17(2), 239–285, p. 257; Teubner, G. (1993). *Law as an Autopoietic System*. Blackwell, pp. 64–65 and 80; Luhmann, N. (1989). *Ecological Communication*. University of Chicago Press. Interventionist law would have reached its limit because of its inability to handle growing social complexity and to trigger in those regulated structures capable of generating ecological knowledge and practices (Ubilla, 2003, pp. 74–75).

[76] Teubner (1993), p. 81, cited in Ubilla (2003), p. 81, n. 37.

of traditional property rights —ownership and easements— and administrative rules. Its failures were analysed under the three forms of Gunther Teubner's regulatory trilemma:[77]

- **Indifference.** The traditional approach was indifferent to social complexity: traditional property rights separate land from the surrounding ecosystems and communities, blocking cooperation and communication, in contradiction with the Ecosystem Approach of the Convention.
- **Social disintegration through law.** Traditional property rights could operate as a juridification of social spheres, in many cases causing the displacement of people from their original habitat and the dislocation of the corresponding network of relationships and knowledge.
- **Legal disintegration through society.** Those rights could orient the selectivity of law solely towards traditional economic rationality, preventing the social practices needed to generate cooperation, communication and shared knowledge about ecosystems.

3.3 Legal forms and reflexive legal forms

Drawing on George Spencer-Brown's laws of form, legal forms are the fundamental distinctions that operate as minimal units of selection within the legal system. **Reflexive legal forms** are those with greater learning capacities: they combine **normative redundancy**, which stabilizes expectations, with **cognitive variety**, which allows the legal system to learn from the observations of other social spheres.[78] From the internal perspective of the legal system, the distinction constitutive of modern property or ownership is exclusive/non-exclusive access, use and control of material resources: ownership indicates the affirmative side; its limitations and obligations —restrictive rights or the social function of property— the restrictive side. The observations of ethics, science or aesthetics could only reach those peripheral and restrictive elements, so that their affirmative valuations of nature were transformed into restrictive representations, that is, into reductions of value.

The doctoral thesis (Ubilla, 2016a) showed that traditional analytical categories, in particular Hohfeld's, do not make it possible to distinguish adequately between rights such as usufruct and easement, since both decompose into sets of different types of rights (claims, liberties, powers and immunities). But that analysis cannot explain why one right is affirmative (or what implications this has) and the other is a restriction or charge (or what implications that has). A socio-legal analysis reveals, instead, that both sets of bundles of rights are typified differently by a second-order observation that distinguishes between **affirmative real rights** or principal rights and **restrictive real rights** or accessory rights. It is this second-order observation that typifies a right, by using the distinction “bundles of rights of the holder / obligations or restrictions of the owner”, indicating either the affirmative side of the distinction —by means of a “faculty”— or the restrictive side —by means of a “charge” or restriction—. It is this second-order typification or description (normally by means of a legal definition) that indicates one side or the other of the distinction, thus providing the general type of the corresponding set of bundles of rights.[79]

[77] Teubner, G. (1987). Juridification: Concepts, aspects, limits, solutions. In G. Teubner (Ed.), *Juridification of Social Spheres*. Walter de Gruyter, pp. 3–48; Ubilla (2016a), ch. 4; Ubilla (2024).

[78] Spencer-Brown, G. (1969). *Laws of Form*. Allen & Unwin; Luhmann, N. (2004). *Law as a Social System*. Oxford University Press; Ubilla (2024). This approach complements Luhmann's socio-legal theory and proposes a solution to the dispute between Luhmann and Teubner on the capacity of law to steer social change.

[79] Ubilla (2016b), pp. 176–178; Spencer-Brown (1969); Luhmann (2004). This distinction, in the sense developed here, has not been put forward by traditional civil law scholarship (ibid., p. 177, n. 100). The second-order observation corresponds to the “definition” of the right; the first-order observation to its “effects”; and the “characterization” of the right (for example, as a limitation on ownership) may be considered a third-order observation.

