

The construction of the regulatory framework of land-use planning and urban planning in Peru: main features and challenges

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Good afternoon. I would like to express my gratitude and appreciation to Professor Goodwin and Mrs. Kim for inviting me to the Graduate Colloquium meeting to give this presentation and thus allowing me to share with you, distinguished fellow Professors and students of the Maurer School of Law of Indiana University, the paper which I have entitled "The construction of the regulatory framework of land use planning and urban planning in Peru: main features and challenges", which is based on recent work I have published.

1. Introduction

In order to specify the purpose of the presentation we will observe a methodological approach which starts with a brief reference to the State model, a review of the structure and competencies of the three levels of administration (central, regional and local) in the area of land use planning and urban planning, followed by the systematization of the public policies approved by the central government and a review of the regulatory framework, including draft laws that have been proposed. Based on this review, the aspects that currently characterize the Peruvian regulatory framework for land use planning and urban planning, as well as the challenges that lie ahead, will be identified, and presented.

2. The Institutional Organization of land-use Planning and Urban Planning in Peru

In order to fully understand the institutional framework for land use planning and urban planning in Peru, a brief preliminary explanation of how both administrative functions are inserted in the Peruvian public administration and in the State model defined by the 1993 Constitution is required.

This is provided for in Article 43 of our 1993 Constitution, which establishes that the State is one and indivisible, and its government is unitary, representative, and decentralized, organized according to the principle of separation of powers.

2.1 Institutional background of urban planning and land use planning

a) Urban planning

- The first institutional references to which we can refer are those corresponding to urban planning, for which we must go back to the 1940s and 1960s, times in which we can identify the pioneering activity of the Institute of Urbanism and

Planning in the private sector, and the National Planning Office and the Urban Planning National Council from the public arena.

- In the 1960s, thanks to the joint work of the Organization of American States, Yale University and the National University of Engineering, the Lima Urban Planning Institute (IPL) was created. The following year (1962) the National Planning Institute (INP) is created by legislative means, and the National Planning System for the Economic and Social Development of the Country some years later.

- In 1969 the Ministry of Housing was created and assigned the functions of planning, regulating, and controlling the construction activity in the country to facilitate the fulfillment of the goals of the sectors.

- From 1981 to 1991, local governments began to assume urban planning functions; this was reflected in 1981 when the National Urban Development Institute (INADUR) was created through the National Urban Development Institute Law.

This institutional evolution also had a decentralized but limited development. Two examples were Lima and Arequipa, which created their municipal urban planning institutions.

- In the case of Lima, the Metropolitan Planning Institute (IMP) was created in 1991.

- As for Arequipa, the Arequipa Municipal Planning Institute (Impla) was created in 2014.

b) Land-use planning

Land-use planning has had a more recent institutional development, and its rency and promotion lies with the Ministry of the Environment (Minam).

2.2 Competent entities

In the current administrative organization, a common aspect between urban planning and land use planning is the assignment of competencies in these matters to the central government and the regional and local governments. The configuration of this scheme of competencies is based, as we will see below, on the decentralized design that characterizes the Peruvian State.

a) Entities with urban planning competencies

The current institutionality for urban planning falls under the three levels of government, that is, central, regional, and local or municipal.

At the Central Government level, the Ministry of Housing, Construction and Sanitation (MVCS) is in charge of urban planning, in accordance with the provisions of the Sustainable Urban Development Law (Law 31313 of 2021),

which implemented a system of clear and specific powers based on the technique of administrative decentralization regulated by the Law of Bases of Decentralization (Law 27783 of 2002), in which the distribution of powers among the three levels of government is classified as exclusive and shared.

The regional governments also assume general competencies in urban planning, in accordance with the provisions of the Organic Law of Regional Governments (Law 27867 of 2002); and, in the case of local governments (municipalities), the Organic Law of Municipalities (Law 27972 of 2003) attributed competencies for the comprehensive planning of local development.

b) Competent entities in land-use planning

As mentioned, the steering role is held by the Minam, even though it is essential to cover aspects that go beyond the environmental issues and the need for greater coordination between the competent entities to address the multidimensional nature of land-use planning.

