LEGAL NATURE OF FOREST AND WILDLIFE RESOURCES

Legal – Administrative Framework & Analysis of Legal Loopholes and Contingencies

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SOCIEDAD PERUANA DE ECODESARROLLO

CONSTITUTIONAL ANALYSIS OF LEGAL NATURE OF FOREST AND WILDLIFE RESOURCES

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1. Introduction

During the past two years, Sociedad Peruana de Ecodesarrollo has researched policies promoting biofuels and agribusiness projects by the Ministry of Agriculture and Irrigation, Ministry of Energy and Mines and the Regional Governments.

Along the same lines, it has researched the legal and administrative mechanisms for the allocation of land, approval and funding of projects, which allow for the deforestation of primary forests and land traffic in the Peruvian Amazon. As part of this research, it has developed a number of complaints about breaches of national regulations committed by private, domestic and foreign capital business groups associated with such projects, and the irregularities perpetrated by various officers of the National Government and the Regional Governments, in order to facilitate these investments, with serious environmental, social, economic and institutional impacts.

In this scenario, it warns of persistent problems associated with the lack of transparency by officers of Regional Governments for the provision of information related to the problems described. It also found uncertainty about the regulatory framework related to the change of use, as well as finding the transferred and/or systematized information referring to agricultural land, energy crops, processing plants and deforestation, among others.

Therefore, Sociedad Peruana de Ecodesarrollo deems necessary to develop a legal analysis study aimed, first, to clarify the legal status of forest and wildlife resources, in particular the Forest and Protected Land, and the legal regime applicable thereto; secondly, to clarify the legal and administrative framework for the allocation and change of forest and protected land use, regardless of the land tenure system; all to facilitate the understanding of these concepts to the responsible jurisdictional entities to investigate and punish environmental crimes related to the allocation of forests, forest areas and protected lands.

In this context, we were required to perform the following activities:

a) Analyze the legal nature of forest and wildlife resources, in particular Forest and Protected Land, and the legal regime applicable thereto, in comparison to and unlike the agrarian system; and the obligations and responsibilities of the entities responsible for managing Forest and Wildlife Resources, at the Central Government and Regional Government levels.

b) Analyze the legal and administrative framework applicable to bidding and change of forest land use and protected land use, unlike the agrarian regime and the relevance or legality of the norms being applied by the Ministry of Agriculture and Irrigation, and the Regional Governments for the awarding for a fee, the purchase/sale or the fragmentation of forests for agricultural purposes and/or agribusiness.

c) Identify regulatory and administrative gaps regarding the application of forestry and wildlife legislation by the entities that promote agribusiness monocrops generating deforestation and environmental damage.

This report, from a constitutional perspective, will perform each of the activities requested.

2. Legal Nature of Forest and Wildlife Resources from a constitutional perspective

The contemporary State, after the events of World War II, has undergone intense changes. One of the most significant changes, from a legal perspective, is certainly the centralized loss of the law, as a privileged source of law, in favor of the Constitution.

Thus, it is stated that modern states are involved in processes of constitutionalization[1], that is, the constitutional content, in particular the constitutional rights and property, have an effect of irradiation on the institutional and social structures of the community, so that not only the public law itself (administrative, criminal and/or procedural law) but also private law (civil, commercial law)[2] are reconfigured by the constitutional mandates.

From this perspective, the State and society as a whole no longer look only at the law and the principle of legality, but also at what the Constitution requires, prohibits or permits, so that we are facing a constitutional principle, according to which the Constitution applies directly to individual cases, not only within what is legally due but also within what is constitutionally possible.

Therefore, in order to establish what is constitutionally prescribed, forbidden or permitted, it is of the utmost importance to establish a typology of the norms contained in the Constitution. Starting from this classification, it will be possible to identify the specific obligations of constitutional mandates, especially those which recognize constitutional rights and property.

2.1 Typology of constitutional norms: Rules and Principles. Form of Application: Subsumption and Principle of Proportionality

In constitutional theory and dogma, since approximately fifty years, there have been discussions in various latitudes, concerning the characteristic features of constitutional

[1] GUASTINI, Riccardo. "La 'constitucionalización´ del ordenamiento jurídico. El caso italiano". ["The 'constitutionalization' of the legal ordinance. The Italian case]" In: GUASTINI, Riccardo. *Estudios de teoría constitucional*. [Constitutional theory studies.] Mexico: Fontamara, 2001, pages 153-183. LANDA ARROYO, César. "La constitucionalización del derecho peruano" [The constitutionalization of Peruvian law".] In: *PUCP Law*, number 71, 2013, pages 13-36.

[2] HESSE, Konrad. *Constitutional law and private law*. Madrid: Civitas, 1985, page 14 and ff.

norms. As a result of such discussions[3] certain consensuses have been reached on the fact that constitutional norms may assume two basic types: rules and principles[4].

Thus, various differentiation criteria have been proposed. Those which have been most diffused are the structural and qualitative criteria. In the case of the former, it is understood that rules and principles are norms that are differentiated by their semantic structure. While in rules it is possible to identify an assumption of fact and a legal consequence, in principles, this is not feasible.

For example, it may be stated that Article 112 of the Constitution, which provides that the presidential term is five years without immediate reelection may be considered as a rule, since it clearly states what is the assumption to which it applies and what is the legal consequence of such application: the elected president may only take that office for five years.

However, articles such as 2.22 of the Constitution which recognize that everyone has the right to enjoy a balanced environment suitable for the development of live does not emanate from the aforementioned structure (assumption plus consequence), this to the extent that the said norm does not refer to a specific assumption, but an ideal state of affairs to be achieved (a suitable environment for the development of the person's life).
In the second case, in the qualitative criterion, it is understood that principles, unlike rules, prescribe something to be done as much as possible, considering existing legal and real possibilities. Therefore, the principles may be conceived as enhancement mandates, while the extent of compliance thereof may be performed to varying degrees. The scope of its performance also depends on the principles and rules opposing it[5].

However, rules are either fulfilled or not since they contain commands within the scope of what is factual and legally possible[6]. Consequently, while principles as enhancement mandates require gradual compliance, to the fullest extent possible;

[3] Undisputed players of that discussion, theoretically, are H.L.A. Hart (El Concepto de derecho. Translation by Genaro Carrió. Buenos Aires: Abeledo Perrot, 1961) and Ronald Dworkin (Los Derechos en Serio Translation by Martha Guastavino. Barcelona: Ariel, 1984).

