JURIDICAL QUALIFICATION OF VOTES AND THE BRAZILIAN CONTROVERSY ABOUT ITS OBLIGATION

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Abstract: Voting represents the exercise of people's sovereignty, the political choices that guide society. Despite its political and juridical essentiality, there are controversies about what it is, what is the juridical nature, and the possibility of it being voluntary in Brasil, where the current system determines mandatory voting. This paper addresses such controversies, outlining the vote and the (im)possibility of it being voluntary in the Brazilian legal system.

Keywords: Vote; voluntary vote; Amendment to the Constitution of Brazil; Suffrage; Political rights.

1. Initial Considerations

Tércio Sampaio Ferraz Jr. (1980, p.177-194) addresses the persuasive discourse of the social function of legal dogmatics with the scientific purpose of replacing belief with knowledge and confirming the theories used to reinforce the role of dogmatics in decision-making by the individual, society, and public authorities. Disregarding the effective plan, democratic discourse proves to be one of the great victors between the XX and XXI centuries .

The Constitutions of many countries expressly provide for the Democratic State: Brazil (article 1), Italy (article 1), Portugal (article 2), Spain (article 1, 1.), Argentina (article 36), Paraguay (article1), Uruguay (article 82), Bolivia (article 1), China (article 1), Ecuador (article 1), Kazakhstan (article 1), Mongolia (article 1, 2.).

There is a profusion of references of ideas when discussing democracy. It is worth highlighting the vote (if not the primary factor) as an idea brought by Robert A. Dahl (2001, p. 49), as an opportunity given to each member of society to equally and effectively be heard and listen to the other members. An example of this opportunity is in the film *Dark Water*[2], starring actor Mark Ruffalo, who represents a lawyer from a major US Office who delves for long years on an issue of the harmful effects of a specific product on people, non-human animals, and flora. At a certain point in the work, the governing body of the office decides to vote whether continueing with the cause would be worth it or not, even more in the face of the apparent financial return and the potential bad fame concerning the industries, with a majority in favor of

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maintaining the sponsorship.

On another occasion, it has been discussed that the democratic exercise given mainly by the vote comprises an objective feature of happiness, attributing to each holder of political rights more than the respect to hear and be heard but the power to contribute to the composition of the decisions that will be taken by the State (PÁDUA, 2019, p. 202-208).

Inspired by the Greeks, especially the Athenian political regime, the Romans established an idea of full legal capacity founded on three *status*: freedom (*status libertatis*), family (*status familiae*), and citizenship (*status civitatis*). The latter comprises a situation that attributed to man the quality of Roman citizen (*civis*), having several prerogatives regarding non-Romans (Latins and pilgrims) (MARKY, 2019, p. 54-55; CRETELLA JÚNIOR, 2004, p. 73; CHAMOUN, 1957, p. 61-65; SCHULZ, 2020, p. 85-86).

A feature highlighted as one of the sources of citizenship is birth. According to José Cretella Jr. (2004, p. 74), Thomas Marky (2019, p. 54), and Ebert Chamoun (1957, p. 61), the birth for the purpose of obtaining Roman citizenship presupposed that the mother was a citizen at the time of childbirth. With certain adaptations, this idea that certain consanguinity is required persists today, in the identification of the assumption for the so-called political rights (here including the vote), which is that the person has a nationality linked to the State, specifically regarding blood, the so-called *ius sanguinis* (DALLARI, 2013, p. 133-138; SILVA, 2013, p. 327-335).

It happens that the definition of people (= set of individuals who have a legal-political link with the State) goes beyond the acquisition of nationality by heredity (*ius sanguinis*) and adopts another form, which is that of birth in the State territory (*ius solis*) (DALLARI, 2013, p. 133-138; SILVA, 2013, p. 327-335).

The Brazilian Constitution of 1988 (CRFB/1988) states in paragraph 2 of article 14 that "Foreigners, and conscripts during the period of compulsory military service, may not be enrolled as voters" (BRASIL, 1988). In conjunction with items I and II of article 12 of the same Political Charter, it can be seen that the model ordinarily adopted by Brazil is that of birth on Brazilian soil for the acquisition of nationality with the consequent (and potential) political legal aptitude.

