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On the pro-hegemonic nature of referenda for constitutional reforms in Turkey. A focus on 16 April 2017 referendum introducing presidentialism•

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ABSTRACT: The article analyzes the referenda for constitutional amendments held in Turkey for modifying the 1982 Constitution in the light the existing literature on referenda, which mainly states they are a pro-hegemonic device. It notably focuses on the 16 April 2017 referendum introducing presidentialism, also proposing a discussion on the main elements of this reform, in order to conclude that, though the theory on the pro-hegemonic character of referenda cannot be confirmed as a general one, it seems at least fitting with the Turkish case. A comparison with the Italian 2016 constitutional referendum supports the elaboration on this point.

1. *Introduction*

On 16 April 2017, Turkish citizens approved with a popular referendum a constitutional reform turning the legal system into a presidentialism. The recourse to people has been necessary because of the procedures for approving constitutional amendments entrenched in 1982 Constitution, but it also confirms a trend of the political history of the country. Indeed, the use of the referendum in Turkey deems to be studied in the light of the general legal theory on referenda in order to understand whether it may be conceived as a pro-hegemonic device, always favoring the ruling party's position, or as a people's check to the activity of decision-makers. As evident, this debate on referenda excludes those who derive from a popular initiative, which are not relevant for the sake of the topic discussed here as Turkey does not provide for such an option, and therefore have been ignored[1].

• Contributo sottoposto a referaggio in base alle Linee guida della Rivista.

[1] For a broader definition, explanation and categorization of referenda suffice to refer to M. SUKSI, *Bringing people in: a comparison of constitutional forms and practices of the referendum*, Martinus Nijhoff, Boston, 1993.

Mindful of these considerations, the present article proposes a brief, and certainly non-exhaustive, review of the existing literature on referendum in order to define a background for analyzing the Turkish experience, with a specific focus on the 2017 constitutional referendum introducing presidentialism and on the content of this reform. After a section on the possible referenda that are currently under debate in Turkey, concluding remarks propose a brief comparison with the Italian case of 2016 referendum for amending the composition of the Senate in order to contribute to the general debate on the pro-hegemonic nature of referenda. Such a comparison allows to affirm that the theory according to which referenda always confirm the position of the ruling party is falsified by the Italian case but, at least until the last referendum, it is valid for Turkey.

2. *On the use of referenda in the legal theory*

Although it remounts to the idea of direct democracy already used in ancient Greece and Rome, as Suksi underlines referendum in its current meaning is a device entrenched in contemporary constitutionalism[2]. It has always been at the center of an intense debate among legal scholars, divided among those who support the idea that its use favors the participation of people in taking decisions fundamental for their country even vetoing the choices of the decision-makers they elected and those who conceive it as a return to some sorts of plebiscitarian democracies paving the way for the consolidation of neo-populisms[3]. Although Charters provide for referendum as an instrument for ensuring a popular check on parliamentary decisions and state it is (under certain conditions) mandatory for constitutional amendments, the most part of scholars argue that it favors the empowerment of ruling elites, which hold them only when sure of the results[4]. Lijpart clearly affirmed this point stating that «when governments control the referendum, they will tend to use it only when they expect to win»[5].

Furthermore, some studies demonstrate that referenda tend to produce a specific behavior in the individuals which decide empathically the vote they will express[6], paying more attention to the charisma parties' leaders are able to show during the campaign than to content of the referendum question and to their position on it. According to some scholars, this depends on the fact that the most part of citizens lacks the competences for taking relevant political decisions[7]. A lack which

[2] M. SUKSI, *Bringing people in*, cit., 2.

[3] On this debate, beyond the other contributions mentioned in this section, see: A.V. DICEY, *Ought the referendum to be introduced into England*, in *Contemporary Review*, 1890; A. DE BENOIT, *Démocratie: le problème*, Le Labyrinthe, Paris, 1985; D. MUELLER, *Constitutional Democracy*, Oxford University Press, Oxford 1996; R.A. MAYORGA, *Outsider and Neopopulism: the road to plebiscitary democracy*, in S. MAINWARING et al. (eds), *The Crisis of Democratic Representation in the Andes*, Stanford University Press, Redwood, 2006.

[4] On a contrary position, see the empirical analysis in M. QVORTRUP, *Are Referendums Controlled and Pro-hegemonic?*, in *Political Studies*, 48, 2000, 821-826.

[5] See A. LIJPHART, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, Yale University Press, New Haven, 1984, 204.

[6] M. OAKESHOTT, *Rationalism in Politics and other Essays*, Liberty Fund, Indianapolis, 1991, 380. See also S. TIERNEY, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford University Press, Oxford, 2012. 28

[7] See G. SARTORI, *The Theory of Democracy Revisited*, Chatham House, New York, 1987, 120, and M. SETALA, *On the problems of responsibility and accountability in referendums*, in *European Journal of Political Research*, 45, 2006, 699 ff.

can also explain why during the campaign the ruling party usually proposes the YES vote as a choice for stability and for the progress of the country, while the NO «is for misery, chaos, or something worse»[8].

