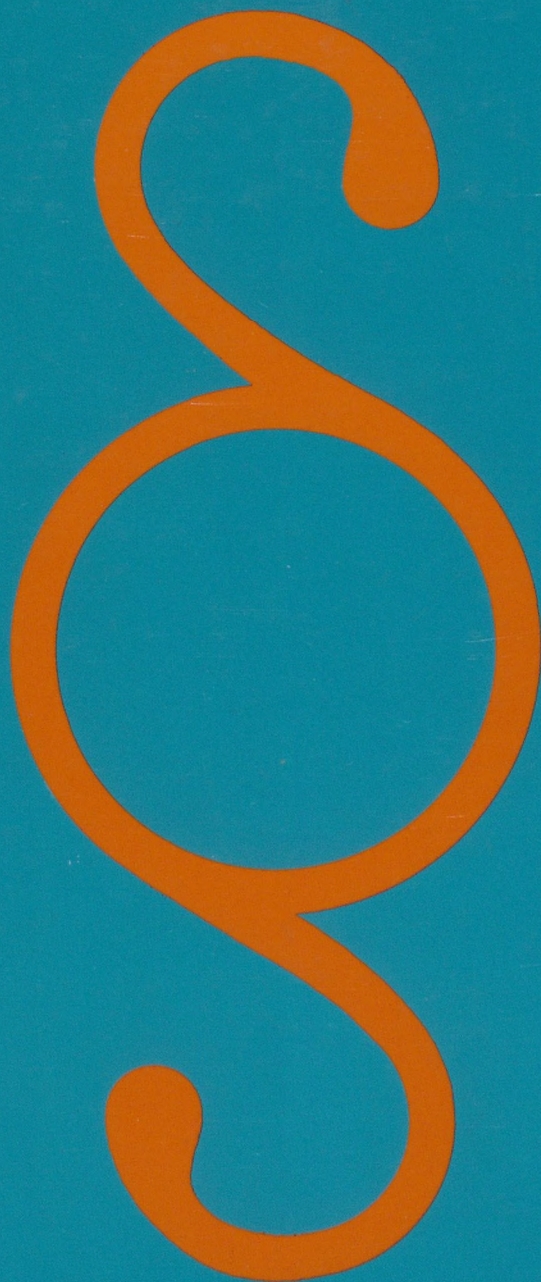


MODERNIZATION

AND LAW

Kálmán Kulcsár



Akadémiai Kiadó, Budapest

Modernization and Law

Kálmán Kulcsár

Member of the Hungarian Academy of Sciences

1993

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Translated by Vera Gáthy

MAGYAR
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Preface

One of the most significant legal (and consequently sociological) problems of our century is: how far and with what consequences can law be used in the process of transforming society.

Illusions and doubts have equally arisen in respect to the use of law. But not even the innumerable and often painful lessons have been enough either to dispel illusions or to reduce doubts. Ambitious politicians and impatient social reformers still frequently turn to law as an almost omnipotent instrument, and at the other extreme the utility of law is doubted and even denied: what is law good for? (Complemented with the feeling that superfluous 'legal rules' only impede the realization of objectives that are painted in glowing colours.) Moreover, these two outlooks may be simultaneously manifest in the same political system and even in the attitudes of the same politician.

Modernization, in the processes of Eastern Europe just as in those of the so-called developing countries which differ so widely from one another, means that a great deal is expected of law precisely because the realization of urgent long-term tasks frequently encounters enormous difficulties, often meets apparently 'incomprehensible' resistance, and runs into the barrier of values and forms of behaviour that are considered to be obsolete. Subsequently, expectations and failure frequently only increases reliance on law, leading to harsh punitive rules and reprisals in the treatment of 'opponents' and 'intractables' as enemies, and to their oppression, instead of trying to study the social context of 'opposition' and 'intractability'. Hence law can easily become simply an instrument, regardless of its possibilities, limitations and characteristics while its real possibilities become blurred, its use corresponding to its characteristics and thus its possible successes fail to materialize.

The problem of modernization and law is highly topical in every society lagging behind (or differing from) the societies of the 'centre'. It is particularly current today when the issue of adaptability has become critical in an economic as well as political sense for these societies, in the wake of the evolution of a uniform world system.

The reader may be surprised to find the problems of Hungary, of the East Central, and Eastern regions of Europe as well as those of the legal systems of African and Asian societies discussed in this work. However, experiences of the interrelationships of modernization and law do, in fact, take us to distant parts of

the world, and these experiences – at least my researches have so far persuaded me – are interesting not because of their possible ‘exotic’ features, but because they derive from phenomena that are in many respects similar or even identical in countries with widely divergent cultures, political, or legal systems. The phenomena of the utilization of law in the present process of modernization – considering also the differences in time between the modernization of the various regions and societies, besides some other differences – allow conclusions that can be generalized and utilized in the understanding of effective factors in the social functioning of law and its efficiency. This knowledge is not only theoretically important, but may even promote solutions to the practical problems of our everyday life; provided we recognize them.

I have studied the role of law in the modernization of societies in different regions of the world, in societies which are following various paths of modernization and have reached different levels. These regions are as follows:

- East Central Europe (as compared to Eastern Europe in certain respects), and naturally Hungarian society first and foremost, where modernization, launched in the last century, was replaced by practice based on a vision of building socialist society;

- India, a society having a sacral legal culture, but which had also been started along the path of legal modernization by colonial rule and where a major role has been assigned to law making in the construction of the society (certain comparisons are also made with the problems of the South-East Asian region and of China);

- the modernization of the legal culture of the African tribal and traditional legal systems during the colonial period and in the building of society after independence, primarily in the erstwhile British colonies of East Africa (as compared to Ethiopia in certain respects, where there had also been a special ‘sacral’ legal culture).

During the past decade I have carried out research partly ‘on the spot’, on the continents referred to above, partly in the United States of America, and naturally mostly in Hungary. I have discussed some of my first hypotheses with researchers of the societies concerned and I have spoken about my work at various congresses and seminars. Therefore I am indebted to a large number of my colleagues at home and abroad for their assistance.

Finally, the English version of this book was finished in the middle of the political transition of Hungary and in other countries in the Eastern region of Europe, which has been transforming the conditions of modernization in this part of the world. I indicated some of the consequences of the political transition with one sentence or two in relation with the problems on which it was rather necessary to be done.

Budapest, March, 1992

The Author

Chapter One

Modernization: the Concept and its Historical Variants

Modernization as a Historical and Sociological Problem

The concept of modernization has now been sufficiently clarified in many respects even today. A number of everyday usages are associated with it as international as well as domestic phenomena. But the history of the concept during the past few decades would itself demand a separate analysis. Even though I may not undertake this analysis here, the major historical problems of conceptualization should be indicated.

The initially quick acceptance of the concept of modernization and its direct general usage have been replaced by doubt. These doubts derive mainly from its rapid spread and from its widespread capacity to explain everything. It has also acquired a political hue partly as a consequence of the identification of modernity with the political slogan of the advanced capitalist system, and partly as a result of the assumption implied by none of the critical analysis of the concept. R. C. Topp is follows: 'the concept of modernization is related to the response of American political elites and intellectuals to the international setting of the post-Second World War area. It was created as a representation, bearing strong marks and a stamp of Western, mainly English and American, ideas, and institutions' (Topp, 1964). All this criticism is by way of a warning for Marshall and his circle researchers in the Third World to challenge the concept of modernization. The challenge has only been corrected by the growing recognition of a number of adapted institutions in the developing countries. In fact these institutions - legal norms, political organizations, public administration, etc. - have mostly proved to be unable to change the nature of a social culture which is most radically different from the one which is supposed to be gradually, rationally as the term of modernization had evolved in a linear 'process' and was criticized as 'Western learning as well. Some of these have begun to doubt as certain critics have called for a 'process of change' by rejecting the 'capitalist' 'Western' model in the concept. Deeply influenced by this, and recently, Jean Chavot has considered the concept of modernization as a 'process' in his own earlier content by the end of the twentieth century in his book 'The History of the Australian National University in April 1964'. 'Modernization is not a linear, rational struggle against "backwardness" but a complex process of the prevailing, all-embracing model of development. It is a process of change, the process of new openings, a process of a different kind, not a linear process of change but a 'stage', which through its rapid transforma-

I

Modernization as a Historical and Sociological Problem

The concept of modernization has not been sufficiently clarified in many respects even today. A number of misunderstandings are associated with it in international as well as domestic academic life, and the career of the concept during the past few decades would itself demand a separate analysis. Even though I may not undertake this analysis here¹, the most important problems of conceptualization should be indicated.