It is important to emphasize that voting is something linked to political rights, which, in turn, are linked to nationality. It happens that they are legal categories distinct from each other. The second will be distinguished from the third.

Nationality refers to Roman Law, specifically to the complex legal position of Public Law that makes a certain subject integrate the political community of a certain State (SILVA, 2013, p.322; SARLET; MARINONI; MITIDIERO, 2016, p. 665). In turn, political rights are understood as a complex of subjective legal positions of Public Law assigned ordinarily to the national (=who has nationality) and which turn to the participation in the formation of the

political will of the State (SILVA, 2013, p. 347-349; SARLET; MARINONI; MITIDIERO, 2016, p. 695)[3].

An important general understanding that covers nationality and political rights is brought under the perspective of the capacity theory developed by Marcos Bernardes de Mello (2019, p. 135-136), who teaches that political capacity is the genus that comprises nationality and political rights, that is, it is a universality that comprises public subjective rights related to State political integration and participation in decisions of the Public Authority.

The vote enters this relationship because of one of the constant positions on political rights, that of the right to suffrage. The logical chain is essencially that nationality gives rise to the subjective political right, which, in turn, gives rise to the right to suffrage, from which the vote derives.

There is a doubt related to the factual framework of the vote brought by Paulo Henrique Soares (2004, p.107-116), who shows the accession of several countries in the American continent to the voluntary vote to the detriment of the compulsory vote, indicating Brazil in the latter class, which compels several nationals to attend the polls for participation since 1932.

One of the ongoing debates between the two sides on voting (voluntary *vs.* compulsory) is that of its legal nature. The following lines address this debate, unfolding the text into three parts: *(i)* initially, some legal institutes from political rights are distinguished, such as suffrage and voting; *(ii)* an overview is drawn on the fundamentals of the currents linked to the legal qualification of the vote with the consequent adoption of one of them, exposing criticisms to the counterposition; and *(iii)* given the constitutional regime of material limitations, we discuss the (un)feasibility of establishing a voluntary vote in Brazil.

2. Subjective political right: suffrage and voting

It has been asserted more than once that the so-called political rights, those contained especially in article 14 of the Brazilian Constitution of 1988, consist of a subjective right of Public Law. Before distinguishing suffrage from vote, it is necessary to present the legal qualification of the broader category, which will also guide the entire development of this item and indicate the positioning to be adopted for the next item.

Giuseppe Lumia (1981, p. 109-121), who systemized the ideas of Wesley Newcomb Hohfeld (1919, p. 23 et seq.), exposes the following active elementary subjective legal positions: pretension (being able to demand the subordination of interest other than one's own), faculty (power that binds to the idea of freedom as the absence of obstacles to the realization of

[3] Both meanings are seen in the definition of subjective law, which does not exclude the definition from the perspective of objective law (in the sense). From this perspective, Political Law is the legal regime that governs the citizen-state relationship concerning the exercise of sovereignty, while Nationality Law is the legal regime that concerns the person-state relationship concerning the legal-political bond between the poles (MORAES, 2018, p. 318 and p. 345).

something), formative power (power of the holder to touch the legal sphere of the counterparty and constitute, modify, or extinguish subjective legal positions), and immunity (power of the holder not to be touched by the formative power of another). Correlated passive elementary positions are behavioral duty, absence of pretension, subjection, and absence of formative power.

The set of active elementary legal positions that belongs to the same holder comprise a complex active subjective legal position: it comprises subjective law when the positions seek the satisfaction of the interest of the holder, and is functional power (called power-duty or duty-power), when the legal positions are again satisfying the interest of others (LUMIA, 1981, p. 112-113).

