The Internet as Constitutional Right and Public Utility in Peru: A Critical Perspective

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ABSTRACT

This paper examines the recent designation of the internet as a constitutional right in Peruvian law, analyzing the relationship between constitutional rights and public services. Generally, not every constitutional right necessitates the creation of a public utility, nor is every public service inherently tied to a constitutional right. As indicated in the legislative record, the constitutional reform recognizing the internet as a right may not yield the anticipated outcomes. The effectiveness and efficiency of such a service cannot be ensured through legal protection alone. Therefore, the establishment of a public service must be grounded in careful planning and foresight, supported by a reasonableness analysis.

Keywords: Constitutional Rights, Public Utilities, Internet, Planning, Efficient Provision.

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El internet como derecho constitucional y servicio público en Perú: una mirada crítica

RESUMEN

Este artículo examina la reciente declaración de internet como derecho constitucional en el derecho peruano. Por ello, describe los conceptos de derecho constitucional y servicio público, así como la relación entre ambos. En principio, no todo derecho constitucional necesita un servicio público, ni todo servicio público está directamente vinculado a un derecho constitucional. En el caso de internet, como se observa en el expediente legislativo, la reforma constitucional no era necesaria. La eficacia y eficiencia del servicio no se logra por una mayor protección legal. Por ello, es necesario que la creación de un servicio público se acompañe de planeamiento y prospectiva, dentro del análisis de razonabilidad.

Palabras clave: derecho constitucional, servicio público, internet, planeación, prestación eficiente.

INTRODUCTION: THE INTERNET—FROM A PUBLIC SERVICE TO A CONSTITUTIONAL RIGHT

Communication is a fundamental need for humankind, encompassing both individual and social dimensions. On an individual level, it fosters the development of various aspects of a person's character, from the material to the spiritual. For instance, health and education are two areas where an individual's physical well-being and spiritual growth are heavily reliant on acts of communication. Indeed, people must express and articulate the ailments they face to safeguard their health. Similarly, education thrives on meaningful dialogue between individuals. Moreover, communication serves as a social act, enriching the lives of those involved. In these contexts, recipients of communication grow as individuals; for example, a doctor evolves and enhances their practice by addressing a patient's concerns, and the same holds true for educators responding to their students[2]. However, it is important to note that this socialization is not merely bidirectional. In the case of human organizations, omnidirectional communication is essential, as their governance depends on it. Families, associations, and businesses all

2 To understand the individual and social nature of communication, see Manuel Martín Algarra, *Teoría de la comunicación: una propuesta*, Madrid: Tecnos, 2004.

rely on communication to enable their members to achieve their objectives[3]. Following this logic, the State is no exception. Governance does not simply coincide with the act of electing rulers. Both public debate on government decisions and the judicial and political oversight of officials require multiple acts of omnidirectional communication. Therefore, addressing the general interest in a democratic manner necessitates the participation of many individuals, whether directly or through their legitimate representatives[4].

To fulfill the need for communication, humankind has developed various instruments. Initially, it was human beings themselves who acted as the medium of communication. For example, messengers—such as the Inca runners—used their own efforts, while others relied on beasts of burden (like llamas or horses) or machines to convey the decisions of their governors. However, between the 18th and 19th centuries, technological advances brought about a disruptive change: cable communication. Stefan Zweig[5] describes the establishment of telegraph connections between America and Europe as a pivotal moment in human history. This technological breakthrough enabled immediate communication, eliminating the need to endure lengthy, uncertain waits for the exchange of messages across various social organizations. Following the telegraph, the pace of technological change has been relentless, leading to the emergence of telephony and the internet. Unlike the telegraph, these new technologies also harness the radioelectric spectrum for communication.

Before proceeding, it is important to delineate the focus of this study. It centers on the type of communication that facilitates the exchange of messages between individuals, whether bidirectional or omnidirectional. Unidirectional communication, such as that found in radio or television, falls outside the scope of this study. However, from a legal perspective, some of the conclusions we reach may also apply to these forms of communication.

In the case of Peru, the evolution of telecommunications can be analyzed from various perspectives, including the technology in use, the enabling regulations, and the service providers, among others. The works of Luis Vinatea Recoba[6] and Diego Zegarra Valdivia[7] address these aspects. However, for this analysis, a different perspective is of particular interest: The

3 Charles Taylor, *Democracia republicana / Republican Democracy*, Santiago: LOM Ediciones, 2016, pp. 31 y ss.

4 *Ibid*.

5 Stefan Zweig, *El mundo de ayer: memorias de un europeo*, 34.ª ed., Barcelona: Acantilado, 2011, pp. 184 y ss.

6 Luis Vinatea Recoba, "Convergencia: necesidad de iniciar un cambio regulatorio para las telecomunicaciones en el Perú", *Derecho y Sociedad*, n.º 26, pp. 180-186.

7 Diego Zegarra Valdivia, *Introducción al derecho de las telecomunicaciones*, Lima: Fondo Editorial de la PUCP, 2018, pp. 15-24.

legal hierarchy of the regulations that protect or promote these technologies. From this standpoint, since the implementation of the telegraph in 1857 and telephony in 1888, communication has undergone three stages: Concessional, legal, and constitutional. The concessional stage began with the introduction of these technologies and extended to the 1970s. It is characterized by ad hoc regulation, as it is primarily found in specific concession contracts. Notable examples include the concessions granted to the Peruvian Telephone Company, established in 1888 (which later became the Peruvian Telephone Ltd. Company), and the National Telecommunications Company.

