



## **Freedom of expression in electoral processes A question of limitation of rights or self-limitation of freedom of expression?**

**La libertad de expresión en los procesos electorales ¿Una cuestión de limitación de derechos o autolimitación de la libertad de expresión?**

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### **ABSTRACT**

The main objective of this paper is to analyze some problematic issues related to freedom of expression in the electoral process, and it is that, based on a statement made by a Peruvian presidential candidate in a media outlet, in which he questioned the effectiveness of a type of vaccine acquired to control the infection and death due to the Covid19 pandemic, thus affecting the vaccination process established by the Peruvian government, led us to question whether in a context like this, freedom of expression should be limited or whether it is a matter of self-limitation, thus affecting the vaccination process established by the Peruvian Government, led us to question whether in a context such as this, freedom of expression should be limited or whether it is a matter of self-limitation, especially if it is a public person who intends to occupy the highest position in the State. This leads us to a weighing of fundamental rights and collective constitutional purposes such as national security and public order, which will explain the need to adopt

limiting measures to guarantee peace and social tranquility in a democratic State under the rule of law.

## RESUMEN

El presente trabajo tiene como principal objetivo, el análisis de algunas cuestiones problemáticas entorno a la libertad de expresión en proceso electoral, y es que, a partir de una declaración de un candidato presidencial de Perú, en un medio de comunicación, en la que se cuestionada la efectividad de un tipo de vacuna adquirida para controlar el contagio y muerte por la pandemia de la Covid19, afectando así, el proceso de vacunación instaurado por el Gobierno peruano, nos llevó a cuestionarnos, si en un contexto como éste, la libertad de expresión debe ser limitada o si resulta ser una cuestión de autolimitación, máxime si se trata de una persona pública que pretende ocupar el más alto cargo del Estado. Llevándonos a un terreno de ponderación entre derechos fundamentales y fines constitucionales colectivos como seguridad nacional y el orden público, que bien explicará, la necesidad de adoptar medidas limitativas para garantizar, en un Estado democrático de derecho, la paz y la tranquilidad social.

## Keywords / Palabras clave

Freedom of expression, electoral process, fundamental rights, national security, public order.

Libertad de expresión, proceso electoral, derechos fundamentales, seguridad nacional, orden público.

## Introduction

Evidently, to speak of freedom of expression involves a great problem given the wide range of situations in which it may come into conflict with other rights, one of them being the freedom of opinion of those candidates immersed in an electoral process, where winning the greatest number of votes prevails over any other interest, to such an extent that no consideration is given to the detriment that may be caused by this excessive freedom which, in an effort to avoid the antipathy of voters, outlines fanciful speeches, magical stories and novelistic tragedies.

However, this freedom of expression that involves personal free will, in addition to finding a limit in the respect for other rights, in a context of pandemic, has collided in an even more dangerous border, which can lead to social exacerbation, if the results of an assertion made in an environment such as these are not calculated with prudence, which will not find justification in the scope of the right to freedom of expression.

Thus, for our analysis, we will take into consideration what happened in Peru, in a small but not unimportant interview with the presidential candidate Rafael Lopez Aliaga of the political party Renovación Popular, in a television program "Combutters" by journalist Phillip Butters, in which the referred candidate without the slightest prudence, under the arguments of the effectiveness of the vaccine against the Sinopharm coronavirus in Peru of 11.5%, pointed out that "11% is like putting on water", questioning without any foresight, the actions of the Peruvian government.

In this context, it is worth asking ourselves whether, under the protection of the right to freedom of expression, any person, and with greater reason, a presidential candidate, can assert arguments that are not within his scope of proof, or is it that the media where such assertions are made, must previously grid and modulate the content of what will be presented to the population, and if doing so would not be violating the right to freedom of expression of said candidate.

Thus, this paper will attempt to unravel the questions raised, but not before conducting a brief study of the scope and limits of the right to freedom of expression, in order to determine the practical impact of this right in a democratic state. However, we will include a variant, the exercise of freedom of opinion in an electoral process, in order to determine whether or not it conflicts with other rights; and if in a context of pandemic, this freedom should be further restricted.

Our research should be qualified by some of the pronouncements of regional courts for the protection of human rights, such as the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR), regarding the essential content of the right to freedom of expression, and its scope as a means to guarantee the enjoyment of other fundamental rights and thus find a balance between its exercise and limitation.

