

**The Essentials of a Functioning Constitutional System for an
Institutionalised and Sustainable Democracy**

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First of all I would like to thank TÜSIAD and Sabanci University for having invited me to address this important Conference. It is well known that TÜSIAD is playing a very positive role for the development of democracy in Turkey and I am therefore pleased to be able to contribute to this effort.

I have been given an ambitious topic and was asked by the organisers to address in this context also current threats to democracy in Europe, including the effects of the economic crisis, tools making democracy sustainable and possible lessons to be learnt by Turkey. This is not easy to do in a short presentation, especially for somebody who is a lawyer and not a political scientist and a practitioner rather than an academic. My professional experience in the Venice Commission relates mainly to the new democracies. What I will say in particular on the old democracies will be my personal opinion and not the position of the Venice Commission.

It has become fashionable to speak of a crisis of democracy in the context of the economic crisis. I am not so sure that this is true. We have a specific problem within the Euro zone that the sovereignty of the highly indebted Euro zone countries has now become quite limited and this indeed restricts the scope for democratic decision-making. I will not address this highly complex issue.

Otherwise, the institutions of the traditional European democracies have withstood the crisis rather well. We have stable governments in crisis countries such as Spain and Portugal. If many governments in crisis countries were voted out of office, that is as it should be if people are not satisfied with the results of the policies pursued. The German elections have shown that a government which is considered to have managed the economy successfully can be re-elected.

It is true that there is a lot of dissatisfaction within the population and that the number of votes for populist parties is increasing in many countries. However, most of these parties are not extremist or anti-democratic and dissatisfaction is a natural reaction in any crisis. One may argue that an excessive fixation of politicians on the short-term and on winning the next elections contributed to the crisis. It is, however, difficult to envisage a remedy for this problem, apart from better education as a very long term solution.

It is, nevertheless true that in multi-ethnic states the crisis has increased tensions. In Spain, separatism has revived in prosperous Catalonia with people thinking they might be better off on their own. In Belgium the traditional differences between the Flemish majority and the French-speaking minority are further complicated by the fact that Flanders is economically far more successful and that the preferred approach to economic issues differs radically. This has made it very difficult to form a government.

Otherwise, the parliamentary system, which is provided for by most constitutions of the old European democracies, continues to function. In the past, in some countries such as Italy and France, parliamentary democracy led to excessive government instability. However, mechanisms have been developed to ensure stability within a parliamentary system. The model in this respect is the German Basic Law, which gives a strong position to the Chancellor with respect to the other members of government and which, through the constructive vote of no confidence, makes it more difficult to vote a government out of office. The constructive vote of no confidence means that parliament can express the lack of confidence in the prime minister only by simultaneously electing a new prime minister. It is thus not sufficient to have a negative majority against the current government but a positive majority for a new government is required.

An even more important factor for government stability is probably the electoral system. An excessive number of political parties represented in parliament makes it more difficult to form and maintain a government majority. For this reason most European countries have electoral systems over-representing the stronger parties and/ or a threshold excluding smaller parties from parliament. It is true that a number of countries such as the Netherlands and Denmark seem to function fairly well with many parties in parliament. However, this seems due to the specific political culture of these countries and, especially for less mature democracies, it seems not advisable to follow their example.

The main challenge to European democracy for me is not so much the current crisis but rather long-term trends linked to the increased individualisation of modern societies. In the past, most European citizens voted for a fairly small number of big political parties, many tended to always vote for the same party and identify with it, and turnout in elections was higher than now. The capacity of political parties to mobilise and represent voters has declined, voting patterns have become less stable and votes are now distributed among a far larger number of parties. The decline in turnout in the elections is a potential threat to the democratic legitimacy of the institutions.

I see no easy remedy to this problem. Often it is argued that this situation requires an increased role for direct democracy. Personally, I am quite skeptical in this respect at the national level. It seems to me no coincidence that Switzerland, which has a quite unique system of government, is the only country to regularly hold referendums. In most countries referendums are rare and focused on a few matters, mainly the transfer of sovereignty to international institutions such as the EU. These are questions which can be answered by yes or no while for legislation the question tends rather to be how to regulate an issue in detail and this cannot be solved by referendum. Moreover, it is legitimate for the opposition to use referendums to undermine the legitimacy of the government. A government, which has lost a number of referendums, will have lost credibility. More direct democracy could therefore undermine government stability and make it more difficult to take decisions, especially unpopular decisions.