When José Afonso da Silva (2013, p. 348), Ingo W. Sarlet (SARLET; MARINONI; MITIDIERO, 2016, p. 695), Luiz Alberto David de Araújo, and Vidal Serrano Nunes Jr. (2018, p. 331) mention a set of political rights, they speak, more precisely, of the subjective political right. As established in article 14 CRFB/1988, "popular sovereignty shall be exercised by universal *suffrage and* by the direct and secret *vote*, with equal value for all' (BRASIL, 1988, highlighted).

There are two perspectives that address voting and suffrage. The first carries the understanding of Célio Silva Costa (1992, p. 732) and Dalmo de A. Dallari (2013, p. 183), who understand that suffrage is synonymous with voting. The second perspective is given by José Afonso da Silva (2013, p. 359-360), Ingo W. Sarlet (SARLET; MARINONI; MITIDIERO, 2016, p.704), and José Celso de Mello Filho (1984, p. 309), for whom suffrage has a spectrum that absorbs the vote, that is, there is a relationship of immanence between one and the other.

We adhere to the second perspective for two reasons. The first is that the Brazilian Constitutional text established that sovereignty will be exercised through suffrage and voting, which already shows the interpreter of the law that they are distinct categories. The second reason is that the understanding of suffrage is broader than its own etymology (*suffragium*) and consists of what the doctrine calls the rights to vote and be voted (SILVA, 2013, p. 352; MELLO FILHO, 1984, p. 309; SARLET; MARINONI; MITIDIERO, 2016, p. 704; GUEDES; in CANOTILHO; et. al., 2018, p. 727-728; ARAÚJO; NUNES JÚNIOR, 2018, p. 334). Therefore, suffrage comprises the right to vote and to be voted, a right that has an active feature (= to vote) and a passive one (= to be voted).

According to José Afonso da Silva (p. 353-357), who is accompanied by the doctrine (MORAES, 2018, p. 347; SARLET; MARINONI; MITIDIERO, 2016, p. 704-708; GUEDES; in CANOTILHO; et. al., 2018, p. 731-732), suffrage can be analyzed from two perspectives: *(a)* concerning its extension, it can be (a. 1) universal, if there is unrestricted grant to nationals, or (a. 2) restricted, if granted to certain groups of nationals because of the specific situation, especially of an economic nature; and *(b)* concerning equality, it can be (b. 1) equal, if all

nationals have an equal right to vote and be voted, or (b. 2) unequal, giving certain groups of voters the right to vote more than once.

In the constitutional electoral system in vogue, suffrage is universal and equal, as can be seen from the content of article 14 of the Political Charter, which states "universal suffrage (...), with equal value for all" (BRASIL, 1988).

On the other hand is the vote, which is the form of performing suffrage in its active sense, that is, the vote is the form by which suffrage is exercised (SILVA, 2013, p. 359; SARLET; MARINONI; MITIDIERO, 2016, p. 704; MELLO FILHO, 1984, p. 309; GUEDES; in CANOTILHO; et. al., 2018, p. 727-728; ARAÚJO; NUNES JÚNIOR, 2018, p. 334). A few classifications must be highlighted regarding the vote. Such classifications results from the careful reading of article 14, head provision, paragraph 1, II and II, CRFB/1988, whose fragments address direct, secret, compulsory (for a certain age group), voluntary (for certain groups) voting.

Dual qualifications are extracted from the constitutional text (SILVA, 2013, p. 361-366; SARLET; MARINONI; MITIDIERO, 2016, p. 704-708; GUEDES; in CANOTILHO; et al., 2018, p. 727 et seq.): *(a)* regarding the choice of the representative, the vote can be direct (= direct choice of the political representative) or indirect (= choice of delegates who will choose the political representative); *(b)* regarding the secrecy of the choice, it can be secret (=state does not give general science of individual choice) or public (=state gives general science of individual choice); and *(c)* regarding the obligation of the choice, the vote can be compulsory (=duty of attendance and respective release of signature in the report) or voluntary (= free attendance and respective release of signature in the report).

Once the distinctive features have been achieved, it is now necessary to deepen the debate around the legal qualification of the vote within the abstractions of a higher legal degree by asking the following: is the vote a power or a legal duty?

