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Democracy as a System of Institutions and Practices: The Dynamic Legacies and Living Commitments of Key OSCE Documents

Introduction

In his book *Democracy and Its Critics*, justly considered one of the most profound accounts of democratic theory in the contemporary literature, Robert Dahl writes:

At the outset we confront the fact that in both ordinary and philosophical language democracy may properly be used to refer both to an ideal and to actual regimes that fall considerably short of the ideal. The dual meaning is often confusing. In addition, if democracy is both an ideal and an attainable actuality, how are we to judge when an actual regime is sufficiently proximate to the ideal that we can properly regard it as a democracy?¹

Responding to this question, Dahl concludes that it is impossible to formulate an adequate democratic theory by using a purely philosophical or deductive approach. There is a significant empirical component in democratic theory informed by historical experiences and actual political arrangements. In attempting to reveal the meaning of democracy, we must not overlook “the conditions that would facilitate the development, and the continuing existence, of the institutions that are necessary to a democratic order”.²

This is the conventional approach taken by historians of political thought, who tend to derive the fundamental premises of democratic theory not only from the realm of pure reason but also, to no lesser extent, from texts intended to address issues of practical relevance, such as the *Declaration of the Rights of Man and of the Citizen* and the *Federalist Papers*. Typically, these documents are nation-specific, even if their conclusions can be generalized and universalized.

In the study of international relations, there is a long-standing tradition of “realism”. While it ultimately aims at maintaining international peace and is therefore not devoid of humanistic content, realism attaches no special importance to fundamental democratic values. The situation started to alter in the post-war period, but profound change occurred only at the end of the last century, when a powerful third wave of democratization, culminating in the

1 Robert Alan Dahl, *Democracy and Its Critics*, New Haven 1989, p. 6.

2 *Ibid.*, p. 8.

collapse of communist regimes in Europe, triggered a fairly broad international consensus on the desirability and possibility of basing the international system on democratic principles.³ The essence of this emerging consensus was encapsulated in various documents of the Organization for Security and Co-operation in Europe (OSCE), which codified the commitments of its participating States in the sphere of democracy and human rights. These included the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*⁴ of 29 June 1990 and the *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*⁵ of 3 October 1991.

Currently, the profound importance and impact of the Copenhagen and Moscow Documents for our understanding of democratic theory and practice is reflected rather narrowly in the scholarly literature. Although they fully recognize the importance of these documents as a source of international obligations, researchers tend to refer to them mainly when dealing with specific issues that require legal interpretation.⁶ This article aims at presenting a wider vision of the contribution made by the Copenhagen and Moscow Documents to democratic theory and practice. I argue that these documents present not only a set of practical commitments, but also a systematic vision of the principles of democratic government. The systemic integration of democratic standards is achieved at two levels: institution building and political practice. In order to substantiate this argument, I will review the ways in which the Copenhagen and Moscow Documents address three key elements of democracy: the representative character of government and democratic elections; freedom of political assembly and political pluralism; and democratic parliamentary norms, political responsibility, and the rule of law. Special emphasis will be placed on the influence of the Copenhagen and Moscow Documents on national and international legislation, enforcement, and government practice.

3 Cf. Thomas M. Franck, The Emerging Right to Democratic Governance, in: *American Journal of International Law* 1/1992, pp. 46-91.

4 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe, Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 439-465; also available at: <http://www.osce.org/odihr/elections/14304> (hereinafter: Copenhagen Document).

5 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, in: *ibid.*, pp. 605-629; also available at: <http://www.osce.org/odihr/elections/14310> (hereinafter: Moscow Document).