Nevertheless, there is clearly a need to give the feeling to citizens that they can exercise influence in the public sphere. One traditional means to achieve this is decentralisation. At the local and regional level citizens have a better chance of being able to influence decisions and people, who dislike the central government, may feel better represented by the local or regional government or vice versa. Similarly, if the State leaves room to trade unions and employers' associations to agree on working conditions, this gives more opportunity for the participation of society and reduces the pressure on the government which cannot be held responsible for the results of such negotiations. Finally, if citizens have access both to administrative courts and a constitutional court, which are regarded as independent and impartial, this increases their feeling that they are able to exercise influence.

These different mechanisms could be linked to a distinction made in political science between what is called the Westminster model and the consensus model of democracy. Under the Westminster model, the emphasis is on having a clear election result based on a majoritarian electoral system, making it easy to form a stable government, usually by one political party, and then letting the government govern without too many checks and balances. It should, however, be understood that in the United Kingdom the power of the government is nevertheless limited by constitutional conventions and a strong tradition of the rule of law. In the consensus model, the emphasis is on decisions being based on a fairly large consensus. Elections are based on proportional representation, governments tend to be based on coalitions, there are checks on the power of the government, for example second chambers or constitutional courts, decision-making is more decentralised and more room is left for self-regulation within society.

The Westminster model has the advantage that it is easier to introduce radical reforms. Margaret Thatcher comes to mind in this respect. However, under modern conditions, in periods, when it has become quite difficult to govern, limitations of the power of the government and checks on its power may increase rather than reduce government stability. Even the United Kingdom now has a coalition government. But the best illustration of the difficulties of the Westminster model to me is France.

France has a different constitutional system from the United Kingdom, it is semi-presidential and not parliamentary. But especially following a constitutional reform which has as its effect that the mandates of president and parliament usually coincide, it shares the characteristics of the Westminster system: power is even more concentrated since the President very much dominates the institutions, there are few checks on presidential power although the role of the judiciary has increased, the country remains fairly centralised and it is expected that the State solves all economic and social issues, leaving little room to employers and trade unions.

Having been elected to his office a year and a half ago, the French President now has the lowest rate of popularity of any President in the history of the Fifth Republic. Since his predecessor was already quite unpopular, I would argue that this unpopularity is not simply due to his possible personal failings but to the fact that in this highly centralised system it is not possible, at least in difficult economic times, to meet the expectations of society.

With respect to the new democracies in Central and Eastern Europe we can see that they have the same problems as the old democracies, mostly in an aggravated form, and in addition some specific problems of their own.

I mentioned before that in the old democracies political parties are losing their ability to mobilise and represent people. In the new democracies the situation in this respect is far worse. Apart from the – usually renamed – former Communist parties most other parties are weak. They are often more fan clubs for a politician or vehicles for personal gain than groupings with a clear programme or ideology. They tend to be unstable, parties emerge quickly and strong parties can disappear from one election to the next. Turnout in elections tends to be very low and there is a lack of confidence in the political system. In the multiethnic countries, tensions have not been resolved and one country, Bosnia and Herzegovina, is completely blocked due to such tensions.

In addition, the rule of law tends to be weak and corruption and clientelism are rampant. While this is not unique to new democracies- clientelism is a main source of the problems of Greece – these problems are usually much worse in new democracies. In these countries it has often not been possible to establish a politically neutral and professional civil service but the civil service is rather regarded as an instrument of those in power. The judiciary is not regarded by citizens as being independent and impartial.

The political climate is usually oriented towards confrontation and not compromise although ideological differences might be quite small. There is a “winner takes all” mentality: whoever wins elections wants to govern without any limitations and is not ready to accept checks on governmental power or the rights of the (political) minority. Institutions which should be independent are instrumentalised. We have seen in Hungary that such a mentality exists even in relatively advanced countries. Even if formally the constitutions may rather reflect a consensus model of democracy, in reality the approach is winner takes all, and much more so than in traditional democracies following the Westminster model since the informal constraints on power, which are important and effective in the United Kingdom, do not function in the new democracies.

