

## EASTERN EUROPEAN CONSTITUTIONALISM, THEORY AND PRACTICE

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The student of Eastern European constitutionalism will find a great many similarities among these Constitutions and also between them and the Constitution of the Soviet Union.

Basically one can distinguish two groups: Constitutions established before 1953 and those established later.<sup>1</sup> The difference lies mostly in the preambles; the latter group eulogizes the victory of Socialism and envisions progress towards Communism, whereas the earlier constitutions start from the principle of the liquidation of the exploiting classes. In the substantive parts, however, there is, practically speaking no difference between the two groups.<sup>2</sup>

I. The theorists of the Constitutions are in agreement as to the nature of the basic principles present in all Eastern European Constitutions (which facilitates our task, in enabling us to treat them as a homogeneous group); the most commonly enumerated are:

- a) The collective and Socialist ownership of the basic means of production;
- b) The concentration of political power in the hands of the working people of the towns and villages;
- c) The establishment of a social order in accordance with the interests of the proletariat;
- d) The political leadership of the avant-garde among the proletariat;
- e) Programmes for the establishment of Socialism and Communism;
- f) The peaceful and international character of the country's philosophy;
- g) The complete harmony between the Constitution and social reality.<sup>3</sup>

One should note that the basic similarities which these authors find among the Eastern European Constitutions result from their analyses of the preambles to the Constitutions. The discussion of Socialist theory will show (in the second part of this paper) that the legal character of the preambles is very controversial and the majority of the authors deny them the character of legal norms.<sup>4</sup>

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1. Albania 14.03 1946, Bulgaria 5.10 1947, Hungary 18.08 1949, D.D.R. 7.10 1949, Poland 22.07 1952, Rumania 21.18 1965, Czechoslovakia 11.07 1960, Yugoslavia 7.04 1963.

2. With the exception of the Constitution of Yugoslavia. It should be noted that Yugoslavian constitutionalism is very different both in law and theory from that of the other Eastern European countries.

3. See: A. Machnienko, "Osnovnye instituty gosudarstvennogo prava yevropejskich stran narodnoj demokracji", (Moskva 1967) p. 17. S. Rozmaryn, "Konstytucja jako ustawa zasadnicza", (Warszawa 1967) p. 74-80. Z. Yicinsky & P. Levit, "Socialisticka Ustava CSSR Ucelny vyklad ustavy", (Praha 1965) p. 25. I. Kovacs, "A Szocialisto alkotmany-lejlodes ujelemei", (Budapest 1966) p. 359-365.

4. See A. Machnienko, op. cit. p. 122. Z. Yicinsky & P. Levit, op. cit. p. 122.

## II. The substantive parts of Eastern European Constitutions.

### 1. *The Rights and Obligations of Citizens*

There is a great similarity in the way in which all the above Constitutions deal with this subject.

The principle of equality of all citizens regardless of race, colour, sex, nationality and religion is the fundamental principle in this part of any Eastern European Constitution.<sup>5</sup>

This group of rights is always treated as an 'umbrella' over the other rights and is understood as applicable to all the other rights of citizens.<sup>6</sup>

The other rights of citizens can be grouped into six categories:

- a) Economic, e.g., the right to work and to vacations;<sup>7</sup>
- b) Social, e.g., to medical help, preservation of health;
- c) Cultural, e.g., the right to participate in the cultural life of the country;<sup>8</sup>
- d) Educational;
- e) Political,<sup>9</sup> e.g., freedom of association, demonstration, to hold meetings;
- f) Personal,<sup>10</sup> e.g., freedom of thought and expression, secrecy of correspondence, protection against illegal arrest.

One should note that the degree of abstraction in these norms is much less than in the preambles; the terminology used very often has a well established legal meaning and from the editorial point of view there is no distinction between these sentences and any legally binding norms.<sup>11</sup>

In all of the Eastern European Constitutions the rights of citizens are connection with their obligations, which can be grouped into four categories:<sup>12</sup>

- a) Legal, i.e., obedience to all legal rules and actions of government agencies;<sup>13</sup>

5. See: e.g., Bulgarian Constitution Art. 71-72, Hungarian Constitution Art. 49-50, etc.

6. The terminology used leaves no doubt as to the legal character of these norms.

7. e.g., Rumanian Constitution Art. 21.

8. e.g., Rumanian Constitution Art. 19, Polish Constitution Art. 59.

9. e.g., Bulgarian Constitution Art. 87, Polish Constitution Art. 72-73.

10. See: Rumanian Constitution Art. 34, Constitution of Czechoslovakia Art. 89, etc.

11. Our purpose in this paper is not to examine constitutional rights or analyze the substantive parts of the Constitution, but only to describe the character of the constitutional norms and we are for this limited purpose only analyzing the contents of the Constitutions.

12. See: Polish Constitution Chapter VII, Rumanian Constitution Chapter II, etc. Technically speaking, most of the rights and obligations of citizens are usually grouped in one chapter under the corresponding heading; however, some of these provisions can be found in other parts of the Constitutions.

13. Czechoslovakian Constitution Art. 38, Hungarian Constitution para. 58, point 2.

- b) Moral, e.g., respect for the principles of Socialist life, obedience to and practice of Socialist morality;<sup>14</sup>
- c) Economic, e.g., the obligation to work, respect for Socialist labour discipline and Socialist property, fulfillment of the National Economic Plan;<sup>15</sup>
- d) Patriotic, i.e., defence of the country, its protection against spies, development of morale in the army, etc.<sup>16, 17</sup>

## 2. *The Rights and Organizational Forms of the Minorities.*

With the exception of Yugoslavia and very recently Czechoslovakia, all the Eastern European countries are of a unitary character, but at the same time all of them (following the principles of the Soviet Constitution which in turn are based on Lenin's analysis of federal and unitary states<sup>18</sup>) have several provisions, or even chapters, dealing with the problem of the autonomy of minority groups.