These reasoning affirming a pro-hegemonic nature of referenda generally exclude referenda for approving a Constitution, as they are considered a part of the exercise of the constituent power through which the people decides whether to transfer its sovereignty to the new institutions[9]. Nevertheless, as the Turkish experience discussed below seems to demonstrate, there have been cases in which the way the referendum question was defined impinged on people's decision even in the exercise of the constituent power, maneuvering it in order to ensure a positive result in favor of the proponents of the new institutional order. The pro-hegemonic nature of referenda is furthermore confirmed in the cases of referenda for constitutional amendments, when the formulation of the referendum question has been relevant as well. Indeed, whether the answer is relatively easy (YES or NO), the question behind may be complex, its perception by people may vary and create a consistent swing in the final decision notwithstanding the existence of a strong ideological bound between the people and political parties[10].

3. *Referenda and Constitutional reforms in Turkey.*

The use of referendum in Turkey dates back to the approval of 1961 Constitution and has become a recurring device since the approval of 1982 Constitution.

Indeed, when the constituent power was firstly exercised in Turkey, any form of popular involvement was provided for the approval the 23 articles of the 1921 Constitutional Manifesto despite its article 1 stated that «Sovereignty is vested in the nation without condition. The governmental system is based on the principle of self-determination and government by the people». Similarly, when the longer and more detailed 1924 Constitution was approved, it was the Grand National Assembly of Turkey (GNAT – the unicameral Parliament) which took the full responsibility for the exercise of the constituent power and for the amending power used for introducing secularism with the amendments of 1928 and 1937[11], for granting electoral rights to women in 1934 and for the other four "modal" amendments introduced during the 36 years this Charter remained into force.

Then, when the Army organized the 27 May 1960 coup d'état and convened the so-called Istanbul Commission for drafting a new Charter, Generals deemed the popular approval necessary and therefore for the first time in the Turkish history citizens were involved in the procedures for allowing the entry into force of the fundamental law of the country with the 9 July 1961 constitutional referendum[12]. In this occasion, traditional actors, such as notables and major

[8] M. SUKSI, *op. cit.*, 12.

[9] K. VON BEYME, *Die verfassunggebende Gewalt des Volkes. Demokratische Doktrin und politische Wirklichkeit*, Mohr, Tubingen, 1968, 5.

[10] See H.A. SEMETKO, C.H. DE VREESE (eds), *Political Campaigning in Referendums: Framing the Referendum Issue*, Routledge, London, 2004, 3-4.

[11] On this point it is worthy to remind that in 1928 the reference to Islam as State religion was abolished, then, in 1937, secularism was explicitly included as a fundamental value of the Constitution at article 2.

[12] Nevertheless, citizens' approval was not required on the occasion of the constitutional amendments introduced in 1971 and 1973.

landowners, deeply influenced voters' behaviors, which massively approved the new Constitution[13]. Instead, on the occasion of the referendum on the 1982 Constitution – drafted after the 1981 military coup d'état by a group appointed by the Army – it was the way the referendum question was written which influenced voters. Indeed, on 7 November 1982, Turkish citizens were simultaneously asked to vote for the approval of the Constitution and for the appointment to the Presidency of the Republic of the General Kenan Evren. The YES was the preferred option of the 91,37 % of the voters for a clear reason: refusing the Charter would have also meant refusing to assign the leadership of the country to the only man at that time considered able to bring back stability.

As abovementioned, 1982 Constitution entrenched referendum in the procedures for constitutional amendments at article 175. It states that the President of Republic may exercise the power of submitting to referendum the law providing for a constitutional amendment in case the GNAT approves such a law without any amendment by a two-thirds majority of the total number of members after the President has sent it back for reconsiderations. A referendum is also mandatory when the law on constitutional amendments is adopted by a three-fifths or less than a two-thirds majority of the total number of members of the Assembly. Here, it is the lower majority the supporters of the law were able to reach which justify the appeal to the popular final decision. In both cases, the entry into force of the laws on constitutional amendment submitted to referendum shall require the affirmative vote of more than the half of the valid votes. The article finally reserves to the GNAT the decision on the referendum question: «The Grand National Assembly of Turkey, in adopting the law on the constitutional amendment shall also decide on which provisions shall be submitted to referendum together and which shall be submitted individually, in case the law is submitted to referendum»[14].

The constitutional amendments introduced to 1982 Constitution since 1987 were submitted to referendum according to these procedures[15]. Two referenda are particularly noteworthy for the argument discussed here: 2007 constitutional referendum on the direct election of the President of the Republic and 2010 constitutional referendum amending both the bill of rights and the composition and functioning of several institutions, both held when the ruling party was the AKP[16].

The referendum held in 2007 is relevant for two reasons, as it procedurally illustrates the functioning of art. 175,1 and also, at least with regard to Turkey, falsifies the assumption that ruling elites call for referendum only when they are sure to win it. Indeed, this referendum concerned a constitutional amendment the AKP proposed meanwhile the presidential election for the successor of President Sezer was in a stalemate. In fact, when the AKP proposed as candidate Abdullah Gül, the political opposition boycotted the first ballot and then appealed the Constitutional Court for the interpretation of the constitutional provision concerning the *quora* for presidential elections. The Court confirmed that the votes Gül obtained at the first ballot were not enough to assign him the

[13] For details on this influence, see B. COP, *The 1961 Constitutional Referendum in Turkey*, in *Sociology of Islam*, 1-2, 2015, 49-75.