The initially quick acceptance of the concept of modernization and its almost general usage have been replaced by doubt. These doubts derive mainly from its rapid spread and from its supposed capacity to explain everything. It has also acquired a political hue partly as a consequence of the identification of modernity with the political setup of the advanced capitalist societies, and partly as a result of the assumption worded by one of the critical analysts of the concept, D. C. Tipps as follows: "the concept of modernization is related to the response of American political elites and intellectuals to the international setting of the post Second World War area. It was linked to developmentalism, became ethnocentric and a vehicle of Western, mainly English and American values, and institutions." (Tipps 1976.)²

All this seemed to be more than enough for Marxism and for some researchers in the Third World to challenge the concept of modernization. The challenge has only been corroborated by the growing dysfunctionality of a number of adapted institutions in the 'developing' societies. In fact these institutions – legal norms, political organizations, public administration, etc. – have mostly proved to be unable to function rationally in a socio-cultural environment basically different from the one of their conception. Eventually, 'fashionable' as the term of modernization had become, it became 'suspect' and was criticized in Western learning as well. Some of those who developed it have begun to doubt it; certain critics have called for a reinterpretation by rejecting the 'capitalist elements' hidden in the concept (Desai 1972:458–474), and recently, Jean Chesneaux considered the content of modernity as opposed to its own earlier content by the end of the twentieth century in his lecture delivered at the Australian National University in April 1987. "Modernity is no longer a universal struggle against established values, but a passive capitulation to the prevailing, all-embracing model of 'development'. It is no longer a relative, ever-renewed process of new openings towards a different future, but a situation of blockage *per se*, a 'stasis', which through its rigid require-

ments and compulsory patterns only perpetuates the present world order." (Chesneaux 1987:1-2.)

The 'rise and fall' of modernization as a concept in itself warrants caution, and in two directions at that. The career of the concept may easily lure one – and in keeping with a preconception – for an exclusive interpretation of one or another phase, and consequently for its rejection or acceptance, whereas the upturning or downward curve of its career may easily lead to its being disregarded because of its fashionable nature, or because of its rejection without consideration on the basis of its ideological foundations referred to above.

However, there are further dangers as well. One of them has been mentioned by Myron Weiner, the eminent analyst of the concept and phenomenon. He referred to the fact that every discipline sees something different in the same phenomenon and interprets the same concept differently. The economist sees the implementation of technology for the control of natural resources in the process of modernization, expressed in the growth of the per capita output; the sociologist considers differentiation, characteristic of modern society, as a significant criterion, and looks for the manner new structures and new roles appear for the new structures or take over functions performed by earlier structures and roles; the representative of political science focuses upon the phenomena of the building of the modern nation and state, and upon the issue of how capable governments are in increasing their innovative capability, by which they can respond to the challenges deriving from change and wrestle with new social conflicts, etc. Others attempt to explore the psychological characteristics of modern man, like David McClelland has done with achievement orientation, yet others see the essence in a process of education which lays emphasis on the unfolding of creativity, etc. (Weiner 1966:3-4.)

In fact if one tried to follow historically the development of the content of the concept, one could justify these limitations coming from different *disciplines* in almost every phase of the definition.

However, the ethno- or culture centism of conceptualization represents a new problem, the essence of which is that the researcher somehow considers the values of a society regarded as modern to be an instrument for evaluation. Consequently the process itself would not be more than bridging over the differences in time and standard of developing societies following the same line, by catching up. This aspect appears in the definition offered by Daniel Lerner, one of the first students of modernization, in the *International Encyclopaedia of the Social Sciences*, where he considers modernization the new name for an old process, the process of social change, by which the less developed societies acquire the common, characteristic features of the more advanced ones, it is a process activated by international and intra-societal communication. He adds that the model of the process has been unfolded in the West and it takes place exactly in the same manner in every society, irrespective of race, colour, etc. It is very interesting, however, that when one of the Indian analysts of the changing concept, Varma wishes to eliminate just the very same ethno-centrism, he himself describes a model bearing similar features itself. "Modernization refers to the process of directed change through which a nation achieves economic growth, political development and autonomy, and social recon-

struction based on the principles of equality, fraternity, enhancement of freedoms, and satisfaction of basic needs. The principles of social reconstruction are articulated by individuals and cumulated by groups often working in the short-term through revolutionary methods but in the long-term through consensus and democratic consent. The model stresses individual autonomy and community growth." (Varma 1980:15.)

Other dangers may also occur during the course of conceptualization, but as far as I am concerned, I consider the above to be the most important. In other words, the overassessment of the historico-political implications of the genesis and take-off of the concept, the dominance of characteristics of one discipline in the definition of a complex process; and ethno- and culture centrism, using a certain system of values as a *measuring instrument*.

It is particularly difficult to avoid the latter pitfall – the concept can easily be 'ideologized' – hence it is also particularly important. Marxist learning, and even a good number of researchers in the developing world had earlier rejected the expression just because of its value content. The language of one of them is almost symptomatic: why should the ideas developed in the eighteenth century be regarded as modern in the second part of the twentieth century? (Arora 1972:204.) Values described at the level of ideas, or even ideology may promote, or may even hold back the process of modernization, but they cannot be considered as a means of measurement. Although it is true that factors which appear as the content of the process of modernization – such as, for instance, creativity, innovation, or even change – may be manifest in value contexts, and they themselves may be expressed as values.

If we wish to avoid the narrow wording of one discipline as well as the use of values as conceptual components, and the ideologization of the concept, then conceptualization can be exclusively built upon historical studies, upon the treatment of the process itself as a historical phenomenon.

It cannot be denied that useful components have been identified during the historical career of the concept itself. In this respect the system of indices showing the development of the society and its economy, or those factors and phenomena may be significant, the existence of which have been considered as a characteristic of modernity. Such has been, for instance, the "ratio of inanimate to animate sources of power", being a "society as modernized whenever small decreases in uses of inanimate sources of power could not be made up by increases in animate sources of power without far-reaching social changes" (Levy 1972:3); the growing separation of the structures and spheres of the activities of society and the differentiation of the role structure as a consequence of growing division of labour; the existence of certain, mainly political institutions, together with the major spread of bureaucratic organization, which formalize political relations; the secularization of the society; the utilization of 'tested knowledge' in every field of the society; faith in the scientific control of the physical and social environment of man, in the successful utilization of technology for this purpose; the relegation of the values of participation and responsibility in the face of professionalism and efficiency; I could continue the enumeration.

All these factors and elements, and some others as well may justly find their place in the interpretation of modernization, yet it is linked to certain relationships as a real historical process. These relationships lead to two points of junction: to the *centre-periphery* relationship and to differences of *organic development* in comparison with the one which strongly influenced by *artificially* introduced elements. In my view the concept of modernization can also be traced on the basis of these relations as the possible effects deriving from the political situation of its genesis become neutral from the angle of the concept thus defined and its often justly criticized ethnocentric nature also disappears.

The *centre-periphery* relationship has been identified by economic historians in the past fifteen years as a result of analyses, based primarily upon European development. Briefly speaking the 'main trend' of development took place in centres during certain periods of history and the development of these territories, societies (states) was also promoted by the exploitation of regions that were peripheral or semi-peripheral if compared to the centre. The centres could live side by side having few or no connections whatsoever (for example China, India or the Inca and Maya-Aztec empires before their discovery, beside the European centre) when a uniform system of world economy did not exist. In fact the historical change of 'connections' described by Marx and Engels also refers to this, the existence of human communities living in relative isolation, having only 'local' history, followed by the extension of the process of connections to "world connections" and the development of history into 'world history'. (Marx and Engels 1960:37, 53 et seq.) In the regions the centres may have 'shifted', like, for instance, from the territory of present-day Italy to the western parts of the continent of Europe.