One may distinguish several groups of constitutional provisions dealing with this subject.

- a) The autonomy of a particular minority in an administrative sense;
- b) The usage of local language in official matters;
- c) The representation of minorities in different branches of government;
- d) Reassurance of the assistance of the supreme organs of the State in the economic, political and cultural development of minorities.

Within this group of constitutional norms one observes a relatively greater variety of solutions and arrangements in respect to the administrative organization of minorities and, in particular, in respect to institutions reflecting the participation of minorities in the governmental process.<sup>19</sup> In the final evaluation of these, one may conclude that in every case we see the acceptance in theory of many of the norms of the Soviet Constitution concerning parallel problems.

## 3. *Constitutional Principles Applicable to all the Organs of Government*

An analysis of the Constitutions of Eastern European countries leads us to the conclusion that there are four principles governing the organization and operation of all the organs (or branches) of the government;

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14. Rumanian Constitution Art. 90, Polish Constitution Art. 76. etc.

15. Czechoslovakian Constitution Art. 13, para. 1 and Art. 35, Hungarian Constitution para. 59.

16. Polish Constitution Art. 79, Hungarian Constitution paras. 60-61, Czechoslovakian Constitution Art. 34.

17. The terminology used as well as the classification, in the absence of methodological studies of the subject, is introduced by the author.

18. See: Lenin, "Collected Works", V. 20, p. 33-37.

19. See: e.g., Constitution of Czechoslovakia Art. 74 point g, and other norms dealing with the Slovak National Council.

- a) The decisive participation of the working people in the organization and activities of the organs of the State;
- b) Democratic centralism;
- c) International socialism;
- d) Socialist legality.<sup>20</sup>

Ad a) Within this group of constitutional norms are general norms dealing with social organization, the process of choosing candidates for any type of elective office, the obligations of people elected to office to remain in contact with the electorate, etc.<sup>21</sup>

Ad b) This principle is based on Lenin's theory of democratic centralism<sup>22</sup> and can be well illustrated by Art. 18 point 1 of the Czechoslovakian Constitution: "Central leadership of the society and state according to the principle of democratic centralism is combined with a broad competence and responsibility in the lower organs, with the active participation of the working people and the utilization of their creative initiative." This principle thus conjoins two elements, democracy and centralism, in the building of Socialist society, and is present in all of the Eastern European Constitutions (and, of course, in the Constitution of the USSR). In the 1960's we may observe a change in the doctrinal approach to the principle of democratic centralism. The First Secretary of the Bulgarian Communist Party put it in this way: "Overcentralization and over-decentralization are in political, cultural and economic life all equally foreign to Lenin's principle of democratic centralism." One should note a number of theoretical works dealing with problems of decentralization.<sup>23</sup>

This principle of democratic centralism is strictly applied in the structure of the legislative and executive organs, as well as in the establishment of relationships between the different levels of the executive organs. In Table 1 such a model (Applicable to all of the Eastern European countries) is presented.

#### Ad c) *International Socialism:*

This principle is realized in two ways: a) internally, and b) externally. Externally, it is apparent in all the norms dealing with similar matter in

20. The leading role of the Communist Parties is, in most cases, not stated expressly in the Constitutions, and even if stated, it is treated as being above the State political system. See: S. Krawczuk, "Sovetskoe Gosudarstvennoe pravo", (Moskwa 1965) p. 139-143; Y. Bartuska, "Czechoslovakian State Law", (Praha 1964) p. 201; L. Wojewodin, D. Zlatopolskij & N. Kurpie, "Gosudarstvennoe pravo stran narodnoj diemokratii", p. 112-114.

21. See: e.g., Magyar Kozlony 1956 vs. 95 and 1957 121.

22. See: Lenin, "Collected Works", V. 26 p. 417, vol. 27 pp. 210, 276, 398, vol. 28 pp. 21, 358, 419, etc. vol. 30 pp. 245, 438.

23. See: B. Spasow, "Rozwitię i uszraszemje na predstavitelnie organy w N. R. Błgarije", (Sofia 1962); Y. Starosciak, "Decentralizacja administracji", (Warszawa 1st ed. 1965); Y. Beer, "A helyi tanacsok kłiankulase az lejłodese Magyarorsztajou", (Budapest 1963); A. Totu & V. Avran, "Centralismul democratic principul fundamental de organizire a statului nostru democrat populev", (Bucharest 1967).

all of the Eastern European Constitutions. Thus, the organizational models of the executive branch of government are similar or identical, and there are common methods of adoption and execution of the National Economic Plans.<sup>24</sup> There are also always norms stating the general principle of the brotherhood of Socialist countries.<sup>25</sup> All these norms lay down the principle of the unity, support and common development of all Socialist countries.

Solidarity with the international proletariat is evident in the constitutional norms granting political asylum to, "Citizens of Capitalist nations, persecuted because of their democratic activity and national liberation wars."<sup>26</sup>

Norms dealing with the rights of minorities are usually considered as a realization of international socialism.

#### Ad d) *Socialist Legality:*

This principle establishes a concept of legality of a very special kind. Legality means the practice of the principles of socialist coexistence,<sup>27</sup> which in turn is defined as the manifestation of the will of the people (or masses). The socialist character of the legal order and the socialist character of any legal norm is considered as being of an objective nature.<sup>28</sup> It is as regards its constitutional manifestation exemplified in the basic principles of the Constitutions.<sup>29</sup>

Socialist legality in this sense is very definitely distinguished from, "Liberalism which creates an atmosphere of anarchy, undermines the socialist legal order and has nothing to do with true humanist socialist legality".<sup>30</sup>

#### 4. *The Legislative Organs.*

In Eastern European Constitutions the stress is on the fact that there are several legislative organs.<sup>31</sup> It is also always pointed out that these organs are the means by which the working people of the towns and villages exercise supreme authority under the leadership of the proletariat.<sup>32</sup>

These organs always create an *a priori*-determined hierarchical system in which the higher organs have control and supervisory functions over the lower.<sup>33</sup> All of these are elected and the system of elections (as we will see

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24. National Plans are constitutional institutions.

