

REVISTA
EUROLATINOAMERICANA DE
DERECHO ADMINISTRATIVO

VOL. 10 | N.1 | ENERO/JUNIO 2023 | ISSN 2362-583X



RED DOCENTE
EUROLATINOAMERICANA
DE DERECHO ADMINISTRATIVO



Escaping the “Regulatory State”: The Case of the Peruvian Tertiary Education Regulations

Escapando del “Estado Regulatorio”: el caso de la regulación de la educación superior en Perú

OSCAR AUGUSTO SUMAR ALBUJAR I, II, *

^I Universidad Científica del Sur (Lima, Perú)

^{II} University of California, Berkeley (Berkeley, United States)

osumar@cientifica.edu.pe

<https://orcid.org/0000-0001-7658-9606>

JULIO CÉSAR ORELLANA PRESENTACIÓN I, III, **

^I Universidad Científica del Sur (Lima, Perú)

^{III} Pace University (New York, United States)

jorellanap@cientifica.edu.pe

<https://orcid.org/0000-0002-6916-4893>

RODRIGO HAWKINS ESTRADA I, ***

^I Universidad Científica del Sur (Lima, Perú)

rhawkins@cientifica.edu.pe

<https://orcid.org/0000-0003-4635-2071>

Recibido el/Received: 20.05.2023 / 20 May 2023

Aprobado el/Approved: 22.07.2023 / 22 July 2023

ABSTRACT

This article examines the regulation of tertiary education in Peru within the context of the pervasiveness of the *regulatory state* in liberal democracies. Peru’s experience with regulating tertiary serves as a cautionary example

RESUMEN

Este artículo examina la regulación de la educación terciaria en Perú en el contexto de la omnipresencia del “estado regulatorio” en las democracias liberales. La experiencia de Perú en la regulación de la educación terciaria sirve como

Como citar este artículo | *How to cite this article:* SUMAR ALBUJAR, Oscar Augusto; ORELLANA PRESENTACIÓN, Julio César; HAWKINGS ESTRADA, Rodrigo. Escaping the “Regulatory State”: The Case of the Peruvian Tertiary Education Regulations. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, vol. 10, n. 1, e237, ene./jun. 2023. DOI 10.14409/redoeda.v10i1.12759

* Vice-Chancellor of Academic Affairs at Universidad Científica del Sur (Lima, Peru). Fellow, Public Law & Policy Program at University of California, Berkeley, School of Law.

** Bachelor of Laws by Universidad Científica del Sur (Lima, Peru). LL.M. in Environmental Law – Global Specialization by Pace University – School of Law (New York, United States). Undergraduate instructor at Universidad Científica del Sur (Lima, Peru). Legal Researcher Associate at 1 Ocean Fund (Paris, France & New York, United States).

*** Bachelor of Laws by Universidad Científica del Sur (Lima, Peru). Undergraduate instructor at Universidad Científica del Sur (Lima, Peru).



of the challenges posed by the *regulatory state*. Despite a decade of *reforms*, the outcome for Peruvians has been reduced competition, increased costs, limited access to education, and no discernible enhancement in quality. The article introduces the regulatory state concept and explores its origins and ongoing expansion. It argues that this expansion results from diverse factors such as economic shifts away from free markets and the implementation of welfare policies. The subsequent part outlines strategies for reducing regulatory burden, ranging from straightforward approaches to paradigm-shifting concepts. However, none of these alternatives proves fully effective. Finally, the authors scrutinize a Peruvian case study of tertiary education -in which the state controls half of the education offerings-. The article's conclusion advocates for strengthening the role of the state to alleviate regulatory pressures. In this sense, a model closer to the Nordic model -wherein state intervention is distinct and strategic within a predominantly free-market economy- is the best way to escape the ubiquity quality of the regulatory state.

ejemplo de advertencia sobre los retos que plantea el estado regulatorio. A pesar de una década de reformas, el resultado para los peruanos ha sido una menor competencia, un aumento de los costes, un acceso limitado a la educación y ninguna mejora perceptible de la calidad. El artículo introduce el concepto de estado regulatorio y explora sus orígenes y su actual expansión. Sostiene que esta expansión es el resultado de diversos factores, como los cambios económicos alejados del libre mercado y la aplicación de políticas de bienestar. La parte siguiente esboza estrategias para reducir la carga reguladora, que van desde planteamientos sencillos hasta conceptos que cambian paradigmas. Sin embargo, ninguna de estas alternativas resulta plenamente eficaz. Por último, los autores analizan un estudio de caso peruano de educación terciaria -en el que el Estado controla la mitad de la oferta educativa-. La conclusión del artículo aboga por reforzar el papel del Estado para aliviar las presiones reguladoras. En este sentido, un modelo más cercano al nórdico -en el que la intervención estatal es diferenciada y estratégica dentro de una economía predominantemente de libre mercado- es la mejor manera de escapar a la omnipresencia cualitativa del estado regulatorio.