[14] See article 175,7 of 1982 Constitution. For the full text, in English, of the Charter, see https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[15] For a discussion on all the constitutional amendments introduced until 2010, see F. PIAZZA, V.R. SCOTTI, *La Repubblica di Turchia: un processo costituzionale continuo*, in C. DECARO (ed), *Itinerari costituzionali a confronto; Turchia, Libia, Afghanistan*, Carocci, Roma, 2013, 27-131.

[16] The *Adalet ve Kalkınma Partisi* (Justice and Development Party) holds the majority in the GNAT, and therefore expresses the Executive, since 2002.

Presidency and, when it became clear that AKP would not be able to reach that majority, the constitutional amendment for the direct election of the President of the Republic was proposed and the GNAT was dissolved. President Sezer refused to promulgate the law declaring that it would have altered the pillars of parliamentarism and, when the GNAT approved it again, decided to use his power to hold a popular referendum.

Therefore, the referendum was not carefully planned by the Executive and popular support was not granted. Nevertheless, it proved to be pro-hegemonic, in the sense that the population confirmed the proposal of the ruling party (21 October 2007) and, in the general elections held few months before (22 July 2007), strengthened its parliamentary majority[17]. This meant, also thanks to the support of the National Movement Party (MHP – *Milliyetçi Hareket Partisi*) which entered the GNAT with that elections, the possibility of electing Gül as Sezer's successor in August 2007 and paved the way for the election of Erdoğan to the Presidency on the occasion of the first direct presidential elections held in August 2014.

The constitutional referendum held on 12 September 2010, instead, deserves attention for the wide content of the reform that was put under the simple YES/NO alternative. Actually, the constitutional law submitted to referendum concerned several constitutional articles on the protection of rights as well as on the function of State's institutions[18]. With regard to the main amendments on rights, it modified article 10 extending the meaning of gender equality and the State's commitment for it as well as introducing an explicit protection for the elderly and the disabled. It also added a section to article 20 on the protection of private and family life for ensuring the protection of personal data and a section to article 41 on the protection of the family for strengthening the State's duty in ensuring the protection of children, especially against abuses and violence. Intervening on the text of articles 51, 53 and 54 it extended the right of participating to labor union and in collective agreement, with a special regard to civil servants, previously excluded from the possibility of join these associations. On the functioning of institutions, the reform intervened on the military justice: the renewed article 125 allowed for the judicial review of the decisions of the Supreme Military Council, and article 145 abrogated the competence of military courts in trying civilians except in times of war. The new text of article 144 provided for the direct engagement of the Ministry of Justice in the supervision, inquiry, inspection and investigation proceedings of judicial services and public prosecutors with regard to their administrative duties and also a greater control on the functioning of the Supreme Council of Judges and Prosecutors. An Economic and Social Council was also introduced for providing opinions for the Government on the development of economic and social policies (article 166). The abrogation of the 15th provisional article allowed for the judicial review of the law approved in the transitional period after 1980 coup and for the trial of its perpetrators. Finally, and probably most importantly, the Constitutional Court modified its composition from 11 judges plus 4 substitutes to 17 judges and introduced among its competences the individual complaint against violation of rights (articles 146,

[17] On this election and on its meaning, see A. ÇARKOĞLU, *A New Electoral Victory for the 'Pro-Islamists' or the 'New Centre-Right'? The Justice and Development Party Phenomenon in the July 2007 Parliamentary Elections in Turkey*, in *South European Society and Politics*, 4, 2007, 501-519.

[18] See Law amending certain provisions of the Constitution n. 5982 of 2010. For a full list of the amendments it introduced, see http://federalismi.it/nv14/articolo-documento.cfm?artid=17125.

147 and 148)[19]. A so vast amendment to the fundamental Charter originated several, and often conflicting, positions about its content; nevertheless, citizens were called for accepting or repealing it in block. The majority supported the YES vote, but there are still criticisms for the fact that together with some amendments unanimously conceived as an advancement for Turkish democracy and for its adherence to the rule of law (such as the introduction of the individual complaint), some others strengthened the Executive's control over other powers, notably the control over the Judiciary due to the extended role of the Minister of Justice in the Supreme Council of Judges and Prosecutors[20]. It should be noted, however, that the European Union, at that time strongly pushing Turkey in introducing reforms through its conditionality, supported the constitutional amendments and therefore influenced voters in considering it as a possibility for consolidating democracy.

3.1 *The failed attempt to call for a referendum for reforming the Constitution*

A referendum was planned as the final confirmation of the popular will in the procedure for the approval of the first civilian Constitution, which failed for the lack of an agreement among political forces on some fundamental amendments such as the recognition of ethnic minorities' rights and the change of the system of government. Indeed, as all political forces seemed to agree on the need of a completely new Charter, in 2011 a Constitutional Reconciliation Commission (*Anayasa Uzlaşma Komisyonu*) was convened. Although the Commission did not end its activity with a proposal to be submitted to referendum and dissolved in 2013, the procedures provided for the approval of the new Charter as well as their constitutional legitimacy in the light of the unamendable clause provided at article 4 of 1982 Constitution are worthy to be analyzed.