With the uniform order of relations of world economy [the basis of which was the so-called European world economy which evolved in the late 15th and early 16th centuries (Wallerstein 1983:27)] a single though widening centre evolved, while some of the earlier centres became its peripheries and semi-peripheries. However, the process produced a reverse relationship as well, when certain peripheries acquired the position of centres (Scandinavia in Europe, Japan outside Europe). Consequently the universal processes of the centre are also coloured and stimulated by the specificities of earlier historical development in the erstwhile peripheries, moreover, an economic and political struggle has been going on within the centres as well.

A number of societies, which evolved side by side, had an 'organic' development following their own laws until several 'parallel' centres came into existence. (However, it did not mean that they were free of all internal and external shocks, as the revolutions in the European centre, and the Mongolian conquest of China opened the way for processes that had already begun, or absorbed whatever was new into an organic development which had started earlier.) Organic development, however, shows a specific trend deriving from the already existing conditions, into which external elements had penetrated, or new ones unfolded under external influences, yet the 'internal logic' remained the dominant one. The different centres reached *different levels of development* as a consequence of factors that cannot be discussed here in detail, provided the level of development could be measured 'by and large'

by some system of indices, on the one hand, and they produced different social structures, set of relations and cultures on the other. When the development of technology and the world economy had established permanent contacts between the different centres, continuously, the already existing level of development, particularly its technical and organizational indices, and also its scientific ones to some extent, later, in the historically accidental conditions of the given period, some regions found themselves in a less favourable situation compared to others. (Several attempts have been made to find out what exactly were these historical conditions – definitely not a single factor – which brought one centre into a better position than others; from Marx's Asiatic mode of production through Max Weber's imperial structure to Toynbee's creativity problem, Levenson's supposition that feudalism encouraged capitalism and Etienne Balázs's theory on the structure of Chinese society hindering development, the bureaucratic state maintaining the structure, etc., numerous and significant research results have pointed to some of the factors. Wallerstein himself has added one or two elements to the above theories, for instance, that the structure of dominance restrained technical development in China, but a comprehensive explanation is missing from his theory as well (Wallerstein 1983: 72–89), and is still awaited. As a consequence of their adverse situation, certain earlier centres – not to speak of their peripheries – got into an increasingly dependent position in relation to the Western European region (industrialized by the first part of the 19th century). The central features of this dependency grew during the second part of the 19th and in the 20th centuries, particularly, when compared with the North American region, affecting the Scandinavian countries and Central Europe.

The consequence of this situation for the peripheral, or semi-peripheral societies in relation to the centre was not only their exploitation, adverse economic position and subordination, but also the discontinuance of their earlier organic development. The breaking of organic development did not always mean a violent external intervention, but at times stagnation, 'exhaustion', and consequently a certain pressure for adaptation accompanied by the 'appeal' of the patterns evolved in the centre, by a complex pressure for adopting (and transferring) these patterns. According to the lessons of history the interpretation of the socio-economic set up, the system of political and legal institutions, or some elements of the centre as a *pattern* is a significant component of the centre-periphery relationship.

Differentiating between 'organic' and 'inorganic' development has also met with criticism. A starting point of criticism was that no actual organic development was manifest in the European centre either, as it was 'broken' by revolutions at a phase considered to be the most important one from the angle of modernization. I am of the view that these revolutions did not create something really new, they rather assisted the promotion of what had already been 'in' development. Alexis de Tocqueville's famous book, *L'ancien régime et la révolution* had already analysed this problem quite convincingly in the middle of the last century. One of C. P. Hill's excellent findings also indicates that even the technical foundations of the industrial revolution were linked to social processes. He says that inventors usually invent things only at a time when the community needs them. These things do not come like manna from heaven, but much more as a response to their environment.

Therefore what created the great changes of 18th century industry was a series of social factors, the various developmental processes of British society. (Hill 1977:22.) Criticism, on the other hand, relies on the finding, that the 'external' elements penetrating development and regarded as inorganic, are less significant, even if they are manifest. Their 'internal' vehicles can be found in the recipient society, therefore the external element is only markedly significant in a colonial situation. Thus, for instance, the capitalist development of Hungary did not come from outside (as was supposed for instance, by Ferenc Erdei), but it evolved organically from the internal conditions. Obviously the adaptation of external elements cannot take place without some internal receptivity, at least not successfully in the long run. In this respect, however, the essential point is the deliberate adoption or even artificial creation of such elements during the course of adaptation to the external conditions, which have already been produced by the conditions of the centre, and, when they are deliberately introduced into a society they result in significant change (even if the adopted element also changes), irrespective of the fact that a certain part of the society had appeared to be ready to accept the external influence, or element, but had not created it. Finally, some discover a 'value element' between organic and inorganic change, or between the organic and inorganic elements, which came from outside or developed under an external influence. The assessment of these two elements of development recall the earlier distinctions manifest (in the 30s) in Hungarian culture and intellectual life as an analogy. (Berend 1988:7-8.) However, the difference between the 'organic' and 'inorganic' elements is not manifest in their being less, or more 'valuable'. The difference in the quantitative appearance and functions, etc. of these two elements is not indifferent in that 'historical continuity' where the organic and inorganic elements are linked together even from the angle of understanding the phenomena of development, and of clarifying the content of modernization. The conceptual world of organic and inorganic development would undoubtedly take us far, not to speak of the consequences. The pair of concepts should be discussed further. However, the arguments so far applied have not been strong enough to challenge it, and it has been shown to yield results from a heuristic point of view; it has an explanatory value in the exploration of the problems of modernization.

The content of the process of modernization is the *solution of the contradiction* which has evolved amidst the challenges deriving from the phenomena of the historically organic development of the societies of the centre and the pressure for answers to the challenges of the centre breaking up and diverting the organic development (or stagnation as the case may be) of the peripheral societies. However, the situations thus evolved are different, they may differ from each other greatly.

Some regions, for instance, were in a peripheral, or semi-peripheral situation for long historical periods. The societies of the eastern, or east central regions of Europe were confronted with the institutions of feudalism while still in a state of tribal and clan organization; they were forced to adopt these institutions of the centre. Though adaptation played a significant role in their subsequent development, their social development was not only 'belated', but also *different* if compared to that of the centre. This development was characterized by the transformation of the adapted

institutions by the 'original' characteristics, and a cyclically recurrent pressure for reform, holding in view the external patterns, and deriving from the processes of adaptation repeatedly becoming necessary. Although modernization started off in the region by the last three decades of the 19th century, it was slowed down by the second decade of the present one, partly because of the World War. In some countries stagnation had set in, and elsewhere modernization had to begin anew because of different situations and factors. In Russia, or the Soviet Union it was the revolution, in Finland it was independence, and so on. In the wake of World War II another take-off began with the vision of building a socialist society, the result of which, the emerging economic and political model, has not proved to be suitable. Negative elements were incorporated into the societies, together with progressive ones, as a consequence of which such societies have not been able to achieve autonomous growth, characteristic of the second phase of modernization, despite the appearance of signs of endogenous development, based on internal properties. (Kulcsár 1986a:14-62.) Finally, the collapse of the so-called 'socialist' systems created a new situation for modernization, the use and the consequences of which are *now* open for different possibilities.

Some of the erstwhile centres outside Europe were able to avoid colonization, the most ruthless variant of the centre-periphery relationship, and attempt to unfold the process of modernization after a longer period of stagnation followed by a subordinate position, and after having wrestled with the problems of adjustment. Some of them started early (like Japan, for instance, from the second part of the 19th century), some others later, or even nowadays (like China), on the basis of their own internal conditions, trying to respond to the challenges coming from outside and also from their own development.