6 Cf. Gregory H. Fox/Brad R. Roth (eds), *Democratic Governance and International Law*, Cambridge 2000.

The Representative Character of Government and Democratic Elections

Over the past decade, international democratic practice has encountered a problem regarding the choice of criteria used to assess political development trends in particular countries. There is a widespread approach, known in the literature as *sequentialism*, according to which evolution to democracy can and should be slow and gradual, starting not with free elections but rather with institutional changes within the framework of authoritarianism.⁷ The adherents of sequentialism are primarily concerned with the improvement of law and order, which they view as a primary precondition for democracy, but it is also not unusual for them to discover signs of progress towards democracy in developments such as the consolidation of the ruling party and other organizations controlled by authorities, and the gradual amplification of freedom of speech within the limits set by authorities. This approach directly follows from the assumption that all institutions have the potential for democratic development.

The historical landscape in which the Copenhagen and Moscow Documents were adopted suggested a different vision of the role of institutions in political development. The demise of communist regimes that were highly institutionalized along all the key parameters topped the world political agenda at that time. For this reason, one of the crucial assumptions of the Copenhagen Document is that no institutions in themselves, however strong and stable they might seem, should be considered an adequate basis for progressive political development. Rather, section 6 of the Copenhagen Document reads:

The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.

Here, the Copenhagen Document largely follows Article 21 of the *Universal Declaration of Human Rights*, but with one amendment that makes a crucial difference: In order to properly serve as an expression of the will of the people, elections have to be fair.

Indeed, the wording in the Copenhagen Document twice emphasizes the obligation of the participating States to hold free and fair elections. This is essential for understanding the difference between the sequentialist approach and the approach that can be found in the Copenhagen Document. It is well known that the institution of elections exists not only in democracies but also

7 Cf. Thomas Carothers, The “Sequencing” Fallacy, in: *Journal of Democracy* 1/2007, pp. 12-27.

in many authoritarian and semi-authoritarian regimes. Electoral authoritarianism is, in fact, the most widespread variety of non-democratic rule in the contemporary world.⁸

Do improvements to elections at the institutional level, such as the improvement of the equipment used by election-management bodies, the better organization of the electoral process, and the application of new vote-counting methods, contribute to the development of mechanisms for the expression of the people's will? According to the Copenhagen Document, the answer is not necessarily positive. Institutional improvements of this kind provide only the preconditions upon which the free and fair nature of democratic elections can be founded. The characteristics of free and fair elections as formulated in section 7 of the Copenhagen Document should be viewed in the context of the totality of the participating States' commitments. Certainly, many of these characteristics can be found in earlier documents, including the Universal Declaration of Human Rights. The uniqueness of the Copenhagen Document, however, lies in the fact that it reflects state practices and draws upon lessons learned while looking beyond merely conceptual requirements and highlighting practical implications.

According to the Copenhagen Document, free competition implies "the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination".⁹ This provision means that party membership should not be regarded as a condition of eligibility. The importance of this provision is obvious, given that the participation of independent candidates is either forbidden or restricted in a number of states. Such practice is normally connected with application of the party-list proportional representation system. It should be noted, however, that in principle such systems do not actually rule out independent candidates' participation in elections. This possibility largely depends on the political will of legislators. In fact, when justifying restrictions, their proponents often resort to an effectively sequentialist logic, arguing that, since institutional consolidation of political parties is good in itself, measures compelling politicians to join parties are admissible. The Copenhagen Document, however, relies on a different logic: It stipulates that the right of individuals and groups to establish, in full freedom, their own political parties should also be free from abusive restrictions, and it introduces a set of criteria for defining fair and free elections. One is that administrative action, violence, and intimidation should not bar parties or candidates from freely presenting their views and qualifications to the public. Voters should also not be prevented from learning and discussing the issues, and they should be able to cast their votes free from fear of retribution. This principle also entails the following: No legal or administrative obstacle should stand in the way of access to the

8 Cf. Jennifer Gandhi/Ellen Lust-Okar, Elections Under Authoritarianism, in: *Annual Review of Political Science* 2009, pp. 403-422.

9 Copenhagen Document, cited above (Note 4), section 7.5.

media on a non-discriminatory basis for all political groups and individuals wishing to participate in the electoral process.

