of the Principle of Restrictive Interpretation” is somewhat balanced by Prof. Bartosh’s paper on “La transformation des principes généraux en règles positives du droit international”. Prof. Bartosh would have done well to develop his theme to its logical conclusion.

The other contributors include, Mme. Bastid, and Messieurs Bindschedler, André Gros, Guggenheim, Edyard Hambro, C. Wilfred Jenks, and Paul Reuter.

J. J. Lador-Lederer

SOCIALIST REPRESENTATIVE INSTITUTIONS. By Professor Otto Bihari. [Budapest, Akademiai Kiado, 1970, 279 pp.].

Professor Otto Bihari is a recognized authority in Hungary in the fields of Constitutional Law and of Legal Theory. He is the Chairman of the Institute for Constitutional Law at the Pecs University, takes an active part in International Congresses on Comparative Law, and in other Congresses, and is an expert not only on the Marxian doctrines, but also on Western legal thought. Despite his expertise in both fields, which is evident in this book, it is nevertheless a conventional book, typical of the books published in the Soviet Block and in the U.S.S.R., because only such books can be published there.

There are five chapters: 1) Principal bourgeois doctrines of structure of political organism; 2) Socialist institutions of state organism; 3) Representative system in the socialist state; 4) Legal acts of the representative organs of state power; 5) The special agencies operating within the framework of the representative organs of state power.

As the titles of the first two chapters testify, the author compares the legal thought and practice in the capitalist and the socialist countries, and, as usual, emphasizes the superiority of the socialist system. He tries to prove this point only by quotations from the founding fathers of the socialist system (Marx, Lenin), without trying to test the hypotheses, and even constitutional definitions, in the light of the reality in the existing socialist states—the U.S.S.R. and the People’s Democracies in Europe and in Asia.

Although the author professes—and rightly so—the need for comparative study of the two systems, in particular on the basis of the development of the different institutions in both systems, even if this would reveal various differences between them, due to the contrasts in their class content, his aim is to prevent the “superficial observer” from being impressed that there is any similarity between the different institutions of the two systems, even if apparent similarity exists. He also tries to avoid comparison on the basis of “positive law” only (p. 7).

In the first chapter the author explores the views of Bodinus, Hobbes, Locke, Montesquieu and Rousseau on the basic questions of sovereignty and popular sovereignty, separation of powers, etc., in their historical development and in their application in the capitalist countries, such as England, U.S.A.
and France. There are no innovations in this chapter; the author contents himself with an exhaustive and accurate survey of the different views on the above mentioned questions, together with a discussion of local authorities, and ends the chapter with a survey of the views of Dicey, Kelsen, Leibholz, Carl Schmidt, Carl Friedrich and Z. Giacometti on the questions of representation, imperative mandate, and state of parties (Parteienstaat). He views the last theory as an anti-representative theory, and claims that the idea expressed in the West-German Constitution: "The parties co-operate in the formation of the political will of the people" (Art. 1. sec. 21), is an idea of "mediatization of the people by the parties", which in his opinion, is a pure fiction, and "... wants to prove that the old institution of representation has in fact not ceased to exist, it is not dead, but comes to existence through the mediatization of intermediate agencies. Nominally the member is a 'representative of the people,' yet in reality he is that of the political parties" (p. 60).

On the other hand, the author claims that the idea of representation, in its original meaning has been carefully preserved in the socialist countries since the Commune of Paris, through the first Russian Soviets after the October Revolution, the Soviets of the U.S.S.R. and the various People’s Councils in other socialist countries, and that "... the Socialist State is built upon the consistant theory and practice of popular sovereignty" (p. 62).

The assessment about the preservation of the principle of popular sovereignty in all the aforesaid countries is acceptable in theory, but it is opposed to the reality as far as practice is concerned.

At the Congress of Comparative Law in Uppsala, Sweden (August 6-13, 1966), most participants from England, France, Germany, Israel, and other countries pointed out that the Executive gains increasing supremacy over the Legislative, and tried to find effective means to check this distressing phenomenon. At this point the Soviet scientists, Khalfina and Luniov claimed that the above mentioned problems existed in the capitalist countries only. They did not exist in the socialist countries, because they were opposed to the very idea of socialist parliament's being the representative organ, on account of the principle of the popular sovereignty which it represents and personifies, and that in their country the government was always and in any aspect, subordinated to the parliament (the Supreme Soviet of the U.S.S.R.). To prove their point they solemnly brought up the fact that exactly at that time the newly elected Supreme Soviet accepted the resignation of the government, and empowered Kosygin to form a new government. I told them that I could not but envy them that their country had no such problems as those raised by the representatives of the most democratic countries in the world. This feeling of envy did not cease after I read the second and the following chapters of the book under review.

The first Soviets were elected after the Communist Party seized control over the country, dispersed all the socialist and democratic parties and became the sole ruling party in the country; they were elected by ballot that
was not general, not direct, not equal, not proportional, and not secret, and in which the votes were cast not in residential districts, but (in order to provide more effective control of the voting behaviour) at the places of work; how can one claim that those Soviets were really representative and embodied the principle of popular sovereignty?