25. See: Czechoslovakian Constitution Art. 1 point 3, Rumanian Constitution Art. 14, etc.

26. See: A. Machnienko, op. cit.

27. See: Czechoslovakian Constitution Art. 17 points 1-2, Polish Constitution Art. 4.

28. See: A. Machnienko, op. cit., p. 137; also, A. Burda, "Demokracja i przerwzadnesco", 1965.

29. See: A. Machnienko, op. cit., p. 137.

30. See: A. Machnienko, op. cit., p. 138.

31. See: Czechoslovakian Constitution Art. 2, Rumanian Constitution Art. 4, Polish Constitution Art. 2, and others.

32. Polish Constitution Art. 2.

later) is identical on all levels. All of them perform primarily legislative functions and also appoint or confirm the appointment of the executive.<sup>34</sup> All of these together implement Lenin's notion of the soviets, "all authority in the state from the top to the bottom, from the village to every district in Petersburg, should belong to the soviets".<sup>35</sup>

It is very characteristic that there is no distinction between Parliament and other legislative bodies. Parliaments are part of the system of the State Councils.<sup>36, 37</sup> This system of State Councils, with the Parliament on the top of the ladder, "is the institutional guarantee of the creation of a new, just society".<sup>38, 39</sup>

It is always stressed in Socialist theory that these organs are distinct from the Russian ones — "It is incorrect to present these (State Councils, M.D.) as mere copies of the councils in the U.S.S.R."<sup>40</sup> However, evidence supporting this thesis is rather weak and unacceptable, on the basis of an analysis and comparison of the councils in the U.S.S.R. and in Eastern Europe. The historical evidence gathered from a study of Eastern Europe leads to the same conclusion.

On the top of the pyramid of legislative organs are National State Councils.<sup>41</sup> All other legislative organs are subordinated to N.S.C.

These organs perform several functions, the main being:

- a) Legislative (passing normal acts of parliament, adopting as law budgets, National Plans, etc.);
- b) Amendment of the Constitution. It is commonly agreed in the theory of constitutionalism in these countries that powers given to the National State Councils by the Constitutions are not meant to be either complete or limited to the functions described in the Constitution. If we look at the internal structure of these organs, the similarities are even more obvious. All of these parliaments are

33. In the name of the principle of democratic socialism.

34. The development of this system was finished in the late 40's, prior to that there was a mixture of pre-World War II administrative organization combined with the new socialistic institutions (e.g., in Bulgaria 1948 development of National Councils, in Rumania 1949, Poland 1947).

35. See: Lenin, "Collected Works", v. 24, p. 92.

36. The term State Councils is equivalent to the term Soviet used by several Western writers; e.g., L. Schapiro, "The Government and Politics of the Soviet Union", (London 1967) p. 107; also, H. J. Berman, "Justice in the U.S.S.R.", (New York 1963). The Russian word Soviet means council; and in all of the Eastern European Constitutions different words are used in title of this institution.

37. In some of the Eastern European countries the highest legislative organ retains a traditional name: The Parliament (e.g. Poland), in others it is replaced by the word Council with adjectives (e.g. Rumania, the Great State Council, etc.).

38. See: A. Machnienko op. cit., p. 146.

39. See also Programm der Sozialistischen Einheitspartei Deutschland, N.D. 25 1, 1963. Materials of the XII Meeting of the Communist Party of Czechoslovakia, Resolutions of the VII Congress of the Bulgarian Communist Party and others.

40. See: A. Machnienko op. cit., p. 147.

41. See: Polish Constitution Art. 15 point 2, Hungarian Constitution para. 10, point 2.

one chamber bodies.<sup>42</sup> The majority of them are elected for four-year terms; numbers of representatives are permanently fixed. Standing orders are very similar in character.

- c) Ratification of international agreements.<sup>43</sup>
- d) Have unlimited rights to control all other legislative organs, as well as all of the executive organs,<sup>44</sup> and to some extent even the judiciary organs.
- e) Appointment or approval of the Cabinet.<sup>45</sup>
- f) Appointment or approval of the justices of the Supreme Court and the General Prosecutors.<sup>46</sup>
- g) Declaration of war.

### *Territorial State Councils.*

The system of Territorial State Councils is built according to the administrative division of a country.<sup>47</sup> Most of the Eastern European countries have three levels of Territorial State Councils.<sup>48</sup> These councils, as well as the National Councils, are elected for a four-year term. All of these Councils have one chamber. The number of representatives is fixed<sup>49</sup> and, generally speaking, they have the same characteristics as the National State Councils. Their functions are also similar to the functions of the national parliaments, the main being:

- a) Local legislation,<sup>50</sup>
- b) Have a right to control lower legislative organs,
- c) Appointment and control of the executive organs (on the corresponding level),
- d) Appointment of the local courts.

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42. In most of these countries there was a tradition of a two-chamber parliament (in D.D.R. the second chamber was present, at least as of 1958).

43. Constitution of the D.D.R. Art. 35 points 9 and 63, Hungarian Constitution para. 20, point 1, Rumanian Constitution Art. 43 point 9, Czechoslovakian Constitution Art. 42.

44. In Poland, Rumania and Hungary. In Czechoslovakia the Cabinet is appointed by the President but approved by the National State Council.

45. e.g., Czechoslovakian Constitution, Art. 46 point 2.

46. See: A. Burda, "Prawo państwowe", (Warszawa 1965), p. 360; Y. Beer, "Na obrabotke gosudarstwiennogo Sobrenija Wiengierskoj Narodnoj Riespubliki", *Obzor Wiengierskogo Praya* 1959 no. 1, p. 6.