Keywords: regulatory state; tertiary education; regulations; reform; Peru.

Palabras clave: estado regulatorio; educación terciaria; regulación; reforma; Perú.

CONTENTS

1. Introduction; **2.** The expansion of the regulatory state; **2.1.** What is the regulatory state; **2.2.** The regulatory state in Peru; **3.** How to reduce the number of regulations; **3.1.** Transiting the regulatory state backward; **4.** The case of the Peruvian tertiary education reform; **4.1.** Context and justifications for the reform; **4.2.** Policy measures and their predictable effects; **5.** How to escape the suffocating mercantilists' educational market regulations; **6.** Conclusion. References.

1. INTRODUCTION

Most Peruvians thought our country experienced a process of *liberalization* in the nineties. To some extent, we did. We transited from an economic crisis plagued with state ownership and harsh interventions like price regulations -with a background of terrorism-, to the incentivization of private investment. Tertiary education was not the exception. Fujimori allowed for-profit universities, which increased the number of universities dramatically, making education accessible for almost all.

Nevertheless, rather than starting a period of a free-market economy, Peru was initiating a transition to a regulatory state. In the case of tertiary education, in 2010, when we reached 150 universities (two-thirds of them private), a process of standardization



began. Now we are close to the end of the first step of this process, with about 100 universities in place (half of them private). In other words, the private offering of universities has been reduced by half. What is even more shocking is that most of the population seems to be happy about this.

The so-called *educational reform* was sold to fight fraudulent universities that want to take advantage of the necessity of young poor people. The narrative was very graphic and based on reality, even when it was anecdotal. The image of the reform was a *garage university*. The reform also had a more technical or academic justification. It was said that there was *information asymmetry*, and that education was a *public good*, resulting in a less-than-optimal quality being offered. Even when it is impossible to see this, they -supposedly- derived this from the fact that the *returns* from university education were relatively low.¹

About ten years from the beginning of the implementation of the reform, the results speak for themselves. We have less competition; most students are concentrated under only three university branches -the *winners* of the reform-; the same returns from tertiary education; and, ultimately, less access to education. The reform, objectively, has been a failure. However, the chances of undue it is minimal. As we said, most people consider it successful, even if just for *cleaning* the market from bad alternatives. So, we must think creatively about ways to escape the regulatory state of tertiary education.

In doing so, we encounter the general problem of the pervasive regulatory state. In Peru, the pervasiveness of the regulatory state is seen as something *natural*. There is no public discussion about its constitutionality or convenience. In the case of education, this is even more patent, perhaps due to the lack of communication between educational studies and regulatory studies.² This article hopes to fill this gap and to provide a somehow innovative approach to the way to *escape* the regulatory state in general, based on the Peruvian example of tertiary education regulation.

As we said, Peru transited from state ownership and direct intervention to a regulatory state. Other countries, like the US, went in the opposite direction. Scaping the regulatory state necessarily involves returning to the same paths. In the case of Peru, this could mean strengthening and supporting direct intervention.

In Part I, we will address what is a *regulatory state*; the different features of it depending on the region; and possible explanations about its main causes. In Part II, we will talk about the *optimal* number of regulations, to determine if the regulatory state is something convenient or not. Even when we do not consider the regulatory state to be something bad *per se*, it is apparent that the regulatory state is over-dimensioned.

¹ YAMADA, Gustavo; CASTRO, Juan. **Calidad y acreditación de la educación superior: retos urgentes para el Perú.** Lima: Repositorio de la Universidad del Pacífico, 2013. p. 25-63.

² KING, Roger. **Governance and accountability in the Higher Education Regulatory State.** Switzerland: Springer, 2007. P. 412.



In Part III, we talk about the case of the regulatory state in tertiary education in Peru. We describe how education was regulated in such a way that competition was diminished, prices rose, and there was a dramatic reduction in access for people with fewer resources. In Part IV, we look for ways to escape the regulatory state, such as procedural changes to alter the weight of different branches of government; measures of regulatory quality; alternatives to regulation, and more dramatic changes like societal changes or constitutional ones.

2.THE EXPANSION OF THE REGULATORY STATE

2.1. WHAT IS THE REGULATORY STATE

The *regulatory state* exists in almost every constitutional democracy around the globe. As noted by Moran: “a regulatory state is now said to exist in a wide range of geographical and institutional settings”.³ Of course, countries like the US are pioneers of this tendency.⁴ In some sense, the US invented the regulatory state.⁵ But even countries like Peru or -in general- developing countries which escaped socialist influence in the nineties, are part of this trend.

Scott defined the *regulatory state* as “a distinctive mode of governance oriented towards the promulgation of rules that engages more or less systematic oversight of compliance with those rules by public agencies operating at arm’s length from those they are overseeing”.⁶ The same Scott then argues that another distinctive feature is the separation of delivery and oversight. Precisely, the regulatory state can be defined in opposition -on the one hand- to state ownership, but, on the other hand, to judicial adjudication of general rules, like torts.⁷ The regulatory state is defined by a preference for *specific deterrence*⁸ over both, *general deterrence*, and direct intervention through ownership (nationalization) and subsidies (welfare state).