As for the procedure, it was built around the principle of civil society's involvement. Therefore, it was established that the Commission would have had to draft a Charter to be then submitted to a popular referendum after having heard the proposals coming from the civil society through the "Turkey Speaks" platform. In order to come out with a fully shared text, it was also decided that the Constitutional Reconciliation Commission had to be composed by three representatives for each of the four political parties which seated in the GNAT after national elections of 12 June 2011[21]; furthermore, the debates of the Commission were considered legally held only when the representatives of at least three of the four involved parties were convened.

Despite the will of involving the population as much as possible and of drafting a text agreed by the whole political spectrum represented in the Assembly, the approval of this Charter was not conceived as a new exercise of the constituent power, but as a constitutional amendment. For this reason, some doubts may rise on the consistency of this procedure with the unamendability clause

[19] On the individual complaint in Turkey, see V.R. SCOTTI, *Il ricorso individuale in Turchia: fra riforma dell'ordinamento e influenze esterne*, in C. DECARO, N. LUPO, G. RIVOSECCHI (eds.), *La "manutenzione" della giustizia costituzionale. Il giudizio sulle leggi in Italia, Francia e Spagna*, Giappichelli, Torino, 2012, 301-314.

[20] Different perspectives on the content and on the consequences of the 2010 referendum are proposed in: D. ERGIL, *Constitutional Referendum: Farewell to the 'Old Turkey'*, in *Insight Turkey*, 4, 2010, 15-22; E. ÖZBUDUN, *Turkey's Constitutional Reform and the 2010 Constitutional Referendum*, in *Mediterranean Politics*, 2011, 191-194; E. KALAYCIOĞLU, *Kulturkampf in Turkey: The Constitutional Referendum of 12 September 2010*, in *South European Society and Politics*, 1, 2012, 1-22.

[21] The parties were: *Adalet ve Kalkınma Partisi* (Justice and Development Party), *Cumhuriyet Halk Partisi* (Republican People's Party), *Milliyetçi Hareket Partisi* (Party of National Movement), *Barış ve Demokrasi Partisi* (Peace and Democracy Party).

entrenched at article 4 of the Constitution[22]. A consistency that is still unclear whether an approval through popular referendum would have rectified[23].

As the Commission failed, the debate on the content of 1982 Constitution continued, notably on the need of changing the system of government from a parliamentarianism to a presidentialism. A matter representing the focus of following sections.

4. *The background for the 2017 referendum on presidentialism*

Before of addressing the topic of the referendum on presidentialism, it is worthy to remind that article 104 of the Constitution, «creating a presidency endowed with substantive political powers»[24], already provided the country for a Presidency defined not only through the typical principles of parliamentarianism – such as ministerial countersign of presidential acts, the responsibility of the Council of Ministers in front of the Assembly, the recognition of ceremonial powers – but also through the recognition of powers and competencies substantially presidential. This office was in effect entitled with clearly discretional powers, such as the appointment of constitutional judges, of a quota of the judges of the Council of State, of the Military Court of Cassation, of the High Administrative Military Court, of the High Council of Judges and Attorneys, as well as of the General Attorney of the Court of Cassation, of universities' rectors, of the members of the Council of High Education. These vast powers of appointment were also coupled with a relevant veto power providing, besides the classic power of returning a law to the Parliament for further consideration, for the refusal of signing ministerial decrees, the rights to appeal the Constitutional Court against laws before of their final approval, and of the already mentioned power of holding constitutional referenda.

After the 2007 amendment, that transformed Turkey in «*parliamentarisme attenué*»[25], the ruling party started to reason on the possibility of a complete change of the system of government, according to a model that its drafters presented as a rationalization of the US model despite the fact that it actually is a *unicum* in the international paramount[26]. As said, such a change was at first attempted during the works of the Constitutional Reconciliation Commission. Then, when the Commission dissolved, the country entered in a period of turmoil, marked by the difficulties in appointing a Cabinet after June 2015 election[27], the failed 15 July 2016 coup d'état which led the

[22] Article 4 states the unamendability of the first three articles, which affirm that the Turkish form of government is republican (art. 1), that the Republic of Turkey is based on democracy, secularism, rule of law, respect of human rights and on the principles of public peace, national solidarity and justice, and is loyal to the nationalism of Atatürk (art. 2), as well as that «the State of Turkey, with its territory and nation, is an indivisible entity. Its language is Turkish» (art. 3).

[23] On the unconstitutionality of constitutional amendments, see Y. ROZNAI, Unconstitutional Constitutional Amendments. The Limits of Amendment Powers, Oxford University Press, Oxford, 2017.

[24] E. ÖZBUDUN, *Presidentialism vs. Parliamentarism in Turkey*, in *Global Turkey in Europe*, Policy Brief n. 1, 2012, 2.

[25] E. ÖZBUDUN, *Contemporary Turkish Politics. Challenges to Democratic Consolidation*, Lynne Rienne Publishers, London, 2000, 59-61.

[26] See S. GUR, *Presidentialism in Turkey. Instability and Change*, Routledge, London, 2017, 2.

