THE CONSERVATION RIGHT: A NEW PROPERTY RIGHT FOR SUSTAINABILITY[1]

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1. General Remarks

Traditional property rights have existed for more than 2000 years, but today we are witnessing the development of a new kind of property right: a conservation right ("Conservation Right") which has emerged from legal research conducted at the University of Edinburgh in the UK and in Santiago, Chile[3].

The Conservation Right, already enacted as law in Chile, is a property interest in the environmental heritage of a certain property or real estate. In contrast to traditional notions of easements or covenants, which by definition represent restrictions on property, the Conservation Right is an affirmative right on the ´environmental heritage´ -or the ´attributes´ and ´functions´ of such heritage- that derives from a particular property.

The Conservation Right is registered akin to other property rights over land or real estate - which in Chilean law includes water rights, mining rights and others, and it can also be freely transferred.

The Conservation Right presents a significant shift in the way sustainable development can be funded and legislated. From the economic perspective, because of its affirmative structure -that facilitates the assignment of value to the conservation of the corresponding ecological attributes and functions-, it provides the basis for the creation of new markets for investment in natural capital assets that deliver a multitude of benefits. In other words, from the economic perspective, the conservation right also provides the legal basis for the valuation and management of ´natural capital´, making possible different arrangements between and among different interested parties. In this context, the Conservation Right is also consistent with ´compensation systems´ (i.e. of the Environmental Impact Assessment System), because it is an adequate legal instrument for transferring the corresponding compensation measures, which thereby can be treated as an asset with value and included in the accounting books and records of the owner.

From a social perspective, it enables the law to indicate/designate those intangible assets as the ´legal object´ of the entitlements for the benefit of individuals, groups and social spheres. Moreover, we are seeing that the Conservation Right provides the legal basis for and facilitates the development of new cooperative practices between and among diverse stakeholders. In this sense, this new property right facilitates and promotes social inclusion, presenting a contrast to the idea of ´exclusion´ that has been a predominant rationale in traditional property right theory to date. This is not only because of the ability to create different conservation rights over different intangibles related to the same property - to the benefit of different stakeholders - but because this new right combines a normative power to ´conserve´ with the notion of intangible assets that by their nature are ´open-access´– and therefore, benefit the general public.

In simpler terms, the affirmative character of the Conservation Right represents a ground-breaking legal design that paves the way for economic and legal systems to recognize the value of different services and benefits that nature provides to a multitude of social and ecological systems.

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[3] Ubilla 2003, Ubilla 2016a. For full references of cited sources please see http://www.conservationright.org/documents/

While the development of conservation practices and natural capital markets are normally approached from ecological, economic, managerial and scientific perspectives, the role of the legal system is often forgotten or simply considered as a mere instrument of implementation. The Conservation Right brings in a new legal perspective that provides a legal structure that facilitates the emergence of new social practices, markets and new forms of cooperation with respect to the sustainable use of nature.

2. Legal Vision: The Origin and Theoretical Basis of the Conservation Right

The Conservation Right was originally proposed in Chile in 2003[4] but its definitive affirmative legal form was developed through research conducted at the University of Edinburgh in the United Kingdom[5].

This new right was called a ´conservation property right´ or ´conservation right´ in order to differentiate it from traditional property rights such as conservation easements or servitudes[6].

The challenge was not simply to create a property right for the conservation of nature. The challenge was to develop a new ´kind´ of property right that would make possible the emergence of new social practices in all spheres of society with respect to biodiversity and natural capital. This would require a new paradigm, a new property right that would facilitate the recognition of the affirmative value of ´the different attributes and functions of nature´ of an intangible character[7].

To achieve this purpose, it was necessary to break away from 2,000 years of tradition, a tradition in which property rights had developed on the basis of agrarian economic structures, a tradition in which only the tangible aspects of land were recognized and valued. Moreover, we also had to step away from the modern view that social and environmental aspects could be managed and considered through external limitations or obligations or restrictions on the right of ownership (i.e. for instance, through easements, covenants, or through the concept of the ´social function of property´ in the continental law tradition). Therefore, we needed a new right where the central normative structure would entail the recognition of the affirmative value of nature. This was achieved by directly combining a new affirmative or permissive normative element (i.e. in continental law this was expressed in a new ´faculty´: the ´faculty to conserve´ or ´ius conservandi´) with a new legal object[8]: the ´environmental heritage´ -and the ´attributes´ and ´functions´ of such heritage-[9].

