Challenges of Human Rights in Latin America

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Minutes of the Fourth Conference of Fundamental Rights

Edited by

César Landa

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PREFACE

Since the beginning of the 21st century, the affirmation of the constitutional democratic model in Latin America finds challenges still unresolved on the validity and effectiveness of fundamental rights, and the necessary balance between the powers of the State. The first product is the transfer of the public economy to private groups and public burdens to the citizens, and; the second, has been characterized by the open confrontation of presidentialism with parliamentarism.

The constant economic growth in the region in recent decades, due largely to the long period of the rise in international prices of renewable and non-renewable natural resources, which is the main source of wealth in the region, has been created in sectors of the population not only vulnerable, social and political instability due to the lack of redistribution of wealth, through the old and new rights, and governmental corruption.

Also, the balance and control between the powers has not been achieved satisfactorily, nor has governmental stability; on the contrary, until the 1980s, the political practice was, in the majority of countries, conflict between the government and the opposition, which is not always resolved through democratic elections, but through military coups and even civilians against the President of turn. The collapse of the rule of law by appealing to the doctrine of necessity and urgency, was the way to resolve conflicts between the government and the opposition during the XIX-XX centuries.

However, with the end of the military governments in Latin America, on the one hand, democracy is protected by limiting political rights against the threats of terrorism and prosecution, and, on the other hand, the dismissal or forced resignation of many Presidents has been a parliamentary practice in a presidential political regime in Latin America. In particular, the impeachment of the President apparently has become a new practice to solve the serious political conflicts between the government and the opposition.

So, the strengthening and development of this model of the constitutional state are a common challenge for the Latin American region, which has

been characterized by historical problems of legal and political instability, and by the need to carry out structural reforms to make the equitable distribution of power and wealth among all citizens.

Moreover, it can be noted that the role of the constitution is not only justice, but also, the Inter-American Court of Human Rights is placed at the heart of the issues of the new constitutional State, to the extent that their work if it is legal in nature is becoming a new pipeline instance and a legal resolution of major issues on human rights with all the dangers of judicial activism and the problems for democratic legitimacy.

In this scenario is the development of the IV Latin American Conference on Fundamental Rights (Lima, 11-13 October), under the auspices of the Rule of Law Program for Latin America of the Konrad Adenauer Foundation, in which the members of the Inter-American Network of Fundamental Rights and Democracy (RED-IDD) have discussed the political rights and the consolidation of democracy, political judgment, the plurality of information and media concentration, due process in the judicial protection of individual rights, new technologies and fundamental rights, the State's fight against corruption, the control of constitutionality and conventionality control; new fundamental rights; and the constitutionalization of law, which are published in this volume, which would not have been possible without the valuable contribution of María-Fernanda Caparó.

We consider, that the Latin American conferences on Fundamental Rights have been consolidated through the academic bridge that has been formed between professors of Constitutional Law of Brazil, Peru, Chile, Colombia, Mexico and Argentina. This will lead to the affirmation not only of the exchange but the construction of constitutional ideas of their own; through the development of research on the problems that beset the democracy and fundamental rights of our constitutional states in Latin America.

César Landa, May 2018

THEMATIC TABLE 1:
POLITICAL RIGHTS AND CONSOLIDATION OF THE LATIN AMERICAN DEMOCRACY

CONSTITUTIONAL LIMITS OF THE RIGHT TO RUN FOR OFFICE

CÉSAR LANDA*

I. Introduction

In the most recent elections in Peru (2016), there was a plethora of candidates—coming from nearly every political party—who had criminal records and/or pending criminal charges. Those who were successfully elected now have immunity and privileges against being investigated by district attorneys or charged in criminal proceedings, due to the fact that members of congress in Peru have legislative immunity. Indeed, in the 2016 congressional elections, there were 52 candidates with criminal records (Transparencia, 2016), a circumstance that serves to weaken our democracy by enabling persons involved in acts of corruption and members of criminal organizations engaged in drug trafficking and/or terrorist financing to infiltrate the constitutional state.

The fact that there was such a high number of candidates with pending criminal charges or convictions for the commission of certain crimes raises serious doubts regarding the transparency and quality of the candidates running for public office under our democratic model, as enshrined in the Constitution of 1993. The principle of democracy does not just mean electing representatives from among those candidates who run for office, on a plural basis, in elections. To earn its name as such, a representative democracy must presuppose that those representing us are citizens with respect for the principles that govern the representation of the general interest and the common good, as provided for in the Constitution and the law.

In view of this scenario and the public debate over electoral reform, it is essential that we analyze some of the proposed impediments to standing for office applicable to individuals with convictions upheld on appeal; those applicable to convicted individuals who have served their sentence; and those applicable to persons with pending criminal charges (when the

district attorney has brought formal charges, but no judgment has been issued yet).