For that reason, in 2017, with the approval of its Regulation of Organization and Functions, through Supreme Decree 022-2017-PCM, the Presidency of the Council of Ministers began to carry out activities related to land-use planning in coordination with regional and local governments.

2.3 The assignment of competencies in land use planning matters.

The Presidency of the Council of Ministers, through the Vice-Ministry of Territorial Governance, has been assuming functions in the area of Territorial Planning for more than two years, which implies a new steering role as opposed to that assumed by the Ministry of the Environment, which arose as a consequence of the broader concept of territorial planning that will allow greater unity in this area and better coordination with regional and local governments, which already have competencies in this area.

3. Urban planning and land use planning as public policies in Peru

A review of supranational and national policies shows that there is a starting point for the implementation of public policies on these two issues, instituted in the signing of the National Agreement.

3.1 Supranational public policies

The most important supranational policy on urban planning and land-use planning to which Peru adheres is found in the 2030 Agenda for Sustainable Development, composed of the Sustainable Development Goals, 9 of which show a marked linkage with the administrative functions of land management and urban planning.

Similarly, the Sendai Framework for Disaster Risk Reduction 2015-2030 is the international policy document of reference for Peru, where elements linked to the use of land-use planning and urban planning can be found.

3.2 State policies on land use planning and urban planning adopted in Peru

These State policies express scopes, goals, objectives, and purposes related to the development of the land use planning and urban planning process in our country, which are articulated with the SDGs.

- Policy 8: On political, economic, and administrative decentralization.

Promotes integral, harmonious, and sustained development in Peru.

- Policy 19: On sustainable development and environmental management.

Expresses the State's commitment to integrate national environmental policy with economic, social, cultural and land use policies.

- Policy 21: on infrastructure development and housing.

It implies a state commitment to develop infrastructure and housing in order to eliminate their deficit.

- Policy 32: on disaster risk management.

Promotes disaster risk management to protect the life, health, and integrity of people.

- Policy 33: Water resources policy.

Ensures universal access to drinking water and sanitation for urban and rural populations in an adequate and differentiated manner.

- Policy 34: on territorial planning and management.

Promotes a strategic, integrated, effective and efficient process of territorial planning and management that ensures human development throughout the national territory, in an environment of peace.

3.3 The Peruvian Government's general policies on land-use planning and urban planning.

The first General Government Policy related to land use planning and urban planning was approved by Supreme Decree 56-2018-PCM and was composed of five general policy axes, three of which were related to land management and urban planning processes.

However, with the change of Peruvian Government, on October 16, 2021, the General Policy of the Government 2021-2026 was published. This general policy is composed of ten policy axes, 4 of which are related to land use planning and urban planning.

- Axis 1: on the generation of welfare and social protection with food security.

It stipulates that the State must guarantee social protection.

- Axis 2: on economic reactivation and productive activities with agrarian and rural development.

It proposes the prioritization of public and private investment with a territorial approach to improve the capacities of regional and local governments.

- Axis 5: decentralization, institutional and civil service strengthening

It seeks to institutionalize territorial planning in our country through a regulatory framework and the strengthening of the decentralization process in an articulated manner between the three levels of government.

- Axis 7: on the efficient management of risks and threats to the rights of people and their environment

The current government's plans are developed for an efficient management.

3.4 Sectoral and multisectoral public policy documents on land use planning and urban planning.

The main sectoral and multisectoral policies are:

a) Sectoral and multisectoral public policies on urban planning.

- National Urban Development Plan called "Peru: Territory for all" (2006).

It established as a guiding principle the attention to the housing demand of the population in both urban and rural areas.