[4] BERNAL PULIDO, Carlos. "Estructura y límites de la ponderación". In: *DOXA. Cuadernos de Filosofía del Derecho* [Journal on the Philosophy of Law], number 26, 2003, page 225.

[5] ALEXY, Robert. "Sistema jurídico, principios jurídicos y razón práctica" ["Legal system, juridical principles and practical reason"]. In: *DOXA. Cuadernos de Filosofía del Derecho*, number 5, 1988, page 143.

[6] Alexy, Robert. *Teoría de los derechos fundamentales [*Theory of fundamental rights]. Second Edition. Translation by Carlos Bernal Pulido. Madrid: Center for Political and Constitutional Studies, pages 67-68.

rules require compliance with all or nothing, not supporting cases of gradual compliance; therefore they would be definitive mandates.

Typology of Constitutional Norms:
Differentiation criteria between Rules and Principles

Criteria	Rules	Principles
Structural	Factual assumption plus legal consequences	List of matters to be achieved
Qualitative	Definitive mandate, compliance with all or nothing	Enhancement mandate, gradual compliance

Based on this approach, it is pointed out that rules are applied to specific cases, using the subsumption technique. This method involves identifying facts (of a case) according to the typical description in a constitutional norm (legal or administrative norm), then if this identity exists, the prescribed consequence shall be applied in the same norm.

As an example we note that Article 30 of the Constitution establishes that "Citizens are those Peruvians over eighteen years." This means that if, for example, Juan Perez, a teenager born in our country turns 18 (an event identified with the factual assumption of Article 30), under that circumstance, Juan Pérez acquires Peruvian citizenship (which comes to be the legal consequence).

Instead, the application of principles is made through the principle of proportionality; in particular, via the weighing forming part thereof.

As a methodological tool, the principle of proportionality involves analysis of intervening (infringing) means (legal, administrative and judicial) in the protected area of rights (constitutional securities and assets), thereby requiring that the measure must be a measure suitable to a constitutionally legitimate end. This first analysis is called a suitability or appropriateness trial (test, examination).

Furthermore, the principle of proportionality requires that there is no other alternative, which achieving with equal efficiency any end, may influence in a lesser extent in the intervened right; actually, it requires for the measure to be necessary or essential to achieve the constitutional end legitimizing it. This second step is called the necessary trial (test, exam).

Finally, it also requires for the measure to be proportional; that is to say, the level of participation of the right involved is to be directly proportional to the level of realization of the right or constitutional end supporting the measure. If this balance is not there, the measure shall be challenged as unconstitutional because of being disproportionate.

Notwithstanding that there may be cases where this imbalance be established, there may also be situations where there is a tie in the proportionality analysis; in such cases, the presumption plays in favor of the measure, meanwhile with the proportionality analysis, the presumption of legitimacy that goes hand in hand with every government measure, in particular, legislative measures, which are also deemed by the democratic principle to be valid, would not diminish.

In order to plot the use of the principle of proportionality, we could cite the case, which as resolved by the Constitutional Court determined the declaration of constitutionality of the legislative measure that banned the use of dredges (or similar devices) in all streams, rivers lakes, ponds, lagoons, water bodies, wetlands, natural springs in the area of small-scale and non-industrial mining (judgment in File No. 00316-2011-PA).

In this regard, the Court held that the prohibition of such devices was a suitable measure, because it avoids the impact made on the environment. In that sense, it was considered that as their use allows to move large amounts of sediment in rivers, such machines will "cause pollution, disturbance of riverbeds, biological impacts, destruction of aquatic habitats, alteration of floodplain ecosystems and destruction of riparian vegetation"; hence, the ban meets a legitimate aim, that of protecting the environment, while it also is an appropriate measure to achieve such purpose.

On the other hand, during the process, it was not demonstrated that there is another measure equally suitable to protect the environment influencing in lesser extent on property rights of the owners of dredges (small miners and artisanal miners).

Finally, in relation to the weighing in the case, the Court considered that the right of ownership on the dredges was intensely affected. However, the realization of environmental protection justified the adoption of such measure (Judgment No. EXP-00316-2011-PA, grounds 20-22).

Application of Principles through the Principle of Proportionality

Test of suitability	- Any action involving a constitutional law or right must be likely to provide a constitutionally legitimate purpose. - Test which correlates the *mean* with the *purpose* being sought.
Test of necessity	- Involves the adoption –among different alternatives– of that limiting to a lesser extent the right being infringed. - Test correlating two means: the mean used by the State (legislature, court, public administration) with an alternative mean, is a *mean-mean* test.
Test of proportionality in the strict sense or weighing	- Involves examining constitutional rights or securities in dispute. - It is governed by the so-called law of weight: the more intense is the infringement or non-performance of a right, the more important should be the performance of that opposing it.

However, the use of principles in the constitution, which does not exclude the use of rules, is due to the fact that written constitutions are the result of constituent processes, eminently of a political nature, where the terms to reach agreements on core issues standards that shall govern society are peremptory. Therefore, the solution is to use formulas allowing a high degree of consensus, although this tactic always causes a loss of clarity concerning what is being prescribed, permitted or prohibited.

Despite this, there is agreement around the idea that such formulas always seek protection at the highest legal level, of judicial property important for social coexistence, if not for society as a whole, may survive as a political unit.

In effect, behind constitutional norms adopting the form of rules or principles, there is always protection of property essential for the individual and society as a whole. The incorporation of such property in regulatory wording, determines that they can be called legal property. Therefore, any property incorporated in the Constitution shall be constitutional property.

Thus, for example, when Article 2.22 of the Constitution recognizes the right of everyone to enjoy an environment suitable for the development of his life, one can define and differentiate between a fundamental right and a constitutional legal right; while the fundamental right consisting of the claim or demand of a person so that the environment in which he performs be appropriate for his lifestyle, the legally constitutional property shall be the environment itself, which as a legal right, shall be given protection at the highest legal level.