In that sense, regulation can be seen as a middle ground between a very interventionist state and a free-market economy. Historically, it came from the bottom or from the upside down. In the US case, it was a response to an economic crisis where the free

³ MORAN, Michael. Understand the regulatory state. **British Journal of Political Science**, v. 32, p. 391-413, mar. 2002. p. 402.

⁴ COFFEY, B; McLaughlin, P; Peretto, P. **The Cumulative Cost of Regulations**. Virginia: Mercatus, 2016.

⁵ MORAN, Michael. Understand the regulatory state. **British Journal of Political Science**, v. 32, p. 391-413, mar. 2002. p. 392.

⁶ SCOTT, Colin. **The Regulatory Theory: Foundations and Applications**. Canberra: ANU PRESS, 2017. p. 265-288.

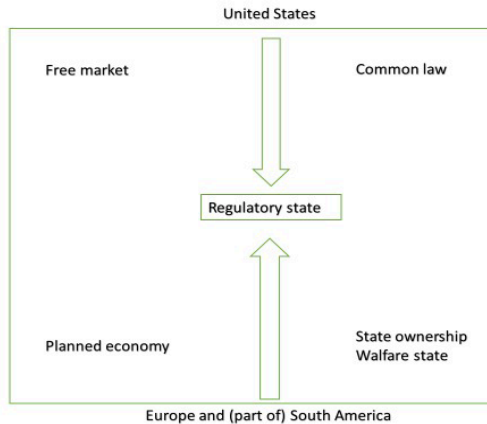
⁷ CALABRESI, Guido. **A Common Law for the Age of Statutes**. Cambridge: Harvard University, 1982.

⁸ CALABRESI, Guido. **The Cost of Accidents: A Legal and Economic Analysis**. Connecticut: Yale University Press. 1970.



market was considered one of the main causes.⁹ The US decided (New Deal and Progressive Movement) that more intervention was needed.¹⁰ In the case of Europe, the UK, and Latin America, the regulatory state was a response to the failure of economic planning and direct strong intervention by the government; coupled with the need to respond to international economic and political pressures.

Figure 1: different paths to the birth of the regulatory state



Once we are in this *middle ground*, there is a risk of abuse and an inertia, that makes the regulatory state *rise and rise*.¹¹ That is why now the focus of most of the regulatory literature is focused on the discussion on the necessity to scape or to maintain or reform the regulatory state.¹²

Also, there is important to understand that even when the regulatory state can be found in almost every system, it is not substantially equal in every country. Authors like Whitman distinguish between systems that are focused on consumers and systems that are focused on producers.¹³ The US is the main example of the first model. The regulation seeks to provide more alternatives at better prices. Regulation in Europe and

⁹ DUDLEY, Susan. Milestones in the evolution of the administrative state. *Daedalus*, v. 150, p. 33-48, jul. 2021. p. 35.

¹⁰ CALABRESI, Guido. *The Cost of Accidents: A Legal and Economic Analysis*. Connecticut: Yale University Press. 1970.

¹¹ LAWSON, Gary. The rise and rise of the administrative state. *Harvard Law Review*, v.107, p. 1231-1254, apr. 1994. p. 1240.

¹² NIELSON, Aaron. Deconstruction (not destruction). *Daedalus*, v. 150, p. 143-154, jul. 2021. p. 147.

¹³ WHITMAN, James. Consumerism Versus Producerism: A study in comparative law. *The Yale Law Journal*, v. 117, p. 340-406, dec, 2007. p. 350.



most Latin American countries seeks health and safety through standards (*social regulation*). That, in the end, reduces competition (fewer alternatives) and creates higher prices as well. This difference may be explained by the origins of the regulatory state. In the case of the US, as we already saw, the regulatory state is a step back from a free market economy. In the case of the UE or most Latin American countries, is the opposite. There could be an inertia that leads these later countries to a more interventionist form of regulation.

2.2. THE REGULATORY STATE IN PERU

As we already said, our process is one of a change from state ownership (and planning) to an open but regulated economy.¹⁴ Starting from 1990, most public services were privatized, but regulatory agencies were created. In the first stage, the agencies were supposed to mimic the market, since competition was lacking. Then, with more competition in place, they not only continued to regulate, but increased the number of regulations and justifications to do it: social, consumer protection, environmental, and so on. In the case of telecom, for example, regulations were increasing even when there was more competition every year.

This process is the same in most Latin American countries¹⁵. We experienced a wave of changes that led us from socialist economics to economic orthodoxy, known as the Washington Consensus. At the end, contrary to the popular view, these changes did not take us to a free market economy, but to a regulatory state.

