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Sousa, Eduardo Manuel Oliveira e, 1985-

Mandatory vote : thoughts on implementation in a hypothetical Portuguese electoral reform

<http://hdl.handle.net/11067/6522>

<https://doi.org/10.34628/r33h-kc04>

Metadados

Data de Publicação

2022

Resumo

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Palavras Chave

Votação obrigatória, Direitos políticos, Sufrágio

Tipo

article

Revisão de Pares

Não

Coleções

[ILID-CEJEA] Polis, s. 2, n. 05 (Janeiro-Junho 2022)

Esta página foi gerada automaticamente em 2024-09-21T12:22:09Z com informação proveniente do Repositório

Mandatory vote. Thoughts on implementation in a hypothetical Portuguese electoral reform¹

Voto obrigatório. Reflexões sobre a implementação de uma hipotética reforma eleitoral portuguesa

Eduardo Oliveira e Sousa

Assistant Lecturer at Lusíada University – Porto and Researcher at CEJEA – Center for Legal, Economic, and Environmental Studies of Lusíada University.

Email: eoliveiraesousa@por.ulusiada.pt

DOI: <https://doi.org/10.34623/r33h-ke04>

Orcid: 0000-0002-9907-7715

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Abstract: The discussion on mandatory voting is usually characterized by two opposite polar ideas – on the one side, by making voting mandatory abstention turnout numbers will undoubtedly be lower than those normally found on systems where voting is a right, not an obligation, and on the other side, there is both the idea that mandatory voting does not improve or enrich the fundamental values of representation underlying democracy and even that obligatory systems cannot adequately impose any effective sanctions to convince people to show up at polls. In this article, we shall glance briefly at mandatory voting in several electoral systems and then focus our sights on the Portuguese elec-

toral system, the alternative methods historically applied, the discussion on mandatory voting at home and finally, if such a system could be applied in Portugal.

Keywords: Voting; Mandatory voting; Suffrage; Politics, Political Rights.

Resumo: A discussão sobre o voto obrigatório é normalmente caracterizada por duas ideias contrapostas - num lado, ao tornar o voto obrigatório, os números da abstenção serão, sem dúvida, inferiores aos daqueles encontrados num sistema em que o voto é um direito e não uma obrigação. Por outro lado, existe a ideia de que o voto obrigatório não melhora os direitos fundamentais da democracia representativa e até mesmo que os sistemas que impõem o voto obrigatório não conseguem prever sanções adequadas por forma a convencer os cidadãos a votar. Neste artigo iremos lançar um breve olhar sobre o voto obrigatório em vários sistemas eleitorais e depois focar-nos no sistema eleitoral português, nomeadamente nos métodos alternativos aplicados ao longo da história, a discussão sobre o voto obrigatório e finalmente se tal sistema poderia ser aplicado em Portugal.

Palavras-chave: Votação; Votação obrigatória; Sufrágio; Política, Direitos Políticos.

1. Mandatory Vote – an historical note in context.

Mandatory vote at the national level finds its modern origins in 1893 Belgium². This method of voting currently encompasses all elections which take place in the country, including the elections to the European Parliament³. The idea behind mandatory voting is that before 1893, only about 10% of those eligible to vote showed up at polls, which meant that compulsory measures were needed to reach those unaware, the uneducated, but also workers who could take part in the elections but were kept from voting by employers.⁴ In essence, mandatory voting was seen as a way with which to fight abstentionism – “*les dirigeants politiques craignaient que de nombreux nouveaux électeurs, peu intéressés par la chose*

1 This work corresponds to the oral presentation made at the conference “The legislative elections of 2022 and the reform of the Portuguese electoral system” which was held on the 25th of May 2022 at Lusíada University in Lisbon.

2 NERINCX, A. (1901) – Compulsory Voting in Belgium, *The annals of the American Academy of Political and Social Science*, Vol. 13, p. 87. However, regionally, modern mandatory voting has its origins in Switzerland, in which both cantons and communes were allowed to determine if voting was mandatory or not. For more on the Swiss experience see BIRCH, S. (2008) – *Full Participation*. Manchester University Press: Manchester, p. 22.

3 AELST, P. VAN, LEFEVERE, J. (2012) – Has Europe got anything to do with the European elections? A study on split-ticket voting in the Belgian regional and European elections of 2009, *European Union Politics*, Vol. 13, no. 3, p. 8.

4 KUZELEWSKA, E. (2016) – Compulsory Voting in Belgium. A Few Remarks on Mandatory Voting. *Białostockie Studia Prawnicze*. Vol 20, pp. 37-38.

*publique, ne se déplacent pas pour voter. Le vote obligatoire, assorti de sanctions, résoudrait ce problème*⁵.