Although the separation line between the two concepts can be very thin, if not diffused, delimitation, at least at a conceptual level, makes it possible to better understand not only the legal category to which a given parcel of reality (faculties of the subject, property, materials, state of affairs) is ascribed to, but also the regime provided by the Constitution to each category.

2.2 The Legal and Constitutional Property as Subject of Protection by the State

As stated, the Constitution has collected a number of properties, which by their location may be described as constitutional property. However, the constitutional property may be objects of various types, such as national security, public order, general welfare, education, social peace, work, family, social security, land, sea near the coast, natural resources, biodiversity, natural areas, etc.

Certainly, it cannot be said that such property, due to the sole consideration of being included in the Constitution, may be classified on its own as fundamental rights. They are properties, which the Constitution recognizes as valuable for social coexistence, if not, for the very existence of the State.

Therefore, the State has a special duty to protect such property, since Article 44 of the Constitution clearly states that the State should: defend national sovereignty, guarantee full respect for human rights, protect the population from security threats and promote general welfare based on justice and the integrated and balanced development of the Nation.

Now then, with respect to the subject of this query, we should ask what is the legal status of forest and wildlife resources particularly forest land and protected land. This will be discussed in the next section.

2.3 Are resources of Forestry and Wildlife, including Forest Land and Protected Land, subject to constitutional protection?

From previous theoretical developments, we must abide by the provisions of the Constitution in order to determine whether forest and wildlife resources have been recognized as legal constitutional property, including the legal and constitutional regime established to this effect.

In this regard, the 1993 Constitution provided a special chapter entitled "The Environment and Natural Resources" in the title referred to the "Economic Regime".

Thus, the following is put forth:

> *Article 66: Natural resources, both renewable and non-renewable, are the property of the Nation. The State is sovereign as to their use.*
>
> *The conditions for their use and granting to private individuals are determined by organic law. Any such concession grants to the holder a real right, subject to the said legal regulation.*
>
> *Article 67: The State determines national environment policy. It promotes the sustainable use of its natural resources.*
>
> *Article 68: The State is obligated to promote the conservation of biological diversity and the natural areas protected.*
>
> *Article 69: The State promotes the sustainable development of the Amazon region with appropriate legislation.*

At first impression, from the transcribed norms it is evident that they take -in some cases- the form of rules, due to how categorical their statements are; and in others, the form of principles. In this regard, we propose the following differentiation:

Rules	**Principles**
Natural resources, both renewable and non-renewable, are the property of the Nation (Article 66).	The State determines the sustainable use of natural resources (Article 67).

The State is sovereign as for the use of natural resources (Article 66).	The State is obligated to promote the conservation of biological diversity and the natural areas protected (Article 68).
The State determines national environment policy (Article 67).	The State promotes the sustainable development of the Amazon region with appropriate legislation (Article 69).

In this proposal, the distinction criterion is qualitative. From this judgment, norms classified as rules, are either met or not met. Essentially, natural resources are the heritage of the Nation or they are not. The constitutional mandate clearly establishes that they are the heritage of the Nation.

There is also no question as to whether or not the statement according to which the State is sovereign for the use of natural resources, must be adhered to, since the State is either sovereign or not, and there is no room for gradualism in the mandate. Similarly, with regard to the mandate under which the State determines the national environmental policy, as such policy is either determined by the State or it is not.

On the other hand, the norms which we qualified as principles, take on the form of enhancement mandates, since the sustainable use of natural resources supports graduations conditioned by the special characteristics of the natural resources themselves. Indeed, it is not the same determining when we are faced with a sustainable use of mineral resources in comparison to biological or forest resources.

Similarly, the obligation to preserve natural areas and biodiversity, supports not only the notion of gradual but also of diversity, because depending on the type of natural area (fallow land, desert land adjacent land to rivers or the sea, vegetation, located on the mountains or in the Amazon) or the type of biological specimen and the potential risk of extinction (sea creatures, jungle, the mountains, the coast) conservation measures can and do differ. However, these measures should be adequate to achieve their conservation.

On the other hand, as from the above provisions it should be noted that the constituent used a broad enough concept to refer to the different resources provided by nature: natural resources. This concept would be only one species within the broader notion of natural elements, defined as all things provided by nature regardless

of their value; however, natural resources are those elements designed to meet human needs[7].

In this sense, constitutional jurisprudence has it that natural resources, in the broadest understanding, are made of "(...) *the set of elements provided by nature to meet human needs, in particular; and generally, biological needs. They represent the part of nature which currently has a value or potential for mankind. In other words, they are the natural elements that human beings uses to meet their material and spiritual needs; i.e., they have the capabilities to generate some kind of benefit and welfare*" (Judgment No. 00048-2004-AI, ground 28).

The breadth of the natural resources allows for the inclusion, for example, of hydrocarbons, minerals, water resources, soils, forests, wildlife and marine species, among others. So, forest and wildlife resources may be included therein, as well as forest and land protection. Consequently, forest and wildlife resources are constitutional goods as such are protected by the State.

However, the legal regime to which the Constitution ascribes for natural resources is that of eminent domain that is not the same as the public domain. It should be kept in mind that the State has public domain and private domain property, but in both cases, it exercises the right to ownership, the former governed by administrative law (under which, property -including natural resources- is inalienable, indefeasible and imprescriptible); and the latter, by civil law (which the State may freely transfer).

In contrast, in the eminent domain regime there is no ownership. Eminent domain property belongs to the Nation as a whole, and the State on behalf of the Nation, as provided in the Constitution itself, should set the rules, via organic law for their sustainable use (Article 66).

In this regard, it should be noted that the Constitutional Court has already held that the scheme of eminent domain does not give the State a right to ownership over natural resources.

In this direction, the supreme interpreter of the Constitution has stated the following: "The State does not hold a subjective situation of owner of natural resources, which may grant it a series of exclusive powers over such property as an owner (...) The State's subjective constitutional statutes -as legal representative of the Administration– with respect to the manorial estate, shall be a duty to guarantee,

[7] HUNDSKOPF, Oswaldo. "Comentario al artículo 66". *[*"Commentary to Article 66."] In: AA.VV. *La Constitución Comentada [Comments on t*he Constitution]. Tome II, Second Edition. Lima: Legal Gazette, 2013, page 170.

protect and use the heritage of the Nation, which is to ensure the full possession of such property to promote general welfare based on justice and on the integrated and balanced development of the Nation, pursuant to the Article 44 of the Constitution". (Judgment in File No. 00048-2004-AI, grounds 100 and 101).