The second stage is the legal stage, characterized by sectoral regulation that is more abstract than its predecessor. This stage comprises two distinct phases. The first phase is marked by a state monopoly, while the second phase focuses on the liberalization of the sector. The state monopoly began with the nationalization of the Peruvian Telephone Ltd. Company, enacted by the Revolutionary Government of the Armed Forces on March 25, 1970. Three years later, both this company and the National Telecommunications Company were expropriated.

The same Revolutionary Government of the Armed Forces enacted the first formal law on this subject (Law No. 19020, General Telecommunications Act). This legislation primarily governs the state's monopolistic regime over telecommunications and broadcasting. Notably, telecommunications provisions constitute less than a third of the legal text. Reflecting the ideology of the military regime during this period, the remainder of the law focuses on the organization of the public company, the participation framework for staff, their rights, and other related matters.

In 1991, the liberalization of the sector began, ushering in the second phase of this evolution. This shift was initiated by Legislative Decree No. 702[8], and later consolidated into the Single Ordered Text of the Telecommunications Act[9]. This regulation is significant as it permits private providers to offer telecommunications and broadcasting services[10]. From an organizational perspective, it delineates the roles of public administration (represented by the Ministry of Transport and Communications) and the regulatory body responsible for overseeing the sector's operations (the Supervisory Organization of Private Investment in Telecommunications). It is also noteworthy that in 2004, radio broadcasting was officially separated from telecommunications, a change formalized under the Radio and Television Act of 2004[11].

8 Legislative Decree 702 of November 5, 1991.

9 Approved by Supreme Decree 013-93-TCC of April 28, 1993.

10 Article 6, Telecommunications Act.

11 Law n.º 28278 of July 15, 2004.

The third stage underpins these activities, beginning with the enactment of the constitutional reform of September 23, 2023[12]. This legislation introduces two amendments to the Constitution, initially of a minor nature, and promotes the use of information and communication technologies while recognizing the right to access free internet throughout the country[13]. One notable change is the inclusion of a provision under section 4 of Article 2, which delineates the freedoms of information, opinion, expression, and dissemination of thought, regardless of the communication medium. This section concludes with a mandate for the state to promote technologies that facilitate the exercise of these rights, specifically stating that "The State promotes the use of information technologies and communication across the country". Additionally, Article 14-A has been added to the chapter on economic and social rights, positioned immediately after the regulation of the right to education. This article stipulates that "The State guarantees, through public or private investment, access to free internet throughout the national territory, with special emphasis on rural areas and indigenous and farming communities".

From this perspective, the issue raised in this text involves examining whether constitutional protection of the internet impacts the specific provision of the service. To address this, a legal analysis will be conducted, focusing on the concepts of both constitutional law and public service law, as well as their interrelation. Ultimately, this study aims to understand the extent to which the law can serve as a tool for enhancing the provision of public services.

1. NOT EVERY CONSTITUTIONAL RIGHT IS A PUBLIC SERVICE

The emergence of constitutional rights and public services, though both rooted in public law, arises from different contexts and ways of thinking. On the one hand, as Gregorio Peces-Barba points out[14], constitutional declarations are the final development of a first generation of human rights, which began in the 16th century as part of the bourgeois effort to limit the power of the modern absolute State. In this sense, Enlightenment liberal thought held that the enshrinement of human rights in constitutional texts

12 Law n.º 31878 of September 23, 2023.

13 Article 1, Law n.º 31878 of September 23, 2023.

14 Gregorio Peces-Barba Martínez, "Los derechos del hombre en 1789. Reflexiones en el segundo centenario de la Declaración Francesa", *Anuario de Filosofía del Derecho*, n.º 6, pp. 57-58.

would guarantee limitations on the exercise of power. Public services, on the other hand, emerge from a different philosophical tradition—Hegelian idealism and 19th-century French positivism. As María Yolanda Fernández García indicates[15], within this new philosophical and political framework, the theories of the Bordeaux School shaped the conception of the State and, consequently, the understanding of administrative law, in particular of public service law, ultimately making it the cornerstone of French law. The pursuit of well-being, driven by the desire for progress, expanded the application of public services to large sectors of society, especially during the interwar period.

In principle, the development of constitutional law and public service law evolved in parallel. They even touched upon different areas of law. Initially, this began with political law, which later solidified into constitutional law. Public services, meanwhile, have always been closely tied to administrative law. However, these parallel paths began to converge with the constitutionalization of so-called social laws, starting with the Mexican Constitution of 1917. Therefore, it is essential to examine the similarities and differences between constitutional law and public service law. In the case of the concept of constitutional law, we are following *in totum* the thinking of Luis Castillo Córdova[16]. In this way, we are highlighting five characteristics of this right: the philosophical foundation, the definition, the rules, the interpretation, the content and the protected dimensions.

Firstly, the foundation. Human nature is a complex reality that tends toward perfection. As this author explains, the complexity arises from its multidimensional aspects—material, spiritual, individual, and social. The fulfillment or perfection of each of these dimensions entails a series of needs and requirements that must be met in accordance with their unique characteristics. These needs, whether material or spiritual, can only be satisfied through certain goods. This is where the law becomes relevant. The legal system must serve as an efficient tool that enables each person to achieve the highest degrees of human development through access to these goods. Thus, the purpose of law extends beyond merely regulating human relations to ensure peaceful coexistence, as emphasized by Enlightenment liberalism. It must also address the provision of goods and services, especially with the advent of the social state clause. In any case, the law must begin with a focus on the human being as its fundamental point of reference for all actions[17].