In fact, if we look at various electoral systems where mandatory voting is present, we can see that its most immediate effect is on turnout rates. In Australia's elections for the House of Representatives, mandatory voting was introduced in 1923, right between the 1922 and 1925 elections, with a turnout increase in 32%, from 59.38% (in 1922) to 91.38% (in 1925)⁶. The same can be seen in the elections for the House of Representatives in the Netherlands between 1917 with a turnout rate of 21,36%, mandatory voting being briefly introduced afterwards to a turnout of 88,43% in 1918, kept consistent in 1922 with 91,45% in turnout.⁷ The Netherlands eventually went on to abandon mandatory voting in 1967, with the turnout rate decreasing from 95% in that same year, to 79,12% in 1971⁸.

2. From inadequate obligations to inadequate penalties

The effects of mandatory voting on turnout do not, however, influence the quality of democratic results. This stems from the fact that mandatory voting can take two forms: in the first case, a vote must be cast, and in the second, the voter must show up at the designated polling station. This, however, raises at least two issues: in first place, although one is obliged to cast a vote, that vote does not have to be valid. In some other cases, only the voter's physical presence at polling stations is required and the specific act of casting a vote is non-mandatory. On the one hand, a

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voter can simply choose to go to polls and invalidate their vote by failing to fulfil the legal requirements when it comes to filling in the required spaces on the ballot⁹, on the other hand, if the voter is merely required to show up at the polling station, what is there to stop him from walking away or straight up refusing to vote? We shall abstain from mentioning the case of mandatory registration, as this is not truly mandatory voting – only registration, its effects are only shown on voter lists, in some cases this is done automatically without any input from the citizen in question and as such falls out of the scope of this presentation.

A secondary issue with mandatory voting is the penalty for failing to fulfil the legal requirement to vote. In Belgium, article 210 of the Election Law determines that the first instance of failing to vote, the voter shall be fined with a pecuniary penalty of 5 to 10 euros, but in case of

subsequent failures, the fine shall be raised from 10 to 25 euros. Such fines fail to consider the monetary capacity of voters by establishing a blanket value applicable to everyone. This means that those of higher income might simply see the fine as some sort of tax to get out of voting, while those of lower income will undoubtedly be compelled to vote out of necessity, as to not further aggravate their personal economies. Such solution can be seen as a degrading factor to democracy, something which could have been avoided by establishing a fine as a percentage of a voter's yearly income. However, Belgian law goes further, by eliminating those which haven't cast their votes for four times over a period of 15 years from the voters' lists. We fail to understand how this might even be construed as a penalty, as what it does is exempt non-compliant voters from voting. The Belgian legislator seems aware of this, as the law also precludes failing voters from applying to public jobs, advance in their careers, or receive honours from public authorities. Such sanctions must, however, be applied by courts in cases put forward by public prosecutors, which is something that does not currently happen in Belgium.

3. The Portuguese case – from an attempt to make voting mandatory, to a constitutional freedom.

Portugal has never had mandatory voting, but several attempts at implementing an obligation to vote have taken place up until recent history. The first and oldest attempt dates from an opinion by Friar José da Imaculada Conceição Amarante, sent on the 26th of October, 1820 to the Portuguese Court provisional junta in which it was defended that those who refuse to vote should lose the quality of citizen (political rights) and be banished from the realm. The second attempt seems to date from 1826 during the monarchy. Article 35 of the instructions for provincial electors with a seat at the Portuguese Court determines that those which fail to show up at any assemblies for which they have been summoned, could be barred

5 DANDROY, R., DELWIT, P., PILET, J-B. (2007) – *Le vote obligatoire*. In FROIGNIER, A-P., DE WINTER, L., BEAUDEWYNS, P. (Eds.) – *Elections: le reflux? Comportements et attitudes lors des élections en Belgique*, De Boeck: Bruxelles, p. 102.

6 Australian Electoral Commission – *Compulsory Voting in Australia*, p. 7. Available [ON LINE] at: https://www.aec.gov.au/about_aec/publications/voting/files/compulsory-voting.pdf

7 KiesRaad Netherlands, database available [ON LINE] at: <https://www.verkiezingsuitslagen.nl/verkiezingen/index/13>

8 *Ibid.*

9 Note that this might not be the case where electronic machine vote are used. It is hard to imagine a invalid machine vote since the automated nature of this type of voting should not allow the voter/user to invalidate their own vote.

from office for a period of four years.¹⁰This, however, is not mandatory voting, but only a provision which determines that democratic representatives must be present at assemblies. The provincial electors were not obliged to vote, as they could abstain from doing so, merely having to be present in the house.