[27] See V.R. SCOTTI, *Bisogna che tutto cambi perché tutto rimanga com'è. Le elezioni turche del 1 novembre 2015 e la promessa costituente*, in *Alexis. Testi per il Dialogo Giuridico Euro-Mediterraneo*, 4, 2016, http://www.unikore.it/images/centrodiricerca/rivistaalexis/4numero/Scotti%20%20Autunno%20Inverno%202015-2016.pdf.

most part of Turkish population to fear a backlash to instability, and the periodical terroristic attacks of the so-called Islamic State and of the Kurdish guerrilla. Envisaging in the establishment of presidentialism a solution for bringing stability back, the AKP decided to directly address a bill to the Assembly, enjoying of the support of the MHP, at first skeptical on presidentialism[28].

This was the background for the presentation, on 9 December 2016, of an 18-articles constitutional bill providing for the introduction of 72 constitutional amendments able to entrench presidentialism in the Constitution. The bill has been approved with 330 votes on 16 January, lacking the 367 votes on 550 needed for a direct entry into force according to the mentioned article 175 of the Constitution, and thus it has been sent to the President of the Republic asking for holding a referendum on its content. The referendum was scheduled for 16 April 2017. The opposition could have decided to appeal to the Constitutional Court for a review of the constitutionality of the bill, but Kemal Kılıçdaroğlu, the leader of the *Cumhuriyet Halk Partisi* (CHP – Republican People's Party) representing the main opposition party, in a declaration of February 2017, stated that his party did not want to impede the approval of a reform that could be in line with popular will and that «A sovereignty that cannot be protected by the people's will is not possible to be protected by any other power. […] If the issue is the nation's sovereignty, the real Supreme Court in that case is the people's, nation's court. That is why we not appeal to the Constitutional Court. We as CHP trust this nation's foresight»[29].

Actually, for this referendum the ruling party anticipated a pro-hegemonic result and supported the idea that confirming the content of the bill would have meant supporting the Presidency of Erdoğan as well as the progress and the stability of the country. In this anticipation, a role has been played also by the state of emergency, declared after the failed coup[30] and thanks to which the YES-field have enjoyed the limitations imposed to the opposition. The whole campaign has been furthermore characterized by an overwhelming favor of mass-media for the introduction of presidentialism, by a strong support to the reform by the supposed-to-be neutral President of the Republic and, according to the OSCE monitoring mission, by the use of State administrative resource for financing the YES-field[31]. However, if "NO" was underrepresented in the motherland it benefitted of the support of several European States, notably Germany, Nederland and Denmark, that forbade the visits of Turkish Ministers campaigning for the 'YES' toward the Turkish citizens living on their territories at the same time authorizing demonstrations of the opponents to the Turkish Government.

The results seem to demonstrate the adversarial consequences of such a campaign. In a voter turnout of 85,32%[32], a scant majority (51,41%) voted YES (48,59% voted NO) [33]. The majority has

[28] Some argued that this sudden support has been due to an agreement between AKP and MHP on the composition of a future Cabinet based on the attribution of a number of Ministers to the MHP in exchange for the votes in favor of presidentialism.

[29] Cit. in Daily Sabah, *Main opposition CHP won't appeal the presidential system reform before Turkey's top court*, 14 February 2017.

[30] The state of emergency was issued on 22 July 2016 and then periodically renewed for three months; at 9 May 2017 it is still in force.

[31] *Statement of Preliminary Findings and Conclusions of the OSCE International Referendum Observation Mission* – hereafter OSCE Statement – available at https://www.osce.org/odihr/elections/turkey/311721?download=true, 7-8.

[32] According to the OSCE Statement «more than 58 million voters were registered to vote, including over 2.9 million abroad», 1.

[33] This evidently shows a loss in popular support even in comparison with the previous referendum held in 2010, when the governmental proposal of constitutional amendment was approved with a 57,88% of votes in favor.

been mainly composed by citizens living in rural areas and of citizens living abroad (i.e. in Germany more than 63% voted YES)[34], whilst Turkish citizens living in biggest cities, toward which the YES-field campaigned more passionately and which on previous referenda demonstrated a huge level of support for AKP, voted against[35].

4.1. *Claiming for more power or ensuring stability: the content of the reform*

Due to the people's approval on the occasion of the referendum, Turkey is now going through the process for implementing a peculiar presidentialism, which some consider as an attempt of the current President to strengthen his power as well as to extend his tenure[36], while others welcomed as a means to provide the country with a better political system, regardless of Erdoğan's alleged personal ambitions[37]. In order to favor the analysis of the Turkish model of presidentialism, its main elements are worthy to be briefly summarized and discussed.

Some amendments concerned the GNAT and its composition. Indeed, the number of MPs has been increased from 550 to 600 and the right to be elected has been extended to those who have reached the age of 18, instead of the previous threshold of 25, in consideration of the demographic expansion and willing to involve the younger generation into politics. For the same reason, the conditions for the candidacy have been modified, allowing it to those «who have exhausted their duties deriving from the mandatory conscription», thus including not only those who are already discharged but also those who have been exonerated or obtained authorized postponements.

The role and functions of the President of the Republic have been empowered. This office subsumes all the competences of the Prime Minister, being this office consequently abrogated. The President will be elected in a double-ballot among those who already served as MPs and belong to a party who obtained at least 100.000 votes on previous election overcoming the 5% threshold, therefore establishing a direct confidence relation with citizens implicitly extended to all the Cabinets and the vice-Presidents[38] s/he will appoint during his/her term. The President also maintains the appointing competences already provided by 1982 Constitution, however in the lack of any form of control on such a vast power of appointment, as for instance the US Senate's advise and consent[39]. The President increases its emergency powers,[40] becoming competent to its declaration, previously in the hands of the Assembly, which maintains only the competence of converting into law the declaration decree and all the other decrees approved during the state of emergency. It remains unclear whether these decrees may be challenged with a judicial review[41].