15 María Yolanda Fernández García, *Estatuto jurídico de los servicios esenciales en red*, Madrid: INAP, 2003, p. 65.

16 Luis Castillo Córdova, *Derechos fundamentales y procesos constitucionales*, vol. 1, *Teoría general de los derechos fundamentales*, Puno: Zela, 2020, pp. 201-258.

17 *Ibid*.

With this conceptual frame, we can display the second characteristic: definition. In this sense, human rights are a combination of human goods that must be known and guaranteed by the law with the aim of permitting the people to achieve quotas of human improvement to the extent that it manages to satisfy their needs or their own and actual human demands. These rights are obligations since they are founded on human dignity. However, it would be up to each legal order to determine the concrete form of its positivization. Normally, these rights are in the Constitution, even though not all constitutional rights are human rights.

Thirdly, we will describe the rules that stem from this definition and foundation. In Peruvian law, this is reflected in Article 1 of the Constitution, which states that the defense of the human being and respect for their dignity are the supreme ends of society and the State. As Orlando Vignolo Cueva underlines[18], we encounter the principle of subsidiarity, which serves as a hermeneutical canon for the entire legal system. This primacy of the person, in the terminology of Luis Castillo Córdova, is manifested through various sub-principles that guide the interpretation of every legal system[19]. The first of these principles is the interpretation of *pro homine*, which implies that all legal interpretations should aim to benefit the human being. Secondly, this principle calls for a harmonizing perspective to resolve conflicts between fundamental rights, based on the unity and coherence of human nature. Human needs must be satisfied without violating the multidimensionality of the person, and when one of these dimensions is social, it should not adversely affect others. For this reason, conflicts between rights are merely conflicts of claims and not of human nature. Conversely, fundamental rights cannot be interpreted using theories that prioritize one right over another in a conflict; the focus should be solely on the claims and the means of proof. Moreover, this approach does not entail establishing a priori superiority of some rights over others.

Fourthly, it is important to define the content of the constitutional rights. As previously mentioned, the human being is a coherent unit with needs that are satisfied by certain legal goods. In this regard, the exercise of an incorrect law is not possible, except where such law is abused. For this reason, delimitation implies establishing where the correct exercise of the law ends and from where the rights of third parties are affected. Delimitation is realized, firstly, through the definition of the Constitution, both in the specific provision (the literal interpretation) and throughout the text (unitary

18 Orlando Vignolo Cueva, *La dogmática del principio de subsidiariedad horizontal. Liberalización de sectores y el surgimiento de la Administración pública regulatoria en el Perú*, Lima: Palestra, 2019, p. 88.

19 Luis Castillo Córdova, *Derechos fundamentales y procesos constitucionales*, *op. cit.*, pp. 201-258.

interpretation) with a view to searching for the unification of the interpretation. Then, a correlation is made of the binding international norms on human rights and the related jurisprudence that has been issued on the matter in the international tribunals with competence to do so (international clause). This implies the fulfilment of the fourth final and transitory provision of the Constitution. After this, the criteria of the human being that is protected under the fundamental right (teleological interpretation) is taken. And the concrete circumstances of the case are analyzed to justify the scope of the constitutional protection (practical concordance).

Finally, having established the content, we can distinguish the dual protected dimensions of each fundamental right. First, there is the subjective dimension, which encompasses the faculties of action reserved by law for its holder, demanding abstention from interference by public authorities and private entities. This dimension is particularly associated with first-generation constitutional rights, including freedom of expression, freedom of movement, and others. Then, there is the objective (or institutional) dimension, which entails the obligation of public authorities to undertake necessary positive actions to ensure the full exercise and effectiveness of fundamental rights in reality. In this context, the legal system must facilitate these actions through both private and public administrative means, particularly in areas such as education and health. Traditionally, these sectors have been protected under the concept of public service. Consequently, no constitutional right can be considered a public service[20].

2. NOT EVERY PUBLIC SERVICE IS A CONSTITUTIONAL RIGHT

The Peruvian Constitution references the term public service on various occasions, and similar to other legal systems, this qualifier has experienced fluctuations in meaning. According to Juan Miguel de la Cuétara Martínez[21], there are different definitions of the term. There is a consensus that public service refers to activities of general interest that must be universal, continuous, of high-quality, and adaptable to new technologies (the progress clause). However, the distinction between the concepts lays within the functioning of the State in relation to those activities. One concept refers to public activity that implies exclusive public ownership (public service in the strictest sense), while the other indicates that the State does

20 *Ibid*.

21 Juan Miguel de la Cuétara, *La actividad de la Administración*, Madrid: Tecnos, 1983, pp. 120 y ss.

not possess ownership but can regulate the activities of private providers (public service in the broader sense). The legal implications of adopting one concept over the other are significant. Regarding the broader sense, private providers can offer such services and must be regulated by administrative policy techniques, and they are generally required to fulfill public service obligations (ablative techniques). Conversely, if the strictest definition is applied, only private providers operating under the framework of public services can offer these services.

The Peruvian Constitutional Tribunal has stated that the concept of public service does not imply its "publification"[22]. Prior to this ruling, national doctrine reflected differing views. Diego Zegarra Valdivia argued that the concept centered around publification, a stance later supported by Laura Francia Acuña. In contrast, Víctor Baca Oneto and Carlos Baldeón Miranda assert that the Constitution recognizes the public service regime in a broader sense, as there is no requirement for the publification of activities.