- National Housing and Urban Planning Policy (2021)

Seeks to define the main priorities and strategies that guide and articulate the actions, efforts, and resources of the three levels of government, the private sector and civil society regarding housing and urban planning.

b) Sectoral and multisectoral public policies on land use planning

Sectoral

- The National Policy on Disaster Risk Management to 2050 (2021).
- National Housing and Urban Planning Policy (2021)
- National Environmental Policy (2021)

Multisectoral

- The National Competitiveness and Productivity Policy (2019)
- The National Competitiveness and Productivity Plan 2019-2030 (2019).

It is important to mention that the above policies or guiding documents belong to the national sectorial or multisectoral policies that develop and configure aspects linked to land use planning, but from a subsidiary or accessory main role, as is the case, for example, with the National Environmental Policy, which considers land use planning as an environmental planning instrument.

3.5 Local plans and policy documents on land-use planning and urban planning.

Local governments have made significant progress in terms of urban planning and development plans, and regional governments have followed suit with respect to land management plans.

a) Urban planning policies and plans developed at the municipal level

District municipalities have made more sustained progress in planning than the Central Government due to the approval of their territorial conditioning and urban development plans based on the competence conferred by the Organic Law of Municipalities.

As an example of this, on September 16, 2022, the Metropolitan Municipality of Lima approved the Lima Metropolitan Development Plan 2021-2040, PLANMET 2040, which is described as a management instrument, guiding urban development that means for the city to have an important roadmap in terms of urban planning.

b) Land-use planning plans approved at the regional level.

Regional governments have participated in projects to develop and implement their own Land Use Plans (POT). For example, in the Cajamarca Region, studies were begun to initiate the process of formulating the POT.

The Regional Government of Tacna was the first in Peru to finalize its land use planning process, getting approved its Land Use Plan-POT through Regional Ordinance 28-2021-CR/GOB.REG.TACNA.

The progress of land use planning and urban planning in terms of public policies has been dissimilar. Urban planning has had a greater development, which has been materialized in the publication and implementation of a national policy. Although this policy shows disorder and a lack of a clear horizon, it establishes

what the State plans to implement, such as guidelines, lines of action, priority objectives, etc.

Something different happened with land use planning. In addition to not having its own national policy, land use planning has been adopted as an environmental planning instrument. This has dismembered its other dimensions to make it just another environmental instrument.

This sort of environmentalization of land use planning is because its main actor in Peru has been the Ministry of the Environment (MINAM). Therefore, it is possible to observe the orientation that has been granted to this administrative function. However, this biased vision should be reformed and give way to other dimensions, social, economic, cultural, etc., as other countries in the region have done.

4. The normative framework of urban planning and land use planning in the Peruvian legal system: its evolution over the last decades

4.1 The constitutional framework

a) Regarding urban planning

The constitutional precepts that inspire urban planning in Peru are found in article 70, in article 192, numeral 2 and article 195 numeral 6 of the 1993 Political Constitution of Peru.

- Article 70

An initial reference to urban planning is noted, given that it delimits the margins of protection and exercise of the right to property of individuals.

- Article 192, numeral 2

The regional authorities are empowered to "formulate and approve the regional development plan in agreement with the municipalities and civil society".

- Article 195, numeral 6

Establishes that local governments are responsible for the exercise of urban planning competencies.

b) In the area of territorial planning

The constitutional precepts that inspire land use planning in Peru are found in articles 54, 67, in article 192 numeral 2 and article 195 numeral 6 of the Political Constitution of Peru of 1993.

- Article 54

The composition of the territory of the Peruvian State includes soil, subsoil, maritime domain and airspace that covers it.

- Article 67

It empowers the State to determine the national environmental policy and promote the sustainable use of its natural resources.

- Article 192, numeral 2 and Article 195 numeral 6.

Attributes to the municipalities the competencies to plan the urban and local development of their districts, including territorial conditioning.

4.2 Legislative evolution

a) Urban planning legislation

- The oldest antecedent of urban planning legislation dates back to the Civil Code of 1852.