47. See: Table 2.

48. As an illustration of the size of these bodies, figures of elected representatives in several Eastern European countries can be used. In 1965, in Rumania 141,884 were elected members of different Councils, in D.D.R. 200,000, in Poland 171,726.

49. There is, however, a difference between National State Councils and Territorial State Councils in determining numbers of representatives. In the latter case, a maximum is given.

50. e.g. The Territorial State Councils pass budgets and territorial parts of the National Plans. This is perhaps a very interesting question to study. There are two ways in which budgets and National Plans become law in all of the legislative bodies of any Eastern European country. Either the National Plan is passed as a law in the National State Council and after that all of the lower bodies enact their parts of the National Plan, or the National State Council delivers very rigid directions to the Territorial State Councils and the legislative process of passing the National Plan as a statutory measure starts on the first west step of the pyramid of the executive organs.

### 5. *The National Organs of State Power.*

This category of organs is of a mixed character; basically it performs functions traditionally reserved to the state, however, as we will see from discussion of their functions, their competence is much broader. These organs are appointed by the National State Councils.<sup>51</sup>

Their competence includes:

- a) The calling of elections to the National and Territorial State Councils and the administration of elections (including the creation of ridings).
- b) The calling of sessions of the National State Councils.<sup>52</sup>
- c) The possession of legislative initiative.
- d) In the interim period between sessions of the National State Councils, the performance of functions reserved to the National State Councils,<sup>53</sup> i.e., the appointment of ministers, justices of the Supreme Court and the Attorney-General,<sup>54</sup> and, more important, the performance of legislative functions.<sup>55, 56</sup>
- e) The nomination of ambassadors, civil servants, military personnel.
- f) The prerogative of mercy and the granting of honours.

### 6. *The Executive.*

The executive power in Eastern European countries is vested in the Cabinets which are appointed by the National State Councils (or by the National Organs of State Power).<sup>57</sup>

The Councils of Ministers (Cabinets) are:

- a) The supreme executive organs of the State;
- b) The makers of decisions and orders binding other executive organs;
- c) The supervisors of all executive organs, with the right to suspend their decisions;

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51. There is a discussion between East European constitutionalists re the character of these organs. One group of writers is of the opinion that these organs are part of the elected National State Councils and are therefore legislative organs. See: e.g., A. Lepieszkin, A. Kim, N. Miziu, P. Romanow, "Kurs Sovietakogo gosudarstwiennego prava", (Moskwa 1962) VII p. 451; also, B. Spasow, A. Angelow, "Drzawno pravo na Narodna Republica Bulgarija", (Sofia 1962) p. 250. The other group considers the fact of appointment as irrelevant and it is pointed out that the Cabinet and Supreme Court are also appointed by National State Councils and are obviously not part of the highest legislative body. See: A. Burda, "Polskie pravo panstwowe", (Warszawa 1965) p. 189-196; also, K. Polak, "Der Staatsrat der Deutschen Demokratischen Republik, Einheit", 1960 no. 10, and others.

52. With the exception of D.D.R.

53. Rumanian Constitution, Art. 64 point 3.

54. With the exception of Poland where the National State Council has the exclusive right to appoint justices of the Supreme Court and the Attorney-General.

55. They are vested with the power to pass decrees with the binding force of Parliamentary Acts which have to be ratified by the National State Council at its next session. There are in every one of these countries well-known frequent cases when this requirement is never fulfilled (for a discussion of such cases, see any textbook of Eastern European State of Constitutional Law, e.g., A. Burda op. cit. Chapter VI).

56. See: Hungarian Constitution para. 20 point 4, Czechoslovakian Constitution Art. 60 points 1 and 2 (with division of authority between the President and collective organs.)

57. See powers of the National State Councils and National Organs of State Power.



- d) Responsible for the preparation of materials re the adoption of budgets and National Plans;
- e) A legislative body.<sup>58</sup>

Generally speaking, Socialist theory of the Constitution pays less attention to the Executive than to elective organs.

### 7. *The Judiciary.*

The three stage administrative division is carried through into the court system.<sup>59</sup> There are in Eastern European countries three levels of courts. Courts of first instance appointed (or elected)<sup>60</sup> by the middle Territorial State Councils, courts of appeal appointed (or elected) by the highest Territorial Councils and Supreme Courts appointed (or elected) by the National State Council or National Organs of State Power. The organs appointing the courts have the right to cancel appointments. The courts are responsible to those appointing them and have an obligation to submit reports on their activity. All of the Constitutions include norms laying down the independence of the judiciary and the principle of public trials (if not otherwise provided for by statutory law) and vest the Supreme Courts with the power to supervise all the courts of the country.

#### *The organs of prosecution.*

There is a common institution of the Prosecutor General, appointed either by the National State Councils or by the National Organs of State Power. The Prosecutor General appoints all other prosecutors<sup>61</sup> (the hierarchical organization of prosecutors is parallel to that of the Courts).

The functions of a prosecutor are not only of the traditional kind, but in the Eastern European Constitutions this officer is given the power to control and supervise every sub-system in the society (of course, on a corresponding level).

### 8. *Constitutional Norms Relating to the Electoral Process.*

Socialist literature distinguishes six principles of the electoral system.<sup>62</sup>

- a) Universal suffrage,

58. See Polish Constitution Chapter IV, Hungarian Constitution paras. 50-51.

59. There are no courts on the lowest level of the administrative division.

60. Theoretically courts have to be elected in all Eastern European countries, but in practice they are appointed.

61. It is stressed in Socialist theory that the principle of democratic centralism must be modified in respect to this institution due to its importance in leading the society towards Communism. B. Spasow, op. cit. p. 173.