Recently, a second ruling by the Constitutional Court addressed this issue[23]. The problem stems from Law No. 30220, the University Law, which designates university activities as an essential public service. The Tribunal stated that 'education is a right and a public service,' which reflects one of the functions of the State, with the provision of education being carried out either directly by the State or through third parties (private entities), always under state oversight. It appears that the Tribunal interprets the term 'public service' in a strict sense (as if it was made public), despite having emphasized for the past ten years that the Constitution does not include its publification. The appropriate approach would be to highlight that the Peruvian Constitution defines public service in a way that does not encompass publification (public service in the broadest sense). This distinction helps prevent interpretative issues and confusion regarding the applicable regime. In the international context, our regime resembles the North American public utilities framework, the Spanish public service model, and the general European services of interest[24].

In light of the aforementioned, the concept of public service is necessarily linked to constitutional rights, even if such rights may only indirectly facilitate their provision. As previously mentioned, public services in health and education are closely associated with constitutional rights. However, services such as access to water, sanitation, and electricity are not directly tied to

22 Constitutional Court, STC 0034-2004-PI/TC of February 15, 2005.

23 Constitutional Court, cases STC 0014-2014-PI/TC, 0016-2014- PI/TC, 0019-2014-PI/TC and 0007-2015-PI/TC of November 10, 2015.

24 José Carlos Laguna de Paz, *Tratado de derecho administrativo, general y económico*, 5.ª ed., Cizur Menor: Civitas, 2023, p. 247.

these rights. Nevertheless, they support various rights, including the right to life, health, and freedom of enterprise, whether through constitutional or legal protections. Following Baldo Kresalja[25], it is important to note that not all public services are linked to constitutional rights, particularly those of a social nature that require state provisions. In this context, it is useful to apply the distinction made by European law between economic services and social services. José Carlos Laguna de Paz explains that if an activity is motivated by profit (maximizing economic efficiency), it is classified as an economic service, while activities governed by the principle of solidarity are categorized as social services[26]. This distinction implies that in the former case, private providers typically finance the cost of the service (though this can be adjusted with cross-subsidies), whereas in the latter case, public funds cover most of the costs. It is essential to emphasize that for social services, the primary aim is to guarantee basic material equality.

3. THE LACK OF NECESSITY TO CONSTITUTIONALIZE THE INTERNET

It is essential to analyze the relationship between the freedoms of expression and communication, the right to education, and the internet as a public service. To do this, we must clearly define each of these fundamental rights, with a focus on their objective dimensions. In the case of the freedoms of expression and communication, the Constitution does not explicitly provide for objective measures to promote these rights. Numeral 4 of Article 2 recognizes these freedoms while establishing administrative limits, either *ex ante* or *ex post*, and connects them to the foundation of the media. Regarding education, Article 14 of the Constitution emphasizes the need for collaboration with the State in promoting the moral and cultural development of Peruvian society. Here, the objective dimension is centered on education as a public service. The Peruvian State not only regulates the content of educational services but has also established a system to offer these services alongside private providers.

It is important to note that in both cases, the internet does not constitute part of the protected constitutional content of each of these rights. In the first instance, there is no objective dimension associated with it; in the second, the internet serves merely as one of the mediums for delivering educational

25 Baldo Kresalja Roselló *et al.*, *Derecho constitucional económico*, Lima: PUCP, 2009, pp. 564 y ss.

26 José Carlos Laguna de Paz, *Tratado de derecho administrativo, general y económico*, *op. cit.*, p. 311.

services. We do not intend to deny the importance of the internet as a service; rather, its significance lies in its role as a medium that supports the realization of many fundamental rights. For example, it can enhance rights such as freedom of enterprise and health. The internet provides opportunities that facilitate the development of these rights, but it is not the sole legal asset available for that purpose.

Moreover, constitutionalizing the internet does not necessarily lead to improvements in efficiency. Following the constitutional reform, the internet has been categorized as a pragmatic right, as outlined in the eleventh final and transitory provision of the Constitution. However, this categorization raises a potential issue: The possibility of initiating a constitutional claim due to a lack of internet access. Importantly, this does not address the underlying problem of service quality. This is why it is also crucial to consider the regulatory framework surrounding the internet. In 2018, the National Program in Telecommunications (PRONATEL) was established as the public agency responsible for internet management[27]. Then, two years ago, Act of Congress n.º 31207 was enacted, which guarantees minimum internet connection speeds and monitors service provision in favor of users[28]. While both the supreme decree and the law relate to the same constitutional reform under examination, they have not led to any improvements in service quality[29]. It is evident that enacting regulations alone cannot resolve management issues.