The Right to Political Participation

In the Peruvian constitutional model, the right to political participation has three facets that may be inferred from the constitutional body of law: 1. The facet pertaining to the right to vote and the right to run for public office (Section 2.19); 2. The facet pertaining to control over democratically elected authorities (removal, revocation, accountability), in accordance with Section 31 of the Constitution of 1993; and 3. The facet pertaining to mechanisms for direct participation in decision-making (referendums) or proposals of public interest (legislative initiatives and constitutional reform initiatives) recognized in Sections 31 and 206 of the Constitution; and indigenous peoples' right to prior consultation (Law 29785).

The presuppositions for the exercise of suffrage rights are set forth in both the Constitution and the law (Jurado Nacional de Elecciones, 2016),[1] thus making this a legally established right, although in an intermediate sense, since Sections 90 and 91 of the Constitution itself establish the requirements for and impediments to being congresspersons; and the requirements for being the president of the republic (Section 110 of the Constitution). In this presentation, we will not be touching on electoral problems involving candidates in regional and municipal elections, given the local particularities of these issues.

In the model of a constitutional democracy, the right to vote and to stand for public office is fundamental, given that our democracy is representative (Section 43 of the Constitution). The right to vote helps to bolster our democracy and civic responsibility, thus channeling and enforcing the principle of political pluralism, which is inseparable from the democratic model enshrined in our Constitution.

According to constitutional theory and jurisprudence, however, no right is absolute. This means that restrictions are admitted, provided they are reasonable and proportional. Under this system, all limits on the right to citizen participation are defined by the legislative branch. These limits typically involve aspects such as age, nationality, criminal convictions, and civic or mental capacity, among others, which will be analyzed below.

[1] See the Jurado Nacional de Elecciones (National Electoral Board). Compendio de Legislación Electoral 2016.

This right may also be limited, however, in the case of persons who commit certain crimes that seriously and directly violate the Constitution.[2]

II. Limits on the Right to Run for Public Office

In the Peruvian legal system, any constituent aged 18 or older is able, in principle, to exercise his or her right to be elected to a public position by popular vote. To exercise the right to vote, in turn, one must be registered with the electoral board. This provision is established in Section 30 of the Constitution of 1993.

Nevertheless, there is currently a public debate regarding the possibility of limiting participation: firstly, by a person with serious criminal charges pending, when no conviction has been issued but the criminal proceeding is underway; secondly, by an individual who has been found guilty and lost a first appeal, when all other possible remedies have not yet been exhausted; and thirdly, by establishing an impediment against standing for public office even after the convicted party has served his or her sentence.

To begin with, it must be noted that the Constitution and the law regulate two aspects pertaining to the right to run for public office: 1. Requirements for being a candidate; and 2. Impediments to being a candidate for a popularly elected position. Those limitations on the right to run for public office applicable to persons with pending criminal charges, those who have been convicted, and even those who have served out their sentence following a criminal conviction all fall within the scope of impediments to running for public office.

We must be careful to point out, on the other hand, that Section 33 of the Constitution establishes two of the grounds for the suspension of suffrage rights: prison sentences, and convictions involving a disqualification from exercising political rights. In principle, the content of this section of the Constitution makes it impossible to suspend the right to run for office in the case of individuals with pending criminal charges, as well as those whose conviction has not yet become *res judicata*. Nevertheless, it is necessary to interpret these provisions in keeping with the principle of practical concordance with the Constitution as a whole.

[2] With regard to this matter, Section 23.2 of the American Convention on Human Rights recognizes that the law may regulate the exercise of rights of citizen participation, including the right to vote and to be elected (active and passive suffrage).

In effect, if it were only possible to suspend political rights—specifically, the right to run for public office—through a judgment, then it could not be argued that Section 100 of the Constitution allows for political disqualification, both from remaining in public office and from exercising the right to run for public office during the disqualification period. Such disqualification, resulting from the commission of a constitutional violation, must be established by a legislative resolution (*resolución legislativa*) issued by Congress; that is, by virtue of a parliamentary document that is *not* a court judgment with the status of *res judicata*. This, too, is a matter of constitutional interpretation, of course, as well as requiring an assessment of the balance between two constitutionally legitimate rights.

The jurisprudence of the Peruvian Constitutional Court contains certain standards intended to protect the rights of candidates and citizens elected to positions by popular vote. Specifically, in the cases of Espino Espino (File No. 2366-2003-AA/TC, 2004) and Castillo Chirinos (File No. 2730-2006-PA/TC, 2006), the court noted the need for a final and binding conviction against the candidate and/or democratically elected authority in order to enforce any restrictions on running for office or to remove the authority from a popularly elected position.