The Peruvian regulatory state, as in the case of Europe, emerged from a previous model of state ownership and welfare state. Also, the Peruvian regulatory model is closer to Europe in the sense that we tend to put a lot of weight in *social regulation*; *i.e.* standards for health, security, *fairness*, other non-economic goals, and the protection of *fundamental rights* in general, even when this protection can lead to less competition.

3. HOW TO REDUCE THE NUMBER OF REGULATIONS?

When asking how to reduce the number of regulations, it is common to resort to procedural measures -like changes in the voting system-; the implementation of regulatory quality measures; or alternatives to regulation. This type of measure has proven insufficient since the regulatory state continues to grow in length and pervasiveness. The probable cause of this is that this type of measure is formal and superficial. They do not alter the fundamental incentives in society.

¹⁴ SUMAR, Oscar; MÉNDEZ, Rubén. Is the Peruvian constitution neoliberal? The influence of the Washington Consensus. *International Journal of Public Law and Policy*, v. 7, p. 14-28, may, 2021. p. 21.

¹⁵ Of course, *Bolivarian* countries did not adopt the reforms in practice but continued to embrace socialist policies. This is the case of Venezuela, Bolivia, and -to a lesser extent- Ecuador.



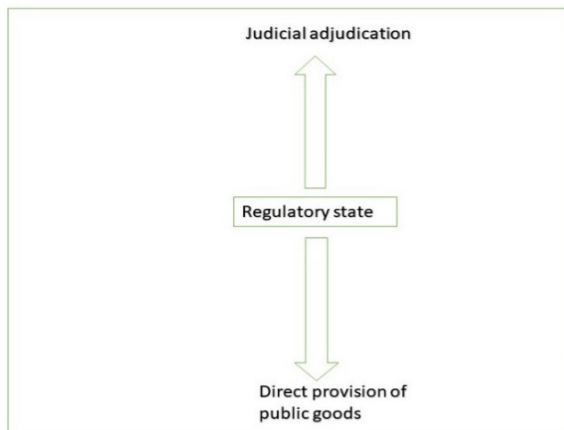
On the other hand, the most substantial measures -like changing the culture or *educating*- tend to be impossible to implement in a reasonable timeframe. Other substantial measures like changing the constitution could be counterproductive. A very rigid constitution with a free-market orientation could easily lead to conflict and be rapidly changed. For these reasons, we are thinking of a new way to address this issue, one that is innovative and maybe even provocative.

3.1. TRANSITING THE REGULATORY STATE BACKWARD

As we already mentioned, the regulatory state started differently in the US on the one hand and Europe and Latin America, on the other. In the US, it started as common law (free market) and then derived in a more intrusive, regulated economy. In Europe and Latin America, it started from an even more intrusive model, based on state ownership and welfare, which transformed itself to a less intrusive model, based on a command-and-control type of regulation.

If we think to apply some symmetry to the way regulation works, an obvious way to revert the regulatory state is to give more power to courts through *class actions*; and, to strengthen more direct types of state intervention. We think that the regulation of tertiary education in Peru could be a good example to put this idea on prove.

Figure 2: Scaping the regulatory State



At this point, it is interesting to look at the *Nordic model*. As with every constitutional democracy, countries like Denmark, Norway, and Sweden have a combination of state intervention and free market. Nevertheless, the way they balance it is different. They are sometimes portrayed as being more interventionist than other advanced countries,



something like a *middle way* between capitalism and communism.¹⁶ This is due to their commitment to equality.

This is not entirely true. The Nordic model relies a lot on the free market or capitalism¹⁷ but has -at the same time- a big welfare state. More than a *middle ground* the Scandinavian model represents the combination of two extremes, where most advanced countries use a more literality-centered solution: regulation. Looking at the Nordic model could illustrate to the rest of the World how to escape the regulatory state.

4. THE CASE OF THE PERUVIAN TERTIARY EDUCATION REFORM

4.1. CONTEXT AND JUSTIFICATIONS FOR THE REFORM

Prior to 1996, there were only 58 universities in Perú, 38 of them being private and none of them for profit. Between 1996 and 2012, we had 140 universities, with 89 private universities, where most of them were for profit. This was a *democratization education* revolution in Peru. Nevertheless, this revolution was received with a lot of critics. The emphasis was put on low quality and labor market outcomes. It was said by some experts and government officials that most people have been tricked by fraudulent universities that offered titles with no economic return.

Technically, the problem was wrapped up as information asymmetry and positive externalities. According to this, on the one hand; people were unable to distinguish good and bad quality in the market of tertiary education; and, on the other hand, there was a free rider effect in providing good-quality education, so markets would not do it by themselves. These two narratives called for a state intervention that assured the provision of more high-quality education.