It is worth mentioning that the legislative procedure file for the processing of this constitutional reform includes an unfavorable opinion from the telecommunications regulator, the Supervisory Agency for Private Investment in Telecommunications (Osiptel)[30]. This opinion explicitly states that the mere recognition of the right to access the internet does not effectively address the existing problems in our country concerning the actual provision of internet access and bridging the digital divide. Instead, it emphasizes that

27 Article 4, Supreme Decree n.º 018-2018-MTC of December 10, 2018.

28 Article 6, Law n.º 21207 of June 2, 2021.

29 Opsitel, Report n.º 00160-OAJ/2022 sent to Congress by Letter 00113-PD/2022, https://wb2server.congreso.gob.pe/spley-portal-service/archivo/MzE2NDU=/pdf (last accessed on November 13, 2023)

30 *Ibid*. During the discussion of the legislative project, various institutions were consulted. Only the Ministry of Economy, the Ministry of Justice, and COMEX, the institution that represents the exporters' association, responded. The Ministry of Economy replied that it was not competent to give an opinion. The other institutions welcomed the proposal. Ministry of Economy Report: https://wb2server.congreso.gob.pe/spley-portal-service/archivo/MzAwMTg=/pdf; Ministry of Justice Report: https://wb2server.congreso.gob.pe/spley-portal-service/archivo/MzM3MjM=/pdf; COMEX Report: https://wb2server.congreso.gob.pe/spley-portal-service/archivo/MzAwMTk=/pdf, accessed on November 13, 2023.

the measures necessary to truly guarantee this right must be evaluated comprehensively. This includes promoting competition among market operators while prioritizing access for less advantaged social groups. As a result, the standard is clearly disproportionate in two areas. From the entirely legal point of view, the internet public service is not essentially linked to any fundamental right. For this reason, its constitutional protection is not necessary. From the efficiency perspective, the increase in the legal protection of a public service by its constitutionalization, does not impact universality, quality or the continuity of the service[31].

4. THE NEED OF PLANNING AND FORESIGHT IN THE PROPORTIONALITY ANALYSIS OF PUBLIC SERVICE CREATION

Constitutionalizing the internet as a public service should prompt us to critically examine the procedures through which public services are organized and managed, regardless of the type of norm that governs them. In reality, simply declaring an activity as a public service—whether in a strict or broad sense—is insufficient. The effectiveness and efficiency of public service characteristics—such as quality, universality, continuity, and adherence to existing technology—cannot be achieved through mere constitutional, legal, or regulatory provisions[32].

In turn, Juan Miguel de la Cuétara noted that the right to access public services encompasses three essential elements: a) defining the public service mission, b) establishing its privileges, and c) imposing responsibilities[33]. This methodology necessitates both political and technical dialogue. However, the organization of public services has often been driven more by populist political criteria than by technical considerations. Politicians tend to decide which activities should fall under this regime without adequately assessing their technical or economic feasibility. Moreover, the management of these services has not been exempt from these concerns. The decisions made by the competent public administration have not been subjected to in-depth scrutiny, often relying on what is termed technical discretion. However, as Tomás Ramón Fernández Rodríguez indicates, we are confronted with

31 *Ibid*. Osiptel has been consistent in its opinions regarding internet legislation since 2018. Reports n.º 00157-GAL/2018; n.º 00113-GAL/2020; n.º 00151-GAL/2020; n.º 00377-OAJ/2021; n.º 00379-OAJ/2021; and n.º 00380-OAJ/2021 can be consulted in the regulatory background of the projects: https://wb2server.congreso.gob.pe/spley-portal/#/expediente/2021/1397 (accessed on November 13, 2023).

32 This point is illustrated by the previously mentioned Osiptel report.

33 Juan Miguel de la Cuétara, *La actividad de la Administración*, *op. cit.*, p. 71.

technical assessments similar to those resolved through expert evidence[34]. In this context, it is reasonable to question the extent of organizational and management oversight, especially if the goal is to ensure that the service is universal, of high quality, and continuous, etc.

The rule of law clause in the Constitution establishes that government should be exercised through legal norms regulated by judges. These legal norms comprise two components: the anticipated action and its legal consequence. This framework serves as a means through which the public administration acts in a specified manner (the legal consequence) upon the occurrence of any situation contemplated by the law (the anticipated action). Nonetheless, these norms encompass more than just legal requirements; depending on the subject matter they aim to regulate, they may include elements not explicitly provided for in the law.

Although developed for public administration decision-making, the methodology described by José María Rodríguez de Santiago offers a useful framework for explaining the application of the rule of law, irrespective of the power (legislative or executive) responsible for creating a public service or the type of norm employed[35]. The author focuses on the rationale behind decisions and the subsequent control measures. To this end, he distinguishes between two types of situations: 1) the construction of a code of conduct that the governor must adhere to, and 2) the establishment of the control standard that the judge must apply. The distinction between the two lies in the sources that define the anticipated action and legal consequence of the standard. On one hand, the code of conduct incorporates not only legal sources but also references from other sciences and arts. For instance, medical sciences inform when health services are deemed to be provided, while educational sciences highlight the acquisition of specific skills. On the other hand, the control standard consists solely of legal norms. At first glance, it may appear that meta-legal considerations lack oversight, leaving some degree of technical discretion to the public administration.

However, this is not the case. The first line of control arises from the juridification of meta-legal principles, such as those related to budgeting, environmental issues, and social concerns, among others. For instance, the principle of subsidiarity plays a crucial role in economic matters. This principle, as outlined in Article 60 of the Constitution, establishes that the State may subsidize business activities—either directly or indirectly—when deemed to serve the public interest or align with national objectives, provided

34 Tomás Ramón Fernández Rodríguez, "La discrecionalidad técnica: un viejo fantasma que se desvanece", *Revista de Administración pública*, n.º 196, 2015, pp. 241-215.

35 José María Rodríguez de Santiago, *Metodología del derecho administrativo: reglas de racionalidad para la adopción y el control de la decisión administrativa*, Madrid: Marcial Pons, 2016.

that the law permits such actions. In this context, the law necessitates evidence of the unmet claim that justifies state intervention[36]. Complementing this, the second control mechanism is the principle of proportionality, which serves as a cross-cutting standard applicable to all these meta-legal matters.