Given that rights and freedoms must be interpreted in accordance with the conventions to which Peru is a party, as per the Fourth Final and Temporary Provision of the Constitution of 1993, it must be noted here that according to the standards of the Inter-American Court of Human Rights (IA Court of HR), suffrage rights *may* indeed be restricted. Thus, States can legitimately regulate political rights through formal laws, although any legal limitations on a political right such as suffrage must meet the prerequisites established by the principle of proportionality: legitimate purpose, necessity, and proportionality in the strict sense (**IA Court of HR, *Case of Castañeda Gutman vs. Mexico*, paragraph 149).**

In the Colombian legal system, for example, that country's Constitutional Court has rejected the application of jurisprudence derived from the case of López Mendoza vs. Venezuela, specifically stating that the mandate established by the IA Court of HR—with regard to the need for a final and binding conviction issued by a criminal judge as a prerequisite for the suspension of the right to run for public office—is applicable to Venezuela, since its constitution specifically establishes such a requirement; but that the same rule did not apply to Colombia, where the legal system recognizes the power to disqualify (suspend the suffrage

rights of) even administrative authorities (Constitutional Court of Colombia, Judgment SU 712/13).

On the other hand, a measure limiting the rights of defendants with a guilty verdict upheld on appeal and/or who have not received any judgment whatsoever does not affect the principles of equality and non-discrimination. Specifically, while such persons may be prevented from standing for a popularly elected position, the reasons for which such a restriction has been imposed are not among the motives prohibited by the Constitution and the American Convention on Human Rights. Since this is a measure limiting fundamental rights, however, it must be duly founded and based on a proper rationale set forth by the legislative branch.

Generally speaking, States have a broad margin of appreciation when regulating their electoral systems and the rules applicable thereto, including rules involving restrictions and/or limitations on the right to run for public office. In principle, the margin of deference on electoral matters will only be limited in cases where the rights of certain disadvantaged groups are violated, or when the practices of a specific State run contrary to the other countries that form part of the Inter-American System of Human Rights, that is, when the State acts in violation of the consensus currently existing on electoral matters (IA Court of HR, *Case of Yatama vs. Nicaragua*, 2005).

III. Types of Crimes due to which the Right to Run for Public Office may be Restricted

In view of the foregoing arguments regarding the crisis faced by the democratic system in Peru, and given the legislative branch's power to freely establish election law, it becomes necessary to set forth a standard on the types of crimes that may be considered grounds for the suspension of the right to run for public office, applicable to those persons accused of serious crimes who have not yet received a final and binding judgment, or those who have already served the sentence issued against them and are supposed to have been rehabilitated.

In fact, the Peruvian legal system already contains provisions affecting the right to run for public office. However, these are not applied until *after* the election campaign, i.e., once the authority has already been sworn in to the popularly elected position. This concept of "vacancy" is, in a way, the *a posteriori* response established by the legal system in the event that an elected authority receives a final and binding criminal conviction.

On the other hand, although the principle of rehabilitation of those convicted of crimes supposes that once the citizen has served the respective sentence, he or she may once again exercise his/her rights, including the right to run for public office, the fact is that this principle appears to allow for some limitations. Indeed, it might be reasonable, in the case of certain crimes, to impose a restriction against running for a popularly elected position, especially if the aspirant has served a sentence for acts that, in and of themselves, violated the very structure and essence of the State.

It could thus be deemed legitimate for the legislative branch, on an exceptional basis, to develop limitations on the right to run for public office, based on certain supreme constitutional values that are essential to the democratic State under the constitutional rule of law—even when there is not yet a conviction with the status of *res judicata*, or when the convicted party has served his/her sentence and has been deemed rehabilitated.

Specifically, the right to run for public office could be restricted provided certain prerequisites are met (Espíndola, 331):

a) The crime must be established in the Constitution, and must warrant a punishment involving the suspension of political rights;
b) The provisional suspension of political rights must be suitable, useful, and necessary for safeguarding a constitutionally acceptable objective; and
c) The crime must involve probable cause of harm or a clear and present danger.

Specifically, it should be noted that the suspension of the right to run for public office—in cases with pending criminal charges, or where a conviction has been upheld on appeal but is not yet final and binding, or in cases where the convicted party has already served the sentence imposed—does not apply to the commission of just any crime, but only to those cases in which a truly serious crime has been committed, of the type the constituent power itself has included directly in the Constitution. As such, the relativization of the principle of the presumption of innocence and the principle of rehabilitation is permissible only in the case of the following constitutionalized crimes:

(i) Commission of the crime of terrorism (Sections 2-24-F and 140).

(ii) Commission of the crime of drug trafficking (Sections 2-24-F and 8).
(iii) Commission of the crime of corruption (Section 41).