These criteria from the Copenhagen Document have preserved their practical importance. The often biased attitude of the mass media during election campaigns can result in the authorities receiving more opportunities to express their political positions and platforms. The mass media often take statements made by ruling party leaders outside election campaigns and present them as elements of news broadcasts, while other parties and candidates have to fit within the limited airtime and print space that is allocated for their campaigns, if this is even provided for by law. Independent journalists often self-censor when covering election campaigns, as laws establish legal liability for statements broadly interpreted as slanderous, extremist, or “violating copyright”. Moreover, restrictions are sometimes imposed on the registration and distribution of newspapers during elections; printed copies of newspapers have been even seized in some instances. These measures are usually based on the laws in force, even if applied unevenly to different political actors, and justified by the particular values of the constitutional state in question.

By placing the content of the political process above its formal characteristics, the Copenhagen Document renders this kind of justification unacceptable. The Document attaches special importance to ensuring that the composition of the legislature is based on the election results. In fact, electoral fraud remains a widespread practice. Although it can be minimized through greater systemization of the electoral process, this is not equivalent to ensuring the fairness of elections. Therefore, the elimination of fraud, as understood according to the Copenhagen Document, requires the effective commitment of election organizers, in terms of both political will and the technicalities of vote counting. The Document commits participating States to invite foreign and domestic observers as an important sign of their political will to eliminate election irregularities.

Since 1991, OSCE participating States have made significant progress in developing democratic election standards. The *Budapest Summit Declaration* (1994) states that democratic values are fundamental to the goal of the participating States to become a community of nations (sections 7, 14). The *Lisbon Summit Declaration* (1996) acknowledges the need for democratization processes and co-operation for the consolidation of democratic gains (section 4). In the *Istanbul Summit Declaration* (1999), the participating States express their commitment to free and fair elections as the only means of ensuring a stable basis for democratic development (section 26). Other international organizations specializing in this field, especially the Venice Commission of the Council of Europe, have greatly contributed to development of the principles of the Copenhagen and Moscow Documents. The Copenhagen Document has therefore provided a solid basis for this progress towards accountable, transparent, and open democracy. In contrast to the sequentialist approach, the Copenhagen Document prioritizes the content of the

political process and the capacity of a range of institutions to ensure true democracy, rather than the mere existence of democratic institutions.

Political Pluralism

The historical context in which the Copenhagen and Moscow Documents were adopted conditioned their focus on problems of democracy, the demise of single-party communist regimes being the key event of the time. It is therefore obvious why recognition of political pluralism with respect to political organizations became one of the central provisions of the OSCE's commitments in the human dimension. In particular, the documents establish "clear separation between the State and political parties" preventing political parties from being "merged with the State".¹⁰ In 1990, this was a new and unprecedented approach. Today, there are only few formal single-party systems left in the world, and the identity of party and state may have passed into history. But this does not mean that the corresponding provisions of the Copenhagen and Moscow Documents have done likewise.

The concept of political pluralism in the Copenhagen and Moscow Documents is much broader than a simple negation of the most straightforward forms of political monopoly. It is integrated with a systematic vision of democracy as a political order based on the expression of the will of the people in a fair and free election. The Copenhagen Document lists the "right of individuals and groups to establish, in full freedom, their own political parties or other political organizations"¹¹ as a feature of such elections. The Document stresses that political parties and organizations should have the necessary legal guarantees to enable them to compete with each other on the basis of equal treatment before the law and by the authorities. Hence, the absence of a single-party system is not equivalent to the presence of political pluralism. Political pluralism can only be said to truly exist when, alongside the existence of a multiparty system, the criteria suggested by the expression "in full freedom" have also been met.