- The most current is the Sustainable Urban Development Law, published in 2021, whose purpose is to address primarily the inefficient and unsustainable production and occupation of land to guide the sustainable development of cities and towns, and make them accessible, inclusive, competitive, fair, diverse and generators of opportunities for the population.

b) Land-use planning legislation

National level

- This process began with the repealed Environmental Code, Legislative Decree 613, which incorporated land use planning as an element of environmental planning.

- And it has as its most current regulation with the Law that establishes Tax Measures, Simplification of Procedures and Permits for the Promotion and Revitalization of the Country's Investment of 2014.

This regulation is important for two transcendent issues.

a. It provides for an explicit and open definition of land-use planning.

b. It clears the possibility of land use planning being used as an instrument for the allocation or exclusion of land uses.

Local scope

- The most important normative antecedent on land use planning was provided by the Ordinance of Land-use Planning and Environmental Management of the River Lurín, Ordinance 310, which introduced the first regulation applied to a specific territory to define various issues related not only to land use planning but also to urban planning.

Draft Land-use planning Law

- It seeks to establish a clear definition of the scope of the material competence of territorial planning.
- The central idea of the convenience of separation with urban planning is maintained, that is to say, in areas destined to land use planning and urban planning.
- The aim is to eradicate the overlapping of competencies between levels of government and institutionalization by means of a national policy that sets the course for subsequent regional and local policies.

4.2 Regulatory developments

a) Urban planning

- The Supreme Resolution of August 22, 1924, is considered the first urban planning regulation.
- Currently, urban planning is regulated in the Regulation of Land Development and Urban Planning for Sustainable Development (Supreme Decree 012-2022-VIVIENDA, 2022), published on October 5, 2022.

b) In the area of land use planning

- The most remote antecedent of the normative development at the regulatory level of land use planning is found in the Regulation on Land Development, Urban Development and Environment, Supreme Decree 007-85-VC.
- The last normative reference at the regulatory level of land use planning is in the current Regulation on Land Development and Urban Planning for Sustainable Development.

5. Main characteristic aspects of the current regulatory framework on urban planning and land-use planning

The review and study of the institutional design, the public policy framework, and the regulations in both areas has allowed us to recognize, from an evolutionary perspective, how the Peruvian State has conducted the process of building the current regulatory framework for urban planning and land use planning in the three areas that shape it.

5.1 The incipient decentralization of urban planning and land use planning functions

It should be noted that the steering role of the urban planning administrative functions is assumed by the Ministry of Housing and Construction and land use planning by the Ministry of the Environment, which reveals an incipient

protagonism of regional and local governments, depending on the function they have to develop, mainly lagging behind because they do not have enough technical capacity or experience to conduct and execute the functions attributed to them by the various laws and regulations governing urban planning and land use planning.

The National Institute of Statistics and Informatics (INEI) reported that, by 2020, out of the total of 1671 local governments, 528 of them sought technical assistance in urban and territorial development management issues; 762, in urban and rural cadaster issues; and 655, in territorial conditioning and urban development issues.

The recent enactment of the Sustainable Urban Development Law seeks to correct some of the main institutional gaps and shortcomings and is expected to accelerate the articulation between the Ministry of Housing and local governments, through the installation of coordination and technical assistance mechanisms to incorporate a broader vision that guarantees the objective of sustainable development of urban space.

On the land use planning side, the draft law on land use planning seeks to correct this situation so that the Presidency of the Council of Ministers assumes the steering role, but from a different approach than the current concentration shown by the Ministry of the Environment.

In this way, the regional governments would assume a more active role in land use planning by virtue of their progressive autonomy. This derives from the very nature of the conception of this administrative function and the importance of following a decentralization policy that articulates the different levels of government.

5.2 The vertical and horizontal articulation of public policies in planning and land use planning.

The framework chosen by the Peruvian State to adopt and implement public policies related to these two areas has been one of vertical and horizontal articulation.