Drug Trafficking Crimes

In the case of illegal drug trafficking, Section 8 of Peru's Constitution establishes the State's obligation to fight and punish this crime. The inclusion of the said crime in the Constitution makes sense in view of the risk it poses to the very effectiveness of the model of the State under the rule of law. On the subject, the Constitutional Court has declared the following:

> (…) this Court has had occasion to reiterate the nature of illegal drug trafficking—a crime that has been constitutionalized, and one subject to the highest degree of prosecution and punishment—and even the effects of this crime on the national economy. Thus, in the case at hand, the laundering of assets gained through illegal drug trafficking *undermines the legal economy and threatens the stability, security, and sovereignty of the State*. It went on to state that *illegal drug trafficking is an international criminal activity, the suppression of which demands urgent attention and the highest possible priority*; and that it *generates considerable financial returns and great fortunes that permit transnational criminal organizations to invade, contaminate, and corrupt the structures of public administration, along with legal, commercial, and financial activities, and all levels of society.* (File No. 0033-2007-PI/TC: 74)

As such, there are well-founded reasons to establish measures—as part of the criminal policy of the Peruvian State—that restrict the right to run for office among those persons found guilty of drug trafficking. Above all else, it must be borne in mind that this is a crime that serves to foster corruption and finance terrorism, consequently giving it the ability to lay siege to the very structure of the State, through candidates who inevitably make their way into legitimate political parties.[3]

[3] EL COMERCIO newspaper. "García returns US$ 5,000 that attorney Abanto contributed to his 2006 campaign, stressing that his administration is waging a forceful fight against drug trafficking." Edition dated Sunday, February 13, 2011. Likewise, presidential candidate Keiko Fujimori was accused in 2011 of having accepted US$ 10,000 from persons tied to drug trafficking. See LA REPUBLICA newspaper. "Keiko received $10,000 from family involved in money laundering proceedings." Edition dated Tuesday, February 22, 2011.

Indeed, the financing that political parties receive from drug trafficking is decisive in helping those who hold representative positions. Anyone backed by funds of illegal provenance does not represent the nation, however, but only the private interests of those involved in drug trafficking. This financing thus becomes a source of corruption and influence peddling, with negative consequences for ethics in public administration and the very health of a democracy (Castillo and Zovatto, 1998: XXIII).

Indeed, the Constitutional Court itself has noted that the existence and spread of drug trafficking affect different basic values and institutions in any social State based on the rule of law, such as the principles and rights to the dignity of the human person (Section 1), the family (Section 4), and social peace (Section 2, Subsection 22), among others (File No. 0020-2005-PI/TC: 118).

In comparative law, measures have also been taken with regard to the preventive control of drug trafficking. In Colombia, for example, Law 001 of 2009 establishes that those parties whose candidates have been convicted of crimes related to drug trafficking and similar deeds—regardless of whether they are actually chosen to fill popularly elected positions—shall lose their eligibility to present candidates for the following election. This example illustrates the seriousness with which narco-politics are taken in the said country, where even the political organizations themselves are punished.

Crime of Terrorism

The same argument can be applied to the case of terrorism or membership in an illegal armed group. It is of particular interest here to note that the Constitutional Court has proclaimed the Peruvian legal system to be a militant democracy. Specifically, it has stated that:

> (…) It should be noted here that the Constitution has enshrined two fundamental principles: one of a political and the other of a legal nature. The first is based on the people's sovereignty, by virtue of which they have opted for a militant democracy, which refuses to allow abuses in the exercise of rights to the detriment of the legal system; while the second is based on constitutional supremacy, by virtue of which the fundamental rights of those who attack the constitutional State under the rule of law and the social order may be reasonably and proportionally restricted. For such reasons, the Court finds that these two points of the claim must be dismissed. (File No. 0003-2005-PI/TC: 371)

The fact that Peru's democracy falls under this category means that it has the power to create and/or apply mechanisms with which to respond to antidemocratic parties or political organizations, or those whose purposes are illegal or run contrary to the model of a State under the rule of law.[4] Indeed, the concept of a militant democracy also enables the legislative branch to impose limits or restrictions on those individuals who have been convicted of or tried for crimes such as terrorism, this being one of the ways to defend the constitutional democratic model.

While the Political Parties Act (Law 28094) has established a legal mechanism to prevent organizations with concealed illegal purposes (such as terrorism) from forming political parties (Landa, 2012: 224),[5] there is also the possibility of establishing a mechanism to prevent the participation of those who have been convicted of or tried for crimes such as terrorism and have not expressed remorse, acting through parties or organizations that are legitimately registered and whose purposes do not formally run contrary to the concept of the constitutional State under the rule of law.

Indeed, the recently-passed Law 30353 creates a Registry of Civil Reparations Debtors, by virtue of which those persons who have been convicted for terrorism and corruption and who still have outstanding debts "shall be prohibited from performing any duties or holding any position, employment, contract, or commission of a public nature, nor may they run for or gain access to public positions by virtue of popular election." The fact of being a "debtor" does not seem sufficient reason—in view of the supreme values of the State—to restrict a person's right to run for public office. Rather, such limitations must be aimed at preventing the aforementioned constitutionalized crimes, when they are currently under investigation or subject to pending charges and/or a criminal conviction.