3. The vote and its legal nature

The approach of John Albert Schützer Del Nero (2001, p. 12 and 13) is contrasting within the framework of the General Theory of Law, in which the activity of the scientist of Law involves the legal status which unfolds in an initial moment, the nomogenesis. This is where the factual data is observed to identify them with the data of the legal experience and the time of the application in which the rule of law is set, imposing the relationship of physical conformation to the law. Considering such a contribution to the case, it is important to highlight the relationship between the vote and the legal abstractions systematized by Giuseppe Lumia (1981, p. 109-121), in which of the components of the legal positions it fits: pretension ⇆ behavioral duty, capacity ⇆ absence of pretention, formative power ⇆ subjection, immunity ⇆ absence of formative power. The understanding of the legal nature of voting will be developed

in two stages.

First, it can be divided into two more general currents. The first will be called vote-duty corrent, which has as authors Nelson de Souza Sampaio (1983, p.180), Sahid Maluf (2003, p. 222), and Alexandre de Moraes (2018, p. 349), for whom voting is much more the functionalization of a civic duty than an option that approaches a legal power. The synthesis is in the following idea of the first cited author:

> From the above, it is concluded that the vote has, primarily, the character of a public function. As a component of the electoral body, the voter competes to compose other State bodies also created by the Constitution. However, the constitutions generally leaves the exercise of the function of voting at the discretion of the voter, not establishing sanctions for those who omit. In this case, the legal standards on voting would belong to the category of imperfect standards, which would result in making suffrage a simple civic or moral duty. Only when it becomes compulsory would the vote take on the true character of a legal duty. This obligation was established by some countries, less by arguments about the nature of voting than due to the abstention of many voters - a fact fraught with political consequences, including in the sense of distorting the democratic system. In electoral contests with a high percentage of abstention, the minority of the electorate could form the governing bodies of the State, that is, Government and Parliament (SAMPAIO, 1983, p. 180).

Sahid Maluf also adheres to the perspective of duty by treating the vote as a public function, a duty-power exercised because of its social-political function:

> Voting is considered an individual right and a social function. As Dugui indoctrinated, the vote is invested in a public function, while holding a right. The right stems from the power to vote that assists citizens, observing the legal prescriptions. (...) The character of social function results, logically, from the obligation of voting (MALUF, 2003, p. 222).

Alexandre de Moraes points out that voting is the exercise of a position simultaneously active and passive, highlighting the second by stating the following:

> The vote is a subjective public right but maintains a political and social function of popular sovereignty in representative democracy. Furthermore, it is a duty to those over the age of 18 and under the age of 70, therefore compulsory. (...) Thus, the nature of the vote is also characterized as a social-political duty since the citizen has the duty to manifest his/her will through the vote to choose the rulers in a representative regime (MORAES, 2018, p. 349).

In summary, the perspective brought by the three authors above is in the sense that the vote is a legal power but that citizenship (= the choice of representatives) is a duty of the citizen, even more so in view of the constitutional prediction that a certain subjective framework is compulsory (article 14, paragraph 1, I CRFB/1988). Because voting has a social-political function, its imposition would be justified, existing a duty to exercise citizenship at least when concerning the choice of those who will be the political agents that will compose the summit of republican majority functions (Executive and Legislative Branches) (ALMEIDA; LA

BRADBURY, 2014, p. 139).

On the other hand, there is the so-called voting-right current, which has a greater adherence by the doctrine, citing José Afonso da Silva (2013, p. 360-361), Ingo W. Sarlet (SARLET; MARINONI; MITIDIERO, 2016, p. 706-707), Néviton Guedes (in CANOTILHO; et al., 2018, p. 727-728), Luiz Alberto David Araújo, and Vidal Serrano Nunes Jr. (2018, p. 334), for whom voting is the exercise of an active subjective legal position, even if attendance is compulsory, this does not sublimate the fact that their exercise is endowed with wide freedom. The Citizen can choose someone or not, only by depositing the ballot in the ballot box or, most currently in Brazil, opting for a 'non-candidate' in the electronic ballot box. Although the words vote and suffrage are treated as synonyms, Hans Kelsen's theory synthesizes in part the perspective of the vote as a legal power:

> The fact that suffrage is a public function through which essential organs of the State are created is not incompatible with its organization as a right in the technical sense of the term (KELSEN, 1998a, p. 419).