- Vertical articulation: they are linked under a hierarchical scheme in which supranational policies are at the top and, from there, State, government, sectoral, multisectoral and local policies are articulated.
- Horizontal articulation: there are policies that belong to the same hierarchical level and share points of connection with each other.

5.3 Improvement of habitability conditions and the right to decent housing as goals of the current national urban planning policy

The main characteristic of the National Housing and Urban Planning Policy is the accentuated purpose of solving the deficit of access to decent housing and the allocation of urban land uses and activities under an approach in which housing,

urban planning and its components are articulated, and their actions are executed in an integrated and coordinated manner at all levels of government.

To achieve this goal, the Policy seeks:

- the priority objective is to guarantee the sustainable growth and development of the country's cities and towns through urban and territorial planning.
- the second priority objective is to guarantee the sustainability of land occupation dynamics in the country's cities and towns.
- the third objective is to increase access to adequate housing in the country's cities and towns, prioritizing the population living in poverty or social vulnerability; and
- the fourth objective is to improve external habitability conditions in the country's cities and towns.

5.4 Absence of a national land-use planning policy.

Land use planning in Peru exists as a state policy, through Policy 34 of the National Agreement, but it does not have its own national policy, even though the Peruvian State has tried a timetable for implementing and executing a national policy that brings together all the sectors that have partial or total responsibility in the sustainable development process.

Therefore, it is imperative that the Peruvian State formulates and implements a national public policy that includes the vision, objectives and essential planning criteria for an articulated and joint land-use planning process that considers the participation of citizens, the main stakeholders of each sector and/or industry and does not dispense with an ethnic approach, given that Peru is a multicultural nation and given the variety of native and peasant communities that inhabit its territory.

5.5 Preponderant environmental approach to land-use planning

The absence of a specific legislation for land use planning meant that it was subordinated to environmental legislation.

Therefore, its nature was reduced to the qualification of instrument of environmental policy, as it is stipulated in the Peruvian environmental legal regime, and the environmental approach in Peruvian regulations was oversized due to its environmental sectorialization, which can only be overcome to the extent that land management is considered an administrative function that is not exclusive to a single sector.

5.6 The excessive breadth of the Sustainable Urban Development Law.

The excessive breadth of the scope of the norm reduces its specialization and generates contradictions that are not fully clarified. An example of this can be seen in the combination of legal regimes for land treatment, natural disaster risk management, urban planning and the regularization of informal properties.

The latter can have two undesirable effects. In the first place, it may not be possible to implement and comply with the norm due to the extended number of functions and obligations, since neither the institutions have so much capacity nor all of them are able to execute such activities. Secondly, they may end up opting for the activity that represents the least difficulty and abandon the others that are equally important.

5.7 The use of the concepts of territorial conditioning and urban planning in the Law on Sustainable Urban Development

One aspect that draws attention is the use of the concepts of territorial conditioning and urban planning in the Law and the omission that implies the non-consideration of territorial planning.

For this reason, in addition to the need to specify the terms and scope incorporated, it is essential that land use planning be incorporated into the law, with the aim of making a clear organic and technical separation between the function of land development and urban planning, without ignoring their complementary relationship.

5.8 The need for a general law on land-use planning

Finally, land use planning does not have its own regulatory framework built around its category, which generates a sense of delay with respect to the advances that proliferate in other countries regarding the notion and adoption of spatial planning, no longer as a policy or instrument of environmental management but as an autonomous mechanism of organization and compatibilization of the purposes that can be attributed to a given territory.

Therefore, it is necessary to redirect the current legislative design of land use planning in Peru so as to refocus its structure by assimilating the spirit of three essential aspects: a) to provide the minimally indispensable opportunities that guarantee an adequate quality of life for the entire population, b) to conserve and develop the natural foundations of life, and c) to maintain the long-term potential of land use and the resources it contains.

Thank you very much for your attention.