Crimes of Corruption

When it comes to crimes against State property, restrictions against running as a candidate are based on the fact that those individuals who

[4] In its Resolution No. 224-2011-ROP/JNE, the National Electoral Board denied an application for registration by the political party "Por amnistía y derechos fundamentales" ("For Amnesty and Fundamental Rights").

[5] See also Resolution No. 1147.2016-JNE, whereby the National Electoral Board rejected the registration of the political party Unidad y Defensa del Pueblo Peruano, a new version of MOVADEF.

hold senior public positions by virtue of popular election must, in fact, meet certain conditions, such as an adequate behavior that reflects transparency, efficiency, and honesty in the management of public affairs, so as to ensure compliance with the general interests of society as a whole.

Corruption is one of the gravest threats to the model of the social State under the rule of law. This threat brings with it perverse institutional and social consequences, resulting, for example, in a sector of voters who prefer candidates "who can steal, as long as they get work done." In this way, crimes of public corruption erode the democratic political system, the public economy, and the constitutional principles of transparency and honesty in the performance of public duties. More concretely, corruption results in a loss of citizens' trust in the model of the State under the rule of law, while also affecting the legitimacy of decision-making authorities, not only at the federal level, but also the regional and local levels.

Corruption likewise has an impact on the country's very economic development, reducing investments and diminishing efficiency and competition among companies active in the same sectors. Indeed, because of corruption, the economic resources necessary to modernize markets and goods are not invested. It is likewise necessary here to draw attention to the fact that crimes of corruption affect the State's ability to function with objectivity, legality, and efficiency (Constitutional Court of Colombia C-944-12).

The Peruvian legal system has implemented a constitutional reform declaring the non-applicability of statutory limitations to crimes of corruption committed by senior public officials (Law 30650), thus expanding upon Section 41 of the Constitution.[6] There is also the need to

[6] "FORTY-ONE: Those public officials and servants established by law, or those who administrate or manage the funds of the State or of bodies maintained thereby, shall file a declaration of assets and income upon taking possession of their positions, during the exercise thereof, and upon leaving the said positions. These declarations shall be published in the official gazette, in the form and under the conditions established by law.
When an official is presumed to be involved in a suspicious increase of net worth, the State Prosecutor's Office, acting on a complaint filed by a third party, or ex officio, may bring charges before the judicial branch. The law establishes the responsibility of public officials and servants, as well as the term during which they shall be disqualified from holding public office.
The term for the running of the statutes is doubled in those cases of crimes committed against the public administration or the property of the State, both for public officials and for private individuals.

respect international conventions on the fight against corruption, such as the Inter-American Convention against Corruption, which was ratified by Peru. This convention establishes that the States parties must adopt the necessary mechanisms to prevent, detect, punish, and eradicate corruption. The same convention also stresses the direct link between the strengthening of the democratic model and the need to fight all forms of corruption in the performance of public duties.

IV. Analysis of Proportionality in the three cases for the Relativization of the Principle of the Presumption of Innocence, Rehabilitation, and the Suspension of Suffrage Rights

The constitutionality of restricting the right to political participation (as an impediment to running as a candidate for a popularly elected position) due to a conviction upheld on appeal

As noted above, the restriction against being a candidate should be implemented in response to the commission of the three crimes of willful misconduct established in the Constitution—namely, drug trafficking, terrorism, and corruption—as discussed hereinabove. The first aspect to be analyzed here is the content of Section 33 of the Constitution of 1993, according to which political rights shall be suspended due to a sentence involving imprisonment or a sentence with disqualification from exercising political rights. As such, it is not necessarily essential for there to be a conviction imposing restrictions on the guilty party's personal freedom as a prerequisite for limiting his or her right to vote or to run for public office (active/passive suffrage).

With regard to both of these cases, it must be noted that the Constitution does not specifically establish whether the judgment must be final and binding, or to have attained the status of *res judicata*. This matter, however, may potentially lead to a conflict with the principle of the presumption of innocence. Thus, it becomes necessary to examine its proportionality, as follows:

The statute of limitations on the criminal action shall not run in the most serious cases, in accordance with the principle of legality."

a. Suitability

This step involves an analysis of the relationship between means and end, that is, *between the means adopted, through legislative intervention, and the end proposed by the legislative branch*. The means here are the restriction of the right to run for public office among convicted persons with a guilty verdict upheld on appeal for any constitutionalized crime involving imprisonment, even if this judgment has not yet been enforced. From my point of view, the conviction must also find that the crime was willfully committed as a prerequisite for the full application of this restriction.