## Materials and Methods

Although the origins of freedom of expression can be traced back to the Enlightenment in the 18th century, when the concepts of individual rights and the creation of the first constitutional instruments, such as the Constitution of the United States in 1787 and the French Declaration of the Rights of Man and of the Citizen of 1789, were born, it seems that the effective birth of the right to freedom of expression took place after the Second World War, when it became a universal right, with the Universal Declaration of Human Rights of December 1948; It seems that the effective birth of the right to freedom of expression took its course after the Second World War, when it became a universal right, with the Universal Declaration of Human Rights of December 10, 1948, stating in its Article 19° that: "Everyone has the right to freedom of opinion and expression."

Thus, freedom of expression is the cornerstone of the very existence of a democratic society. It is indispensable for the formation of public opinion. Therefore, it is possible to affirm that a society that is not well informed is not fully free. (García & Gonza, 2007). Thus, the Peruvian Constitutional Court has stated that freedom of expression "refers to the ability to receive the personal views of the issuer, which, as they are opinionated, require a basic character of congruence between what is sought to indicate and what is finally publicly stated" (STC Exp. No. 226262, 2007). (STC Exp. N°2262-2004-HT/TC, F.J. 13).

In the same sense, the Inter-American Court of Human Rights has established the relevance of freedom of expression in a democratic society: it is its sustenance and effect, an instrument for its exercise, a guarantee of its performance. There is an evident relationship between the deployment of expression and the enjoyment of freedom. These concepts inform various international human rights instruments, at both the universal and regional levels. The democratic public order therefore calls for the defense of freedom of expression. The Court's jurisdiction serves this, within its sphere of competence (Ushakova, 2020).

Likewise, the IACHR in Advisory Opinion 05/85 pointed out the existence of a necessary relationship between democracy and freedom of expression in the following terms: freedom of expression is a fundamental element on which the existence of a democratic society is based. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for political parties, trade unions, scientific and

cultural societies and, in general, for those who wish to influence the community to develop fully. It is, finally, a condition for the community, when exercising its choices, to be sufficiently informed (Bedriñana, 2015).

## Results

On the other hand, with regard to the scope of freedom of expression, it must be analyzed within the scope of its individual and social dimension, as Sergio García Ramírez would point out (2007) who, interpreting Article 13 of the American Convention on Human Rights, has pointed out that:

The individual dimension, which ensures the possibility of using any suitable means to disseminate one's own thought and bring it to the knowledge of others. The potential or actual receivers of the message have, in turn, the right to receive it: a right that concretizes the social dimension of freedom of expression. Both dimensions must be protected simultaneously. Each acquires meaning and fullness in function of the other (p.18).

In this sense, as we can see, the effective exercise of freedom of expression is closely and directly linked to democracy as an effective mechanism for social participation, this being the means for the acquisition of information, training and support for their freedom of public opinion, two phases clearly necessary for the enjoyment of their freedom in a constitutional state of law, in which the protection of fundamental rights must be ensured.

### Electoral process and freedom of expression

As has been pointed out, freedom of expression is the cornerstone of democracy, since it allows the development of tolerance, pluralism, but also the supervision and control over transcendent aspects of public life: political, electoral, judicial processes of public importance and foreign policy; therefore, taking into account that an electoral process is one of the manifestations of democracy, freedom of expression must be guaranteed in each of its stages for the optimization of citizens' awareness prior to the exercise of their free vote (Muñoz, 2014).

In this context, it is worth saying that the scope of protection of freedom of expression will guarantee the actions not only of the voters but also of the candidates involved in an electoral process, who on the

basis of their constitutionally protected rights will put forward more than one proposal, qualification or opinion that will always be subject to criticism in the public eye, both by the media and the voters, who will always remain, to a certain extent, expectant to each of their arguments in order to refine their choices between one candidate or another.

Political discourse therefore becomes fundamental in a democratic society, since the functioning of the mechanisms of representation and the conduct of democratic elections will depend on it. (Mathieu-Mohin and Clerfayt v. Belgium, para. 47). Therefore, it is thanks to the free expression of political opinions that citizens are able to comment on political leaders and parties and make conscious decisions as to whom to support, making it indisputable that "the exercise of political rights and freedom of thought and expression are intimately linked and mutually reinforcing" (Case of Ricardo Canese v. Paraguay, para. 47). (Case of Ricardo Canese v. Paraguay, para. 90)..

Considering the fundamental value of freedom of political expression in political pluralism and democracy, the role of the press (and of the media in general) in the dissemination of political opinions, as well as in the exchange of information between political leaders and society, is of vital importance. This has been pointed out by the European Court of Human Rights, in its judgment in the *Castells v. Spain Case* (1992), when it stated that it (the press) "enables everyone to participate in the free political debate which is the very essence of the concept of a democratic society." (para. 43).