> **An example: landscape.** A normative expectation of landscape conservation —for example, the aesthetic valuation of a valley— can be translated legally in two ways: as a restriction or as an affirmative right. As a restriction, for example an easement, it transforms that positive valuation into a normative structure that indicates a negative value: a reduction of the economic value of the property. As an affirmative right, it represents it in a normative structure that indicates the corresponding positive value: the faculty to conserve that landscape. The form of the easement is reflexive only to traditional economic discourse; the conservation right, by means of the faculty to conserve, is reflexive to the other social discourses.[80]

The conservation right was structured by applying the distinction affirmative right/restrictive right and indicating its affirmative side. This allows the "value observations" of different social spheres, which attribute a positive value to nature, to be internalized by the legal system in their original affirmative form. To that end, the institution combines two innovative elements: a new affirmative normative element, the **faculty to conserve** or *ius conservandi*, which brings with it the well-established understanding of traditional proprietary faculties and thus stabilizes normative expectations (redundancy); and a new legal object, the **environmental patrimony and its attributes or functions**, predominantly intangible, which offers a high potential for cognitive variety and reflexivity towards the observations of other spheres.[81] If the *ius utendi*, *fruendi* and *abutendi* allowed the interaction of property law with the observations of the economic system, the *ius conservandi* allows its interaction with the ecological, aesthetic, community, moral and spiritual spheres, as well as with the economic sphere.[82]

3.4 A new generation of environmental regulation

Different conservation rights may be constituted over the same property with respect to different attributes or functions of its environmental patrimony, which facilitates processes of communication and cooperation that make possible the emergence of new information and knowledge, in a context in which the biodiversity crisis is also an information crisis.[83] The public and the private are thus understood as a reflexive *continuum* that admits multiple combinations, and not as a binary opposition. This allows new forms of cooperation among owners, communities, scientists, investors and public bodies in the same territory.[84] In that sense, the conservation right is an instrument of a fourth generation of environmental regulation:

Generation	Instruments
First	Command and control: prohibitions and mandates.
Second	Economic incentives and market mechanisms designed by the authority.
Third	Participation and consensus mechanisms.
Fourth — reflexive	Legal forms that trigger learning among law, society and ecology. The conservation right makes visible the intangible aspects of the environmental patrimony and makes new sustainable practices more probable, beyond protected areas.

[80] Ubilla (2016b), p. 178.

[81] Ubilla (2024); Ubilla (2016a), ch. 9. The right may be general or particular: over the entire environmental patrimony of a property or, for example, over the carbon capture function of a forest.

[82] Ubilla (2016b), p. 174.

[83] Ubilla (2016b), p. 175 and n. 91, referring to the Convention on Biological Diversity (preamble and arts. 17 and 18) and to the Strategic Plan for Biodiversity 2011–2020 (Aichi Target 19). This was one of the reasons for expressly including the reference to attributes and functions in the proposed definition.

[84] Ubilla (2016a), p. 224; Ubilla (2016b), pp. 156 and 175.

Since its enactment, the conservation right has been applied to the most diverse situations —public and private conservation initiatives, specific ecosystem functions such as watershed regulation, carbon capture or landscape, indigenous sites, the recovery of contaminated sites, ecovillages and urban green areas— and is being evaluated for the conservation of darkness for astronomical observation and of silence in spaces devoted to spiritual practices. These developments seem to show that the system of real rights is internalizing a broader range of social interests and observations.[85]

4. Everyone can conserve: the three justifications and open titleholding

The three justifications also converge in a consequence that gives its name to this series: everyone can conserve. Law N° 20.930 provides that "any natural or legal person, public or private, may be the holder of the conservation right" (art. 4). This openness is not a mere legislative policy option, but a requirement of the very foundations of this new real right. For the same reason, the conservation right does not require —and is contraindicated by— the figure of "custodians" or "guarantors", that is, the requirement, legal or contractual, that the right be held, supervised or guaranteed by a specialized organization other than the owner and the person who should be the "holder" by virtue of his or her connection with the territory.[86]

From the normative justification. The interest that the right protects —exclusively determining the conservation of environmental aspects of a thing— is not only not exclusive to conservation organizations —since any person may have it, from any of the social spheres of meaning (scientific, community, aesthetic, spiritual or economic)—, but is held especially by those who know the territory and have a direct relationship with it. The normative power to constitute the right is granted to the owner and to any third party, and its exercise is an expression of positive liberty. Interposing a custodian or guarantor between the holder and the owner replaces that liberty with a tutelage: the holder's interest ceases to be the sufficient reason for the owner's duties, and the decision on what and how to conserve shifts to a third party who is neither a party to the agreement nor the one truly entitled to hold the right.