But there were also some issues with these justifications. Regarding information asymmetry, this hypothesis does not explain the big differences in prices among universities or the difference in payments among employees who graduated from different universities. And, even more, how these differences coincide with the rankings of universities. Therefore, the justification on the asymmetry was that -in general- tertiary education did not guarantee a better salary. Of course, this argument is very indirect and is flawed since this could be seen as a global issue rather than a problem specifically connected with the quality of tertiary education in Peru. In other words, in almost

¹⁶ HILSON, Mary. The Nordic Welfare Model. In: LINDSKOG, Annika; STOUGAARD, Jacob. **Introduction to Nordic Cultures**. London: UCL Press, 2020. p. 70-84.

¹⁷ ENGELSTAD, Fredik; LARSEN, Håkon; Rogstad, Jon. **The Public Sphere in the Nordic**. 1st ed., 46-70. Norway: De Gruyter, 2017.



every country, the increment of people with university degrees will have an impact on the relative value of the titles. That is not indicative of a market failure but rather the consequence of a well-known economic rule: the price of a good relates to the availability of that good (law of supply and demand).

Regarding positive externalities, the argument is even more shockingly misleading, since it criticizes the increment of education based on an alleged market failure that prevents the market to deliver education. Of course, they add the word *quality* to it, but does not make sense still. People have incentives to obtain the best education they can pay. Companies have incentives to hire well educated people. Universities have incentives to deliver that education if they can charge people for it. If there is a free-rider effect is not as big as to justify public intervention alone, and -in any case- it will never justify reducing the offer of tertiary education.

Independently of this, the *reformist narrative* became very popular. Most people do not know or understand the economic regulation discussion, but they were affected by an image of a *garage university*. Of course, the *gimmicky* argument is also flawed. To begin with, is anecdotal. Moreover, it does not imply what the *reformists* want it to imply. A novel university -like a computer company- can start in a garage and it does not mean is a bad *quality* university. Some universities in Peru struggle to have enough room for their students at their beginnings and now are very big and with campuses even abroad. Even more, *quality* is a difficult term to grapple with. There is a say by which *an image is worth more than a thousand words*. This may be true, but also an image could oversimplify and close prematurely a debate about quality, evolving quality, costs, solutions, motivations, and so on. Finally, even if a picture of *Garage University* was true, it justifies a reform that touches 140 universities. Maybe there were general rules in Peru that could cope with a problem -if you consider it to be a problem- and maybe some solutions different to close those universities.

4.2. POLICY MEASURES AND THEIR PREDICTABLE EFFECTS

One first measure, enacted in 2012, was to ban the creation of new universities for two years. This was seen as a preamble to the put in place of a licensing system, that started working in 2014. The rationale for it was that if there is not a quality system in place, every new university could be low quality, exacerbating the problem. The shocking thing about this measure was that it was extended to 2022, even when the licensing system was implemented starting in 2014.

This second measure, the licensing system, consisted of a series of standards (hundreds of them) applied by a regulatory agency. The result of the application of these standards -starting at the end of 2014- was the closure of 50 universities (out of 140).



Most universities that were closed are private (96%) and new. Almost 80% of *new* universities (created from 2008 to 2012) were closed.

A third measure was supposed to be the betterment of public universities. Nonetheless, even when half of the current universities are public, there is no sign of a policy to increase the quality of public universities. For example, the resources (public investment¹⁸) devoted to public universities have remained stagnant since 2010.

The bad consequences are obvious: the reduction of competition (50 universities closed, which represented almost half of the private offer) leads to higher prices. This, of course, has an inequitable redistributive effect as well and -in general- a deterioration of higher education in Peru, if you define a *good tertiary education system* as a combination of access and quality. Of course, this can be reversed -at least in some way- if we can find a quality increment.

Regrettably, this increment is not there. By now, salaries are not higher than before. Could be higher in the future? Maybe, but the average salary of the remaining wealthier students at licensed universities is higher will be still no proof of a better -more efficient or more equitable- labor market in Peru.

Some enthusiasts of the reform have turned to other ways to measure or show the success of the reform. They argue that an increase in academic publications starting in 2014 proves that the reform is good in terms of academic quality and has the promise of helping Peru to become a scientifically or industrial-relevant country. This is coupled with an improvement in the performance of Peruvian universities in international rankings. This argument is flawed in various ways. First, the dates do not match. An increment in the number of publications is apparent since 2014 or even earlier, but the licensing system was implemented starting at the end of 2014 or even 2015. Second, there are various causes for this, including more public funding for research starting in 2012 and a growing interest in university rankings. Finally, the increment of publications -specifically when forced- is not necessarily good news by itself but depends on the quality of the publications. In recent years, there has been a growing number of academic scams and cheating in publications that can be attributed -at least in part- to this urge for publishing.

As the competition was eliminated and prices increased, three business conglomerates concentrated nearly 70% of private university students. Two of these groups have political presence directly or indirectly. Coupled with the results of the *reforms*, there are some questions about the real motivations behind these policies.

¹⁸ Private investment in public universities is nonexistent, in Perú.