A criticism to be made to the first current is that the perspective of a mandatory role of fulfilling a civic duty evaluates the legal phenomenon from the outside, from the social-political understanding. Moreover, seeing that voting is a duty because it is compulsory is a partial understanding of the total phenomenon since all active subjective legal position has a social function, obviously concerning what F. C. Pontes de Miranda (2012, p. 65 et seq.) denotes legally relevant intersubjective relations. In other words, it is not because there is an obligation on a certain legal interest that it has to be qualified as a duty.

The property in its narrowest sense is a subjective right of Real Right. It is, as the denomination itself shows, an active legal position, a complex legal power. The Constitution of Brazil itself determines that this subjective right will fulfill its social function (article 5, XXIII). Especially from the perspective of ownership over immovable property, article 182 of the Brazilian Fundamental Charter determines guidelines with which the owner must comply (= legal duties) so that, e.g., he/she does not suffer from the progressive increase of the Property Tax (paragraph 4, II) and, ultimately, is not expropriated (= lose the domain) (paragraph 4, III).

In the same sense, the contract is a business through which the parties discipline their positions of patrimonial nature (PÁDUA, 2020). The Fundamental Law determines in its article170, III, the social function of the property concerning the economic order, highlighting the role of the contract as the primary means of the constitution and functioning of the market. The contractual business must meet its social function, which, as written in another text (PÁDUA, 2020) turns to the economic service of the contractors, provided that the contract is not harmful to the collective interests protected by the legal order. The fact that there is a social function, which addresses the imposition of duties more closely, does not mean that the contract is a duty.

Furthermore, the existence of duties that permeate the legal power does not cause the central position to be converted into a duty. We adhere to the perspective of Ingo W. Sarlet, in which the obligation is in the attendance and one's signature in the minutes of attendance, observances such that are of a formal character. Thus, the substance of the vote is still free, that is, the act of voting has wide freedom in the sense of not imposing an option on the citizen (SARLET; MARINONI; MITIDIERO, 2016, p. 706-707). In short, the holder of the suffrage in his/her active feature must show but is not forced to choose a specific candidate, and can vote blank or annul his/her vote.

The question initially made remains, which corresponds to the second stage of development. With which active elementary subjective legal position does the vote have an homologous correspondence?

Going deeper into the Hohfeldian theory well outlined by Giuseppe Lumia (1981, p. 109-121), we highlight a previous stage to understand each active elementary legal position. They arise from the *summa divisio* between primary and secondary standards but tho one addressed by Hans Kelsen (1998b, p. 48-65) regarding the existence or not of sanction, but rather the approach of Herbert L. A. Hart (2009. p. 118-128), Norberto Bobbio (2016, p.175), the aforementioned Giuseppe Lumia (1981, p. 55-57), and Riccardo Guastini (1998, p. 23-24), who teach that primary (or conduct) standards are intended to discipline behaviors, while secondary (or competence) standards are intended to discipline the production of other standards.

According to the positional Hohfeld-Lumia model (Lumia, 1981, p. 109-121), the primary standards originate the claim and capacity because they involve the exercise of a behavior in the factual plane, as well as a conduct adopted by the counterparty, or regarding the claim (to meet the dominant interests) or the capacity (to be exercised in freedom). Secondary standards originate the power of the formation and immunity since both active positions act on the logical plane and, therefore, do not require coordination of the other party to meet its end, operating on the logical plane through the establishment of standards for the holder of the correlated passive position.