Therefore, the Constitution provides that the natural resources, including forest and wildlife resources are the heritage of the Nation. Given this condition, the State is sovereign in its use, since "(...) *the political body has the judicial capacity to legislate, manage and resolve any disputes which may arise concerning their best use.*" (Judgment in File No. 00048-2004-AI, ground 29).

As noted in doctrine, *"National Heritage [of natural resources] means that the State owns what others cannot own and within a peculiar regime: that which the Nation needs to impose. The question is posed as a title corresponding to the eminent domain of the nation, expressing its sovereignty and enabling it to issue regulations within the scope of its territory for goods and people* (... therefore ...) *there should not be confusion between the eminent domain of natural resources in public domain. Thus, the concept of eminent domain refers to property which is the original property of the State, including those on which can establish private property rights. Instead, the term public domain refers to a special legal regime of the State property which is inalienable*[8]*."*

In the table below we plot the differences in assigning a particular legal regime to natural resources:

Differences between the Regime of Eminent Domain and Public Domain

Eminent domain	Public domain
There is no ownership over the natural resources.	There is a property regime under the administrative law according to which, such property should be inalienable, indefeasible and imprescriptible.
The State is sovereign to determine any rules for the sustainable use thereof.	The State could not grant titles allowing the exploitation thereof.

[8] Kresalja ROSELLÓ, Baldo and César OCHOA CARDICH. *Régimen Económico de la Constitución de 1993* [Economic Regime of the 1993 Constitution]. Lima: PUCP Editorial Fund, 2012, page 188.

On the other hand, although the State may grant the sustainable use of natural resources to the private sector, it remains *"bound to promote the preservation of biological diversity and protected natural areas."*

This implies that the exploitation of natural resources, in whichever form, "(...) *cannot be separated from national interest, being the universal heritage of Peruvians of all generations. The benefits derived from their use must be shared by the Nation as a whole; hence, their single and particular enjoyment is outlawed"* (Judgment in File 00048-2004-AI, ground 29). Precisely, the Constitution provides that the State promotes the sustainable use of natural resources, and if it is the case of resources in the Amazon, adequate legislation allowing their sustainable development should be enacted.

Along the same lines, the Constitutional Court has stated that the State has the obligation to protect and preserve natural resources, avoiding predation to safeguard the public interest (Judgment in File 0006-2000-AI, ground 2).

Now it is clear that such constitutional property, forest and wildlife resources make up what is called the environment, that is, the environment in which human beings develop and unfold. This, as such, constitutes another important constitutional right, because it is inseparable from the average human being, the space actually occupied[9].

However, it should be noted that this constitutional property has a subjective dimension, since it is not only a constitutional property, but it can also be treated as a fundamental right, this is like the right of everyone to have an adequate environment for the development of his life, according to the provisions set forth in Article 2.22 of the Constitution.

In its subjective facet, i.e., as a fundamental right, the right to the environment involves two aspects: a) the right to enjoy such adequate environment, and b) that the environment must be preserved.

In this regard, the Constitutional Court has stated that the contents of both facets are interrelated, as the right to enjoy a suitable environment involves: "(...) *the power of people to enjoy an environment in which its elements develop and interact naturally and harmoniously; and in the case where man is involved, it should not present a substantive alteration of the interrelationship between the elements of the environment. This means, therefore, the enjoyment of not just any environment, but*

[9] It refers to the same idea as in judgment of File 00048-2004-AI, ground 17.

only of that which is suitable for the development of the person and his dignity (Article 1 of the Constitution). Otherwise, its enjoyment would be frustrated and the right would be so devoid of content" (Judgment in File 00048-2004-AI, ground 17).

Moreover, the right to preserve the environment in a healthy and balanced manner "(...) *involves binding obligations for public authorities to maintain environmental goods in appropriate conditions for its enjoyment. In the opinion of this Court, such obligation is also extended to private individuals, and even more so to those whose economic activities impact directly or indirectly the environment"* (Judgment in File 00048-2004-AI, ground 17).

However, the Constitution also recognizes that economic use of natural resources is not inconsistent with its preservation. For this, the State is responsible for promoting the sustainable use of any resources through the enactment of legislation and an appropriate institutional framework.

With respect to this subject, the Constitutional Court has held that "(...) *the link between economic production and the right to a balanced environment adequate for the development of life, is embodied according to the following principles: a) the principle of sustainable or supportable development; b) the principle of preservation, in which merit the aim is to maintain environmental property in optimum condition; c) the prevention principle, which involves safeguarding the assets from any environmental hazards which may affect their lives; d) the principle of restoration, based on sanitation and environmental recovery of impaired assets; e) the principle of improvement, by which it seeks to maximize any benefits of environmental property in favor of human enjoyment; f) the precautionary principle, which involves measures of caution and reserve when there is scientific uncertainty and threat indications on the actual size of the effects of human activities on the environment; and g) the principle of compensation, which involves creating repair mechanisms for the exploitation of non-renewable resources."* (Judgment in File 00048-2004-AI, ground 18).

Essentially, in addition to the principle of sustainable development, development legislation must respect the provisions and materialize these principles. Therefore, from the provisions set forth in the Constitution and the legal developments materializing it, there must be an evaluation of the legal regime applicable to forest and wildlife resources.

3. Legal Regime applicable to Forest and Wildlife Resources

In our legal system, currently there are two norms governing the legal regime of forest and wildlife resources.

a) Law No. 27308, the Forest and Wildlife Act, enacted on July 15, 2000, which was repealed by the Single Complementary Provision Derogatory of Legislative Decree 1090, published on June 28, 2008. Nevertheless, one year later, its effect was restored by Article 2 of Law 29376, published on June 11, 2009; and,

b) Law No. 29763, the Forest and Wildlife Act, dated July 21, 2011. which effective term has been suspended until the adoption of its regulations[10], except as provided in Articles 12 to 17 (governing the creation, supervision, functions, organizational structure and resources of the National Forest and Wildlife Management System), Article 135 (enabling public investment in forestry matters by regional and local governments), and the Sixth, Seventh and Eighth Final Complementary Provisions linked to term rules and regulations of the law and of the National Forest and Wildlife Management System.