Though rather marked differences can be found among the earlier colonial countries, yet they are in a historically identical situation as far as their essential features are concerned, the most important of which is the continuation of modernization launched by the colonial power, on the basis of the patterns developed and partly introduced by it (mainly in public administration, in the legal system, and so on). In such a society the internal conditions, the endogenous development based upon them, and the related problem of the preservation of cultural identity have become particularly important. In the period after independence partly the adapted institutions, but mainly the political systems had dysfunctional consequences. In addition, the failures of the mostly 'socialistic' development, based on an indigenous ideology, have led to a critical situation. Hence modernization has not been able to unfold properly even in the phase of take-off in the majority of these countries.

One would interpret the process of modernization narrowly, and hence wrongly, if it were considered only a 'closing up', where the reduction of the differences between the centre and periphery takes place as a consequence of the adaptation of the institutions of the centre. Overcoming the difference manifest in the centre-periphery relationship – and hence the content of modernization – is not a 'simple closing up', but *adaptation*. However, the process of adaptation to the world economy, and to the global community, one may add an adaptation that may eliminate the epithet and condition of 'subordination', the usual corollary, in the

long run – may be realized only in the second, so-called ‘sustained growth’ phase of modernization following take-off. It can evolve as a result of development becoming organic and based on the internal conditions of the given society, including its historical specialties (making repeated take-offs and the cyclical pressure for reform unnecessary). This is the true content of modernization.

By emphasizing the significance of historical aspects I see the most important characteristic of modernity in whether *a society is capable of continuous social change by utilizing its own, internal conditions*, though the significance of certain indices showing economic and social advancement should also be acknowledged, all the more so, as the unfolding of the most important feature greatly depends upon the changes of these very indices. One may say that in this sense every society is always modern, as some degree and quality of change can be produced even by the most stagnant societies: the content of traditions, even though slowly and with a new message, always changes everywhere. But the capacity for change that represents the content of modernization has factors, components related to the historical situation already described. Such changes are involved as a consequence of which the peripheral, or semi-peripheral society becomes capable of reducing this situation and the related disadvantages by the unfolding of its own endogenous development in the long term. Therefore, successful modernization is the function of such an economic and social structure which is *capable of functioning while keeping pace with the changing external and internal conditions* on the basis of the conditions of the given country; it means the development of such a social structure which is first and foremost the basis of further progress in this process in all, or at least in its dominant components, and such a political system which is capable of safeguarding the continuous operation of the internal factors of social change. Thus a ‘modern’ society differs from a ‘traditional’ one not only quantitatively, but also qualitatively in respect of its ability to change (Kautsky 1972:20); and perhaps it is also not insignificant to note that the theoretical, ideological justification of change itself generally expresses traditionalism in traditional societies. In other words, traditionalism makes change acceptable by making references to the past and links the new with antecedent values; hence the past means a ‘reference situation’ for the society. (Hoselitz 1961:86.) In a ‘modern’ society the past as a ‘reference situation’ may have an entirely different role and it is often the necessity of change which is justified by a *breaking away* from the past in the modernizing societies.

This concept is *theoretically* unrelated to the so-called westernization, to the acceptance of the economic, political, and general institutional set up of the advanced Western societies as the *pattern* of modernity. At a debate organized by the UN University a few years ago it was clearly stated that a society was modern if it was capable of producing its own endogenous development. (Nagai 1984:64.) Therefore, political reservations, mostly reflecting a conservative outlook on society and even having their impact on Marxist social theory, which have evolved in the face of the concepts of modernity and modernization prove to be unfounded, as does the interpretation of these concepts as being of an ethno-centric nature.

The above-mentioned reservations – as I have already indicated – have also derived from the fact that in the first period of the elaboration of the content of

'modernity' the Western bourgeois-democratic political set up had acquired especially great emphasis. A number of authors have gone so far as considering the process of modernization as laying the foundations of a future *political system the components* of which will undergo convergence. (It should not be forgotten, however, that a similar perspective was offered by Marxism as well, though the word modernization was not used, when it hypothesized the global development of a socialist, and subsequently communist social system, moreover, the 'vision' of socialist society, as it evolved in Eastern Europe appeared in practice in the general features of the 'socialist' political systems of some developing countries as the *pattern* of modernization.)

In the latter interpretation, i.e. which treats modernization as an ethno-centric concept, presumably two elements have played some role. Partly, it is the failure of the experiments intended to transplant the Western political set up, mostly of the earlier colonial powers, which can be observed in the past two decades in the majority of developing countries, and which has led to natural disillusionment and to the quest for new directions. Partly, but in connection with the above features, there is the universal phenomenon of search for identity, the protection of one's own culture against universal, and far from always attractive or even generally acceptable, patterns (see the trend of consumer habits becoming universal, the impact of the products of the Western 'entertainment' industry, shaping general tastes and behaviour even in the developing countries). Development has not only created dependence upon the world market, as has been stated by the already quoted Chesneaux, but also the *homo mundiatis modernicus*, and his ideological base to "bridge over the difference between the so-called advanced and less developed countries". (Chesneaux 1987:7.)

Besides the 'ethno-centric' tendencies 'reflecting' Western culture, or political set up – which is assessed by most authors as the ideology of advanced capitalist countries striving for cultural domination – other kinds of ethno-centric phenomena also occur as a sort of reaction. These include the various 'fundamentalist' ideologies appearing in religious, or in a peculiar ideological-socialistic guise, which both attempt to lay the foundations of breaking away from the global context in an extremist manner and from the process of modernization, usually after the failure of some kind of attempted modernization. Naturally the phenomena of the 'ethno-centric modernization' based on Western elements, have amongst other things produced or reshaped such extremist ideologies, and have evolved political movements based on them aimed at isolation. It is a much more rational and widely known view according to which "every society has to follow its own path of development, though no society can afford to ignore the phenomena that are taking place at the global level." (Varma 1985:25.) If all this is considered, and joined to the concept of modernity as given above, then the 'decline' of the variant of the concept of development which is a straight and unilinear one, becomes understandable. This is sufficiently supported by the results of historiography, and particularly those of economic history, which try to understand the phenomena of individual societies too, on the basis of global relationships.

One of the critics of the Western theories of modernization (Snyder 1980a) challenges just this presumed unilinear character by the presentation of the so-called dependency theories which reject the original concept of underdevelopment. This concept actually sets out from the idea that "if there are 'developed' and 'advanced' countries in the present they must have at some time been underdeveloped". (Hoselitz 1952a:V.) Whereas it is just the contrary, the contemporary developed societies, or at least the majority of them may have been undeveloped, but were never 'underdeveloped'. (Frank 1969:4.)

Underdevelopment and development, accordingly, are the two faces of the same process which are interrelated and condition themselves mutually. As a result underdeveloped societies differ fundamentally from the developed countries in their internal characteristics and position in the world system. "Consequently the history of developed countries cannot possibly provide a model of development for contemporary underdeveloped countries." (Snyder 1980a:748.) Therefore, the study of underdevelopment must start from "the period in which any given region of today's 'third world' began to be progressively incorporated into a permanent relationship with the expanding, capitalist economy". (Leys 1975:8.)

This undoubtedly fruitful conception should be complemented in two aspects, though it is definitely justified to rise above analysis on national or even subnational level and place the question into 'global contexts'. One of the possible complements is that the 'subordinate incorporation' of contemporary underdeveloped societies has internal, 'inherent' components, and may even have continuous and specific 'developmental' aspects. The other complement is rather a question: was there not a possibility and consequence of dominant and subordinate incorporation into a broader but not global economic order prior to capitalist development? In a certain sense André Gunder Frank set out in this direction when he first created the model of "several metropolises and the system of their satellites" and then outlined the various, divergent, uneven ways of capital accumulation and the system of relations deriving from it. (Frank 1967:7-8.) Following the same path, Wallerstein reached the theory of the long 16th century, the system of peripheral and semi-peripheral states. (Wallerstein 1983.) [Other views have also been expressed, though they cannot be discussed here in detail. (Snyder 1980a:755 et seq.)]