The purpose of this measure is to promote a representative political system that meets the standards required by the democratic principle of the representation of the popular vote. Specifically, it seeks to guarantee the morality, transparency, efficiency, and proper functioning of the administration of public assets.

b. Necessity

In Peru, the political system is currently experiencing a crisis tied to the legitimacy of its representatives, a situation that poses a serious risk to the proper functioning of the country's democracy. There is no denying the influence of drug trafficking in the sphere of politics, for example, given the glut of candidates who have been convicted of this crime, but whose judgment has not yet been ruled final and binding. These reflections on crimes of drug trafficking also apply to other types of crimes deemed especially grave due to the legal rights violated, most notably crimes of terrorism and corruption.

In this case, the measure should be aimed at restricting—or, if one prefers, preventing—convicted persons from running for office (even when the sentence has not become *res judicata*), so long as the conviction has been upheld on appeal. The fact is that a decision to this effect would be a violation of the presumption of innocence. Nevertheless, it should be noted that the situation referred to in the question involves a second-instance sentence upholding the candidate's criminal responsibility, meaning that a presumption has been made with regard to the commission of a crime that warrants criminal punishment.

When faced with this matter, the legislative branch might decide not to establish any restrictions whatsoever, allowing the guilty candidate to stand for office and possibly even win an election. In the case of the

Peruvian Congress, this would lead to a procedure for their replacement by a substitute (Section 23 of the Regulations on the Congress of the Republic) in the event that the winning candidate was later convicted in the final instance. The question that needs to be asked here, however, is whether this possible restriction should prevail over the current situation, where—in practice—a candidate who has already been found guilty (when the ruling is not yet final and binding) stands for office, possibly wins the election, and is later declared guilty and forced to vacate his position.

The first option should also prevent the party or political movement from continuing to occupy the congressperson's vacant position, in view of the fact that the said organization allowed the candidate—who had already committed illegal acts that prove his inaptitude to hold a popularly elected position—to run for a position in an election. It is precisely the political parties that have a responsibility to select the candidates who will represent them. Therefore, they are also responsible for making sure that the political system has the most suitable representatives to safeguard the general interests of society.

In view of the foregoing, responsibility for this situation must not be analyzed in purely individual terms, but instead must be based on the candidate's membership of the political group he or she represents. It would thus appear more feasible to prevent a candidate from running for office at the start of the election process, as opposed to after being elected.

Mechanisms for *a posteriori* control fail to not explicitly establish or faithfully reflect the need to legitimize the democratic system starting from its very foundations upward—that is, to ensure that the representative aspect of the constitutional democratic model allows only those citizens who respect the law and the Constitution to participate. It thus becomes necessary to establish or assume that the suspension of the right to run for public office among those being tried for terrorism, illegal drug trafficking, and corruption is not a *conviction*, but rather a *precautionary measure* aimed at protecting the democratic order.

With regard to this matter, the Spanish legal system—in its Law 1/2003 (the act guaranteeing democracy in city councils and the safety of council members)—establishes that those individuals who have been found guilty and sentenced—even if that sentence is not yet final and binding—for crimes of rebellion, terrorism, or attacks on state institutions cannot run for popularly elected positions on city councils in Spain's autonomous communities.

The European Court of Human Rights has likewise ruled—in the case of Scoppola vs. Italy (No. 3)—that the voting rights of convicted prisoners (currently serving prison sentences) may be limited or suspended, given that such measures help prevent crime, enhance civic responsibility and respect for the rule of law, and guarantee the democratic regime itself.[7] To a certain extent, this criterion can also be considered in the case of guilty parties with a second-instance sentence, even if that sentence is not yet final and binding. Specifically, the Court has established that States have a broad margin of appreciation in electoral matters, especially with regard to the regimen applicable to those found guilty of certain crimes (*Case of Scoppola vs. Italy (No. 3)*, 2012, paragraph 90).

As such, it could be argued that the fact that a candidate has a second-instance sentence is equivalent to the requirement of plausibility that must be met when issuing a precautionary measure, given the threat posed to democracy by a candidate with a conviction upheld on appeal—even if it is not yet final and binding—who seeks to hold a popularly elected position.

It should be recalled here that in the Peruvian legal system, the Code of Criminal Procedure allows for precautionary measures such as preventive custody, without such measures violating the right to the presumption of innocence. In this regard, it has been pointed out that preventive custody does not affect the right to the presumption of innocence because it is not a punitive measure, strictly speaking (Peruvian Constitutional Court, File No. 1260-2002-HC/TC: 3).

Thus, the restrictions set forth in the bill under consideration are similar to a precautionary measure aimed at defending the democratic order. This measure seeks to protect the rights of the average citizen, along with other constitutionally protected rights, such as constitutional public order, legal certainty, and the proper functioning of justice, social peace, and democracy, which itself encompasses all of the foregoing (Ovejero, 2004: 141).