#### 1. Freedom of opinion as a manifestation of freedom of expression in an electoral context

In the words of the Andean Commission of Jurists (Andean Commission of Jurists, 1999) freedom of opinion can be understood as:

The faculty that every person has to adopt and maintain his convictions and beliefs on aspects of any nature, whether political, philosophical, religious, etc. The opinion, when formed and maintained in the internal forum of each person, becomes inaccessible to others and causes the right in question to be absolute and unlimited (...) Once the opinion leaves the forum of the person, and is made known to others, no one can be a victim of any kind of aggression or violation of their fundamental rights for having certain ideas (pp. 24-25).

From the foregoing, it can be inferred that, in international law or the plurality of constitutions, it is expressly stated that no one may be harassed or persecuted on account of his ideas or opinions, nor discriminated against on account of them, and this is also the understanding of Ernesto Villanueva (Villanueva, 1997)(Villanueva, 1997), pointing out that freedom of expression, "has as its object thoughts, ideas and opinions, a broad concept within which beliefs and value judgments must also be included" (p.16).

In contrast to the Spanish Constitution, the Peruvian Magna Carta, in its Article 2, paragraph 4, states that everyone has the right "to freedom of information, opinion, expression and dissemination of thought through the oral or written word or image, by any means of social communication, without prior authorization or censorship or any impediment (...)", making a certain distinction between freedom of opinion and freedom of expression.)", making a certain distinction between freedom of opinion and freedom of expression; however, if we review the Spanish law we can see that in relation to this right, in Article 20, it is certainly more detailed and specified, clearly distinguishing between freedom of opinion and the right to communicate and receive truthful information.

We can then affirm that freedom of opinion is presented as a way of exercising the right to freedom of expression in any context, whether electoral or of any other nature, in which citizens -candidates- may freely express their own ideas, which may not necessarily coincide with a common public sense or ideology, but that on the basis of such discrepancies, within democratic canons, deliberation will be encouraged as the best mechanism for exercising and respecting the right to freedom of expression.

Thus, when referring to the aforementioned interview of a presidential candidate in a mass media, at first glance, we could accept that the content of his statements and allegations, whatever they may be, are within the scope of his exercise of freedom of expression in the form of free opinion, however, as we will see in the following section, this freedom must be limited within the constitutional parameters of safeguarding fundamental rights, national security and public order, values to which he is also bound, not only as a candidate for the presidency, but also as a candidate for the supreme office of the presidency, as we will see in the following section, this freedom must be limited within the constitutional parameters of safeguarding fundamental rights, national security and public order, values to which

he also owes, not only as an aspirant to the supreme political representation of the State, but also as a citizen respectful of peace and social tranquility.

## 2. Limits and restrictions on freedom of expression

As has been pointed out, although freedom of expression is a fundamental right, as a manifestation of thought, it is not absolute and therefore finds necessary limits to safeguard equally important demands, such as the honor and reputation of others or the security of the State (Zagrebelsky, 2020, p. 519)..

The European Court of Human Rights, as well as the Inter-American Court of Human Rights have heard on more than one occasion cases associated with the violation of the right to freedom of expression that, having come into conflict with other rights, mainly related to honor and privacy, the latter have been superimposed on the privileged position of freedom of expression, making it clear that rights, however absolute they are created, may present exceptions, i.e., limits or restrictions to their exercise.

Now, when we talk about the limits to the right to freedom of expression, it should be specified that these should be established to the extent possible so as not to affect the hard and intangible core of the right, to avoid transgressing as much as possible, and it is also necessary to determine in each specific case whether or not such restriction is necessary, Thus, although we cannot create a predictable rule for all cases, we avoid the abuse of the right, since for the particular case, we must necessarily carry out a proportionality analysis of the facts and circumstances in order to evaluate the rationality and reasonableness of the restrictive measure or measures.

However, according to the international legal system, both for countries subject to the jurisdiction of the American and European Convention on Human Rights, states are legally entitled to exercise their power to limit and prohibit certain conducts to the full enjoyment of the right to Freedom of Expression, for which it is required that such measures must be expressly established by law and be necessary to ensure: i) Respect for the rights or reputation of others; or, ii) The protection of national security, public order, or public health or morals<sup>1</sup>.

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<sup>1</sup> Article 13, paragraph 2 of the American Convention on Human Rights.



In the same sense, the American Convention on Human Rights has been precise in pointing out that the right to liberty will be defeated in the face of particular circumstances, such as those indicated in paragraphs 4 and 5 of its Article 13<sup>o</sup>, highlighting that:

4. Public entertainment may be subject by law to prior censorship for the sole purpose of regulating access to them for the protection of the morals of children and adolescents (...).
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to violence or any similar unlawful action against any person or group of persons on any grounds including race, color, religion, language, or national origin shall be prohibited by law.