Many adherents of the sequentialist approach to democratization ground their arguments on political pluralism. These arguments are often derived from the political practices of Eastern European, Central European, and post-Soviet countries shortly after the collapse of communist regimes. The destruction of official political monopolies resulted in the emergence of dozens of new political parties. Despite having no mass support among the electorate, many of them were able to win sufficient votes to be elected to parliament. In some places, the presence of too many parties in parliament resulted in excessive fragmentation, and adherents of sequentialism use this adverse consequence to support their key thesis about the consolidation of institutions

10 Ibid., section 5.4.

11 Ibid., section 7.6.

being more important than the improvement of basic features of democracy, claiming that the main priority should be placed on the institutional development of a comparatively small number of “viable” parties. Limiting the formation and functioning of political parties, including their participation in elections and representation in elected bodies, is often considered the main way to achieve this goal of formal institution building. Indeed, as some governments contend, the presence of numerous short-lived parties can disorient voters and even contribute to political manipulation. Therefore, the idea that the electoral marketplace should not be entirely open has become acceptable to some states in the OSCE region. But when assessing the benefits and limitations of this idea, it is of primary importance to take into account the priorities that guide the legislators when imposing restrictions on the formation and functioning of parties. The Copenhagen and Moscow Documents prioritize complete fulfilment of the will of the people, which implies freedom of political expression for various social groups. As for the institutional development of parties, this goal, though very important, is not always a matter of top priority.

With regard to party registration, there is a tradition of political thought that views parties as private associations of individuals requiring no official recognition. An alternative approach is that the official registration of parties is useful, primarily due to the public funding of political parties, which has become widespread. Furthermore, official registration prevents the abuse of party identity (names and symbols) by dishonest rivals. When introducing party registration, the legislature generally imposes certain requirements on political parties. They may be required to provide evidence of minimal support and details of the composition of governing bodies and policies, as well as to pay a registration fee. The practice of registration does not conflict with the commitments in the Copenhagen and Moscow Documents, but the issue of proportionality should be analysed. Thus, if evidence of minimal support requires only the provision of dozens or hundreds of signatures of citizens who support the idea of forming a new party, such requirements do not infringe upon the principle of political pluralism, but are appropriate for preventing the formation of “frivolous” parties whose leaders are not interested in pursuing serious political goals. Unfortunately, in some countries restrictions related to party-formation procedures go much further, and the legislature may, for instance, define a minimum number of party members, sometimes amounting to several thousand or even tens of thousands. Such excessive requirements, being obviously unrealistic, undermine healthy competition by giving the existing and ruling parties a tangible advantage.

Similar logic can be applied to registration terms for parties and candidates running in elections. Such terms are set by legislatures in the majority of countries. They normally stipulate the collection of signatures in support of a nomination, and sometimes election deposits that are returned only if the party or the candidate receives a certain number of votes. As a rule, the terms

are usually moderate and aimed at the exclusion of “frivolous” parties and candidates. However, in some countries the election deposit is so high that it actually restricts eligibility and begins to resemble qualification through property ownership. Unfortunately, even relatively harmless requirements, such as the collection of signatures, have been used to limit political pluralism over the past decade. This becomes possible above all when parties or candidates are required to collect an inflated number of signatures. Such requirements are often combined with dishonest practices in signature verification. The uncertainty of verification criteria and the use of purely technical verification procedures (such as checking the correctness of signatories’ addresses, the precision of their personal identification data, and the graphology of their signatures) have sometimes led to the mass disqualification of parties and candidates. Political pluralism in the broad sense, as reflected in the Copenhagen and Moscow Documents, implies not only free participation of political parties and candidates in elections, but also a real opportunity to be elected. Indeed, only in this way can the will of the people be exercised.

Opportunities for enhancing pluralism depend on the election system in a given country. The OSCE documents provide no recommendations on which of the two most widespread varieties of election system – proportional representation and majoritarian – better ensures political pluralism. This is quite understandable. On the one hand, both contain built-in barriers to the representation of small parties. On the other, either can be arranged in a way that makes these barriers acceptable and prevents fragmentation or the intentional restriction of pluralism. In majoritarian systems, restrictions on pluralism can be imposed by unfair (unequal and/or politically biased) districting. In proportional representation systems, equal representation can be hampered by excessively high legal thresholds of representation. Contemporary democratic practice shows that thresholds exceeding five per cent can lead to considerable divergence between election results and the composition of parliaments. Resolution 1547 (2007) of the Parliamentary Assembly of the Council of Europe, on the state of human rights and democracy in Europe, reads: “In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections.”¹²