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[34] For an overview of the vote of Turkish citizens living abroad, see B. BAŞER, *The Turkish diaspora and the constitutional referendum*, in *Independent Turkey*, 22 April 2017, http://independentturkey.org/the-turkish-diaspora-and-the-constitutional-referendum/#APFd6e9jrGEr1Mpm.99.

[35] Istanbul YES 48,6% NO 51,4%; Ankara YES 48,8% NO 51,2%; Izmir YES 31,2% NO 68,8%; Adana YES 41,81% NO 58, 19%; Antalya YES 40,92% NO 59,08%; Diyarbakir YES 32,41% NO 67,59% (Data retrieved from CNN Turk, accessible at www.cnnturk.com/referandum-2017).

[36] See I. EGRIKAVUK, *Turkey Ponders Presidential System*, in *Hurriyet Daily News*, 15 April 2011.

[37] See M. TURKONE, *Is a Presidential System Feasible in Turkey?*, in *Today's Zaman*, 9 April 2011.

[38] Vice-Presidents may substitute him/her if needed. Their number will be fixed by an ordinary law.

[39] See article 2, 2 of the US Constitution.

[40] As the martial law has been abolished, this is the only emergency measure provided by Turkish legal system.

[41] According to art. 148 of the Constitution, emergencial decree cannot be subject to a control of legitimacy. However, the Constitutional Court stated its competence in verifying their compliance with principles of necessity and

Finally, concluding a long debate which revamped after the direct election of Erdoğan, the constitutional provision forbidding the elected President to hold political offices has been abrogated. Although it is contrary to a consolidated Turkish tradition established since 1961 Constitution, this abrogation is in line with the US model, where the President holds the leadership of his/her party.

The reform modifies the "interactions" between the Assembly and the President. Their terms last both for 5 years, with the prevision of compulsory contemporary elections. According to a *simul stabunt simul cadent* principle, the GNAT, with 300 votes, may dissolve itself at the same time ending the presidential term[42]; similarly, the President my end both his/her term and that of the Assembly. The introduction of this principle originated some criticism as well as the decision of holding both elections on the same day, with the aim of avoiding any possible "*cohabitation*" between the President and the majority in the Parliament. Although the procedure seems reasonable in a country characterized by a deep ideological divide among political parties – which will make impossible a compromise in case of cohabitation – the consequences for the independence of the Assembly cannot be ignored, moreover in case the current proportional electoral system will be modified with the introduction of majoritarian elements, as some AKP's members are proposing. The Legislature and the Executive have a joint responsibility as regard to the approval of the budgetary law: its proposal has become a presidential prerogative, the Assembly then may discuss it but cannot increase the expenditures and compulsory have to approve it in 55 days; in case of delays, the budget of the previous year remains into force. The President may also issue decrees for ensuring the accomplishment of the Executive's duties and in all those fields not yet ruled by the Assembly. These decrees, which may be the object of an *a posteriori* control of the Constitutional Court, do not need any conversion into law from the Assembly and are abrogated in case the Parliament legislates in the same field. However, it is not specified the institution that will be entitled with the competence in resolving the potential – but evidently possible – conflicts of jurisdiction. In the exercise of its legislative power, the Assembly has also to reach the absolute majority in order to approve again a law returned from the President, instead of the simple majority required according to the previous system. This higher majority limits the legislative activity of the Parliament to those bills on which a real parties' engagement will exist, in the lack of which the main legislator will be de facto the President. Direct oral question time has been abrogated and the Parliament may control the Executive only through general debates, parliamentary inquiries, investigations and written questions. The Assembly may also intervene in the (very hard) procedure for criminal liability or for the impeachment of the President of the Republic[43], who is no more covered by the principle of Presidential irresponsibility.

proportionality (see E1990/25 K1991/1 10 January 1991 and E2003/28, K2003/42, 22 May 2003). Then, in 2016 the Court overruled this jurisprudence declaring itself non-competent for the judicial review of emergency decrees (see *Basın Duyurusu* n. GK 8/16, 4 November 2016).

[42] In case of dissolution by the Assembly, the President, though in its second term, could be entitled to run for another term. However, in order to avoid that this measure allows for an unlimited extension of presidential tenure, the President may present his/her candidacy after a dissolution only once.

[43] In order to try the President, the Assembly has to approve the proposal for starting the investigations with absolute majority and, after a debate that should take place no more than one month since the first approval, has to confirm its position in a secret ballot scrutiny with a three-fifth majority. Then, an ad hoc Commission, composed of 15 members chosen respecting the proportions among the political groups of the Assembly, is appointed with the aim of investigating and of preparing a report to be presented at the Speaker no later than two months since its appointment, eventually extendible of three more. The Speaker must distribute the report to MPs in ten days and then s/he has to

The reform finally affected the Judiciary, first of all ending the long struggle for removing the members of the Army from civil offices. Thus, all the military Courts have been suppressed, with the only exception of disciplinary tribunals, and the principle of impartiality and unity of the Judiciary has been entrenched in the Constitution. Due to the abrogation of military Courts, the two judges they used to appoint at the Constitutional Court have been abrogated as well, so that, at the end of the office of those currently in, the number of constitutional judges will be reduced from 17 to 15. Finally, the reform reduced from 22 to 13 the number of the High Council of Judge and Prosecutors, which lose the "High" in its denomination.