The legal nature of the vote adjusts to the capacity, considering the current use of the word freedom of vote by José Afonso da Silva (2013, p. 362), Ingo W. Sarlet (SARLET; MARINONI; MITIDIERO, 2016, p. 706), and Néviton Guedes (*in* CANOTILHO; *et al*., 2018, p. 729-730), and the fact that the passive pole of the relationship instituted of Political Law in which the holder of the (legal power of) vote can exercise it through non-impositions of the holder of the related passive position. In other words, voting is a capacity, an active elementary subjective legal position linked to the free exercise of behavior without hindrance to its performance. This behavior to be performed is the choice between a candidate, voting blank, or annulling the vote, imposing on the citizen only his/her attendance at the polls.

4. Brazilian Constitution and the voluntary vote?

Arising from the debate between voluntary and compulsory voting is the possibility of implementing the first species in the Brazilian constitutional system. It is worth noting that the constitutional electoral structure of Brazil absorbs both species. However, one has a certain predominance, as stated in the Federal Charter:

> Art. 14. Popular sovereignty shall be exercised by universal suffrage and by direct and secret voting, with equal value for all, and, in accordance with the law, by:
> (...)
> Paragraph 1. Electoral registration and *the vote are*:
> I - *compulsory* for those over eighteen;
> II - *voluntary* for:
> a) the illiterate;
> b) those over seventy;
> c) those over sixteen and under eighteen (BRASIL, 1988, highlight).

The debate that revolves around the obligation to vote should be seen not in the face of the existence of a legal-political institutional model that imposes the exercise of voting (= attendance at the polls) on all but on a socially broader group. According to the publication of the newspaper Portal EBC (2019), people over the age of 70 comprisse 15% of the Brazilian population, while the Abrinq Foundation (2020) shows that of the 211 million Brazilians estimated in 2020, 11,323,451 are adolescents between 15 and 17 years, which corresponds to approximately 5% of the Brazilian population. These data allow the elaboration of the Brazilian Social age pyramid, which shows that a substantial portion of Brazilians are citizens with compulsory electoral attendance.

Given the information above, it can be concluded that the debate between compulsory and voluntary voting concerns the majority of the Brazilian population.

Returning to the (im)possibility of instituting voluntary voting in Brazil, the Brazilian system is endowed with a higher diploma that has as its main characteristic its rigidity in the process of constitutional reform, which currently takes place through amendments to the Constitution, whose article 60 is understood as presenting three blocks that limit the exteriorization of the Power of Reform (SARLET; MARINONI; MITIDIERO, 2016, p. 125-126; SILVA, 2013, p. 67-70). For this article, it is necessary to explain the so-called material limitations, which are essentially contained in article 60, paragraph 4 of the Constitution. We use the terminology given by F. C. Pontes de Miranda (1972, p. 80) on legal outlines: limitations are the outlines established by the legal order, while restrictions are outlines derived from the will reflected in legal acts, particularly in legal affairs. Hence the use of the word material limitations.

And what are material limitations? They are a set of qualities that the power of reform

must meet in relation to aspects of content against which the constitutional amendment bill (PEC) cannot develop since they comprise the material core that gives identity to the Constitution (SARLET; MARINONI; MITIDIERO, 2016, p. 132; BARROSO, 2015, p. 194; SILVA, 2013). It will conform to the expressed material limits, better known as stone clauses, specifically in one of the following four:

> Art. 60. The Constitution may be amended by the proposal:
> Paragraph 4. The amendment proposed tending to abolish the following shall not be the object of deliberation:
> I - the federative form of State;
> II - the direct, secret, universal, and periodic vote;
> III - the separation of Powers;
> IV - individual rights and guarantees (BRASIL, 1988).

There is an express mention of voting as a stone clause, that is, there can be no abolition of direct, secret, universal, and periodic voting by the Reforming Power, and acts that contradict the substantial limit are subject to material unconstitutionality and can (in fact, should) be the object of specific judicial measure, the control of constitutionality.

At first, the reader of the transcribed legal statement could conclude by the impossibility of textual change of article 14, paragraph 1 of CRFB/1988 and enable the voluntary voting (in practice, attendance at the polls). It happens that this reading is careless since the content of the text nothing mentions the compulsory character of the vote, that is, the voluntary vote would be impossible if item III of paragraph 4 of article 60 CRFB/1988 established the direct, secret, universal, periodic, and compulsory vote.