Luis Castillo Córdova has systematized three arguments that support the principle of proportionality within the Peruvian legal system[37]. The first argument pertains to human dignity. The other two stem from rulings by the Constitutional Tribunal, which implicitly align with the rule of law clause established in Article 45 of the Constitution[38]. Additionally, one interpretation of Article 200 of the Constitution explicitly identifies the principle of proportionality as a framework for analyzing restrictions imposed under exceptional regimes[39]. With this triple foundation, the highest interpreter of the Constitution has applied the principle of proportionality across various legal contexts, particularly concerning the exercise of *ius puniendi*[40]. However, the absence of any ruling from the Tribunal regarding public services means that this principle can be circumvented.

Carlos Bernal Pulido has described the functioning of this principle as a means of control of the legal power, which is the one that normally delimits the content of human rights, both in the objective and the subjective realms[41]. At the same time, this principle, comprises three subprinciples that must be fulfilled, on a trial basis (test): 1. Subprinciple of suitability; 2. Subprinciple of need; and 3. Subprinciple of proportionality in the strict sense. In the following part, we will follow what the cited author has published to explain each of these. The subprinciple of suitability implies that the act has a purpose that is permitted by the legal system and some means which are adapted to establish its aim. The second subprinciple implies examining if the measure is less restrictive in relation to the rights of other ones which are equally efficient. Lastly, proportionality in the strict sense implies analyzing the advantages and disadvantages of the measure taken to develop solutions between them.

The definition of the principle of proportionality is clear and can be applied as a standard of control for any public service. However, the emphasis

36 *Cfr.* Guillermo Chang Chuyes, "El principio de proporcionalidad como medio para combatir las desigualdades sociales", en Francisco Bobadilla Rodríguez (coord.), *La Constitución de 1993: presente y futuro*, Lima: Themis, 2022.

37 Luis Castillo Córdova, *Derechos fundamentales y procesos constitucionales*, *op. cit.*, pp. 359 y ss.

38 Constitutional Court, STC 001-2000-AI/TC of January 3, 2003.

39 Constitutional Court, STC 001-2000-AI/TC of January 3, 2003.

40 Constitutional Court, STC 001-2000-AI/TC of January 3, 2003.

41 Carlos Bernal Pulido. *El principio de proporcionalidad y los derechos fundamentales*, 4.ª ed., Bogotá: Universidad Externado de Colombia, 2014, pp. 1075 y ss.

tends to be predominantly on the ends and means, often neglecting the concrete situations faced by the recipients of these public services, which should serve as the foundation for public decisions. While this consideration may seem implicit, it has not been adequately highlighted in various trials, particularly regarding meta-legal issues. Therefore, it is essential to explicitly require this consideration, especially concerning two instruments: planning and foresight.

José María Rodríguez de Santiago states that planning involves an ambitious process of accessing and developing information, alongside a decision-making process structured by law, primarily through the dogmatics of weighting[42]. It is important to note that the plan resulting from this activity is a direct consequence of the principle of proportionality, balancing reality, means, and ends. However, it is insufficient for planning to remain theoretical; it must be viewed in a long-term context.

Delving into the details, we can infer several concrete legal requirements. Essentially, planning, governed by the principle of proportionality, necessitates justifying the need for administrative action and the means to satisfy that need, selected after evaluating various activities. This is accomplished through several steps: 1. Determining the needs; 2. Developing proposals for solutions; and 3. Weighing the solutions and selecting one. The reports and documents produced during these phases must adhere to the principles regulated in Article IV of the Preliminary Title of the Consolidated Text (TUO) of Law nº 27444 (General Administrative Procedure Act). It is essential to highlight the concrete application of some of these principles.

Firstly, the principles of impartiality and participation must be jointly applied to respect the diverse opinions of both beneficiaries and those affected by the implementation of public services. In this context, public administration must equitably listen to all parties, as this is essential for forming the public interest. Furthermore, when technical documents are submitted, it is important to remember that they are protected by the principle of presumption of veracity. However, this does not imply that public administration cannot challenge those documents. In fact, the principle of presumption of material veracity obliges it to review the documents submitted by individuals and, if necessary, to develop its own technical documentation. It is essential to note that the application of these principles materializes under more concrete legal-formal requirements linked to evidentiary performance and the participation of regulated parties as outlined in the TUO of the General Administrative Procedure Act (Articles 170-196). Additionally, the provisions of Law n.º 29733 on Data Protection and its regulations

42 José María Rodríguez de Santiago, *Planes administrativos. Una teoría del plan como forma de actuación de la Administración*, Madrid: Marcial Pons, 2023, p. 22.

regarding the information that verifies the number of beneficiaries or affected individuals must be respected.

The consideration of proposals and the finding of a solution has a special nuance. The triple proof (suitability, need and proportionality in the strict sense), in principle, must be expressed in the dossier. However, the case of motivation *in aliunde* can arise article 6.2 of the TUO of the General Administrative Procedure Act in documents or in the technical reports. In that case it could seem as if there was no control. Nonetheless, it is important to remember that the analysis of management that is conducted in any company is not different to the proportionality analysis. For example, José Navas and Luis Guerras also suggest conducting a triple analysis of company strategy: suitability, feasibility and acceptability[43]. Suitability and rationalization, look at how the proposal addresses the concrete need. Feasibility analyzes the means available to implant it. Acceptability measures the impact on the different interest groups.