For its part, the European Convention on Human Rights has stated that interference with the exercise of freedom of expression is permissible only if it is "prescribed by law", "pursues a lawful aim", and "is necessary in a democratic society" (Atienza, 2007, p.68). (Atienza, 2007, p.68).(Atienza, 2007, p.68), in accordance with the provisions of Article 10, paragraph 2 of the same Convention, which states:

2. The exercise of these freedoms, which carry with them duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information, or for ensuring the authority and impartiality of the judiciary.

Thus, it is clear that interference with the right to freedom of expression is exceptional, but such exceptionality must be previously established by law, always obeying the protection and guarantee of equally safeguarded constitutional values, in that sense, when we are facing an electoral contest, as Sergio García Ramírez and Alejandra Gonza would say (2007) :

Freedom of thought and expression in its two dimensions constitutes a fundamental bastion for the debate during the electoral process, since it becomes an essential tool for the formation of the voters' public opinion, strengthens the political contest between the different

candidates and parties that participate in the elections and becomes an authentic instrument of analysis of the political platforms proposed by the different candidates, which allows for greater transparency and control of the future authorities and their management (p.48).

On the other hand, it should be noted that the European Court of Human Rights has delimited the restrictions that are applicable when the object of the expression refers to a private individual and, on the other hand, when it refers to a public person such as, for example, a politician; stating:

The limits of acceptable criticism are, therefore, wider with respect to a politician than in the case of a private individual. Unlike the latter, he inevitably and consciously opens himself up to rigorous scrutiny of all his words and deeds by journalists and public opinion and, consequently, must demonstrate a greater degree of tolerance. Undoubtedly, Article 10, paragraph 2 (art. 10-2) allows for the protection of the reputation of others - i.e. of all persons - and this protection also covers politicians, even when they are not acting in a private capacity, but in such cases the requirements of such protection have to be weighed against the interests of open debate on political issues. (Case of Dichand and others vs. Austria, note 91, para. 39; Case of Lingens v. Austria, note 91, para. 42).

As it has been said, in order to feel present the democracy of a country, it is convenient to observe if it guarantees or has implemented means for the exercise of freedom of expression, which in an electoral context will be framed -in one of its assumptions- in the freedom of the press, who play a preponderant role in the political debate, radio and television, and now social networks have become the media par excellence for the transmission of political messages, Given the technological developments, it is almost impossible to think that any person has not heard any of the proposals of a candidate, authority or any other person, which has led to the restrictions mentioned above to be seen as invisible milestones, since it is increasingly complicated to control the information that enters or leaves each of the media.

However, the very important role played by information dissemination channels cannot be denied, as recognized by the ECtHR in the case of *Jersild v. Denmark* (1994). (1994) where it stated that: "the transmission of news (...) is one of the most important means by which the press can perform its role as a public watchdog (...) the

press's contribution to the debate on matters of general interest" (paragraph 35).

## Conclusions

As we have been able to appreciate, although the right to freedom of expression is mainly shown in preferential order when it conflicts with other rights, it is not an absolute right at all, and may be subject to restrictions and/or limitations, therefore, under the protection of its internal legal regulation and international jurisprudence, the State is duly authorized to dictate the pertinent and necessary limiting measures, if the case warrants it, always respecting and self-limiting - as far as possible - not to violate fundamental rights.

In this sense, taking up the questions posed at the beginning of this paper, it is possible to maintain that, as has been pointed out, in situations of national security, public order, public health or morals, these will take precedence over the right to freedom of expression, However, this does not imply that it becomes a rule of immediate application, since it must be evaluated on a case-by-case basis whether or not it is proportional to dictate a measure limiting the right to freedom of expression.

However, such a conclusion is preceded -perhaps- by a sort of balancing test, since we have given greater value to collective constitutional purposes such as national security, public order or public health or morals, and we have sacrificed the individual right to freedom of expression, and it is more than necessary to make such a value differentiation because the idea that prevails in them is that of the common good over individual interests; such an assessment may be mistaken, but it is the one that comes closest to that of a state in which respect for democratic values and the constitutional goods that underlie them prevail, but which are equally protected.