What the legal hermeneutic field allows is that the device (article 60, paragraph 4, III) is understood in its individuality and inserted into the system. Individually, the aforementioned item III does not refer to the obligation. What is not expressed is outside the intangible field ruled by the material limitation. Item III systematically shows that the Constituent Assembly did not include a compulsory requirement as part of the stone clause given that the Assembly originally established two forms of electoral registration: a general standard in item I (= destined for a class of the people), establishing a compulsory electoral registration and vote by those above eighteen, while item II presents a general standard (= destined for a class of the people), establishing a voluntary registration and vote for the illiterate, those above seventy, and those above sixteen and below eighteen.

Furthermore, as shown by the surveys conducted by Paulo Henrique Soares (2004, p. 114-116), there is a tendency to dragging: as attendance is compulsory and voting itself is voluntary, the last hypothesis drags the former towards voluntaryism, that is, attending the polls tends to follow the vote itself concerning the freedom of citizens to exercise or not their choice.

Some Constitutional Amendment Bills deserve to be highlighted, even though they have been filed by the Constitution, Justice, and Citizenship Commission (CCJ) of the Federal

Senate. The first is PEC 61/2016, in whose justification there were several arguments on freedom of choice, two deserving attention: the first is that the dissatisfaction of the citizen can manifest itself through non-attendance, that is, "abstention from the electoral process, the non-attendance of the voter in the voting section, must be recognized as an integral part of the free exercise of the right to vote" (BRASIL, 2016). The second argument does not address the vote itself, but the electoral registration, which is a form of State supervision regarding the situation of citizens in the electoral aspect, stating in the PEC that

> We believe it is necessary, however, to maintain the obligation of electoral registration (...). The compulsory voter registration increases the degree of freedom of voters, keeping the possibilities of attendance and non-attendance open until the day of voting (BRASIL, 2016, n.p.).

The second bill is PEC 18/2017, which adhered to the current that voting is a freedom, as well as Brazil must join the growing list of countries that either have Constitutions whose original texts already contained or have been amended to indicate the voluntary nature of voting (BRASIL, 2017). At the same time, the reasoning for PEC 18/2017 was more direct regarding the maintenance of the requirement of electoral registration to thoses above eighteen years: "despite making the vote voluntary, it maintains the requirement electoral registration with the goal of quantifying and recording the national electorate, and not make the registration requirement a deterrent to the exercise of the right to vote" (BRASIL, 2017).

The difficulty brought by Lucia Helena Herrmann de Oliveira (1999, p. 149-151) is that Brazil has the vast field of empirical research in which the author drew conclusions that voluntary voting would not lead to an improvement in the choice of the elections, as well as the removal of the requirement to attend - which she denominates voting obligation - would have a potential unbalancing effect both from the perspective that the democratic legitimacy would be based on a much smaller number of votes and would make the election and party system deficient, which would decrease the stimulation to the various individual factors that encourage the citizens to attend the polls.

The partial conclusion made here is that the problem with the change from compulsory to voluntary is not legal but more rooted in Brazilian political culture. As emphasized by Luis R. Barroso (2015, p. 482-501), Brazil is a recent democracy whose culture accumulated during its history constituts fragile structures for a democratic coexistence, demanding from all the "will of democracy". Under the perspective of Norberto Bobbio (2019, p. 35-68), Steven Levitsky, and Daniel Ziblatt (2018, p. 76 et seq.), the democratic regime establishes mechanisms of self-preservation, e.g., mutual tolerance between opposition and government, acting in a way to avoid extrapolating the democratic cell itself (e.g., anti-democratic discourses).

According to an exhibition based on the research of Luzia Helena Herrmann de Oliveira

(1999, p.149-151), the compulsory vote in Brazil can be thought of as something beyond the social-political or civic duty, but a mechanism of preservation of the political regime in vogue, which could avoid an attack against the Brazilian political grids, especially by choosing political agents in the majority "Powers" (Executive and Legislative Branches) that resist the potential discoursive and behavioral antidemocracy (exercising the chacks and balances of Montesquieu).