5. HOW TO ESCAPE THE SUFFOCATING MERCANTILISTS' EDUCATIONAL MARKET REGULATIONS

As we saw in Part III, *traditional* ways to coup with the regulatory state have little chance to work. Of course, having more division of power to reduce the power of the university quality agency (Sunedu¹⁹); more regulatory quality to reduce the costs of these regulations; better civil or administrative liability systems to protect students that can force back more specific regulations; more information that can reduce the need for asymmetry corrections; more confidence in the role of families to decide about their kids' education; and, even a more liberal constitution without a specific mandate to intervene in the education market, can help to reduce the burden of the regulatory state of tertiary education. Nevertheless, these measures appear to be insufficient or too difficult to implement:

- i) *Less power to the regulatory agency*: there is currently a debate in Peru about an act that -allegedly- reduces the attributions of Sunedu. The controversy is ultimately meaningless since Sunedu preserves all its attributes. The only relevant changes are: a) the composition of the directory of the agency (that now includes three out of seven university representatives, but two of them from public universities); and, b) the concede of more attributions to a similar agency (Sineace²⁰), that has a different role in evaluating university quality since Sunedu is supposed to evaluate *minimum* standards and Sineace the achievement of quality goals, which are not mandatory for the majority of programs. Champions of the reform said that this act is an attack on the reform. Yet, most political forces and groups behind the reform support Sunedu, so it does not make any sense that they are now trying to bring Sunedu down. The text of the act itself does not support this claim. Even, in 2020 the Constitutional Court of Peru has recently decided that the act does not oppose the reform.
- ii) *Regulatory quality*: Peru is also under a regulatory quality process sponsored by the OECD. As we said in Part III. This process is not intended to reduce the influence of Sunedu, but to marginally reduce the burden of some of Sunedu's procedures. This can alleviate citizens and the subjects of regulation to some extent, but -as we already said- it would not have a real impact on the scope of the *reform*. If you undertake an evaluation process about the whole reform, the results will tell you that it must be revised. Nevertheless, incumbent actors are already discarding any criticism of the reform and -vigorously- trying to make

¹⁹ SUNEDU is a specialized technical body attached to the Ministry of Education of Peru, which has technical, functional, administrative, economic, and financial autonomy.

²⁰ Sineace is an institution that depends on the Ministry of Education, and it is responsible for the accreditation of both educational institutions and programs or professional careers that have voluntarily participated in a process of evaluation of their pedagogical, institutional, and administrative management,



people think that the reform was a success. Yet, as we saw in the last part, there are no achievements to show at the time.

- iii) *Better civil or liability systems*: we already have in place different ways in which students can complain about the services given by universities. For example, we have a consumer protection authority called Indecopi. Also, we have a *writ of amparo*, by which judges can protect fundamental rights, including the right to have a good education service. Nevertheless, we have a big gap in the way our judicial (or pseudo-judicial) system can influence public policy in a more relevant way. Our constitutional judges cannot adjudicate damages and our civil judges (including officials of consumer protection) cannot resolve cases in a *general way*, just case-by-case. We do not have a good class action system in Peru. Constitutional judges can resolve this in a more general manner (*estado de cosas inconstitucionales*²¹), but without awarding damages.
- iv) *Information provision*: since the alleged problem with tertiary education was a lack of information about the quality of universities; giving prospective students more information seemed like a natural solution. The Peruvian government thought the same, so they put in place a page with information about the fees and monetary returns of each degree/university. The information shown in this portal contradicts the *information asymmetry* premise since the most expensive universities also have the biggest monetary returns. Apparently, the page is a success but is not good enough to trust when it comes to letting the prospective students (or their families) decide the best for them.
- v) *More confidence in the role of families*: derived from the last point, one can say that, if there is enough information, families should be able to decide the best combination of quality and price for them. Nevertheless, the reform seems to be a very paternalistic policy, based on the idea that people are unable to decide for themselves. This approach is difficult to contest since most people seem to agree with it, even though they -themselves- are confident in their own ability to decide which university to study and even judge other people's decisions.
- vi) *Constitutional change*: the Peruvian constitution established the *subsidiarity principle* which is supposed to reduce state intervention in the economy. Some have interpreted that this principle only reduces the entrepreneurial activity of the state, but others think that it also applies to regulation, in the sense that it

²¹ This is a judicial doctrine that allows judges to resolve a situation that goes beyond the case before them. For example, one student claims that the university quality is too low and that violates its rights to have a good quality education. By knowing this case, a judge can resolve that the education system -as a whole- violates the constitution. The consequence of this declaration is that the decision affects not only that student-university, but every student in the same position is beneficiary of it. So, every student can go to a lower judge just to execute the decision, without having to make a different claim. This type of decision is rare, and the mechanism of implementation is not clear.



privileges the market. Even when this could be true, education, along with other activities, are mentioned as topics of *special interest* to the state. So, even when the Peruvian constitution is regarded as a fairly liberal constitution, education is treated as an exception. Could this be changed? Hardly. It will come at a big political cost. Also, it will probably be counterproductive, as we will show in the next lines.