The Copenhagen and Moscow Documents have considerably influenced international law in the sphere of freedom of association. Norms enshrined in these documents have been incorporated in a number of documents passed by the Parliamentary Assembly of the Council Europe and its advisory body, the Venice Commission. The key documents are Resolution 1308 (2002) on restrictions on political parties and Resolution 1736 (2010) on the code of good practice in the field of political parties. The commitments found in the Copenhagen and Moscow Documents have significantly influenced decisions of the European Court of Human Rights (ECtHR), including such important

12 Parliamentary Assembly, Council of Europe, *Resolution 1547 (2007), State of human rights and democracy in Europe*, section 58.

cases as *United Communist Party of Turkey and Others v. Turkey* of 1998 (19392/92), *Socialist Party and Others v. Turkey* of 1998 (26482/95), and *Presidential Party of Mordovia v. Russia* of 2004 (65659/01).

The systematic vision of democracy presented in the Copenhagen and Moscow Documents includes political pluralism as a major practical benchmark. Institutional consolidation of political parties certainly fosters democratic development, but it is important that efforts aimed at consolidation should not lead to restriction of opportunities for expression of the will of the people in fair and free elections. Such restriction poses a risk for democracy, especially at the start of a democratic transition process, as it can lead to the authoritarian transformation of elections and political parties, forcing them to gradually adapt to the non-competitive political environment and lose their sensitivity towards people's needs, which would eventually result in institutional degradation.

Parliamentarianism and the Rule of Law

Sequentialism emerged as a reaction to the approach known as electoralism. The "electoralist fallacy" equates elections with democracy, but this is erroneous if elections are devoid of real competition, and if they do not function as mechanism for the alternation of power.¹³ Thus, not every electorally sanctioned political regime is democratic. While recognizing fair and free elections as a precondition for and a decisive characteristic of democracy, the OSCE documents provide a set of criteria that allow for making distinctions among different stages of democratic development. The Copenhagen Document observes that "vigorous democracy depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions".¹⁴ Thus democratic values and practices should be realized not only in elections, but should also inform and guide the work of a range of democratic institutions. What institutions are implied in the documents?

First of all, these are the representative bodies of government. The Copenhagen Document states that democracy is "a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate".¹⁵ Democracies can exist in two institutional forms: parliamentary (in which the executive is accountable to the elected legislature) and presidential (in which the executive is directly accountable to the electorate). But both forms attach special importance to parliaments because of their exceptional role in the legislative process, which is

13 Cf. Philippe Schmitter/Terry Lynn Karl, *What Democracy Is ... and Is Not*, in: *Journal of Democracy* 3/1991, pp. 75-88.

14 Copenhagen Document, cited above (Note 4), section 26.

15 *Ibid.*, section 5.2.

key to the functioning of a democratic state. The Moscow Document states that “legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.¹⁶ It is worth mentioning that this commitment to an open process has no equivalent in earlier or subsequent international documents, which makes it even more important to discuss its implications. An open legislative process involving the collective development of draft laws, their public discussion, and the voting process, should be achieved on the parliamentary floor.

However, the existence of a parliament, even if elected in fair and free elections, does not guarantee that the legislative process maintains the characteristics identified in the Moscow Document. First of all, the parliament, as an institution, should have sufficient autonomy from the executive. Parliamentary autonomy has two aspects, one of which is political. If an absolute majority of seats in parliament belongs to the party associated with the head of state, parliamentary autonomy declines. The other aspect of parliamentary autonomy relates to the parliament’s interior structure and its institutional role in relation to the executive. Even if a majority of seats belongs to one party, the parliamentary opposition should still be able to maintain its influence on the legislative process. This can be achieved through application of the following mechanisms: effective participation of the opposition in legislative agenda planning via representation on parliament’s collective governing bodies; creation of an effective system of special parliamentary committees and commissions to carry out preliminary work on draft laws; and creation of opportunities for the involvement of all members of parliament, regardless of their allegiance, in parliamentary oversight and control of the executive.