[7] The European Court of Human Rights has acknowledged that the suspension of the suffrage rights of convicted prisoners serving jail time may be a legitimate objective for preventing crime and enhancing civic responsibility and respect for the rule of law.

c. Proportionality in the Strict Sense

The principle of proportionality in the strict sense can be translated into the following statement: "The greater the degree to which one principle is not met or is affected, the more important it is to satisfy the other." In this regard, it should be noted—in the case of individuals with a conviction upheld on appeal—that while the right to run for public office is restricted, this measure also fosters the legitimization of the representative political system, given that only those persons with a suitable profile—that is, those who not only possess technical knowledge, but also ethical principles—should hold the position of democratically elected authorities. Therefore, the measure is proportional.

The constitutionality of restricting the right to political participation (as an impediment to running for a popularly elected position) despite having completed rehabilitation

a. Suitability

The end sought here by the legislative branch is to defend and strengthen the democratic model by assuring the personal quality of those who wish to run for a popularly elected position. Specifically, what is being limited here is the right to run for public office and the principle of resocialization. The principle of resocialization is affected to some degree, in any event, although not its essence which remains untouched.

b. Necessity

The proposed measure is necessary, given that the principle of rehabilitation is not limited by establishing terms of disqualification that go beyond the completion of the criminal sentence imposed. Here, it must be noted that the relationship between rehabilitation and impediments to being a candidate for a popularly elected position is not strictly one of necessity. The fact that a person convicted of a crime has completed his or her sentence does not prevent the legislative branch from deeming this individual fully rehabilitated for reinsertion into society, but not necessarily fit to manage public affairs by holding a popularly elected position (Constitutional Court of Colombia C-652-03).

It is necessary, however, to establish a period of disqualification as an impediment to running for a popularly elected public position. In other words, this restriction cannot be indefinite. In the Peruvian legal system,

one reference point can be found in the disqualification imposed following impeachment. According to Section 100 of the Constitution, this disqualification has a maximum term of ten years. This does not mean, however, that the legislative branch is not necessarily required to establish this same period as a limitation, given that constitutional offenses differ from the commission of criminal offenses involving willful misconduct. If we were to propose a time limit, left up to the discretion of the legislative branch, it would be two-thirds of the sentence, without exceeding the total prison sentence served, given that in such a case the accessory sanction or punishment would end up being more severe, in some ways, than the prison sentence itself.

In regards to whether the suspension of suffrage rights should be temporary or permanent, note must be made that under Law 29444, teachers found guilty of terrorism, corruption, or sexual assault are barred from sitting examinations for public sector teaching positions, some even permanently. In this case, it could be said that the right to access a public position has been restricted under equal conditions. However, because education is a right and an essential public service, the Constitution has established that it must be imparted in accordance with constitutional principles and the purposes of the corresponding educational institution (Section 14). Thus, an examination of proportionality shows that this latter purpose (that of the respective institution) legitimizes the restriction of the right to access a public position among teachers convicted of terrorism.

In the case of political representation at the national level, special note should be made of the particular nature of the right to run for public office, given that a candidate who is ultimately elected must represent the interests of the nation or region where he was elected, as well as seeking the general interest of the public, in accordance with the principles enshrined in the Constitution. It may thus be legitimately argued that political representation can only be exercised by persons who have been proven to meet the respective profile and who conduct themselves ethically, in accordance with the Constitution and the principles of democracy.

In any event, a person who aspires to a public position under equal conditions may fully develop and realize him/herself in other spaces or spheres in which the criminal conviction for the especially serious crimes he/she has committed is not decisive in impeding him/her from engaging in the *res publica*.

It is useful here, however, to look at a comparative legal analysis when determining the level of consensus existing among States regarding the restriction of the right to run for public office. In any event, if there is a limit to the measure restricting the right to run for public office, it would have to be tied to the principle of resocialization inherent to the sentence. While a temporary limitation is admitted for those convicts who have served a sentence for one of the aforementioned crimes, an absolute limitation might ultimately violate the essence of the principle in question.

With regard to this matter, there is a discussion in North American theory about whether the limitation of the plaintiffs' right to run for public office is, in fact, admissible under the social contract theory. The truth of the matter is that while there is some justification for limiting the suffrage rights of those who have committed crimes so serious that they have affected the very notion of the social pact on which the model of the constitutional State has been built, such limitation cannot be absolute (Levine, 2009, 193). Indeed, there are also other arguments that lead us to the conclusion that suffrage rights may only be limited on a temporary basis.