Basically, the legal framework applicable to the use of forest resources remains under Law No. 27308, the Forest and Wildlife Act of year 2000. This will be so until the Regulations of Law No. 29763 are approved.

Then, from a review of Law No. 27308 it is noted that a number of definitions on forest resources, wildlife resources and environmental services have been established (Article 2). In the case of forest resources, it includes natural forests and forest plantations, as well as land which major use capacity is for production and forest protection and other wildlife components of emerging terrestrial and aquatic flora, regardless of their location in the country.

It also sets forth that the State promotes the management of forest and wildlife resources as a crucial element to ensure its sustainable development. To do this, the Ministry of Agriculture, now the Ministry of Agriculture and Irrigation, has been instructed to regulate the role and promotion of the sustainable use and preservation of forest and wildlife resources (Article 3).

[10] The draft for the Regulations of Law No. 29763 was published and opened to suggestions from the public until February 28, 2014, as set forth in Article 1 of Ministerial Resolution No. 0374-2013, MINAGRI, published in the "*El Peruano*" Official Gazette on September 30, 2013. It should be noted that in accordance with Article 4 of the same Ministerial Resolution, after consolidating the input received from the public and having produced a new text for the draft regulations, it must be subject to a process of consultation with the indigenous peoples.

In relation to forest management, the norm provides that the National Forest Heritage is composed of:

Type of forests	Definitions
Production forests	Wooded areas, which, due to their biotic and abiotic characteristics, are suitable for permanent and sustainable production of timber and other forest services. They are subdivided into: a. Permanent production forests-. They are areas with primary natural forests, which through Ministry of Agriculture resolution, are available to individuals for exploitation, preferably of wood and other forest and wildlife resources as per INRENA proposal. b. Reserve production forests-. They are primary natural forests intended for preferential production of timber and other forest goods and services that government held in reserve for future empowerment through concessions. Rights can be granted in these areas for the exploitation of different timber and wildlife products, while not affecting the exploitable potential of these resources.
Forests for future use	They are surfaces, which due to their biotic and abiotic features are being developed to be placed on permanent production of timber and other forest services. They are subdivided into: a. Forest Plantations: Are those achieved through the establishment of tree and shrub cover in forest areas of major use capacity. b. Secondary Forests: Are wooded areas populated by pioneer species, consisting of primary forest loss due to natural phenomena or human activity. c. Forest Recovery Areas: Land without vegetation or with sparse tree cover or low commercial value, requiring afforestation and reforestation to reintegrate them into production and provision of forest services.

Forests in protected land	Are surfaces which due to their biotic and abiotic characteristics, serve primarily to preserve the soil, maintain water balance, preserve and protect riparian forests oriented to watershed management to protect biodiversity and environmental preservation. Indirect uses are promoted within these areas, such as: ecotourism, the recovery of wildlife in danger of extinction and exploitation of non-timber products.
Natural areas protected	Surfaces necessary for the preservation of biological biodiversity and other values associated to environmental, cultural, scenic and scientific interest, are considered protected areas in accordance with the provisions of Law No. 26834.
Forests at indigenous and rural communities	Those which are within the territory of such communities, with the guaranties afforded thereto by Article 89 of the Political Constitution of Perú.
Local forests	Are awarded by INRENA according to the regulations, through authorizations and permits to rural populations and communities for the sustainable use of forest resources.

Similarly, Law No. 27308 establishes two types of concessions for the exploitation of forest resources: forest concessions for timber purposes and forest concessions for non-timber purposes (for ecotourism, for example).

Meanwhile, Law No. 29763 focuses on the issue from another perspective, which is more comprehensive if possible. In this sense, it establishes a set of principles (forestry and wildlife governance, participation in forest management, free and informed query, etc.), catalogs to forests and wildlife heritage in an encompassing manner, as it points out that such heritage consists of forest ecosystems, forest and wildlife resources at their source, forest and wildlife biodiversity, including genetic resources, planted forests on the State land, services of forest ecosystems and other wild vegetation ecosystems, among others (Article 4).

Regarding forest resources, it states that they include natural forests, forest plantations, land whose use capacity is forest or for protection, with or without tree cover and other wild components of emerging terrestrial and aquatic flora including their genetic diversity (Article 5).

Regarding the purpose of the query, it resulted of particular importance as established in Article 37 of Law No. 29763, which states:

> *"Article 37: Prohibition of current land use change of higher capacity use of forest and protected land.*
>
> *In the case of land with major use capacity of forestry and higher use for protected land, with or without vegetation, the change in current use for agricultural purposes is prohibited.*
>
> *The granting of land titles, certificates or proof of possession in public lands with higher forest use capacity or major use of protection capacity, with and without forest cover, as well as any type of recognition or installation of public infrastructure services, is prohibited, under liability of the officers involved.*
>
> *This does not preclude the granting of in rem rights under use assignment agreements for use in exceptional cases and subject to the most stringent requirements of environmental sustainability in areas zoned as subject to special treatment under this Act and its regulations. This provision is established without prejudice to the rights and the land of indigenous and rural communities"* (we have added underlining).

This legal provision expressly prohibits changing the use of land with major forest use capacity and major protection use capacity, which purpose is to use it for agricultural purposes.

While this is an important development in the legal regulation of forest resources, clearly aimed at preservation, unfortunately this norm is not in effect, as is the case with the entire Law No. 29763, with the exceptions already noted above.

Another norm linked to the forest resources regime is that consisting of the regulations of Law No. 27308, approved by Supreme Decree No. 014-2001-AG, which remains in force until such time as the Regulations of Law No. 29763 are approved.

In addition, Law No. 26821, Organic Law for the Sustainable Use of Natural Resources is of particular importance. This norm sets out a series of rules related to the State sovereignty in the use of natural resources (Article 6), the promotional duty of the sustainable use of resources (Article 7), the use of natural resources granted to the private sector should be in harmony with the Nation's interest (Article 8), as well as general provisions relating to granting rights to the exploitation of natural resources, conditions for sustainable use of resources, among other topics.

Likewise, include is Supreme Decree No. 009-2013-MINAGRI, enacted on August 13, 2013, approving the National Forest and Wildlife Policy. This policy adopts the principles set out in Law No. 29763, the Forest and Wildlife Act.