Yet, there are other ways in which the state can intervene and can reduce the need for a big regulatory apparatus. These ways are related to the idea of pushing in the opposite direction that brought the US or Europe/Latin America to a regulatory state in the first place.

5.1. A RADICAL CHANGE IN THE CIVIL LIABILITY SYSTEM: CLASS ACTIONS

One way in which regulation is a stronger way to intervene in the markets is because of its general scope. By introducing class actions to adjudicate damages, you can overcome this relative disadvantage of the *common law* way of adjudication compared to regulations. Another way is giving constitutional judges (who already have more tools to protect rights collectively) the ability to award damages.

Authors like Rosemberg understand -well- that the judicial system is a counterpart of the regulatory state.²² Within the judicial system, he emphasizes the superiority of class action over individual litigation. Nevertheless, he fails to address how class action is better than regulation.²³ Viscusi asserts that regulatory agencies are better suited to address risk issues of specific products, because of their expertise. He also mentioned that in other cases, litigation could be complementary to regulations and even incentives. Our take -based on the Law and Economic tradition of the superiority of the common law started by Posner- is that litigation, as an *ex-post* remedy, has some major advantages:

a) It deals with real problems, not problems derived from the imagination of a regulator. Of course, regulation can also emerge from a real issue, but then policymakers have the task to anticipate every risk possible. In the case of litigation, judges only deal with an issue that has caused real harm.

b) The scope of the decision is limited to one issue. Regulations tend to be long and to address many issues at once, because of tradition and incentives of policy makers. In turn, litigation is concentrated on one issue before them.

²² ROSENBERG, David; WOOTTON, James. The Regulatory Advantage of Class Action. **Regulation Through Litigation**, p. 244-309, 2002. p. 278.

²³ VISCURI, W. Kip. Overview. **Regulation Through Litigation**, p. 1-21, 2002. p. 17.



c) The judicial system, because of its limited power and scope, is less subject to capture. And, overall, having distinct branches resolving issues, makes it more difficult in general to subvert the regulatory process.

For these reasons, having a judicial system with the ability to resolve class actions could be not only an alternative or complement to regulations but also a way to reduce the pace of the advancement of the regulatory state.

5.2. DIRECT PROVISION OF EDUCATION BY THE STATE

This model is inspired by the Nordic model, in which almost all universities are publicly funded²⁴ but less regulated. This is consistent with the goal of an educational system: to have more access (even *universal access*) and control over quality. If the state does not fund private universities, in which capacity is entitled to determine standards for them? Even more salient is the case where the state owns half of the universities, mismanages them, yet has a strong regulatory body to tell private universities what to do.

In Peru, before the *reform*, one-third of universities were state-owned. After the reform, about half of them are. Also, *universal access* to tertiary education is a very popular policy to implement. Nevertheless, as we already said, the Peruvian government has not invested more in public education since the reform started. The obvious explanation is that there is a bias in favor of certain private groups that benefit from the lack of public offers and the entry barrier for private institutions. As we already said, although difficult, a campaign for expanding public offers is feasible and with a low political cost. Who would oppose public universities becoming better and that reduces the access gap?

Of course, public universities are like islands with administrative and agency problems. It would be difficult to overcome these issues. Instead of trying to solve them, the Peruvian government has implemented something like a voucher system, by which the government subsidizes the demand for private education. In this scheme, the public offer goes to a second place and is no longer relevant to increase the quality of it, not even to increase access.

Even when counterintuitive, Peru should stop the more market-oriented voucher system and invest in public universities directly. By doing so, it could *regulate* the quality of it more directly than by posing standards to private ones. Also, it could tackle access, providing quality education for all. This strengthening of the public sector, in turn, should reduce the size of the private sector but also the urge for stringent regulation.

²⁴ HALLONSTEN, Olof. **Where did all the money go? Funding, personnel and expenditure in Swedish universities and colleges 2001-21.** Swedish: Quality in Higher Education, 2022.



Even this reduction of the private sector could come more naturally that by choosing winners and losers through an arbitrary licensing system.

Also, public universities should be formally excluded as subjects of university regulations. Of the total universities closed by Sunedu, only 4% were public universities, and the remaining 96% were private. Nevertheless, formally, public universities are in the same position as private, regarding Sunedu. So, in the public eye, Sunedu is also in charge of the quality of these universities. This is not true. Public universities are dependent on the State as a whole. To terminate this *illusion*, public universities should be excluded, so their quality would depend on the number of resources and proper management of them.

6. CONCLUSION

In some sense, the *regulatory state* is inescapable, since is a mark of our times. The complexity of economic relations and economic crisis has led the World to adopt this type of organization. Nevertheless, we also feel the need to oppose its advance. Traditional methods of coping with this problem have proved ineffective. Rearrangements of the power structure; regulatory quality; nudges; alternatives to regulation; and even paradigm changes are not enough to subvert the regulatory state.