Transparency in debating and voting on draft laws acquires special importance in a developed democratic environment. Regardless of the party composition of parliament, each faction should have sufficient opportunities to express its positions in parliamentary sessions and to publish and distribute its views broadly. Moreover, parliamentary autonomy means that parliaments and individual parliamentarians should have considerable resources that are free from the control of the executive. These resources should include financial assets (adequate salaries for parliamentarians, the opportunity to hire personnel and issue invitations to experts) and privileges, including immunity, as long as limited to legitimate parliamentary work.

The nature of a mature democracy cannot be reduced to the institutional characteristics of government bodies. The Copenhagen and Moscow Documents attach special importance to creating a favourable social environment for the functioning and development of democracy. The rule of law is one of

16 Moscow Document, cited above (Note 5), section 18.1.

the elements of this democratic environment. The Moscow Document includes the following provision:

The participating States recall their commitment to the rule of law in the Document of the Copenhagen Meeting and affirm their dedication to supporting and advancing those principles of justice which form the basis of the rule of law. In particular, they again reaffirm that democracy is an inherent element in the rule of law and that pluralism is important in regard to political organizations.¹⁷

In fact, it was the Copenhagen Document that connected the concept of the rule of law to other major international commitments on democracy and human rights. Until then, the concept had been confined to legal and political theory and used exclusively by lawyers and political scientists. The Copenhagen and Moscow Documents crystallized an evolutionary transition in international law by highlighting the links between democracy and the rule of law. It is well known that recognition of the rule of law is not confined to democracies, but is also widespread in the rhetoric of authoritarian regimes; hence the erroneous argument that the rule of law is in itself conducive to democratic development. Indeed, democracy lacks meaning if laws that embody the will of the people as expressed in elections do not work because of the imperfections of the enforcement system. Yet in terms of the OSCE's fundamental commitments, it is also vital that the rule of law includes democracy as an inherent element, because mere formal state "legalism" cannot provide for the expression of the will of the people.

The recognition of fair and free elections is not the only aspect of democracy enshrined in the Copenhagen and Moscow Documents. The importance of this standard is compelling, yet sustainable democratic development requires much more. If democracy starts with elections, without further steps, such as the improvement of parliamentarianism and the consolidation of a constitutional state, it is doomed to stagnation. The Copenhagen and Moscow Documents provide for definite criteria that allow for assessment of the quality of democracy via a set of definitive and concrete criteria. These are not merely theoretical, but practical. Moreover, they are expressed in the form of commitments that have been willingly assumed by the participating States. Thus, the Copenhagen and Moscow Documents can be regarded as a comprehensive roadmap to democratic development.

17 Ibid., section 18.

Conclusion

The significance of the Copenhagen and Moscow Documents for contemporary democratic theory and practice consists in their formulation of a systematic vision of democracy as a developing political reality, and their establishment of clear criteria for mapping the political development of individual countries. Free and fair elections form the core of democracy as a system. No political development, even if it furthers the consolidation of political institutions and stability, can be regarded as a path to democracy without such elections.

The second key element is political pluralism. On the one hand, it is an aspect of free and fair elections; on the other hand, it has its own significance as a set of institutions and practices that shape fundamental aspects of democracy, including political responsibility and the accountability of the executive, free competition in the political marketplace, and alternation in power. Therefore, free and fair elections, if combined with political pluralism, serve as a key measure for distinguishing democratic and authoritarian regimes. Yet the core of a system is not equivalent to the system itself. A developed democracy includes many other elements, such as mature parliamentarianism and the rule of law.

Democracy is distinguished by the dynamism of its various elements and the need for efforts to adapt and reproduce them under changing social conditions. Efforts to promote democracy must include practical benchmarks, and the Copenhagen and Moscow Documents serve as such. Their legacy is dynamic and valuable not only as a tool for the assessment of political processes, but also as a set of guidelines for lasting democratic practices.