It also establishes that the general policy goal is to seek *"Contribute to the sustainable development of the country, through proper management of the Forestry and Wildlife Heritage of the Nation, to ensure sustainable use, preservation, protection and enhancement, for the provision of goods and services from forest ecosystems, other wild vegetation ecosystems and wildlife, in harmony with the social, cultural, economic and environmental development of the Nation's interest"*. Consistent with this general objective, four specific objectives are established:

> "*Specific objective 1: Guarantee an institutional framework to ensure an ecologically sustainable, economically competitive, socially and culturally inclusive administration of the Nation's Forestry and Wildlife Heritage, in a framework of governance, governability, trust and cooperation between all stakeholders.*
>
> *Specific objective 2: Ensure the preservation and sustainable use of goods and services from forest ecosystems, other wild vegetation ecosystems and wildlife, promoting integrated management respects: forest management; security on acquired rights; monitoring, supervision and control; as well as timely, transparent and accurate information for decision making.*
>
> *Specific objective 3: Promote competitive business nationally and internationally, which must be socially inclusive and environmentally sustainable, prioritize the generation of high added value and provide a lasting profitability to forest users and the country, while at the same time discourage the change of use of forest land.*
>
> *Specific objective 4: Strengthen and promote community forest management by Indigenous Peoples and other local peoples users of the forests, respecting their*

rights and cultural identity, and promoting social inclusion, equity and gender equality in the conduct and use of forest and wildlife resources."

It further establishes six policy axes: Institutionality and governance, sustainability, competitiveness, social inclusion and multiculturalism, and knowledge, science and technology. A series of specific actions are provided for compliance purposes with respect to each axis.

A comprehensive assessment of these general norms, from the perspective of the provisions of the Constitution and constitutional jurisprudence, reveals that emphasis is placed on the sustainable use of forest resources, as it is clear from the provisions set forth in the Constitution.

However, there are no major regulations linked to the respect for the other principles involved in the sustainable use and economic exploitation of natural resources.

Indeed, in the regulations under review, there is no legal development related to the principles of preservation (in which merit the aim is to maintain environmental property in optimum condition); of prevention (which involves safeguarding the assets from any environmental hazards which may affect their lives); of restoration (based on sanitation and environmental recovery of impaired assets); of improvement (by which it seeks to maximize any benefits of environmental property in favor of human enjoyment); the precautionary (which involves measures of caution and reserve when there is scientific uncertainty and threat indications on the actual size of the effects of human activities on the environment); and of compensation (which involves creating repair mechanisms for the exploitation of non-renewable resources).

However, given the provisions of the Constitution[11], which presume the immediate implementation of the mandates and constitutional principles and the binding legal force of constitutional rulings, including those related to File No. 00048-2004-AI, where such principles are recognized, there is no legal impediment for such principles to be directly applicable to specific cases.

[11] LANDA ARROYO, Cesar. "La fuerza normativa constitucional de los derechos fundamentales" ["The Constitutional Regulatory Force of Fundamental Rights]." In: Bazán, Claudio Victor and NASH (editors). *Justicia constitucional y derechos fundamentales. Fuerza normativa de la Constitución* [Constitutional Justice and Fundamental Rights. Regulatory Force of the Constitution]. Montevideo: Konrad Adenauer Foundation - Center for Human Rights, School of Law, Universidad de Chile, pages 17-42.

4. Differences between the Legal Regime applicable to Forest and Wildlife Resources and the Agrarian Regime

Unlike the legal regime of forest resources, the agrarian regime is governed by Legislative Decree 653, Ley of Investment Promotion in the Agrarian Sector. This legislation states that the comprehensive development of the agrarian sector is a priority, so the State should promote the efficient use of land and water dictating the norms for the protection, preservation and regulation of the use of such resources (Article 1). Thus, it regulates the right to land ownership, its free transfer, possession, lease, mortgage and agricultural collateral, limitations on property rights, regulation of rural land.

In the case of rural land, it states that these are located in rural areas, which are intended or likely to be intended for agrarian purposes and not enabled as urban. It also states that the land abandoned by their owners go into the State's public domain.

In relation to the land located in the jungle and upper jungle, the aforementioned legislation states that forest and jungle land areas are awarded for a consideration. Land with forest production potential shall be governed by the applicable law, namely, the Forestry and Wildlife Law - Law No. 27308, until Law No. 29763 becomes effective.

This approach to the agrarian regime reveals that there are two substantial differences between this regime and the forest resources regime. First, the applicable legal regime is different, while forest resources are subject to the eminent domain regime, where the State may use concession for sustainable development but not grant property rights. In the case of the agrarian regime, the regime is that of the public domain, whereby the State may transfer ownership via transfer -for a fee- of the premises for economic exploitation.

Secondly, the forest regime allows the use of forest resources for preservation, however, the agrarian regime provides for the purpose of economic exploitation, whether for the farming, agro-livestock industry or other related activities.

Differences between the Eminent Domain Regime of Forest Resources and the Public Domain Regime applicable to the Agrarian Sector

Forest Resources (Eminent domain)	Agrarian sector (Public domain)
Concessions for use for sustainable development are made. No transfer of ownership	The State may transfer ownership of the land, for a fee.
Use for preservation purposes is permitted.	Transfers are made for economic exploitation.

However, given the complex orography of our land, there may be a case where the property or rural land for agrarian purposes overlap with land where forest resources exist and wildlife resources are protected; so it is necessary to have different levels of coordination between levels of government related to the protection of forest resources and the soil exploitation for agrarian purposes: Central Government (Ministry of Agriculture and Irrigation) and Regional Governments.

In this context, it is interesting to address the various obligations which can be enforced both government levels to ensure forest resources and wildlife resources.

5. Role of the State over the use of Forest and Wildlife Resources

The State, as guarantor of forest and wildlife resources, must design an appropriate legal framework for the development and sustainable use of forest and wildlife resources, especially those located in the Amazon. Additionally, this legal framework must develop, in addition to the principle of sustainable development, any principles of preservation, prevention, restoration, improvement and precautionary compensation, as set forth in constitutional jurisprudence.