At this moment, we could question when the Brazilian people will be able to effectively make voting voluntary in its legal sense, untied from the obligation of attendance at the polls. As Brazil is hypercomplex, a diversity of social, economic, cultural, ethnic, and legal complications, only time will tell when this change and implementation will occur. Its present and future show an overwhelming political acculturation that burden the Brazilian people, requiring the adoption of gradually established stages and steps: a first concerning education, in which the Constitution of 1988 establishes it as a right for all, with the objective of personal and political development (article 205); a second stage would be to use this framework for educational preparation to consolidate the democratic rules and the strengthening of its self-preservation instruments (e.g., changes in the electoral party system), by the end of the implementation of the voluntary nature of the vote, the final stage that represents the path.

5. Conclusions

Understanding the vote presupposes the simultaneous distinction and proximity of political rights and nationality rights in the subjective sense. The first effective category is a subjective right of Public Law assigned to the national and concerning the participation in the formation of the State political will, while nationality is a subjective right of Public Law assigned to a certain individual on the basis and purpose of which it integrates a certain State political community.

Taking another situational step, we identify two basic legal positions of great reference within the subjective political law, suffrage and voting, which, despite the etymology of the first word, are distinct. The explanation of the first leads to that of the second since suffrage comprises the right to vote and be voted, a right that has an active (= to vote) and a passive feature (= to be voted). In other words, suffrage has an active feature corresponding to the vote, and a passive feature, which corresponds to the power to run in the electoral political sphere.

Another degree of deepening consisted of the analysis of the legal nature of the vote, with the current that essentially evaluates the preponderance. Despite the current of the vote-duty beginning from the idea of being a civic duty, it adheres to the current of the vote-right since the civic character is extrajuridical, of a social-political nature. Additionally, the obligation addressed in the first perspective does not concern voting in itself but the attendance to the polls, allowing the citizen to choose a candidate, vote blank, or even annul his/her vote. Moreover, within the active legal positions of the Hohfeld-Lumia model, the vote stands out as

a right since the freedom to accomplish something lies in the fact that the citizen has the free choice between voting for a candidate, voting blank, or annulling the vote, compelling the citizen only to attend at the polls.

The distinction between voting and attendance is that the debate that permeates the Brazilian legal-political field is not the obligation of the vote itself but its attendance, with comparative research showing a strong tendency in the Constitutions to institute voluntary voting either originally or through constitutional reform (= attendance and, always, the vote itself). This pro-voluntary vote movement reflects in proposals for amendments to the Constitution, highlighting two, PECs 61/2016 and 18/2017, which were processed in the Federal Senate (and were filed), showing the adoption of an intermediate route between compulsory and voluntary: maintaining the compulsory voter registration but leaving the attendence to the polls at th discretion of the citizen, consequently, voting.

Considering that articles 14 and 60 of the Constitution expressly mention the characters of the vote (direct, secret, universal, periodic, and compulsory), a doubt arose before the second constitutional device which establishes in its paragraph 4 the limits or material limitations to the Reforming Power, the so-called stone clauses. The feasibility of reform without hurting a stone clause (article 60, paragraph 4, II of CRFB/1988) is justified from two perspectives: individually, the text that enunciates the stone clause speaks in direct, secret, universal, and periodic vote, nothing establishing an obligation, considering that what is not there is outside the intangible field ruled by the material limitation; and systematically, the same item III of article 60, paragraph 4 shows that the Constituent Assembly did not include the obligation as a stone clause in the face of the fact that it originally established the hypotheses of voluntary and mandatory voter registration and voting.

The debate over the implementation of the voluntary vote is quite legal, as it touches on the Law (even more so Constitutional Law). However, the real discussion should occur in the cultural political background, inquiring if it would be possible to allow the citizens to choose to attend the polls in a recent Brazilian democracy with so many problematic contrasts, even in the face of research that shows that the obligation serves as an instrument for the protection of the (weak) grids of the democratic Brazil.

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