It can be inferred from the analysis of the theories of modernization, underdevelopment, dependency, etc. (on the assessment of the theories of modernization see Varma 1980), that the historical content of modernization is a changing one. And the presently significant, concrete historical content of the process can be grasped in the – historically also changing – relationship of the centre and periphery. Actually, on a certain level of generalization it can be stated that in the historically evolved centres, internal, automatically progressing *organic* development can be seen (even if originally this development may have been related to external factors, and resulted only subsequently in motion becoming organic), which is *capable of accepting social change, of making changes 'organic', and thus shaping responses including the necessary adaptation and corresponding to the continuous challenges*. In contrast, stagnation can be seen in the current peripheries (and in many respects also in the societies representing the semi-periphery). Changes start from the

outside and usually try to liquidate the peripheral situation by following an external pattern. But since the external pattern can rarely be applied without distortions, the development of the periphery continues to differ from the processes and phenomena visible in the centre partly because of the inherent specificities, and partly because of the modified and transformed survival of the external pattern. But the success of modernization is not and particularly not only the successful introduction of the economic and social phenomena and institutional system of the centre regarded as a pattern. What is really important, that is an evolution of social conditions which are capable of *ensuring self-movement for changes and successful adaptation* of a society for the challenges coming from the inner and outer world.³ This movement – even if only after a longer period – lifts the given society out of the condition showing the characteristics of the periphery. Adjustment, based on the endogenous factors, to the global economic processes promotes the continuation of this movement.

The dual influence of the 'patterns' deriving from the 'Western' development, i.e. its nature of being an *instrument for the evaluation* of the inner conditions and provoking *resistance* against the 'foreign' influence is far stronger in this process of modernization than in the historical development of the East or East Central European societies, though it never has been negligible.

Today a growing emphasis is being placed not only on the concept of the so-called endogenous development, according to which the development of the society should be primarily based on the internal factors, adequately utilizing the historically evolved institutions and values of the given society in the process of modernization even if these are linked to the traditional relations, but the concept and model of 'populist modernization' has also appeared. According to this model the traditional peasant communities are not only capable of modernization autonomously (though under the influence of the external environment) but promote the integration of the broader society as well: "It is no exaggeration to claim that populist modernization has continuously sustained and strengthened the process of nation-building in India." (Ishwaran 1977: 119.) Although populist modernization is a new expression, it is only new as an expression. In fact the appearance of populism in the backward countries of the world, with a large peasantry has essentially been accompanied by such an experiment in modernization which regarded the European model (or the one evolved in the European centre) as inapplicable. It has appeared in historically different periods and societies, for instance the populist movement of the inter-war period in Hungary contained such efforts. (Kulcsár 1986a: 109–156.) The question of populist modernization – where the endogenous factors and their role are 'revaluated' – leads us to an interesting problem.

According to S. N. Eisenstadt the problem of modern society is that modern social rationality is opposed to such cultural orientations and values as tradition, religious or mystic experience. Rationality, as he says, is frequently understood as 'technical' efficiency, as a consequence of which man becomes the master of himself and of his destiny. But – he continues – man, freeing himself from all common values and orientations may become an uncontrolled creature, exposed to his

unregulated instincts and to the unpredictability of conflicting interests. Therefore, the problem of the maintenance of solidarity and justice has become a highly important one in modern societies. The reality of the problem is indicated by the new individualism, ways of life based on nostalgia for the past, sects and narcotics, irrational ideas and superstitions, etc., "trying to escape from the pressure of modernization" (Chesneaux 1987: 12.) in the modern countries as well, or the forms of 'alternative modernization' inclined towards utopia as mentioned earlier. (Szabó 1985.)

However, this problem still appears with a reversed emphasis in the modernizing societies. In other words, the cultural orientations, values and ideological aspects that have come into existence, even if they are not traditional in origin, may 'effectively' restrict the assertion of rationality in thinking, action, decision-making, organization, etc. All the more so, as these components lead to specific interests to a large extent. Yet the problem mentioned by Eisenstadt is a real one. The disappearance or challenging of a value system is not always, and particularly not immediately followed by the creation of a new one (if it develops at all). Thus the continuity and change of values, the incorporation of tradition into a modern society are not minor problems of modernizing societies.

I cannot venture to analyse, or even to give glimpses of the most important aspects of the value problems of modernization as they appear in literature. I would only like to indicate a single question, for which Hungarian research results are available (Hankiss, Manchin *et al.* 1983); this is the issue of the so-called negative values of modernization and its relationship to the problem mentioned above.

The research represents the difference between the American and Hungarian values of modernization on two curves which indicate an identical path in the process of modernization and in the changes of values but with a difference in time. The modern values associated with the period of the industrial revolution and the conditions of capitalist society in boom are being pushed into the background in the transformation of American values, and the novel values of the 'post industrial' age are coming into the foreground. "In other words: the emotional and community values, the values of the perfection of human personality and of the community are being intensified besides the values of enbourgeoisement of the early 20th century, that is besides the values of objectively rational, pragmatic action, and those of the autonomous human individual." (Hankiss 1986: 373.) As contrasted to it the 'traditional' phase of the modernization of values had not yet taken place in Hungarian society when the new social order simultaneously destroyed the traditional values and transformed this quasi-bourgeois set of values – mostly in slogans, but much less in practice – into a new 'order of values', theoretically advocating the importance of the community, the honour of work, and demanding sacrifice in the interest of community objectives, etc. Elemér Hankiss and his co-authors call the basic characteristic of the developing new order of values rough or void individualism.⁴

The social basis of the transformation of the American order of values – as analysed in an eminent American work (Bellah *et al.* 1985) is a development from the world of 19th-century local communities characterized by the transparency of economic and social relations – which could be interpreted as parts of a bigger

community even though rather imperfectly – into a technically, economically and functionally far better linked and integrated society. In this society the individual tries to mobilize his own energies, to achieve success in his own, still comprehensible world, and ultimately to evolve his own world like a professional manager and a therapeutic psychiatrist. However, such a man is no more the ‘autonomous’ entrepreneur of the 19th century, or citizen of a small community as the basis of both was liquidated by the post-civil war development. If this managerial and therapeutical ethos is not completely dominant and the values of the old Biblical and republican America constantly challenge it, the community does not help adjustments to the new challenges anymore on the basis of the old individual ethos, and the demand for shaping the entire society is hidden at times in action within this small world. (*Op. cit.* 50–51.)

Hungarian society entered from the world of traditional social linkages and values with its less developed capitalist–bourgeois–rational values into a world advocating community values on a new level at a time when even the rational content of the bourgeois set of values could not unfold. The society was forced to take up empty traditional behaviour in this new world in order to follow its own interests in detours, by a revival and even strengthening of the bad traditions of a world seen as receding into the past in this reality (amidst the contradictions of the normative level and reality), inevitably resulting in the disturbance of values. It would be a rather one-sided approach to link this disturbance of values to the process of reform. The phenomena of anomie developed by the processes of the last four decades – particularly the contradictions between the values advocated on a normative level and reality – have naturally made not only practice but even the normative world of values uncertain. This took place much earlier than the appearance of contradictions between values guarded on the normative level, the ideologically confirmed principles and practice again supported by the state and politics (though with a considerable amount of vacillation), between the old interpretation of ‘socialism’ and the new practice, which by its very essence almost inevitably indicated and assisted the way of society out of ‘socialism’.