In the legislative process required to enact the Conservation Right in Chile, we saw the contrast between the traditional ´restrictions´ approach and this new ´affirmative´ approach. The traditional approach was presented in the lower house through a draft that proposed the adoption of ´conservation easements´. However, this approach met significant difficulties and the resulting changes to the draft ultimately sent to the Senate imposed a 20 year duration limitation on these easements. The reason for this was clear: restrictions are considered to reduce the value of ownership and, therefore, reduce the circulation of

[4] The original proposal is contained in Ubilla, 2003.

[5] Ubilla, 2016b

[6] The denomination was also proposed in Ubilla 2003, but a more thorough justification is found in Ubilla, 2016a..

[7] From a socio-legal perspective, such a property right would facilitate the reflexive interaction between law and the different social spheres and, therefore, it would be deemed to be a ´reflexive property right´ (Ubilla 2015a, Ubilla 2016a). This socio-legal analysis was based on the theory of the ´*reflexive form of law*´ proposed in Ubilla 2016a Ch.7 and 8, and applied to property right in Ch.9. From this perspective the basic challenge was to design a property right that would not only be reflexive to the expectations of the economic sphere but also the expectations of ´other spheres of society´ – such as ecology, aesthetics, morality, spirituality, education, etc. For this purpose, it was necessary to develop an ´affirmative´ legal form that would recognize the ´value observations´ of other social spheres (Ubilla 2016a). Only in this way, the various ´value observations´ would be taken into account in their own affirmative form, so that through interactions with the economic system new natural capital assets would eventually emerge.

[8] In the context of the property rights system, this means new ´assets´. These assets come to legally exist for the purpose of their conservation.

[9] This new legal structure was presented in Ubilla 2014, and further developed and justified in Ubilla 2016a y 2016b.

economic wealth and, consequently, are subject to the principle of "limitation of restrictions" [10]. Therefore, the lower house established such a duration limitation for easements. At this stage, the conservation right was defined as a restriction or easement, and the word ´encumbrance´ was used in the very definition of article 2 of the draft. The time limitation was a great disappointment for the conservation community in Chile.

It was only at the Senate that the idea of a new kind of property right, an affirmative and reflexive right, was proposed[11]. This theoretical approach was well-received because under this new framework the Conservation Right would be defined as an affirmative *right to conserve* the environmental heritage –and the corresponding attributes or functions- of a certain land or real estate asset. In other words, it was understood that this new right would essentially be a right to conserve new intangible aspects of land, that is, new intangible assets. This new understanding allowed for the conclusion that these new assets constituted new wealth or ´natural capital´ that would also need to circulate perpetually for the relevant markets to emerge. Consequently, this new legal design and definition allowed for the elimination of the 20 year limitation[12].

The economic approach, however, was only one of the rationales presented to support and justify the creation of this new legal framework[13]. Other rationales such as the legal-theoretical, the socio-legal and the political arguments had significant influence in the legislative process. The legal-theoretical argument is related to the normative justification of the conservation right on the basis of the freedom to pursue the conservation of nature[14]. The socio-legal argument is related to the need to promote the reflexive interaction of different social spheres and the proper inclusion of diverse social interests into the property rights system, because only if all spheres of society can cooperatively interact, will there be a chance for new social practices to unfold - and new ecological knowledge to emerge-[15]. The political argument is related to the need to tackle the challenges of the ecological crisis of biodiversity and climate change[16]. This new kind of property right appeared to be a proper legal mechanism for the implementation of the Convention on Biological Diversity, not only with respect to ´in-situ conservation´ but also with respect to the various Aichi Targets, among which Target 19 on ´knowledge´ appeared to be the most significant. Moreover, in this context, it was also mentioned that the Conservation Right was flexible enough to facilitate the implementation of the different conservation categories proposed by the IUCN[17].

3. General Practical Vision

The Conservation Right has a broad scope of application, which is partly due to the broad definition of "environmental heritage" adopted by Chilean law.