There is certainly no miracle solution for the problems of these countries. It takes time for political and constitutional culture to develop. In the meantime it is important that the institutions are structured in a manner which both allows effective government and favours the gradual emergence of a mentality in which the making of compromises is accepted as a main element of any democracy. Parliamentary democracy seems the most suitable system in this respect if it is well designed. A number of important reforms can be undertaken: the establishment of a professional civil service, the strengthening of the independence of the judiciary and of other institutions such as the central bank, transparency in the administration to make corruption more difficult and legislation on political parties ensuring internal democracy within parties.

These reforms are not always in the interest of those in power and it is no secret that European integration has been a main – if not the main- tool to favour reforms in these countries. The Council of Europe, the European Union, OSCE and other international organisations are playing a major role supporting reforms or at least preventing setbacks. With respect to countries interested in EU membership, the European Union can also exercise considerable pressure. But building a stable democratic system is a marathon and not a sprint and the task is far from completed especially in those states which have not yet become EU members.

Before concluding, I'd like to make a few comparisons with the situation in Turkey, without entering into much detail since the members of the next panel are more competent in this respect.

Turkey seems to me a very special case. Economically Turkey recently has been one of the most successful countries in Europe if not the world. This success has without doubt contributed to political stability and the Turkish government has enjoyed an unusually high degree of support in the population for quite a long time. It has, however, also created a much bigger middle class and higher expectations in society. If Turkish democracy does not adapt, it may therefore become less stable in the future.

Turkish democracy is older than democracy in Central and Eastern Europe but there have been interruptions. Moreover, until recently there existed a system of tutelage in which the democratically elected politicians were held in check by the military and the high bureaucracy. This system, which had no democratic

justification, has now been dismantled. This is welcome but there is a risk that no or very few checks on governmental power remain. The “winner takes all” mentality characteristic for new democracies seems also to exist in Turkey and political parties seem more inclined towards confrontation than co-operation.

In such a situation it seems to me important to preserve the parliamentary system, which has been quite stable in Turkey recently, since it provides a better basis for the development of a mentality of readiness to compromise. Moreover, the division of roles between the Head of State as arbitrator and conciliator and the head of government seems to me to have functioned very well and should be maintained. By contrast, a system concentrating a lot of power in the hands of a single person would seem risky. Moreover, in a US-type presidential system the political orientation of the parliamentary majority can be different from the party affiliation of the President. One may have doubts whether Turkish democracy could effectively cope with such a situation.

A main necessary reform in my opinion is decentralisation. It is quite striking for a foreigner that a local problem, the transformation of a park, which normally should be dealt with by local government, has become a major national issue in Turkey. This seems to me an example that it is rather better for government efficiency if the government is not responsible for everything happening in the country but that it is better to divide responsibilities.

A number of other reforms, which have already been started, remain desirable: the adoption of a new Constitution, strengthening of the independence and impartiality of the judiciary and the Constitutional Court.

To conclude, there are a number of institutional mechanisms to make democracy more stable and sustainable. With respect to parliamentary democracy as the system predominant in Europe, I'd mention a strong role of the Prime Minister as the person responsible for government action in general, the constructive vote of no confidence and the avoidance of an electoral system which leads to an excessive number of parties represented in parliament. These are measures designed to increase the strength and stability of government. Parliamentary democracy is not a system with an all-powerful parliament but a system with a powerful government accountable to parliament.

These mechanisms are applied successfully in a number of European countries. But this is not sufficient to meet the new expectations within society. Mechanisms have to be developed giving more opportunity to citizens to exercise influence such as decentralisation, leaving room for the social partners to autonomously regulate certain areas, a constitutional court as a check on governmental power, independent administrative courts to control the administration as well as a civil service which is professional and not a tool of the ruling parties. A system based on consensus-seeking and respect for the rights of minorities seems better equipped to deal with the new expectations of society. Moreover, in difficult times it is better for governments not to decide everything but to share responsibility with other actors.

Political and constitutional culture are as important if not more important than institutional rules. In the new democracies we tend to have a “winner takes all” mentality which is reluctant to accept any checks on governmental power. Mentality changes of course slowly but it is also shaped by institutions. It can therefore be hoped that, if the institutions of a consensus model of democracy are established, the mentality in the new democracies will develop towards more acceptance of compromise and checks on governmental power.