Thus the modernization of values is a process particularly loaded with problems in Hungarian society, and ideology has played an ambivalent role in this process, to say the least. The ‘socialist’ ideological objectives and the real processes have jointly unfolded a world of values that can be justly called uncertain, and in almost every aspect void today, which offers very unfavourable conditions for modernization. This ‘empty individualism’ also evokes the phenomenon discovered by Elemér Hankiss, who tried to interpret it by an analysis of Peter Shaffer’s play, *Equus*. (Hankiss 1983:428–432.) In a ‘crudely timely’ manner he sees the message of the play in the growing uncertainty of man relieved of the bondage of values, of the web of idols and symbols and asks whether man has become any happier as a result. I may add in an even timelier manner that individualism becoming increasingly empty creates a great opportunity for nostalgia for the traditional values and linkages, but as their social base is missing to a large extent, this nostalgia may revive these values in a distorted form though with a great emotional content. Consequently it is less able to select between the elements still valid and belonging to

a certain age. ('Selection' was particularly difficult in where the world of the old values had been liquidated violently and to some extent by external influences; hence nostalgia became even more curious.) However, this 'premodern' world of values is unfavourable in all aspects from the angle of the development of values suitable for the process of modernization. As a serious analysis of the values of traditional Hungarian society, free of prejudices is still awaited, the nostalgic approach – naturally even if it is directed towards the Hungarian society of the fifties and not towards the 'old' one – and its linkage to values and behaviour rejecting the modern world with a curious distortion as is manifest on a global level, further hinders us in 'finding our way' and leaves little opportunity for developing the values of modernization with traditional elements.

The measure of value of the modernizing process if we may think of such a "standard" at all, is the *adaptive, innovative capacity and readiness of the society*, together *with its success in harmonizing the changes* necessary in the interests of renewal and of the real values evolved earlier.

The 'logical' antonym of 'modernized' society is the 'traditional' one. In reality, however, there are now only a few truly traditional societies left. The problem is rather the extent to which a society has emerged from the traditional condition, the size of the traditional sector within the given society, etc. For the societies now modernizing some phenomena that evolved during the development of the advanced countries serve as a pattern to a certain extent (modern economy, organization, administration, etc.); thus, even if modernization is not identical with the so-called westernization, these patterns represent a specific kind of opportunity for comparison. Assessing the extent to which these elements may be functional in a modernizing society, or conversely, how far they restrict the process of modernization with their possible dysfunctional impact, how far they restrain or hinder the development of a mechanism based on endogenous factors is therefore a considerable problem.

This, however, leads to yet another question: is the problem of identity of national or ethnic culture appearing and increasingly vigorously disputed in some modernizing societies, only a self-defence (as I have described it above) against the consequences of the global processes, or does it express some rationality of the necessity of using the internal conditions even if in a distorted ideological form for promoting modernization. Finally, it shall be interpreted only a kind of substitution for a frustrated modernization? Actually the internal conditions – even if Wallerstein's view of the dominance of the world system in the development process and, together with it, that the internal processes are shaped by external influences is accepted – have grown into historically specific ones in any society with borders that were arbitrarily drawn. To some extent Wallerstein also considers this when he speaks about the impact of the Gesellschaft-type world system creating Gemeinschafts, even though he considers the communities thus created unambiguously irrational and sees the unfolding of their existence with a function historically challenging the system.

The issue can be further complicated: when do these endogenous conditions create or maintain parochial relations and cultural characteristics that make the

adaptation of the society difficult; or when does this parochial kind of relationship and culture become 'aggressive', considering itself as a pattern for other societies, or even for the whole world?

In the first case the parochial ideologies growing into 'fundamentalism' (either linked to traditional elements, or to created 'new traditions') may even evoke the interruption of the process of modernization with their social context. (This has happened for instance in Burma and may take place in Iran.) They may slow the process down, or even become an obstacle to modernization, as was the case in some aspects in inter-war Hungary and in others in after-war decades, or in the Soviet Union particularly during her recent decades, even in times of Gorbachev.

Taking into consideration the historical changes of the centre-periphery relationship 'in our time' (including a considerable part of the last century) *the process of modernization occurs* and produces phenomena offering more general conclusions *at two peripheries*. These 'two' peripheries are *Eastern Europe* (including East Central Europe) and the new states located on the territory of *earlier colonies* dispersed over continents and greatly differing in respect of their past, and their cultural and economic development.

Although the so-called advanced capitalist countries are usually considered to have the most modern societies, one could hardly grasp the process of modernization by the study of these countries and their development.

In Western Europe (and one may list North America under this heading, despite all the different characteristics of the various countries) industrialization has organically grown from the development of the economy and society.⁵ This 'organic' development, together with the organic evolution of the bourgeois society and with the process of the accumulation of capital (in this respect its sources may be disregarded) created the framework, way of life, philosophical ideas, political views, way of thinking, etc. of the bourgeois industrialized society which subsequently penetrated the entire society during the course of creating the bourgeois political system, even though with some modifications, and far from their entirety during their realization. If we accept W. W. Rostow's view – and only this one, but not his theory on the stages of development (Rostow 1960) – that the take-off, which can be defined in industrial societies, requires a massive set of preconditions going to the heart of a society's economic organization and its effective scale of values (Rostow 1964:289) then we must also accept the inference. Accordingly – if there is no external example – these preconditions can only come into existence by the organic development of the society, and essentially, simultaneously in all the spheres of the society, though some minor differences of time may be possible. But if 'organic' development in the economic, social, and even cultural sense had taken place in practically all the spheres of the society, there would have been hardly any chance of utilizing 'substitutive' means. (E.g. law with its own instruments did not substitute certain processes, but it helped those already in progress.) Consequently the various spheres of the society could unfold relatively independently, though related to one another and in a synchronous manner. Literature e.g. has not, or has only in certain situations, and quite rarely, substituted for politics; the framework of political activity has also grown organically, (occasionally on the basis of 'tradi-

tional' elements). This is true even if this 'organic' development took place through the interference of revolutions, since in fact 'two revolutions', the industrial and the political were linked to each other in this development.

Precisely because it was an organic one, this development did not have a 'spectacular' confrontation with the traditional phenomena traditional sectors (as ultimately none of them survived) of the society, we cannot regard it as modernization. By gross simplification we may say that there was nothing left to be 'modernized', as the 'traditional' developed into the 'modern' in the various spheres of the society.

The process of modernization in the limited sense of the word (where I consider this narrower meaning to carry the specific content) took place in the countries which were lagging behind the Western capitalist path of development and developed into something characteristic differences partly because of the countries' original features, and partly because of circumstances related to backwardness.⁶ Such phenomena occurred in the northern periphery of Europe (where this process was quickly completed), and at the southern periphery, the special features of which differed in some respects from those in the east but the process of modernization has typically unfolded in the East European and East Central European societies, and in the earlier colonies. This interpretation is founded on the by now practically accepted view of economic history, according to which "development and backwardness are not two different phenomena, but two sides of the same phenomenon, its dialectic unity; the developed countries develop exactly because of and from that which caused others to sink into backwardness." (Berend and Ránki 1979:11.)

II

The Problem of Modernization at the Eastern Periphery of Europe

1. The backwardness and 'differentness' of the East European and East Central European societies has become manifest to highly varying degrees in the different countries, the fact, however, characterizes all of them.⁷ At the eastern periphery the impact of Roman institutions, which had greatly influenced the character of Western feudalism, was not felt or only to a very limited extent. In Russia elements of the Asiatic mode of production, the Byzantine influence (in the political, as well as ecclesiastic and cultural fields), later on the consequences of the Mongolian conquest, the special features of the absolutist monarchy which created Russian unity (the growing strength of feudalism, the role of the nobility in its service, the lack of autonomous urban existence, etc.) all contributed. (Anderson 1974:195 et seq.) Elsewhere subordination to the Turkish empire – the Wallachian principalities, Bulgaria, Serbia – had an influence, which laid the foundations of the still existing characteristics of the region. (Niederhauser 1988:675.) In East Central Europe the web of backwardness and 'differentness' had already made the development of the feudal society a specific one. Special features were, for instance, the small number of urban bourgeoisie, and consequently the lack of 'minor autonomies', the early evolution of the estates by rapid and inorganic assimilation on the pattern of Western society, etc. Consequently the Western European model asserted itself but it was distorted by the impact of the East European elements, phenomena and processes. Later economic changes (e.g. the shift of trade routes, the second serfdom, in connection with the subordinate integration into 17th and 18th-century European agriculture), the external political factors, like the Mongol-Turkish conquests, and the 'peripheral' position within the Habsburg empire, further strengthened the specificities of this region. Industrialization not only unfolded in these societies later, but was, to some extent, also due to largely external, somewhat specific factors, related to the challenge of Western European development, and not – or at least not entirely – as a consequence of the earlier phase of development. Although the 'challenge' deriving from the development and economic 'leap' of the Western European countries may have questioned the backward economic, social, and political structure of these societies, yet at the same time it gave 'momentum' to the development of agriculture, still characterized by traditional conditions. "The world economic centre had literally pulled the raw material and food production of the world to itself." (Berend and Ránki 1979:27.) For the eastern periphery