62. The first four principles are commonly accepted as basic; it is questionable whether the latter two are of a basic nature. For a discussion of different positions on this subject see: Y. Umanski, "Sovietskoje gosudarstviennoe pravo", (Moskwa 1965) p. 409-415; also, A. Lepieszkin, A. Kim, N. Miszin, P. Romanov, "Kurs sovietskogo gosudarstviennogo prava", (Moskwa 1962) VII p. 306-344.

- b) Equality under the electoral law,
- c) Direct elections,
- d) Secret ballots,
- e) Nomination of candidates by social organizations and collectives of the working people,
- f) The maintenance of close ties between the representatives and the electorate and the right of the electorate to cancel the delegation.

Ad a) The right to vote is guaranteed to all citizens regardless of sex, race, religion, class, profession or property census. As a realization of this principle, the coming of age to vote and to hold an elective office was lowered.<sup>63</sup> This general constitutional principle is sometimes undermined by statutes depriving certain groups<sup>64</sup> of the right to vote.

Ad b) This principle is implemented by a system of one man one vote and is discussed at great length in connection with the system of establishing electoral ridings so as to give equal weight to each vote.

Ad c) All elections are direct and the only theoretical problem discussed here is Lenin's theory<sup>65</sup> of the two types of elections desirable in a Socialist state. There is common agreement that Lenin's opinion on this subject was formed by specific historical circumstances and in principle Lenin was of the opinion that direct elections should be held as the best form in a Socialist state.

Ad d) The principle of secret voting is always stated in the Constitutions of the Eastern European countries and is considered as "excluding the possibilities of exercising pressure on the electorate".<sup>66</sup> However, in practice voters are always encouraged to vote openly, open voting being considered as a *sui generis* vote of confidence in the Communist Party.

Ad e) This principle is a precaution against "infiltration of the elective organs by the exploiting elements and its advocates".<sup>67</sup> After these undesirable elements disappear from the society, this device is considered a method of reassuring the highest quality of the candidates.

Ad f) The cancellation of the mandate may be done in two ways: either by the electorate in the same manner in which a person is voted into the particular organ, or (more frequently) on the petition of the electorate by

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63. See Table 3.

64. e.g. In Bulgaria according to Art. 98 of the Bill on elections to National State Councils and Art. 45 of the Bill on elections to the Territorial State Councils, persons who have manifested their fascist or anti-democratic principles are denied the right to vote. (This type of norms is of rather exceptional character.)

65. See: Lenin, "Collected Works", v. 28 p. 249.

66. See: A. Machnienko, *op. cit.*, p. 178.

67. See: A. Machnienko, *op. cit.*, p. 179.

the organ of which he is a member. In theory there is a controversy as to which method is more Socialistic. E. Poppe is of the opinion that the second method is more practical (long time to arrange voting, etc.) and builds a collective mode in the said body, and is a lesson for every member to act properly.<sup>68</sup> M. Jaroszynski takes a different stand and considers this method as contrary to the elective character of an institution and therefore only the electorate has a right to revoke the mandate.<sup>69</sup>

### 9. *Political Parties in the Constitution of Eastern European Countries*

There are two ways in which the leadership of the Communist Parties is introduced to these Constitutions. Some of the Constitutions expressly state that "The Communist Party is the leading political force in the whole society".<sup>70</sup> In these norms the Communist Party is usually defined as voluntary association of the most active and conscientious citizens from the workers, peasants and intelligentsia. In other Constitutions (and this is more usual) there are no norms referring to the Communist Party, however, there is always the principle of the leadership of the working class.<sup>71</sup> Constitutional theorists are in absolute agreement that these norms have to be read as expressing the principle of the "leadership of the Communist Parties in the state and society".<sup>72</sup> One has to notice that in most of these European countries there are other parties operating. Constitutions, however, include norms dealing with these parties.

Their activity is based on Lenin's concept of participation of the non-Communist<sup>73</sup> parties in the process of creation and development of the Socialist society. These parties must:

- a) Accept the leadership of the Communist Parties,
- b) Contribute to the building of Communist society,
- c) Represent interests of the classes united with the proletariat in the fight for a Communist society.<sup>74</sup>

The Constitutions also define and establish social organizations as constitutional institutions based on principles of:

- a) Voluntary membership,

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68. See: E. Poppe, "Der sozialistische Abgeordnete und sein Arbeitsstil", (Berlin 1959).

69. See: M. Jaroszynski, "Zagadnienia rad narodowych", (Warszawa 1961).

70. See: Rumanian Constitution Art. 3, also, Czechoslovakian Constitution Art. 4.

71. See: Hungarian Constitution preamble and para. 56 point 2. Also, preamble to the Polish Constitution.

72. See: A. Machnienko, op. cit. p. 27. Also, J. Umanski, "Sovietskoje gosudarstviennoje pravo", (Moskwa 1965) Chapter II, and others.

73. See: Lenin, "Collected Works" vol. 26. p. 304-333.

74. In Poland Peasant Party and Democratic Party. In Czechoslovakia Socialist Party, Slovak Party of Liberation and Slovak Party of Restoration; in D.D.R. Democratic Peasant Party, National Democratic Party and Christian Democratic Union; in Bulgaria Peasant Union, and others.

- b) Activation of the society building Socialism,
- c) Organizing only the working people.

Most of the norms dealing with the political parties and social organization<sup>75, 76</sup> can be found in the Cabinet and Ministerial Decrees and cannot be discussed at this point (some of them are of great constitutional importance, e.g., Decrees and Acts of Parliament dealing with Fronts of National Unity as organizations providing candidates for the National State Councils and Territorial State Councils.)

### III. *Theory of the Eastern European Constitutions.*

Probably the best developed theory of the Constitution of Eastern Europe is that presented by S. Rozmaryn.<sup>77</sup> I shall attempt to present Socialist theoretical concepts of the Constitutions using his work as a guideline.