A prospective analysis complements the plan, considering the scenario in the long term. Zulima Sánchez Sánchez highlights that foresight is a means of thinking about possible future scenarios with the aim of anticipating or preparing for it[44]. However, the question here is defining the criteria of inclusion of this analysis to avoid succumbing into the allure of science-fiction. Prospective would be determined by the principle of predictability and legitimate trust. In effect, the second and third paragraph of numeral 1.15 of Article IV under the commentary mention the importance of the consistency of the proceedings of the administration with the expectations of those that are administered and the prohibition of arbitrariness. In this sense, the possible imagined scenarios in the prospective exercises must protect the general interest and the expectations of the administered individuals.

Venturing into procedural matters, the legal or regulatory norms that create or manage public services can be challenged for unconstitutional actions: this includes unconstitutional actions in the case of laws and class actions, as provided in Law No. 31307 (New Procedural Constitutional Code). It is important to highlight that the control exercised by the Constitutional Tribunal, while it may seem redundant, focuses solely on violations of constitutional standards, including the principle of proportionality. Following such a declaration, it is the responsibility of the competent body to amend the standard. In the case of administrative actions taken on the same

43 José Emilio Navas López y Luis Ángel Guerras Martín, *Fundamentos de la dirección estratégica de empresa*, 3.ª ed., Madrid: Civitas, 2023, pp. 260-262.

44 Zulima Sánchez Sánchez, "Administración, previsión y regulación resistente al futuro" en Zulima Sánchez Sánchez (dir.), *Regulación con prospectiva de futuro y de consenso. Gobernanza anticipatoria y prospectiva administrativa*, Cizur Menor: Aranzadi, 2022, p. 35.

matter[45], control must be exercised during the contentious administrative process[46], adhering to the highlighted criteria.

An additional question concerns the effect of judicial control over norms. In the case of legal and regulatory norms, the declaration of unconstitutionality by the state holds significant weight. Both the Constitutional Tribunal and the Supreme Court of Justice can extend the effects of their rulings to eliminate the widespread violation of rights perpetrated by state institutions when they fail to fulfill their obligations as legal guarantors. This reflects a denunciation of the inefficiency in the protection of the legal system.

It is essential to emphasize that this applies not only during the initial organization of the public service but also throughout its provision by the administration, whether or not this is anticipated by the legal framework. Any proposed modification in the mode of service provision is critical for maintaining its fundamental characteristics: continuity, universality, quality, and adaptability to progress. Furthermore, if the public administration decides to deviate from the established regime regarding this activity, such deviations must also be respected. With these requirements, the control code of the principle of proportionality can be enhanced, albeit always with limitations. As noted by José Carlos Laguna de Paz, due to the separation of powers, public administration exercises legitimate discretion, and judges can only annul decisions when specific circumstances eliminate the margin of discretion[47]. This was recently highlighted in ruling n.º 8-2022-PI/TC[48], where the Constitutional Tribunal stated that it neither participates nor should participate in debates over the best option, as such discussions regarding the opportunity and convenience of a legal formula fall outside its constitutional competencies. This principle applies broadly to judicial review. Consequently, it is the judges' role to exercise oversight over the principle of proportionality through requirements for planning and foresight

45 In principle, article 200.5 of the Constitution foresees the possibility of class action against the rules, administrative norms and resolutions and decrees of a general nature, regardless of the activity. The Judicial Power, in the First Jurisdictional Plenary on Constitutional and Contentious Administrative Matters foresees that in this constitutional action other administrative actions that have similar effects to the regulation can be challenged (belonging to the legal system with a vocation of permanence, consumption and generality).

46 *Cfr.* Guillermo Chang Chuyes, "En torno a la naturaleza jurídica del proceso contencioso administrativo: una revisión necesaria", en Tania Zúñiga Fernández (ed.), *Aportes al desarrollo del derecho administrativo en el Perú: análisis y perspectivas sobre la LPAG y la LPCA a los 20 años de vigencia*, Lima: CDA - Yachay, 2022, pp. 451-474

47 José Carlos Laguna de Paz, *Tratado de derecho administrativo, general y económico, op. cit.*, pp. 502-508.

48 Constitutional Court, ruling No. 8-2022-PI/TC of December 20, 2022.

from a formal perspective. This ensures that the norm establishing the public service is equipped with greater elements for its full efficiency.

CONCLUSION

Communication is a fundamental human need, vital for the development and refinement of individuals. As science progresses, new tools have emerged to facilitate this essential exchange, with the internet standing out as one of the most transformative. In Peru, this has led to the inclusion of the internet's promotion within the constitutional framework. However, not every constitutional right demands the creation of a public service, nor is every public service intrinsically tied to the realization of constitutional rights. The internet, while a valuable tool, is not fundamentally linked to core rights like freedom of information, communication, or education. Thus, its constitutionalization, while symbolically important, is not inherently necessary. To avoid the pitfalls of poor regulation in public services, the principles of careful planning and foresight must guide their governance. This approach, anchored in the principle of proportionality, should apply universally, regardless of the public authority responsible for implementation. Nonetheless, it is important to recognize that judicial oversight in such matters remains limited by design, reflecting the balance between legal standards and administrative discretion.

REFERENCES

Baca Oneto, Víctor. "Servicio público, servicio esencial y servicio universal en el derecho peruano". En Orlando Vignolo Cueva (ed.), *Teoría de los servicios públicos*. Lima: Grijley, 2009.