of Europe this 'pulling effect' made possible the growth of the export of raw products. However, as a consequence of the existing political structure an important part of which was the system of large estates, agriculture could not respond to this challenge by modernization. Its response was much more the increase of the efficiency of the traditional framework. As the East Central European development had not created, or if at all, only with great delay, an economically and politically *sizeable* bourgeoisie, the political movements (and even the revolutions), amplified also by the Western European challenge, had essentially taken place under the leadership of the upper professional stratum and the nobility. Thus, the 'two revolutions', the industrial and the political were not only belated, but were not even linked to each other. Partly due to this a pure bourgeois society could not evolve anywhere, and to some extent feudal elements 'grew' into these societies even during the course of modernization. All this had far-reaching consequences. First of all even after the abolition of serfdom, landed property remained as it had been earlier, with feudal limitations attached, and with the political, power- and ideological structure based on it. The consequences could be seen for a long time in the economic and social life of these countries and in practice hindered the unambiguous unfolding of 'civil society' as developed in the centre.

The modernization of agriculture could not develop in all its aspects later on either (although the few decades prior to World War I helped a great deal in take-off at least in Hungary)⁸, the Western European 'pulling effect' only acted to a degree and in some cases. Even if industrialization began in places, its pace and proportions within social production continued to lag far behind if compared with that which occurred in the centre. It could not 'absorb' the superfluous agricultural labour, hence significant agricultural unemployment or 'underemployment' evolved. Part of this redundant labour attempted escape by migration overseas prior to World War I, another part of it was absorbed by industry, but ultimately this redundant labour hindered the real modernization of agriculture, along with the limitations of a feudal nature (in Hungary, for example, as late as 1913 sixty per cent of the holdings above 114 hectares had a limited circulation only).

As a consequence of the special, 'non-organic' nature of this development national awakening of these societies did not take place as an integrative result of economic development, and, due to this circumstance it was in a sense an artificially created one. Nation was primarily manifest on the intellectual-emotional plane accompanied by a sense of backwardness with 'anguish' and an 'inferiority complex' as its corollaries, which was then compensated for by overemphasizing the earlier institutions, characteristics and values of the given society and also by a very marked defensiveness. In this context Western development could function as pattern and measure, but it was also an achievement against which 'self-defence' was necessary and the efforts towards the protection of national values regarded everything traditional as national in an undifferentiated manner. Subsequently these conditions incorporated certain retrograde elements into national consciousness. This also led to an increased political role for literature and literary scholarship (also as a substitute for the lack of possibilities and proper forms for broader political participa-

tion), together with the relative backwardness of disciplines more directly concerned with the society and economy (economics, sociology).

As a specific consequence of this development the ideological sphere has become predominant, particularly in relation to national consciousness. Elements and phenomena that have evolved in this manner have (often like a taboo) restricted or weakened – even if only as a basis of reference – the rational elements and also the trend of the decision-making process. All the more so, as politics – which was not separated from the other spheres of life – particularly penetrated into the world of consciousness.

It was also related to the briefly described features of development that in these backward societies – due to the neglect of the economic aspects of social problems, and to the lack of adequate economic means caused by economic backwardness – politics has applied means acting upon consciousness and behaviour (e.g. legal norms) much more than means actually suited for the solution of problems.⁹

I have already indicated briefly those similarities and differences which have coordinated the societies of Eastern Europe and of East Central Europe in a number of basic features, yet have historically shaped them to become different at the Eastern periphery of Europe. (Szűcs 1983.) These similarities and differences have been even more markedly manifest in respect of the *political system*, political culture and political thinking. Here there is no opportunity for a profound analysis of the entire region, therefore, I attempt to present the region through the example of Hungarian society. The societies of East Central Europe (the Czechoslovakia of today, Poland, the historical Hungary including Transylvania annexed to Romania by the peace treaties of Trianon (1920) and Paris (1947), Croatia, Slovenia and the Voivodeship (constituting the territory of former Yugoslavia) have adapted to the European centre, even though they themselves have not become partly or fully an organic part of the societies of that centre.

Thus the question is what are the common, the peculiar and the specific elements in the evolution of the East European (East Central European) political systems and the Hungarian one among them?

The societies of East as well as East Central Europe are societies that evolved at the Eastern periphery of Europe. The *permanence of peripheral development* was added to the historical delay of these societies in the unfolding of feudalism and to the pressure for adaptation deriving from it (a pressure to adjust to the European centre, together with a certain pressure to adopt the patterns evolved there). It means that the development of this region has remained a peripheral one if compared to the Western or Central European centre, in other words, its adverse position has become a permanent one in the centre-periphery relationship. It is partly due to this situation and partly to the fact that this relationship, becoming permanent as a consequence of recurrent economic dependencies, has also evolved into a politically adverse situation in which the societies of this region have also frequently got into a *politically* peripheral position, either as parts of a major empire, or its vassals. Those economic and social phenomena which could have led to a strong political autonomy in the face of the central authority could not develop because of the specificities related to the periphery. Wherever such an autonomy could develop,

like in the Hungarian comitats of the nobility, it was – in spite of the fact, that the nobility was able to introduce some elements of rule of law and (later against the Habsburg political efforts to diminish the independence of Hungary) even the idea of constitutionalism – sometimes in a way distorted. Subsequently the *political system became historically excessive in the society* as a consequence of the permanent pressure for adapting the external pattern and the mechanism of ‘closing up’. Politics penetrated into other spheres of social activity as well, it ‘politicized’ these spheres, obviously distorting them, but also the development of the political system itself. One such ‘distortion’ which derived from the excessive dominance of the political system and has been further amplified by the lack of the minor autonomous communities was the *excessive dominance of the political centre within the political system*. In this context feedback coming from the environment, a mechanism regularly feeding back the consequence of politics has not developed either, or it has remained backward, and at times distorted. As the problems of modernization remained unsolved – and ultimately only a change of social formation, the building of a new society in the wake of the revolution offered an opportunity for a solution – the internal and external historical and social conditions of the building of the new society have only further enhanced the dominance of the political system and the problematic phenomena deriving from it.

Somewhat different phenomena were manifest in the two regions under survey besides this basic feature, or a rather specific group of factors.

In the eastern region, and primarily in Russia an economic, political, religious and cultural association with the Byzantine Empire, another ‘centre’ of Europe, strongly declining and subsequently itself becoming a periphery, had been present for a long time, and eventually the political set up of the Russian principalities was shaped along the Byzantine pattern in many respects. The support of the central authority by the religious leadership, and even the subordination of the Church to the state, meant that cesaropapism became significant, resulting in a political and religious autocracy. It is not insignificant that the legal systems of this region – including the Romanian, Serbian and Bulgarian principalities – developed along the Byzantine, but the already *transformed* (and distorted) Byzantine ‘Roman’ law, while retaining their own norms of customary law, and not on the basis of Roman law in its still classical form, summarized already in the East Roman Empire. (Moreover, the first Russian ‘lawbook’, the Russkaya Pravda was published four hundred years after the appearance of similar Western collections.) As was stated by Emil Niederhauser: “Besides all its obvious internal modifications, and even significant changes Byzantium stood much more for tradition than for renewal, for the ossified than for the pliant, for backwardness, rather than for progress. The Byzantine influence which had long survived the Empire itself, became a decisive factor of backwardness.” (Niederhauser 1988:670–671.) However, something else had also come from Byzantium, namely a *special sense of political and ideological mission*. The idea of the third Rome associated with the monarch of the Moscow principalities and subsequently with the tsar of all Russians and his seat, Moscow in the united country. This was accompanied by a long isolation from the Western centre of Europe, and with an expansion towards the West, but much more towards the East.