The primary question is in what respect does the Constitution differ from other acts, and what are the essentials of the Constitution. After analyzing the Eastern European Constitutions, S. Rozmaryn concludes that there are unique characteristics of each Constitution; in the first place there is the special title "The Constitution of . . ." which is the initial difference between the Constitution and any other act of parliament; there is also always a special procedure for the amendment of the Constitution;<sup>78</sup> and finally, the Constitution is granted the position of the supreme law. The supremacy of the Constitution is manifested by the special procedure for amendment, the power of delegation to ordinary legislation because the Constitution can and often does delegate matters to ordinary legislation but the reverse does not occur. The Constitution is binding on all organs of the state, and exception to the general principles laid down in the Constitution may be made only by the Constitution itself. In other words, the Constitution has a:

- a) specific substance,
- b) specific name,
- c) specific procedure for amendment,
- d) specific legal nature.

75. The Constitution of Czechoslovakia states in Art. 16 point 2 that the state is supporting social organization in artistic and scientific creativity for the benefit of the whole society and in Art. 16 para. 3 that "social organizations are working systematically to liquidate the relics of the exploiting society in people's minds".

76. See: Czechoslovakian Constitution Art. 5, Hungarian Constitution para. 56 points 1 and 2, Polish Constitution Art. 72. The term 'working people' is meant as excluding the possibility of organizations of people opposed to the interest of the working class.

77. See: S. Rozmaryn, "Konstytucja jako ustawa zasadnicza PRL", (Warszawa 1st edition 1967).

78. e.g. The requirements for the amendment of any other act are usually established by the S.O. Rozmaryn is of the opinion that a S.O. establishing the requirements equal to those for the amendment of the Constitution would be unconstitutional. See: S. Rozmaryn op. cit. p. 37.

The interrelation between these four characteristics is of a dual nature: *de lege lata* all of these principles are of equal weight, but *de lege ferenda* "specific substance" is of fundamental importance, the other three being merely supplementary. These latter three characteristics are of a formal nature, and substance should always (in the Constitution) have priority over form. The presence of these four elements in an Act is a ground for considering such an Act a Constitution. Another consequence of this analysis is that "The fact that a particular problem is dealt within the Constitution shows with absolute certainty that the legislature considered this matter as exceptionally important from the sociopolitical point of view".<sup>79</sup> Therefore, by definition, every matter included in the Constitution is of extreme importance. This view of the essence is the most popular, but there are some authors who point out other sources of the Constitution. The most representative of this group is D. Kierimowa,<sup>80</sup> who includes in the substance of the Constitution, acts dealing with the structure of the courts, citizenship, and even some international agreements. This group of writers argue that the very fact that an act fulfills the requirement of "specific substance" makes it a part of the Constitution. Rozmaryn, however, rejects the distinction between the Constitution in a substantive and in a formal sense. The acceptance of this distinction leads, in his view, to a situation in which none of the Constitutions could fulfill all of the requirements.<sup>81</sup>

There is, however, a characteristic distinguishing Socialist Constitutions as a group.<sup>82</sup> The Socialist Constitution is a result of the revolution of the proletariat, and this is a new dynamic principle of Socialist and Communist society.<sup>83</sup>

The next question posed to the Socialist theorist is the character of the constitutional norm.

As we have already seen, the Constitution is a special kind of law distinct from any other. This is also the case as regards a constitutional norm. The same four characteristics which were present in the analysis of the Constitution are also a starting-point for the analysis of the constitutional norm. This, by virtue of being part of an act having a special name, each constitutional norm is a special norm; it can be amended only in a special way, has a specific substance of a particular "sociopolitical significance and specific legal power".<sup>84</sup>

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79. See: S. Rozmaryn op. cit. p. 36.

80. See: D. Kierimowa, "Zakonodatielnaja diejatelnost sovetskogo gosudarstva", (Moskwa 1965) p. 68-73.

81. See: Cp. S. Ravin, "Sorok let sovetskogo prava", (Moskwa 1962) vo. 1 p. 83.

82. See: P. Levit, "Pravnik", 1960 no. 6, p. 493-494.

83. Ibid.

84. e.g. Rozmaryn says that as regards the rights of citizens, only those expressed in the Constitution are basic; others, regardless of their substance, are of a secondary nature. See: S. Rozmaryn op. cit. p. 49-56.

The whole Constitution is constructed of legal norms regardless of the formal construction: "It is self-evident that the denial of the character of a legal norm to a part of the Constitution will lead to a significant limitation of these acts, and will support the argument of those who consider wrongly many parts of the Constitution as mere phraseology."<sup>85</sup> Other authors who agree in principle with Rozmaryn blame bad legislative drafting for the difficulty in finding legal norms in some parts of the Constitution.<sup>86</sup>

Thus, the whole of the Constitution consists of legal norms, because there is no evidence of the will of the legislator to the contrary.

In cases where it is not self-evident that a particular sentence creates a legal norm, the norm must be constructed by combining different parts of the Constitution, the most obvious example being the combination of the preamble with any of the operative parts of the Constitution. In most cases, however, proper interpretation is sufficient to disclose the legal force of constitutional norms.<sup>87</sup>

Another group of writers is of the opinion that not every part of the Constitution can be described as a legal norm, even that the Constitution does not include legal norms at all. Some Russian authors distinguish two parts in any Constitution: the normative part, and the statement of the political program. These authors consider that it was the intention of the legislator to state political programs in the Constitution, which sometimes include the goals of the future Communist society, which cannot be considered as presently binding legal norms.<sup>88</sup> They also point out the fact that Constitutions very often delegate matters to ordinary legislation and in such cases acts of the ordinary legislator create the legal norms, not the Constitution.