Another author, like Calabresi, already thought about the idea of escaping the regulatory state trough transiting the way back to pre-regulatory state practices. In the case of Calabresi, he emphasizes the role of the judiciary. That makes sense in the US case since your regulatory state comes from there. In this work, we have presented a different solution, more compatible with our regulatory state origin. In the case of Peru, escaping the regulatory state probably would need us to strengthen the role of the state as a direct provider of goods. This is inspired by the Nordic model, in which the state funds universities but is less focused on micromanagement them.

The case of the regulatory state in tertiary education in Peru is very illustrative. We have a regulatory body that erased half of the private sector and 80% of the new offer; without adding resources to the state-owned universities or the universities system in general. This means that now we have less competition, higher prices, less access, and no measure of quality increase. This is a failure of the regulatory state. To escape this, we do not necessarily need to deregulate (at least as a first step) but to strengthen the role of the state through the already state-owned universities and by more funding of private universities. This will increase access and reduce the need for regulations.

REFERENCES

CALABRESI, Guido. **A Common Law for the Age of Statutes**. Cambridge: Harvard University, 1982. Available at: <https://doi.org/10.2307/j.ctvjnrnv5p>



CALABRESI, Guido. **The Cost of Accidents: A Legal and Economic Analysis.** Connecticut: Yale University Press. 1970. Available at: <http://www.jstor.org/stable/j.ctt1cc2mmw>

COFFEY, B; McLaughlin, P; Peretto, P. **The Cumulative Cost of Regulations.** Virginia: Mercatus, 2016. Available at: <https://www.mercatus.org/research/working-papers/cumulative-cost-regulations>

DUDLEY, Susan. Milestones in the evolution of the administrative state. **Daedalus**, v.150, p. 33-48, jul. 2021. Available at: https://doi.org/10.1162/daed_a_01858

ENGELSTAD, Fredrik; LARSEN, Håkon; Rogstad, Jon. **The Public Sphere in the Nordic.** 1st ed., 46-70. Norway: De Gruyter, 2017. Available at: <https://www.jstor.org/stable/j.ctvbkk05k.6>

HALLONSTEN, Olof. **Where did all the money go? Funding, personnel and expenditure in Swedish universities and colleges 2001-21.** Swedish: Quality in Higher Education, 2022. Available at: <https://doi.org/10.1080/13538322.2022.2121469>

HILSON, Mary. The Nordic Welfare Model. In: LINDSKOG, Annika; STOUGAARD, Jacob. **Introduction to Nordic Cultures.** London: UCL Press, 2020. Available at: <https://doi.org/10.14324/111.9781787353992>

KING, Roger. **Governance and accountability in the Higher Education Regulatory State.** Switzerland: Springer, 2007. Available at: <https://doi.org/10.1007/s10734-005-3128-2>

LAWSON, Gary. The rise and rise of the administrative state. **Harvard Law Review**, v.107, p. 1231-1254, apr. 1994. Available at: https://scholarship.law.bu.edu/faculty_scholarship/2627

MORAN, Michael. Understand the regulatory state. **British Journal of Political Science**, v.32, p.391-413, mar. 2002. Available at: <https://doi.org/10.1017/S0007123402000169>

NIELSON, Aaron. Deconstruction (not destruction). **Daedalus**, v. 150, p. 143-154, jul. 2021. Available at: https://doi.org/10.1162/daed_a_01864

PERÚ. Tribunal Constitucional. Case number: 0008-2022-PI/TC. **Congresistas vs. Congreso and Poder Ejecutivo.** 20 de diciembre de 2022.

ROSENBERG, David; WOOTTON, James. The Regulatory Advantage of Class Action. **Regulation Through Litigation**, p. 244-309, 2002. Available at: <https://www.jstor.org/stable/10.7864/j.ctv86dhwh.11>

SCOTT, Colin. **The Regulatory Theory: Foundations and Applications.** Canberra: ANU PRESS, 2017. Available at: <http://www.jstor.org/stable/j.ctt1q1crtm.25>

SUMAR, Oscar; MÉNDEZ, Rubén. Is the Peruvian constitution neoliberal? The influence of the Washington Consensus. **International Journal of Public Law and Policy**, v. 7, p. 14-28, may, 2021. Available at: <https://dx.doi.org/10.1504/IJPLAP.2021.10035863>

VISCURI, W. Kip. Overview. **Regulation Through Litigation**, p. 1-21, 2002. Available at: <https://www.jstor.org/stable/10.7864/j.ctv86dhwh.4>



WHITMAN, James. Consumerism Versus Producerism: A study in comparative law. **The Yale Law Journal**, v. 117, p. 340-406, dec, 2007. Available at: <https://doi.org/10.2307/20455797>

YAMADA, Gustavo; CASTRO, Juan. **Calidad y acreditación de la educación superior**: retos urgentes para el Perú. Lima: Repositorio de la Universidad del Pacífico, 2013. Available at: <http://hdl.handle.net/11354/1916>