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[10] In common law this is manifest in the idea that *´covenants are not favorites of the law´* - Quoted by Korngold referring to several precedents in the United States of America, see Korngold (2004), pp.298-99.-

[11] The original proposal to the Senate of the Congress of Chile was contained in Ubilla, 2014. See also Bulletin No. 5.823-07. of the Senate of the Congress of Chile, for full references please see http://www.conservationright.org/documents

[12] Ubilla 2014; Ubilla 2015, Ubilla 2016a.

[13] Ibid.

[14] Ubilla, 2016b.

[15] Ubilla, 2016a, Ch.9. This involves a contrast with the socio-legal structure of traditional property rights that would solely or predominantly facilitate the interaction between the legal system and the economic system, without taking into account other social spheres or social interests (See Ubilla, 2016a for the specific reference to property rights analysed from the perspective of social systems theory, see also Luhmann, Niklas 2015.

[16] Ubilla 2016 a, Ch.1, 2, 3, 4 and 9.

[17] Ubilla 2016a. Additionally, the Conservation Right was also conceived as a legal instrument that would facilitate the integration of different interest groups or stakeholders into the relevant natural spaces. This would also involve a new paradigm, in contrast to the traditional approach that in many occasions results in the forced migration of local communities –and therefore in the loss of traditional and local knowledge about the corresponding ecosystems-. See Ubilla 2016a Ch.4, and Agrawal y Redford (2009), pp.1-10.

Thus, the Conservation Right can be established with respect to large ecosystems but also with respect to attributes or functions of specific environmental components such as air, water, soil, noise and others; as well as over other environmental "intangibles" such as eco-systemic functions or services -including socio-cultural practices ranging from indigenous customs to dark-skies for astronomical observation- or values associated with the artificial environment created by man. Additionally, the conservation right could also be applied to urban spaces for the conservation and development of green areas, recreational areas, urban crops, urban-architectural values, etc. The use of the Conservation Right for these purposes would significantly reduce the transaction costs of those projects (i.e. by preventing the costly purchase or ´regulatory taking´ of the underlying properties).

Moreover, as said, this new property right can also facilitate the emergence of secondary markets for compensation and mitigation measures, both for the environmental impact assessment system and for other off-set systems (i.e. in Chile, the urban compensation system known as ´contributions to public space´).

It is noteworthy that it is possible to establish different Conservation Rights on the same underlying property in relation to different attributes, eco-system services, etc. This is not only important in order to provide diversified sources of financing to a given project, but also in order to facilitate the inclusion or involvement of diverse social interests in the development and management of the corresponding project.

This new right can empower communities, neighborhoods' associations or any kind of associations to participate in the development of sustainable projects and practices at different levels, including at the local level.

The Conservation Right may be held by private or public legal entities and, therefore, it may also be used for the implementation of public policy agendas - within the scope of the functions of the corresponding agencies.

Therefore, the Conservation Right appears to be a very flexible mechanism that can be used in diverse contexts and for different types of projects, from those that relate to the conservation of rural or urban lands to those that relate to the development of natural capital markets, among others.

Some Projects in Chile

Our Conservation Law Center of Chile (the “CLC”), has established Conservation Rights for diverse projects, following the affirmative and reflexive approach described above. The CLC also established the first public (State-owned) Conservation Right on 6,000 hectares property, in favour of CONAF, the conservation agency of Chile[18]. The CLC is working on a dozen more cases, relating to rural and urban areas, which will be posted from time to time in the referenced webpage.

Final Remarks

Our planet is facing unprecedented challenges and it appears that on the current trajectory we will not be able to meet these challenges much less achieve our sustainability goals and the corresponding Aichi Targets.

Each time a strategic plan fails, we insist that we just need “better implementation”. The paradox is that, in many respects, we continue to use regulatory tools developed hundreds of years ago. The Conservation Right is a modern tool that introduces a new affirmative and reflexive paradigm more suited for handling the ecological and social complexities of our post-modern societies.

[18] Further details in http://www.conservationright.org/cases/

This new legal paradigm should be seriously considered by different countries and international organization as an indispensable tool for tackling the urgent problems we face.