The classic Socialist doctrine that the Constitution merely lays down the principles of the Socialist way of life is considered today as outdated. Some remnants of it can, however, be seen in the theories of a constitutional norm as an ethical norm. Authors such as I. Nowickij, P. Nedbajlo<sup>89</sup> argue that, in a Socialist society, to bring constitutional norms 'down' to the level of an ordinary legal norm is in contradiction to the spirit of this society, which is ruled by the system of Socialist values and not by the mere power of legal enforceability.<sup>90</sup>

Rozmaryn, in arguing against these concepts, answers that the dynamic

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85. See: S. Rozmaryn op. cit. p. 60.

86. See: I. Wroblewski, "Zagadnienia teorii wykladni prawa ludowego", (Warszawa 1965).

87. An example of such an interpretation is Rozmaryn's analysis of the sentence, "Poland is a republic of working people". Rozmaryn sees here two norms: a) Poland is a republic, b) the class character of this republic.

88. E. Iserzon defines (which is unusual) legal norms as those applicable in a court of law.

89. See: I. Nowickij, "Socialiatistickazkaja Konstitucija", (Moskwa 1963); P. Nedbajlo, "Woprosy Konstituciji", (Moskwa 1962).

90. These authors never consider the fact that Marxism (as a philosophy) never created a system of ethics.

character of the constitutional norms seen in the statement of future goals does not deprive them of a normative character. On the contrary, patterns of behaviour conducive to the achievement of these goals are established by the norms.<sup>91</sup> The argument that ordinary legislation may sometimes create constitutional norms is unacceptable to this group of writers because it would create a situation in which the Constitution is dependent on the actions of the ordinary legislator and this is against the general principles establishing the special position of the Constitution.<sup>92</sup> From what has already been said it is obvious that the sanctions for the breach of the Constitution cannot be contained in ordinary legislation. Lack of guarantees through judicial review does not, in the opinion of these writers, affect the normative character of the Constitution,<sup>93</sup> "which must be remembered by the outdated followers of the anachronistic theory of Dicey".<sup>94</sup>

English theorists are often used as supporting evidence for this position (G. Marshall, G. Moodie, E. C. S. Wade and I. Jennings are among the most frequently quoted) and in particular their discussion of conventions. This is supposed to prove that norms without sanctions are still legal norms. They fail, however, to notice that English theory does not consider constitutional conventions as a part of law or as legally binding norms,<sup>95</sup> and secondly they apply the argument to an institution which is totally different from conventions.

They distinguish between sanctions for breach of the Constitution in the narrow legal sense and sanctions of a supreme character. These supreme sanctions are defined as material guarantees as opposed to the first category which is merely procedural. These material guarantees are present in the very institutions created by the Constitution. All of these institutions are bound to operate within the framework of the principles stated in the Constitution.

This must be so as they themselves contain an element of the *supra* character of the Constitution. In other words, the principle of the supremacy of the Constitution is built into every Constitution, and this fact creates a guarantee of obedience to the supreme act. Thus, in order to discover the means by which observance of the Constitution is guaranteed, we must look into the actual application of constitutional norms. The primary principle which operates in the application of constitutional norms

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91. See: P. S. Romaszkin, S. G.iP. 1960 no. 10; A. Paszerstnik, and others.

92. See: e.g. For Rozmaryn the fact that in Poland the constitutional principles of election of judges or of the cancellation of a mandate to the Sejm, or Territorial State Councils, were never introduced because the lack of ordinary legislation is irrelevant to the legal character of these constitutional norms.

93. See: S. Rozmaryn op. cit. p. 107-140; P. Nedballo, "Sovietskije sochahisticzeskije prawowyje normy", (Moskwa 1959) p. 59; B. Szczejudkin, "Suszczestnost sovetskogo prava", (Leningrad 1960) p. 85-96.

94. See: S. Rozmaryn op. cit. p. 131.

95. See: I. Jennings, "The Law and the Constitution", U. of London Press, 1st edition 1963, p. 80-84.

is the hierararchical structure of legal norms in general.<sup>96</sup> The legislature is bound by a system of positive and negative commands and prohibitions, respecting the substance of the legislation which it introduces, and exceptions to this rule may only be made by the Constitution.<sup>97</sup>

This creates the only scientifically provable rationale for the supremacy of the constitutional norm.

It is clear that such construction leads to the rejection of judicial review.

A distinction is made between sanctions and guarantees. For the protection of the Constitution a system of guarantees is essential and this is supposedly realized by the supremacy of parliament which cannot be limited by the courts, and by courts which also have a positive obligation to abide by all legal norms in the process of adjudication; and thus all possibility of judicial review is excluded. It is also pointed out that judicial review would fail to control the legislator in any positive way or guarantee the fulfillment by the legislator of the positive obligation to pass legislation required by the Constitution.

The final guarantee of the Constitution lies in the relationship between the electorate and their representatives;<sup>98</sup> in respect, for example, to the Polish Constitution, Rozmaryn sees this guarantee in:<sup>99</sup>

- a) The principle of the dependence of the representatives on the electorate;
- b) The positive obligation of the representative to give reports to the electorate;
- c) That every law must "express the interest and will of the working people".<sup>100</sup>

So, to summarize, the guarantees are understood by this group of writers as legal institutions assuring the control of the activity of state organs which are obliged to apply the constitutional norms, and influencing this activity in a positive and negative direction.<sup>101</sup> This leads to the conclusion that a constitutional norm is a legal norm of a specific character, namely, it does not require a sanction as a necessary element.<sup>102</sup> This constitutes an additional difference between the Constitution and ordinary

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96. This hierarchy of norms establishing the supremacy of the constitutional norms derives from the will of the proletariat as expressed by the constitutional legislation, and this is the only way to create a system corresponding to the will of the proletariat.

97. e.g. The constitutional principle of protection of the right to property does not permit the ordinary legislator to create any system of protection of the right to property. He must create a system in accordance with the Socialist concept of property.