5. *Other referenda on the horizon*

Already during the campaign and moreover after the approval of the constitutional amendment, at least two more referenda seems to be in the AKP's political agenda.

The first one concerns the possibility of reintroducing the death penalty in the country, the AKP's leaders advanced soon after the failed 2016 coup. This would mean overturning a process Turkish citizens started with the 1983 de facto moratoria introduced in the country and then confirmed with the constitutional referenda in 2001 and 2004, when the death penalty was abolished[44]. During the demonstrations which followed the coup, the Prime Minister, Binali Yildrim, and President Erdoğan reassured the population that this penalty would have been reintroduced, the former promising to address a bill in this sense to Assembly, the latter confirming that he would have signed such a bill for its ratification as soon as he would have received it[45]. A position confirmed also immediately after the 16 April 2017 referendum[46].

The possibility of such a referendum is deeply affecting Turkey's relations with some EU countries, which are clearly demonstrating their opposition. For instance, German Chancellor Angela Merkel's spokesman, Steffen Seibert, considered «politically inconceivable that we would agree to such a vote in Germany on a measure that clearly contradicts our Constitution and European values», and a spokesman for Foreign Affairs Minister Bert Koenders said the Dutch cabinet «does not want this and will not facilitate it»[47].

This "incomprehension" between Turkey and EU countries could be considered at the origin of the second referendum under discussion. Although the skepticism of the Turkish leadership has been declared since long time, the request of a popular decision on the possibility of definitively close the negotiation for the accession to the EU could become a reality in a close future, also because of the "cold" reactions of several EU countries and of the EU institutions to the results of the referendum on presidentialism. Indeed, soon after the proclamation of the results, and already

convene the Assembly in other then days for a general debate. On that occasion, whether the Assembly votes in favor with a two-third majority, the President is indicted in front of the Constitutional Court, acting in its function of Judge of highest charges of the country. The Court will then have three plus three months to end the trial. All along these procedure, it will not be possible to hold elections, even it previously scheduled.

[44] For further details on the abrogation of death penalty in Turkey, see V.R. SCOTTI, *Il Costituzionalismo in Turchia fa circolazione dei modelli e identità nazionale*, Maggioli, Sant'arcangelo di Romagna, 2014, 235-236.

[45] See K. AKYOL, *Will Turkey reinstate death penalty?*, in *Al Monitor*, 29 July 2016.

[46] See C. GAFFEY, *Turkey's Next Referendum Could Reintroduce the Death Penalty, Erdogan Says*, in *Newsweek*, 17 April 2017.

[47] See Middle East Eye, *Germany to ban Turkish nationals from death penalty vote*, 6 May 2017, http://www.middleeasteye.net/news/berlin-bar-turks-voting-germany-turkish-death-penalty-670527612.

during the campaign, several EU Member States declared their opposition in continuing the negotiations. Then, on the occasion of the EU Foreign Ministers Informal Meeting (Gymnich) at La Valletta (28 April 2017) the European Union Foreign Affairs Chief, Federica Mogherini, stated that talks with Turkey are still on-going, although «we are currently not working on any new chapters»[48]. The day after, on 29 April, the Commissioner on European Neighborhood Policy and Enlargement Negotiations, Johannes Hahn, seemed to keep a greater distance, affirming that «Everybody's clear that, currently at least, Turkey is moving away from a European perspective […] The focus of our relationship has to be something else […] We have to see what could be done in the future, to see if we can restart some kind of cooperation»[49]. On the Turkish side, President Erdoğan excludes any other solution different from a full accession[50] and already before 16 April advanced the idea of holding a referendum on the accession[51], warning the EU that «Turkey won't wait at Europe's door forever»[52].

6. *Concluding remarks: on the pro-hegemonic nature of referenda in Turkey*

As previous paragraphs demonstrate, the case of Turkey is perfectly consistent with the theory of the pro-hegemonic nature of the referendum device, but actually this theory could be falsified with several examples concerning other countries. The Italian story of constitutional referenda, and the recent case of the referendum for the modification of the composition of the Senate held in 2016 could help in demonstrating that referenda, even when promoted by the Executive, may have a contra-hegemonic effect, leading to a political crisis. Actually, because of the opposite trend they show, the comparison between the Italian case and the Turkish one may contribute in elaborating the general theory.

In both countries, indeed, referendum is compulsory when the majority reached in the Assembly is not "qualified enough" to ensure that a constitutional amendment is based on a broad consensus among political forces[53] able to include (at least a part of) the opposition. In the mind of Italian and Turkish framers, referendum was therefore conceived as an instrument for limiting the chances of scant parliamentary majorities of modifying the fundamental law of the country. However, despite the existence of a common normative background, in these countries referenda produced opposite effects, whose reasons are evident even by analyzing just the cases of 2016 Italian referendum and

[48] Anews, *EU respects results of Turkish referendum*, 28 April 2017, http://www.anews.com.tr/turkey/2017/04/29/eu-respects-results-of-turkish-referendum.