It is true that some people in the West, too, believed that the direct and crude ways of the Soviets—voting by raising hands at public meetings, together with the right of recall, brought to the illiterate workers a freer and more effective democracy than the constitutional balloting at closed ballot box, and that those Soviets presented political issues to the masses in a language they could understand.

It is possible that it was true in the first, and very short, period. However, Rosa Luxemburg so described the Soviet reality and its future, when she wrote in 1918: “In place of the representative bodies created by general, popular elections, Lenin, and Trotsky have laid down the Soviets as the only true representation of the laboring masses. But with the repressing of political life in the land as a whole, life in the Soviets must also become more and more crippled. Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which only the bureaucracy remains as the active element. Public life gradually falls asleep, a few dozen party leaders of inexhaustible energy and boundless experience direct and rule. Among them, in reality only a dozen outstanding heads do the leading and an elite of the working class is invited from time to time to meetings where they are to applaud the speeches of the leaders, and to approve proposed resolutions unanimously—at bottom, then a clique affair—a dictatorship, to be sure, not the dictatorship of the proletariat, however, but only the dictatorship of a handful of politicians... such conditions must inevitably cause a brutalization of public life; attempted assassinations, shooting of hostages etc.”

Those prophetic words were fulfilled in full, and it is difficult to claim, in the light of the Soviet reality, that any principal changes have occurred in the fields of civil rights, the essence of elections, or in the methods of the Soviets—either in the U.S.S.R. or in other socialist states.

Indeed Stalin’s Constitution of 1936 has changed the electoral system, and introduced general, equal, direct and secret ballot. It has also changed the institutional structure, separated the formerly centralized government into four branches (the net of the Soviets, the administration, the judiciary and the Procuratura), however, even if this was meant to sum up the economic achievements, and, on a more solid basis, to achieve from then on, through

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more democratic means, what up to then was achieved by means of cruel tyranny, it did not succeed. The Constitution was enacted in the midst of the "great purge", which continued till the end of 1938, the new electoral system clearly did not change the essence of the elections as a means to provide the authorities with legitimization, through procedures which had nothing in common with democratic elections. Indeed, it was only then that the elections took the form of a referendum more and more, in which the masses were called upon to approve, with participation of almost 100% and with no opposition, the composition of the Soviets (Supreme and others), as decided upon by the Party organs.

The Constitution of 1936 introduced a more clear division of roles between the various organs and branches of the Government, and established a hierarchy of legal norms, by making a distinction between Law (Zakon), enacted by the Supreme Soviet and Decree (Ukaz), with the power of law, enacted by the Presidium of the Supreme Soviet; in practice the real legislative work has been transferred from the hands of the Supreme Soviet into the hands of the Presidium, and in the other socialist countries—from the hands of the Parliament into the hands of similar presidiums, existing in the various countries under different names. For example, in Hungary, between 1957 and 1966 although only 42 laws were enacted by the legislature, 352 Decrees with the power of law were issued by the Presidium.3

The fact of this disproportion between the Laws and the Decrees with the power of law is brought to light in the socialist countries whenever a "thaw"—caused by internal or external developments—occurs. Poland in the pre—"Polish October" period, when a discussion on the need to strengthen the legality in the country began, may serve as a good example. The Prime Minister, Joseph Cyrankiewich, had then promised that in the future "efforts would be made basically to change the proportion between the scope of the Laws, which would be enacted by the Sejm (The Polish Parliament), and the scope of the Decrees of the State Council (the Polish equivalent of the Presidium of the Supreme Soviet—L.B.).4

Polish scientists of that period, while still free to express their true views, have recognized the legality of bestowing on the State Council the right to publish Decrees with power of law, but they have also expressly stated that those Decrees should pertain to lesser matters only, while the Sejm should concentrate on legislation in all the important matters of public interest, after deep and thorough analysis and discussion of each problem. And even where less important matters are involved the Decrees of the State Council be published under the supervision of the Sejm; thus the

4 Trybuna Ludu, September 7, 1956.
Decrees would express the will of the Sejm, and would not replace the legislation by the Sejm.\(^5\)

The author himself cannot ignore the fact that “…theoretically the supreme representative organ can draw within its competence any question,” but “…the problem is that practically often the line of demarcation between the supreme representative organ and the government, the supreme organ of public administration—becomes blurred.” (p. 92).

From the principle that Marxism does not recognize the principle of separation of powers, and from the practice of the socialist states until then, the author infers that “…no theoretical line can be drawn between the functions of the representative and the administrative organs, in particular when the latter are such of general competence.” (p. 93).

Nevertheless, he admits that up to now there existed an undesirable situation in the socialist countries in this matter, as if to say, in contradiction to the reality, that this situation does not exist any more: “In all circumstances we should like to avoid the appearance as if this statement wanted to support the incorrect practice of a few years ago, when the state agencies withdrew almost all questions from the representative organs, so that they became entirely impotent and void of content” (p. 94).

He goes on to say that all the theoretic discussion of the sovereignty and representativity of the organs of government (the Soviets) was aimed “…to enliven the activities of the representative organs” (p. 94).