Among other reasons, Levine argues that the idea that an ex-convict will contaminate the democratic process cannot be partially admitted in the legal system, without in fact assuming that the ex-convict is completely incapacitated, as if all other citizens were superior to him. Likewise, a sanction such as perpetual disqualification would mean that the model of the constitutional state is guided by the parameters of retribution as punishment for the commission of a crime, but lifetime disenfranchisement is neither an inhibitor—nor, if one prefers, a mechanism for preventing the commission of crimes—and it most certainly does not rehabilitate the prisoner. On the contrary, it has more negative effects, even going so far as to affect the very principle of equality (Cosgove, 2003: 157)

c. Proportionality in the Strict Sense

As far as proportionality in the strict sense, it should be noted that this measure, too, has been adopted in legal systems such as that of Colombia. Section 122 of the Colombian Constitution, along with that country's criminal laws, has established that the political disenfranchisement of those convicted for the crimes constitutionalized in Peru is legitimately constitutional.[8] This measure helps to strengthen democracy by ensuring

[8] Conviction for the commission of a crime against the public administration—with imprisonment. Conviction for the commission of crimes against State

the efficiency, transparency, and honesty of the representative democratic system itself.

Going into further depth on the comparative experience, some countries have established the suspension of the right to run for public office even after the sentence has been served. One illustrative case is that of *Zdanoka vs. Latvia*. In this case, the European Court of Human Rights analyzed the situation of a candidate running for a seat in the Latvian Parliament, who was prevented from running due to her ties to the Communist Party. In 1991, the Communist Party had tried to promote multiple coups aimed at bringing Latvia back into what had been—up until 1990—the Soviet Union. As a consequence of these coup attempts, Latvia declared the Communist Party illegal and passed laws under which anyone who had actively participated in the parties (among them, the Communist Party) that formed part of the coup attempt in 1991 was barred from running for election or being elected to the Parliament or city councils (ECHR, *Case of Zdanoka vs. Latvia*, 2006)

In its decision, the Grand Chamber of the ECHR stated that this measure was admissible in a context such as Latvia's, where democracy had been established after many decades, following the dissolution of the Soviet Union. In effect, by ruling that democracy formed part of the European model or public order, the court admitted that it was legitimate to restrict the right of certain individuals to run for public office, if this measure succeeded in preserving democracy (*Case of Zdanoka vs. Latvia*, 2006).[9] As such, it deemed Latvia to be in a better position than the Court itself to define and assess the country's political context. This, in turn, legitimized Latvia to restrict certain citizens' suffrage rights, based on their membership of a prohibited political organization (*Case of Zdanoka vs.*

property. Conviction for the commission of crimes related to illegal armed groups, crimes against humanity, or drug trafficking.

[9] In order to guarantee the stability and effectiveness of a democratic system, the State may be obligated to take specific measures to protect itself. Thus, with regard to the demand for political loyalty imposed upon public functionaries, the Court recognized the legitimacy of the concept of a "democracy capable of defending itself" (§§ 51 and 59). It has also been found that pluralism and democracy are rooted in a commitment that requires various concessions by individuals, who must sometimes be prepared to limit some of their freedoms in order to guarantee the greater stability of the country as a whole. ECHR. Case of Zdanoka vs. Latvia, 2006.

Latvia, 2006).[10] Nevertheless, the European Court noted that it was necessary to establish a limit on the application of such prohibitive measures, based on the context and situation of each country, as well as the assertion of the democratic model itself. Indeed, the ECHR pointed out that the law in question—although it did not affect suffrage rights—needed to be continually reviewed, and even amended in the near future.

Based on this case, it can be argued that the right to rehabilitation, too, is relative, and may take a back seat to the need to ensure the permanence and stability of the democratic model, which in turn guarantees the full effectiveness of fundamental rights such as the right to equality, to non-discrimination, and to the dignity of the human person. As such, it is admissible and strictly proportional to limit the right to run for public office by those who have served a sentence for the constitutionalized crimes of terrorism, drug trafficking, and corruption.

The constitutionality of restricting the right to political participation (as an impediment to running for a popularly elected position) due to the commission of any type of willful wrongdoing

Here, we are dealing with a case in which the person who aspires to a popularly elected position has not yet been convicted, but currently has charges pending for the crimes mentioned in the first section. It thus becomes necessary to establish a proportionality test to determine whether or not the measure is constitutional.

a. Suitability

The end sought by the law via the aforementioned measure is to ensure that the legislative branch is able to defend and strengthen the democratic model by assuring the personal quality of those running for popularly elected positions. What is specifically being limited here is the right to run

[10] The Court accepts that, in the case at hand, the national authorities of the State of Latvia, its members of parliament and judges, are in a better position to evaluate the difficulties involved in establishing and guaranteeing the democratic order. The said authorities must evaluate the needs of their society and those of its new democratic institutions. As such, they must periodically review the measure or law restricting the suffrage rights. In 2000, the Constitutional Court argued that, due to historical and political circumstances, the restriction was neither arbitrary nor disproportional, since—as of the year of the decision—it had only been nine (9) years since the attempted coups d'état.