Notwithstanding the above, from the perspective of the provisions set forth in the Constitution, the President of the Republic, as head of the Executive Branch, must steer the Government's general policy (Article 118.3). Therefore, in the Law for the Bases of Decentralization - Law No. 27783, it has been established that it is the exclusive competence of the National Government, to design national and sectorial policies (Article 26, numeral 26.1, subsection a).

In relation to the Regional Governments, the Constitution sets out in Article 188 that decentralization is a form of democratic organization, which is a process of progressive devolution and competences and resources. As part of this process, the responsibility of Regional Governments is "*to promote and regulate activities and/or services in agriculture, fisheries, industry, agribusiness, trade, tourism, energy, mining, transportation, communications, education, health and environment, in accordance with law*" (Article 192, numeral 7).

Along the same lines, the Law for the Bases of Decentralization, more specifically entrusts the Regional Governments the exclusive jurisdiction to manage and adjudicate the urban and vacant land owned by the State in its jurisdiction, except for municipal land (Article 35, subsection j)), and to promote the sustainable use of forest resources and biodiversity (Article 35, subsection n).

On the shared competences of the Regional Governments with the National Government, it is noted that they share the "*promotion, management and regulation of economic and productive activities in their area and level, corresponding to the agriculture sector (...) and the environment*" as well as the "*sustainable management of natural resources and improvement of environmental quality*" and the "*preservation and management of reserves and regional protected areas*" (Article 36, subsections c), d) and e)).

From this perspective, it could be identified the specific functions corresponding to the Central Government and Regional Governments in relation to the problem subject matter of query.

5.1 Executive Branch

In the Executive Branch, two entities are immersed in the problems described in the introduction to this report: the Ministry of Environment (MINAM) and the Ministry of Agriculture and Irrigation (MINAGRI).

According to the provisions of Legislative Decree 1079, through the National Service of Natural Areas Protected (SERNAP), MINAM is the competent authority to manage the forest heritage, flora and fauna. In addition, MINAM has a Vice-Ministry of Natural Resources Strategic Development, which in turn, has a General Land Management Directorate, responsible for developing, in coordination with relevant parties, any policies, plans, guidelines for land planning, which includes the management of land located in the Peruvian Amazon, both for use in forestry and targeted to farming.

Meanwhile, MINAGRI, through the General Directorate of Agricultural Environmental Affairs (former National Institute of Natural Resources), is responsible for implementing the Regulations for Land Classification by Major Use Capacity, approved by Supreme Decree No. 017-2009-AG.

This norm makes it possible to characterize the soil potential at the national level, by determining their ability and identifying limitations thereof. Moreover, it allows for the reclassification of land for economic exploitation purposes, in accordance with the processes of promoting private investment in farming, as defined in Legislative Decree 653, Law of Investment Promotion in the Agrarian Sector.

5.2 Regional Governments

Regional Governments, in accordance with the provisions set forth in their Organic Law - Law No. 27867, as part of the process for the transfer of duties, have gradually assumed responsibility for land management and use and sustainable development management of natural resources, including forest and wildlife resources within their territory.

In this regard, Article 53, subsection a) of Law No. 27867, provides that the Regional Governments, in environmental and land use matters, are responsible for: defining, adopting, implementing, managing, controlling and administering environmental and land use plans and policies, in accordance with the plans of the local governments.

On the other hand, as far as farming is concerned, Regional Governments are responsible for: issuing permits, authorizations and forest concessions in areas within the region as well as for carrying and exerting control in strict compliance with national forest policy (Article 51, subsection q) of Law No. 27867.

Therefore, it is the Regional Governments in the jungle, which are authorized to directly award the barren lands, located in the Amazon, for purposes of farming and agro-industrial exploitation.

6. Legal and Administrative Framework applicable to the Allocation and Use Change of Forest Land and Protected Land. Constitutional Analysis

The applicable legal framework for the allocation of forest land and protected land is the Forest and Wildlife Act – Law No. 27308 of the year 2000, as long as Law No. 29763, Forest and Wildlife Act of the year 2011, does not enter into effect.

Law No. 278308 provides for the possibility of concessions for the sustainable use of forest resources located in forested land owned by the State.

In addition, the provisions set forth in Law No. 26821, Organic Law for the Sustainable Use of Natural Resources are applicable. In this regard, Article 11 of the said norm provides for Ecological and Economic Zoning (ZEE for its Spanish acronym), to support the land use planning to avoid conflicts caused by overlay of titles and inappropriate uses. The norm goes on to state that the zoning is performed on the basis of priority areas reconciling national interests related to the preservation of the natural heritage with the sustainable use of natural resources.

However, the Regulations for Land Classification by Mayor Use Capacity, approved by Supreme Decree No. 017-2009-AG, applicable at the national level to land users in the context of farming, of the Economic Ecological Zoning and land use, permit the reclassification of a unit of land whenever changes in edaphic or relief parameters have influenced the change of its use capacity.

While the norm allows for the reclassification of land, no contains a prohibition such as that prescribed in Article 37 of Law No. 29763, Forest and Wildlife Act (not yet in force), cited above, which prohibits reclassification of forest land capable of increased usage and greater use for protection; therefore, land with these features under the aforementioned regulations, may be reclassified for farming or agribusiness use.

In this regard, it is important to note that the querying entity has realized that certain economic groups are promoting changes in land use with greater forest use capacity and with greater protection use capacity, in principle protected and regulated by forest and wildlife legislation for being allocated to farming and agribusiness use, particularly for the exploitation of *Elais guineensis* (oil palm), regulated by the norms related to the farming sector (Legislative Decree 653, Law of Investment Promotion in the Agrarian Sector, and the Regulations for Land Classification for Greater Use Capacity, approved by Supreme Decree No. 017-2009-AG).

In this sense, these business consortiums would be promoting the informal occupation of forest land by local people, then the logging of forest resources, land traffic or land usurpation, with the promise of future purchase sale. Simultaneously, these companies would file applications for the land to be awarded to the Regional Governments, so that they, in turn, would transfer it to the General Directorate of Environmental Affairs of MINAGRI. The latter would reclassify the land under the forest protection scheme as land with greater farming use capacity. This process would be developed unevenly, because the MINAGRI does not have good engineering studies. After the forest land

has been reclassified for agricultural use, the Regional Governments –under the Legislative Decree 653– would be awarding it as rustic or rural land[12] which can be sold.