At this point, first of all, let us recall the journalistic facts from which the analysis of this work arose, in which a presidential candidate questioned the effectiveness of one of the types of vaccine against Covid19 that have been applied to the Peruvian population; However, it is clear that the questioning is directed towards the government's treatment of public health, but not the effectiveness of the vaccine, therefore, it is this situation - the purpose of the statement - which should be the object of the examination of weighting with respect to

the freedom of expression that the speaker fully enjoys, that although his expression must be free, as we have already seen, it can be restricted if it contravenes the purposes of a constitutional state of law, in which public order, peace and social tranquility must be guaranteed.

Secondly, it is clear that the expression "11% is like putting on water", to some extent is not such an apocalyptic or frightening phrase, but we must keep in mind the context in which it has been outlined, since we are not in any circumstance, but that of a pandemic, which has already left more than 2.5 million families mourned by deaths around the world, In which anxiety and despair have become the only emotions in an environment of desolation and misfortune, therefore, no matter how simple the expression may sound, people, and even more so any aspirant to public office, should prudently limit their statements in order to avoid social exacerbation, especially if they have no objective means to corroborate them.

Finally, the argument that the aforementioned phrases are the result of personal appraisals of a person who does not hold a public office or any authority, and that his criticisms are made as any other person, is inconsistent with the discourse of a candidate who seeks to occupy a place in the public administration, and the values to which he will be bound once elected, Although he does not yet hold an office, his opinions, upon leaving his personal sphere and entering the public sphere, become of legitimate interest to society and, like any other, are subject to criticism and control.

To all of the above, it should be added that it is more than necessary to recognize the preponderant role of the media in an electoral process, given that it not only participates as an instrument of mass dissemination of political information, but also as a tool of control and filter of each of the data that is disseminated through them, Therefore, as an active participant in a democratic contest, it must in the first place - and as far as possible - watch over the authenticity and veracity of the information exposed to the public, especially if on this, society will form its political convictions for the scrutiny and election of its new representatives.

## References

Atienza, M. (2007). Debate on Laicism. The Caricatures of Muhammad and Freedom of Expression. *International journal of*

- political philosophy, 30, 65-72. <http://e-spacio.uned.es/fez/eserv/bibliuned:filopoli-2007-30-0003/PDF>
- Bedriñana, K. G. A. (2015). Constitutional regime of human rights treaties in Latin American comparative law. *Prolegómenos*, 18(35), 135. <https://doi.org/10.18359/dere.815>
- Andean Commission of Jurists (1999). Protection of Human Rights. Operative Definitions. Tercer Mundo Editores.
- Spanish Constitution (1978). Updated. <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>
- American Convention on Human Rights (1978). [https://www.oas.org/dil/esp/1969\\_Convenci%C3%B3n\\_Americana\\_sobre\\_Derechos\\_Humanos.pdf](https://www.oas.org/dil/esp/1969_Convenci%C3%B3n_Americana_sobre_Derechos_Humanos.pdf)
- European Convention on Human Rights (1950). <https://www.coe.int/en/web/human-rights-convention/home>
- Inter-American Court of Human Rights (2004). Judgment in the Case of Ricardo Canese v. Paraguay, August 31, 2004.
- García, S., & Gonza, A. (2007). La libertad de expresión en la Jurisprudencia de la Corte Interamericana de Derechos Humanos (1st edition). Mexico City Human Rights Commission.
- Muñoz, T. C. V. (2014). Freedom of expression and electoral communication: pathways to a deliberative model. *Electoral Justice Journal*, 1(15), 245-277. <https://dialnet.unirioja.es/descarga/articulo/5590272.pdf>
- Tello, R. E. (2021). "Rafael López Aliaga in Combatters. Live." Facebook. <https://www.facebook.com/100051062837338/videos/256118159433610/>
- Constitutional Tribunal of Peru (2005). Case No. 2262-2004-HT/TC. Tumbes: October 17, 2005.
- European Court of Human Rights (1987). Judgment 9267/81, Case Mathieu-Mohin and Clerfayt v. Belgium, March 2, 1987.
- European Court of Human Rights (1992). Judgment 11798/85, Case Castells v. Spain, April 23, 1992.
- European Court of Human Rights (1994). Judgment 15890/89, Case of Jersild v. Denmark, September 23, 1994.
- European Court of Human Rights (2002). Judgment 29271/95, Case of Dichand and others v. Austria, 26 February 2002.
- Ushakova, T. (2020). Cooperation of NHRIs with international human rights treaty bodies. *Lex social*. <https://doi.org/10.46661/lexsocial.4547>

Villanueva, E. (1997). Régimen constitucional de las libertades de expresión e información en los países del mundo. Editorial Fragua.

Zagrebelsky, G. (2020). Manual de Derecho Constitucional (1st edition). Zela Grupo Editorial.