But how can this be achieved if the Communist Party still plays the leading role in all the state and community institutions, and the principle of dictatorship of the proletariat prevails? These two principles are, by their very nature opposed to the principle of the sovereignty of the representative organs.

The author concludes that: “The most significant trait in the socialist representative theory i.e., the close, indissoluble bonds between the organs of state power and the working people at all grades, is characteristic of all socialist states. These bonds are social and politically determined and cannot exist unless on the grounds of the dictatorship of the working class, i.e., on the soil of construction of communism. The most natural and most solid way of transmission of the will of the working class, and the people as a whole, is the guiding activity of the pioneer troop of the working class, i.e., its party.” (p. 112).

Not less confusing are Professor Bihari’s views about the socialist parliamentarian’s mandate being an imperative mandate in its pure sense. Though he quotes other Hungarian scientists who claim that this is not the case (p. 116), he himself confirms, in contradiction to reality, that the mandate of a socialist M.P. is imperative indeed. However, when he discusses

the essence of this term, he says "...the delegate, although he is not independent of his electors even in matters of detail, has discretionary powers to decide whether the position taken by his electors is in harmony with public interest. When there is conflict between the two, he may, or is even bound to, refuse the representation of the will of the electorate." (p. 118).

Prof. Bihari creates the concept of limitative imperative mandate, from which it can be inferred that, in practice, the representative is limited by the demands of his voters only when they are "...so to say supplementing the general policy and... are of public interest" (pp. 118/119).

The author discusses the parliamentary interpellations as if they were common in the socialist states, while it is well known that they began to appear only after the 20th Congress of the C.P.S.U., in the U.S.S.R. and in a few other countries (Poland, Hungary), and have remained to this day, few, controlled, and usually—of the "invited" type.

The author devotes much space to the problem of recall of the members of a socialist parliament, according to the Leninist theory, and brings the Commune of Paris as an example. He also quotes the relevant articles of the constitutions of the various countries, but cannot avoid the well known conclusion, that "...in the majority of the socialist countries the problem of recall of members of the supreme representative organ of state power by the electors has not been successfully solved." (p. 125).

Here we should add that it was only in 1959 that a Law of Recall of the members of the Supreme Soviet was enacted; in 1957 similar laws—pertaining to Local Councils' members, were enacted in Poland and some other countries; however, they have nowhere been put into practice, because in spite of the provisions of the Law nobody knows how to implement them.

It would be possible to enlarge on each of the problems discussed by the author from the theoretical aspects only, without relating them to reality, and without analyzing the theory in the light of reality, which contradicts it in almost every question; but, we shall content ourselves with some remarks on the problem of examination of the legality of laws by courts, or by special Constitutional Court.

After the 22nd Congress of the C.P.S.U., in 1961 which declared the U.S.S.R. a "whole people's" state (which, by the way, is not spoken of anymore), the Hungarians, too, begun to discuss the legal problems of their Constitution, and in particular—the preservation of civil rights. 6

Obviously, this cannot be done without discussion of the legality of laws, which in contradiction to the Constitution, are often, prejudicial to human rights. Most jurists declared, following the resolutions of the 8th Congress of the Hungarian Communist Party, that the Constitution has a normative nature, and, therefore, all state organs, and above all—the legislature, are obliged to follow closely the norms of the Constitution. The concept of

6 G. Brunner, op. cit., p. 3, pp. 11-12.
constitutionality is defined as the obligation, on the part of both the organs of the state and the citizens, to obey the norms of the Constitution. However, when it comes to the institutional guarantees of the civil rights by a Constitutional Court, there were some led by Prof. Bihari who opposed them.

In the book under review the author opposes the idea of judicial review of the acts of a socialist Parliament, because, as the Parliament is the supreme representative organ of the sovereign popular will, it is impossible that another organ should be superior to it, and able to control its acts in the light of the Constitution, which only the Parliament is entitled to do. The socialist Parliament “... is as for authority superior to any other existing or potential organ, it has a kind of established primacy which does not tolerate even a state of balance between the supreme legislative organ and other agencies” (p. 174). “... in a socialist state the supreme representative organ of state power cannot pass unconstitutional legislation... and all this is buttressed up by the policy of the Party” (p. 177).

Should it be so—and the practice proves that it is not—one can only wonder why Prof. Bihari should propose a de lege ferenda solution for Hungary, in which the actions of the Government and the State Council would be controlled by one of the parliamentary committees—the Committee of Law and Justice? Is it that only the Parliament “cannot” enact acts contradictory to the Constitution? Are not the State Council and even more—the Government, guided by the policies of the same ruling Party? In general, is there no unia personalis between the Party and the Government leadership?

In spite of all the above criticism, the book under review is very important, as a source of information concerning the mechanism of the representative organs of the socialist states, at least as far as theory is concerned, and there is no doubt that the theory is very clearly explained by an authoritative scientist.

This book may be recommended for study, with the reservation that the Soviet or communist legal system cannot be understood from abstract descriptions by communist jurists, because “a pure legalistic approach and literal interpretation of the Soviet legislation if not based, or accompanied by an explanation of its political significance, remains sterile and ununstructive.”

Leon Boim

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