From the economic justification. The conservation right is justified because it reduces the transaction costs of the decision to conserve and because it allows ecosystem assets to be allocated to whoever is in the best position to conserve them (sections 2.3 and 2.5). A mandatory custodian produces the opposite effect: it adds a party and a cost to each transaction, duplicates monitoring and control functions, creates an obstacle to access to —or use of— the institution, and restricts in advance the universe of holders to one type of organization, even though others —a local community, a company, a municipality, a neighbour or a research centre— may be in a better position to affect the value of those goods. The functions usually attributed to a guarantor, such as monitoring, reporting or verification of compliance, can be agreed or contracted when the parties deem it useful, without becoming a condition for the existence of the right.

The use of a custodian or guarantor generates at least two problems: (i) it creates a conflict of interest, since the same holder cannot report that its own performance is correct; (ii) it externalizes the normative titleholding of ecosystem assets, thereby hindering the self-sustainability of the actors who live in the territory and who will need those assets to finance long-term conservation.

[85] Ubilla (2024).

[86] This model comes mainly from United States law on *conservation easements*, in which the *holder* must be a public body or a qualified non-profit organization: Uniform Conservation Easement Act (1981), § 1(2); see also Internal Revenue Code, § 170(h)(3). Law N° 20.930 establishes no restriction whatsoever on titleholding (art. 4). Titleholding is developed in Bulletin 3 of this series.

From the socio-legal justification. The reflexivity of the conservation right depends on the different social spheres being able to access the legal form directly and to express in it their own value considerations or valuations of nature; hence also the possibility of several holders concurring over the same property. A custodian model reintroduces, by private means, the logic of traditional regulation: an intermediary that filters and translates those valuations according to its own criteria, concentrates conservation in a small number of organizations and reduces the cognitive variety that the legal form seeks to enable. In terms of the regulatory trilemma, this again risks indifference to social complexity and social disintegration through law, that is, the juridification of local conservation practices.

In sum, the affirmative and open character of the conservation right is what allows conservation to cease being a task reserved to the State or to specialized organizations and to become a social practice within the reach of any person, in and from any social activity. In short, it must be ensured that "everyone can conserve".

In this context, it should be noted that, whatever the titleholding and depending on the type of project, the relevant conservation standards must be applied, such as the Standards of the International Union for Conservation of Nature (IUCN), which we will address in Bulletin 3 of this series. Likewise, depending on the case, verification of their implementation may be established by external, independent and neutral entities, such as auditors. Such verification is sufficient to certify compliance with those standards in the areas where this is necessary, without requiring the titleholding of the conservation right to be ceded.

Conclusions

1. **An interest worthy of protection.** The conservation right is justified by rights and liberties, not by interventionist public policies. It protects the interest in exclusively determining the conservation of environmental aspects of a thing and makes possible a positive liberty exercised from different social spheres of meaning. That is why its central element is a faculty —the faculty to conserve— and not a charge.

2. **Conservation as value creation.** As argued in 2003, the right reduces the transaction costs of the decision to conserve, since it makes it possible to obtain the conservation attributes of a property without acquiring all the rights over it or resorting to expropriation; it delimits attributes that were in the economic "public domain"; and it creates new wealth that can circulate, without implying ownership of nature or its reification. The efficient division of rights is consistent with the principle of circulation of wealth of the Civil Code, which explains why the law declares it transferable, transmissible and of indefinite duration.

3. **A reflexive legal form.** By indicating the affirmative side of the distinction between affirmative and restrictive rights, the right combines a stable normative structure, the faculty to conserve, with a broad object, ecosystem assets. It thus addresses the regulatory trilemma of ecosystem conservation and makes new sustainable social practices more probable in different areas of human activity.

4. **Everyone can conserve – without custodians or guarantors.** Because of its affirmative character and open titleholding, the conservation right does not require custodians or guarantors, which are contraindicated from each of its three justifications. Conservation ceases to be a task reserved to the State or to specialized organizations and becomes a social practice within the reach of any person, especially those who have a direct relationship with the territory. The application of adequate standards

(e.g. IUCN standards) and the adequate verification of their implementation by external, independent and neutral entities (e.g. auditors) is sufficient to verify compliance with them in the areas where this is necessary.

5. **Convergence in the form.** The three justifications converge in the two elements that the Senate introduced into the legal definition and that Bulletin 1 identified in the legislative history: the faculty to conserve and ecosystem assets. It is the form of the right that makes possible its normative justification, its economic function and its social reflexivity.

Next bulletin · Tuesday, November 24, 2026. *Bulletin 3: «Titleholding, ecosystem approach and IUCN Standards», with its talk on the channel @todospuedenconservar.*

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