98. See: B. Szeidukin, "Suszczynost Sowetskogo prawa", (Moskwa 1959); P. Nedbajlo, op. cit., p. 58.

99. See: S. Rozmaryn, op. cit., p. 193-220.

100. See: Polish Constitution Art. 4 para. 1.

101. See: S. Rozmaryn, op. cit., p. 201.

102. See: N. Tomaszewakij, op. cit., p. 76.



legislation and, of course, is an additional argument for the non-applicability of the constitution in the courts of law (this same argument is used by the other group of writers to prove that the Constitution is something other than a legal document).

This leaves us with two possible conclusions: either Eastern European Constitutions contain other than legal norms, or the term legal norms as applied to the Eastern European Constitutions means a legal norm without a sanction and not applicable in a court of law.

On this basis, Socialist theory establishes several principles of amendment and interpretation of the Constitution. Amendment of the Constitution can occur only in a manner prescribed by the Constitution and only in the *a priori* determined direction. This is developed into a principle of the relative unchangeability of the Constitution which varies according to the internal hierarchy of norms within the Constitution. Only those constitutional norms which do not directly establish a Communist society as the ultimate goal can be changed. In other words, the Constitution can be divided in two parts: Supreme norms which are virtually unchangeable and secondary norms which are only supplementary.

Therefore in the usage of the Constitution, Supreme norms are excluded from interpretation, but the secondary part is interpreted by every institution applying the Constitution. The power of interpretation cannot be given to any organ because the Supreme norms cannot be extended.

Therefore, a constitutional norm cannot possess a sanction and cannot be applied in a court of law as a source of rights and obligations of citizens or institutions because this would be unconstitutional.

In conclusion one must stress the discrepancy between the formal appearance of Eastern European Constitutions and the theory of the Constitution. The formal appearance leads one to the conclusion that these establish a system of norms creating rights and obligations defining, distributing and limiting powers within the State. The above analysis of the theory, however, leaves us with the impression that these documents can be treated as political programmes only. Of the two trends in constitutional theory, even the normative one understands a constitutional norm as one without a sanction and not as creating rights and obligations, thus denying them a normative character in the accepted legal sense. The closest analogy to this concept of the Constitution may be found in the English theory of the constitutional convention "which consists of customs, practices, maxims or precepts which are not enforced or recognized in the courts".<sup>103</sup>

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103. See: A. V. Dicey, "Introduction to the Study of the Law of the Constitution", (London 1950), p. 417.

One may suggest the thesis that a legislative body when enacting a Constitution is not acting in its ordinary capacity but is rather declaring political programmes. The fact that legislative technique and language are used has led to the confusion.

Therefore, L. Schapiro is perhaps wrong in describing the Soviet Constitution as creating rights and obligations or in referring to the unconstitutional character of certain laws in the traditional juridic sense.<sup>104</sup> If we wish to discuss the Soviet or Eastern European Constitutions in the traditional context, we must study the ordinary legislation and not the Political Programmes called the Constitution.

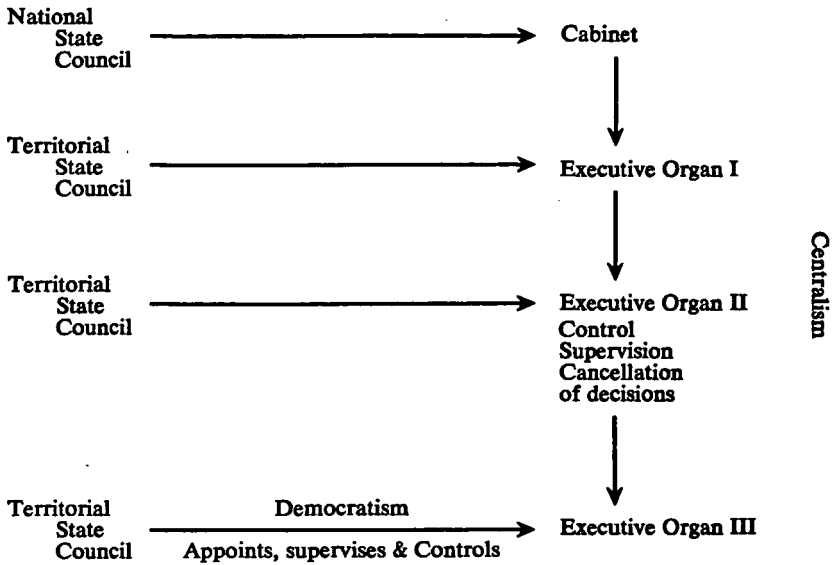
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104. See: L. Schapiro, "The Government and Politics of the Soviet Union", (London 1967), Chapter IV.

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TABLE 1



**TABLE 2**  
**ADMINISTRATIVE DIVISION**  
**OF ANY EASTERN EUROPEAN COUNTRY**

|   |       |      |     |
|---|-------|------|-----|
|   | } III |      |     |
|   |       | } II |     |
|   |       |      | } I |
| <p><b>Plus</b><br/> <b>Cities excluded from territorial units</b></p> <p>a.     <b>Cities</b>       = <b>I</b><br/> b.     <b>Cities</b>       = <b>II</b><br/> c.     <b>Cities</b>       = <b>III</b></p> |       |      |     |

TABLE 3

| Country        | Year           | Voting Age | To Be Elected | Year | Voting Age | To Be Elected |
|----------------|----------------|------------|---------------|------|------------|---------------|
| Hungary        | 1947           | 20         | 20            | 1953 | 18         | 18            |
| Poland         | 1945           | 21         | 25            | 1952 | 18         | NSC 21 TSC 18 |
| Bulgaria       | 1945           | 19         | 23            | 1947 | 18         | 18            |
| Rumania        | Before W.W. II | 21         | 25            | 1952 | 18         | 23            |
| Czechoslovakia | Before W.W. II | 21         | 25            | 1965 | 18         | 21            |