[49] See Hurriyet Daily News, *Turkey's EU dream is over for now, top EU official says*, 2 May 2017, http://www.hurriyetdailynews.com/turkeys-eu-dream-is-over-for-now-top-eu-official-says.aspx?pageID=517&nID=112638&NewsCatID=351.

[50] On 2 May he declared that, unless new chapters of negotiation will be opened, the Turkish accession path may be considered concluded. See APF, *Erdogan warns Turkey could 'say goodbye' to EU*, 2 May 2017, https://www.afp.com/en/news/826/erdogan-warns-turkey-could-say-goodbye-eu.

[51] See Reuters, *Erdogan says Turkey may hold referendum on EU accession bid*, 25 March 2017, http://www.reuters.com/article/us-turkey-referendum-eu-idUSKBN16W0R2.

[52] See Hurriyet Daily News, *Turkey won't wait at Europe's door forever: President Erdogan*, 26 April 2017, www.hurriyetdailynews.com/turkey-wont-wait-at-europes-door-forever-president-erdogan.aspx?pageID=238&nID=112434&NewsCatID=510.

[53] Article 138, 2 of the Italian Constitution states that laws for constitutional amendments have to be submitted to referendum in case they have been approved with a majority lower than two/third of the members of each Chambers. For the other cases in which the Italian Constitution provides for a referendum on constitutional amendments, see the full text of art. 138, available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

2017 Turkish one. First, the political environments differ from a cultural perspective. In the Italian case, the political majority fragmented soon after the referendum was held and the seceding parts – one of them ironically named "Young Turks" – joined the opposition in criticizing the personalization of the referendum the then Prime Minister Matteo Renzi proposed at the beginning of the campaign. As a consequence, the real question the referendum seemed to ask to the population was to confirm the confidence for the Executive, and the amendments to the composition and functioning of the Parliament became secondary. Furthermore, this occurred in a country where the confidence of the population toward the political elites is traditionally low, moreover in time of economic crisis, and where the people's ideological belonging to political parties is weak. Therefore, several elements deriving from the political culture impinged on the results of a referendum. *A contrario,* confirmations of this assumption may be derived from the Turkish case. In Turkey, political parties are characterized by a strong internal discipline, making a secession within the ruling party at the eve of a political campaign unthinkable. Furthermore, since decades, the population, notably in rural areas, recognizes in the traditional leader of the ruling party and current President of the Republic, Recep Tayyip Erdoğan, the forerunner of its emancipation. For these reasons, coupling the support to the reform with the confidence in the leader in Turkey has proved successful, whilst in Italy resulted in an evident defeat of the ruling party. Such a personalization, however, highlights a common attitude of the oppositions toward the leaders of the ruling parties, which conceived of the reform as a solution for fastening the decision-making process. In both cases, they have been accused of desiring a reduction of the powers of the Parliament in order to strengthen their personal power and reprimands of authoritarianism became a common-place during the campaign. However, in Italy this argument recalled the Fascist experience and the modification of the perfect bicameralism[54] was refused. In Turkey, although the opposition constantly mentioned the authoritarian will of the leader – and the risks could be perceived as more consistent due to the abovementioned content of the reform – the most part of the population seemed not to fear the strengthening of presidential powers. For instance, the analysis of the electoral results shows that the majority of Kurds living in Southern-East Turkey voted in favor of the reform as they consider Erdoğan the most liable actor for pacifying that part of the country[55].

Although against this interpretation of the results of the 2017 Turkish referendum several objections may be advanced, such as the possible riggings occurred during the vote[56] and the influence the state of emergency had on the campaign, they cannot concern the previous ones, during which the state of emergency was not in force and the monitoring bodies confirmed the fairness of the whole electoral procedures[57].

Conclusively, it could be objected that in Turkey the referendum proved to be a pro-hegemonic device because of the innate favor for authoritarianism of the Turkish Republic[58], pushing people in supporting charismatic individuals, especially during times of crisis[59]. Nevertheless, it cannot be

[54] According to this formula, in Italy the two Chambers have exactly the same powers and functions.

[55] See B. YINANÇ, *Erdoğan has "unconditional support" of 35 pct of Turkey*, in Daily Sabah, 24 April 2017, 4.

[56] The mentioned OSCE Statement, however, seems to exclude the possibility of riggings and links the unfairness of the vote to the consequences of the state of emergency.

[57] OSCE/ODIHR Reports on Turkish elections, stating the general fairness of the procedures, are available at http://www.osce.org/odihr/elections/turkey.

[58] A. INSEL, *The AKP and normalizing democracy in Turkey*, in 3 *South Atlantic Quarterly*, 293-308 (2003), 293.

[59] B.E. ODER, *Turkey's ultimate shift to a presidential system: the most recent constitutional amendments in details*, in *Constitutionnet*, 31 January 2017, http://www.constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details.

ignored that the most part of the referenda for amending 1982 Constitution have been held when the country was deeply involved in the EU accession process and that, at least until 2010 referendum, EU institutions strongly supported the reform path Turkish ruling party proposed. Therefore, future studies on referenda should introduce, among the variables explaining the possible results of referenda and modelling voters' behaviors, the influence of the EU conditionality.