A veritable attempt at defending the idea of mandatory vote does come up in the Second Republican Congress of Aveiro in 1969, where Manuel da Costa e Melo, from the republican-democratic opposition bench, argued that *“the right to vote cannot fail to correspond to the obligation to vote...”* and that *“mandatory voting as the necessary satisfaction of the citizen’s collaboration in the Nation’s governing process, corresponds to its demand which shall have primacy over all others...”*¹¹ These ideas would gain traction during the early years of the Portuguese democratic regime after the 25th of April 1974. The 1st provisional government sets up, on the 24th of May of that same year, a Commission charged with drafting a project for a new election law. The resulting project establishes under its article 133 that voting *“is a civic duty”* but determines that *“the failure to exercise the right to vote determines the ineligibility for the legislative assembly, for the administrative bodies or for the governing bodies of any public legal person during the period of one year after the election of the Constitutive Assembly”*. This text is included in the final version of the Decree-Law 621-C/74, under article 84, but the established penalty only determines the ineligibility for the bodies described above for voters which failed to vote for the Constitutive Assembly. This was also the case

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of article 77 of the Decree-Law 93-C/76 of January 29, another version of the electoral law previous to the entry into force of the Constitution, although in this later version the ineligibility isn’t for those which failed to vote in the election for the constitutive assembly, but for regular legislative elections, specifically those held on 25th of April 1976.

Notwithstanding such a provision, the Constitution which had entered into force on the very same day of the legislative elections, determined only on its article 48 no. 2 that the right of suffrage is *“personal and constitutes a civic duty”*. Under the Constitution, voting isn’t legally mandatory and the failure to vote isn’t met with any sanction whatsoever.

Finally, there were two other instances of mandatory voting being proposed, specifically in the draft projects separately proposed by both the Social Democratic Party (PSD) and the Social Democratic Centre Party (CDS). Both projects generally es-

tablished voting as not only a right but also civic duty (the CDS’s project states that such civic duty is mandatory). However, the sanctions for failing to vote are quite different, as the PSD project determines that those who failed to vote were ineligible in the next legislative elections as well as for local municipal governments and were to be fined in the amount of 500PTE (roughly 2.50 eur) which shall revert to civil parishes.¹² In the CDS’s case, it would be up to the judge in the judicial district where the non-compliant voter was registered to determine if there were any justification for the failure to vote, and in the negative case, the voter was both ineligible in the next legislative elections and be subjected to a fine of 5% of that year’s income tax.¹³

None of these draft projects were taken into the final version of the law, the *Lei Eleitoral da Assembleia da República* (LEAR), Law 14/79 of May 16, which simply establishes on its article 81 that suffrage is a right and a civic duty. Voting isn’t mandatory in Portugal.

4. Concluding thoughts – could mandatory voting be implemented in Portugal?

We are not convinced that mandatory voting could be implemented successfully in Portugal. The reasons for such thinking might be found in the limits to constitutional amendments present in the Portuguese Constitution (article 288 subparagraph d). Since the right to vote is a fundamental right enshrined in the Constitution, to make it mandatory would require a constitutional amendment of article 49 of the Portuguese Constitution. However, suffrage or the right to vote is technically a freedom and guarantee type of fundamental right, which are rigorously protected by the system of checks and balances regarding fundamental rights, one of which determines that these types of rights, freedoms, and

10 Moreira, V. & Domingues, J - Para a História da Representação Política em Portugal: A consulta pública de 1820 sobre as Cortes Constituintes, Lisboa, Assembleia da República - Divisão de Edições, 2021, p. 338. See instructions of August 7th, 1826, in ALMEIDA, P.T. (org. and introduction) – Legislação eleitoral Portuguesa, 1820-1926, Lisboa: Presidência do Conselho de Ministros – Imprensa Nacional – Casa da Moeda, 1998, p. 49

11 MELO, M.C. – *Bases para uma lei eleitoral de expressão democrática*. In II Congresso republicano de Aveiro – Teses e documentos, Vol I, Dafundo: Ceara Nova, 1969, p. 239.

12 The PSD Draft project is accessible [ON-LINE] at <https://debates.parlamento.pt/catalogo/r3/dar/s2/01/02/100/1978-08-23/1061> (Accessed on 16/09/2022)

13 The CDS Draft Project is accessible [ON-LINE] at: <https://debates.parlamento.pt/catalogo/r3/dar/s2/01/02/102/1978-08-30/1116> (Accessed on 16/09/2022)

guarantees are to be strictly respected in the event of a Constitutional amendment – their scope of protection may never be diminished in such an event.

As one must remember, fundamental rights, freedoms, and guarantees are in their essence, negative rights, public powers, or authorities must not interfere in the quasi-sacred relation between individuals and these rights, even if such rights aren't being exercised at a given moment. The right to vote isn't just the right to cast a vote, but also the right to abstain, to choose not to vote if one so decides. Any amendment to the right to vote, making it mandatory would in turn kill the "right" to vote, and it would become an obligation to choose between parties and/or candidates.

Such an obligation would not be perfect, or even be adequately enforceable, and in turn one can't reason that mandatory voting improves the quality of democracy. But one is convinced, however, that mandatory voting would harm the liberty and the guarantees on which the right to vote is enshrined – which the Portuguese Constitution shields from amendments, and rightly so.