Matched with this situation, there has also been evidence of the fraudulent use of the provisions of Legislative Decree No. 838, which had a limited effective term, first to December 31, 1998, but later extended to December 31, 2000 by the sole article of Law No. 27041.

In this regard, it should be recalled that Article 1 of Legislative Decree No. 838, suspended the application of Article 19 of Legislative Decree No. 653[13] in economically depressed areas in the Highlands, Lower Jungle and Upper Jungle, in order to promote the reintegration of people displaced by terrorist violence.

In effect, this was special legislation passed on behalf of those displaced by terrorism, to be able to award land in deprived areas to promote repopulation. However, that object is being denied as apparently the cover norm is reportedly being used for a non-intended purpose, that is, allocate land for those displaced so that they will then proceed to transfer it to companies for farming or agribusiness (oil palm) exploitation purposes.

These situations create an obvious fraud against the law and abuse of rights, which is prohibited by Article 103 of the Constitution[14]. Indeed, the aim would for land covered by forest and wildlife legislation to be converted to the agrarian regime, so that its agribusiness exploitation would be facilitated (felling natural forests, destroying ecosystems) to grow oil palm; as well as use a system conferring the right to preferential access to rustic State property located in areas of the upper and lower jungle, which originally have a specific purpose (the repopulation of those displaced by terrorism) to end up being channeled toward other purposes (agribusiness exploitation for the growing and exploitation of oil palm).

[12] SOCIEDAD PERUANA DE ECODESARROLLO. *Monitoring and Mitigation of impacts on elaeis guineemsis agribusiness monocrops in the Peruvian Amazon. F*

[13] Article 19 of Legislative Decree No. 653 provides: "Any award of rural land to any person or entity, will be done for a fee, through a purchase/sale agreement with reservation of title until full settlement of price. The agreement may be executed by private document, with legalized signatures, which will be sufficient title registration."

[14] Constitution, Article 103: "Special laws can be passed because the nature of things so require, but not because of differences among people. The law, since its coming into force, applies to the impact of existing legal relationships and situations and has no retroactive force or effect; unless, in both cases, in criminal proceedings, whenever it acts for the benefit of the defendant. Only a law may repeal another law. A law may also be declared without effect by a sentence stating its unconstitutional status. The Constitution does not protect abuse of law "(underlining added).

This situation, which seriously affects the sustainable use of protected resources, is facilitated by the non-effectiveness of prohibition, as referred to in Article 37 of Law No. 29763, Forest and Wildlife Act. Unfortunately, non-effectiveness of this norm causes the State not to be fulfilling its role to fully protect the existing natural areas and biodiversity. Therefore, this would be a case of a violation of Articles 67, 68 and 69 of the Constitution.

7. Regulatory and Administrative Gaps regarding the Application of Forestry and Wildlife Legislation by the Entities that promote Agribusiness Monocrops generating Deforestation and Environmental Damage.

A regulatory gap implies that a norm does not exist, depending on the specific competences of their issuing body to regulate a particular factual situation. Certainly, there is an intimate relationship between the norm and the factual assumption used to regulate.

As noted, the problem which motivates the query consists of the fact that private entities, with the consent and cooperation of the Regional Governments and MINAGRI, are promoting the change of use of land located in the Amazon, which is under the scope of forest laws, so that it will be subject to the agrarian regime, which allows the commercial exploitation of land for farming and agribusiness purposes.

Thus, the regulatory gap would consist of the absence of a norm prohibiting the change of use of land where forest resources are located. However, such a norm exists, which is Article 37 of Law No. 29763, Forest and Wildlife Act; despite it is not effective

It would therefore be appropriate for Congress to provide for the effectiveness of the said norm.

Accordingly, while this norm is not applicable, one cannot ignore the fact that the State cannot remain indifferent against risks such as the vacuum generated. In this sense, the principles established by the Constitutional Court in File No. 00048-2004-AI, could be applicable, especially the principles of preservation and prevention. Under these enhancement mandates, the State should maintain in optimum condition the environmental property which includes forest resources; similarly it must protect environmental property from any danger which may affect its existence.

That danger is not potential but actual. According to the querying entity, forests are subject of informal possession; and then they are cleared to proceed with their

reclassification as land for farming purposes for adjudication as brownfields. During the process, any damages sustained by the ecosystems are irreversible, because their use does not imply preservation but transformation for commercial purposes (industrial exploitation of oil palm).

In this context, while it is not legal to promote an economic activity, such as the exploitation of oil palm for biofuel generation, it should not be forgotten that such exploitation should respect the existing legal framework and without committing fraud against the law. In any case, it is the duty of the competent authority of the Judiciary and the Public Prosecutor's Office to take the necessary corrective measures to prevent irreversible damage to the forest resources of the Peruvian Amazon.

8. Conclusions

Based on what was developed in this report, we can conclude that:

a) Forest and wildlife resources are constitutional property benefitting from legal protection by the provisions set forth in the Constitution.

b) The legal regime applicable to forest and wildlife resources is the eminent domain, not the public domain.

c) The State has a duty to protect the sustainable use of natural resources and wildlife, especially of those located in the Amazon, through appropriate legislation.

d) Due to the decentralization process, there are responsibilities to be shared between the central and regional levels of government in land administration, environmental management and protection of natural resources, including forest and wildlife resources.

e) The legal framework applicable to forest resources does not contain a provision prohibiting the change of use of the land where such resources are located, so that it will not be possible for them to be reclassified as land for agricultural or agribusiness use.

f) To ensure the State protection of these resources public officers of the central government and of the regional governments should apply the preservation and prevention principles established by the Constitutional Court in File No. 00048-2004-AI.

9. Recommendations

According to the above, we recommend as follows:

a) The Congress to provide immediate effect for Article 37 of Law No. 29763, Forest and Wildlife Act.

b) Administrative officers of Regional Governments and the National Government, given the regulatory gap ensure that forest and protective grounds are not reclassified as land for agricultural and agribusiness purposes, applying the principles of preservation and prevention, as set out in Legal Basis 18 of the Constitutional Court judgment handed down in File No. 00048-2004-Ai.

Lima, April 23, 2014.

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