Baldeón Miranda, Carlos. *La autorización de servicio público*. Lima: Adrus, 2014

Bernal Pulido, Carlos. *El principio de proporcionalidad y los derechos fundamentales*, 4.ª ed. Bogotá: Universidad Externado de Colombia, 2014.

Castillo Córdova, Luis. *Derechos fundamentales y procesos constitucionales*, vol. 1, *Teoría general de los derechos fundamentales*. Puno: Zela, 2020.

Chang Chuyes, Guillermo. "El derecho a la salud como derecho constitucional y servicio público". En AA. VV. *Derecho administrativo sanitario*, t. I. Bogotá: Universidad Externado de Colombia, 2021.

Chang Chuyes, Guillermo. "El principio de proporcionalidad como medio para combatir las desigualdades sociales". En Francisco Bobadilla Rodríguez (coord.), *La Constitución de 1993: presente y futuro*. Lima: Themis, 2022.

Chang Chuyes, Guillermo. "En torno a la naturaleza jurídica del proceso contencioso administrativo: Una revisión necesaria". En Tania Zúñiga Fernández (ed.), *Aportes al desarrollo del derecho administrativo en el Perú: Análisis y perspectivas sobre la LPAG y la LPCA a los 20 años de vigencia*. Lima: CDA - Yachay, 2022.

Chang Chuyes, Guillermo. "La educación como derecho constitucional y servicio público". *Eduationis Momentum*, vol. 8, 2023.

Dávila Seminario, Carmen. "¿Pueden los jueces del Poder Judicial aplicar la figura de la declaración de estado de cosas inconstitucional? Algunas precisiones en torno a la denominada 'declaración de estado de cosas ilegal'". En Leila Díaz Tarrillo y Ronald Vílchez Chinchayán (eds.), *VI Convención de Derecho Público*. Lima: Palestra, 2019.

Dávila Seminario, Carmen. "Legitimidad del Tribunal Constitucional para declarar un estado de cosas inconstitucional: Alcance y límites de dicha atribución". En Ernesto Blume Fortini (coord.), *Desafíos del constitucionalismo peruano a los 25 años de la Constitución de 1993*. Trujillo: Fondo Editorial UPAO, 2018.

De la Cuétara, Juan Miguel. "Perspectiva de los servicios públicos españoles". En Gaspar Ariño Ortiz (ed.), *El nuevo servicio público*. Madrid: Marcial Pons, 1997.

De la Cuétara, Juan Miguel. *La actividad de la Administración*. Madrid: Tecnos, 1983.

Fernández García, María Yolanda. *Estatuto jurídico de los servicios esenciales en red*. Madrid: INAP, 2003.

Fernández Rodríguez, Tomás Ramón. "La discrecionalidad técnica: un viejo fantasma que se desvanece". *Revista de Administración Pública*, n.º 196, 2015.

Francia Acuña, Laura. "Competencias municipales en la regulación de servicios públicos: Cuando la autonomía se vuelve autarquía". En *El derecho administrativo y la modernización del Estado peruano*. Lima: Grijley, 2008.

Kresalja Roselló, Baldo, *et al*. *Derecho constitucional económico*. Lima: PUCP, 2009.

Laguna de Paz, José Carlos. *Tratado de derecho administrativo general y económico*, 5.ª ed. Madrid: Civitas, 2023.

Martín Algarra, Manuel. *Teoría de la comunicación: una propuesta*. Madrid: Tecnos, 2004.

Navas López, José Emilio, y Luis Ángel Guerras Martín. *Fundamentos de la dirección estratégica de empresa*, 3.ª ed. Madrid: Civitas, 2023.

Peces-Barba Martínez, Gregorio. "Los derechos del hombre en 1789. Reflexiones en el segundo centenario de la Declaración Francesa". *Anuario de Filosofía del Derecho*, n.º VI, 1989.

Rodríguez de Santiago, José María. *Metodología del derecho administrativo: Reglas de racionalidad para la adopción y el control de la decisión administrativa*. Madrid: Marcial Pons, 2016.

Rodríguez de Santiago, José María. *Planes administrativos. Una teoría del plan como forma de actuación de la Administración*. Madrid: Marcial Pons, 2023.

Sánchez Sánchez, Zulima. "Administración, previsión y regulación resistente al futuro". En Zulima Sánchez Sánchez (dir.), *Regulación con prospectiva de futuro y de consenso. Gobernanza anticipatoria y prospectiva administrativa*. Cizur Menor: Aranzadi, 2022.

Taylor, Charles. *Democracia republicana / Republican Democracy*. Santiago: LOM Ediciones, 2016.

Vignolo Cueva, Orlando. *La dogmática del principio de subsidiariedad horizontal. Liberalización de sectores y el surgimiento de la Administración pública regulatoria en el Perú*. Lima: Palestra, 2019.

Vinatea Recoba, Luis. "Convergencia: necesidad de iniciar un cambio regulatorio para las telecomunicaciones en el Perú". *Derecho y Sociedad*, n.º 26, 2006.

Zegarra Valdivia, Diego. *El servicio público: Fundamentos*. Lima: Palestra, 2005.

Zegarra Valdivia, Diego. *Introducción al derecho de las telecomunicaciones*. Lima: Fondo Editorial de la PUCP, 2018.

Zweig, Stefan. *El mundo de ayer: Memorias de un europeo*, 34.ª ed. Barcelona: Acantilado, 2011.