This special sense of mission was disturbed by two factors. First of all as a consequence of the characteristics of Islam, which had grown out of the same Jewish-Hellenistic culture as Christianity, the state institutions and culture of which had been profoundly influenced by the Byzantine Empire. (Rustow 1965:172.) Secondly, the Turkish empire, the Sultanate, with its centre in Constantinople also nurtured a similar sense of mission partly, though strongly deriving it from the Byzantine heritage. Later, as "*the second phase of feudalism* only spread in the Western part of East Europe with its technical innovations and new structure" (Niederhauser 1988:674), this region included the Ukraine and Belorussia of the Russian empire, but not Russia itself. Peter I had to recognize the disadvantages deriving from backwardness in the face of the technical and economic advancement of the European centre, and he had to open up towards the Western centre of Europe and to launch a special process of 'modernization'. If the earlier, relatively long Mongolian-Tatar rule is added, with its strongly centralized nature apparatus of authority based on service and strong sanctions, then we have more or less summarized the historical sources of the specificities manifest in the autocratic rule of the tsar and the political system associated with it in the 19th century and surviving to some extent even after the revolution. (For the historical roots see, for instance, Eisenstadt 1978:123-128, 234-235, and Bilington 1970.)

However, the specificities of the post-revolutionary political situation were produced primarily by the given historical situation which had considerably transformed the principles expounded before the revolution, naturally not independently from the historical context outlined above. But the evolving ideological and political system could not receive some of the political institutions developed in the earlier context. For instance, the lessons of the structure and role of the Bolshevik party are very interesting. The bases of this party were elaborated by Lenin when the party had been working underground in tsarist Russia, but it could continue to function later with a similar structure and principles of leadership after it ascended to power. The policy which rejected Trotsky's permanent revolution and advocated the possibility of building socialism in a single country could be transformed into a policy based on the support of countries with 'socialistic' characteristics in various parts of the world, and offering new opportunities of power, yet be at one with earlier traditional Russian objectives, even in the new situation after World War II, amidst the changing power relations.

The societies of the East Central European region occupied an intermediary place in this respect as well, and not only in a geographical sense, between the two big regions of Europe, the Western centre and the Eastern periphery, striving to play the role of centre. On the one hand, it meant that they shared the special features of the historical development of the Eastern periphery and the consequences of this for their political systems. On the other hand, the pressure for adaptation deriving from late development ultimately linked these societies to the processes of the Western centre with minor or major 'fluctuations', in the adoption of the patterns developed there but eventually very often functioning differently on home ground. Finally, this region (with the exception of Poland, where the country had been broken up and a part annexed by tsarist Russia although the other parts shared the

destiny of the other countries of the region) had been developing within the political unity of a Western, or Central European empire, the Habsburg one, for a shorter or longer time. Consequently *elements of the political system of the Western centre had also appeared in the political systems* of the East Central European region. These elements, such as parliamentarism in Poland or in Hungary, though they had been functioning in a distorted manner in many cases, yet they established some relationship with the political system evolved in the Western centre. However, the political system characteristic of the Western centre never developed fully in this region, with the possible exception of Czechoslovakia during the inter-war period. The political system of these societies became similar to that of the eastern region in many respects, partly due to historical circumstances – like, for instance, the defence of independence which meant essentially also the protection of a special political system in Hungary until the first part of the 19th century – partly by the conditions of dominance slowing down modernization and making it heterogeneous, and finally by the factors of a given historical and social situation, like the external and domestic political consequences of the Trianon peace treaty in Hungary. (The impact of fascism of western origin is special and requires further study.) Subsequently, in the historical situation following World War II the political systems of these countries were built along the lines of the political system which had evolved in the eastern region.

I have already referred to the factors which gave to Hungary particular features within the political system of the East Central European region. Such an individual feature was, for instance, the autonomy of *comitats* (only Poland was similar in this respect) and particularly their historical role. The autonomy of *comitat* as an organ of the self-government of the nobility had a special role in the face of centralized political authority, but this role was a changing one. For a long time the *comitats* had represented the interests of the nobility and as such – but at times also as the protector of national characteristics – had stood against the reform of traditional conditions and the political system. In the second part of the 18th century, however, a special enlightenment of the nobility occurred, in which the concept of Hungarian constitutionalism, commensurate with the Western model was, along with other things, formulated. Later, in the early 19th century the nobility had a decisive role – substituting for the bourgeoisie – in the reform movements, in the first experiment with modernization, and in the creation of political institutions for a bourgeois political system. Conversely, albeit in a different historical situation the domination of the nobility long hindered, for instance, the establishment of a professional public administration through the maintenance of the traditional political culture. This has contributed to the prominent role of the political element in public administration and the management of the state as against expertise, until today. With the liquidation of the autonomy of the nobility the autonomy of the *comitats* became “empty” one in many respects. It was built upon the interests of the organization of public administration in the *comitat* and hindered the self-government and real autonomy of the organically evolving local communities.

2. *The political thinking of the East Central European region* reflects the features that have appeared in the modernization of these societies, and have influenced the role and the opportunities of law, or rather the interpretation of this role and opportunities.

The special feature manifest in the political thinking of the region – linked to the characteristics of development mentioned above (to be illustrated concretely by the Hungarian political thinking as suggested earlier) – may be identified as follows.

The *permanent presence of the idea of reform* is the most important characteristic, always linked to the belated development of the region, to the constant pressure for adaptation to the centre, to the sense of backwardness and differentness.

As backwardness and development into something different becomes manifest in phases, so the idea of reform has been recurrent in the political thinking of this region. But the idea of reform has some other characteristic features.

Until and when the pressure for adaptation became manifest in the Eastern periphery of Europe in the face of the given society as an autonomous political entity, the agent of the adoption of the foreign economic and institutional patterns, or even those of the structure of the society – and primarily those of the European centre – had been the ‘endogenous’ authority located in the centre of the political system, which tried to realize reforms through forced adaptation by state, political and legal means, organizing it downwards from the top. This was a characteristic part of the process during the original adjustment, in the period of the organization of the state following the arrival of the peoples constituting the societies of the periphery in Europe (during the time of St Stephen in Hungary, i.e. just around 1000 A. D.), and in every situation (see Peter I’s efforts in Russia), when backwardness became dramatically obvious, shedding light on the need for adjustment. However, most countries of the region – including Hungary – were in a strange situation from the 16th century onwards, because they became parts of major political units, of empires, or were taken into a sphere of influence. Hence not only the challenges requiring adaptation arrived from outside, but also the *reforms aimed at the realization of adaptation*. These reforms, initiated by the central government of the empire, were also directed at least indirectly against the interests and way of life of a significant part of the society and directly against the institutions and legal system linked to the original features of these societies which were more or less integrated into the empire or had developed at an earlier stage of history. (The most obvious example of such reform objectives was the attempt of Joseph II, the Habsburg Emperor to liquidate the constitutional separateness and integrity of Hungary, to transform its social structure and integrate it into his empire.) From one aspect these reform efforts had the same consequences as in the case of the states forced to adjust as autonomous political entities, in other words, they further enhanced the role of the political system and of the state in the society. In the meantime they also generated a different kind of political thinking which could unfold partly in a reform thinking starting from ‘below’, and partly in a political thinking opposed to reforms.

I would call the first type a *reform thinking of a creative nature*. Its starting point is that the conditions constituting a ‘modern’ state and society were non-existent in

the given society. For instance, it was clear in the Hungarian reform period lasting from the late 18th century until the middle of the 19th that the economic base had to be created by the adoption, or even only by the use of patterns that had evolved in the centre, a bourgeois kind of social structure should replace the feudal one, the national language should be cultivated so that a national literature could be created, and national historiography should be promoted with a view to strengthening national consciousness. In other words such elements and conditions had to be *artificially* created which had developed in the European centre in the course of an organic development. (In fact, the so-called bourgeois revolutions of the West constituted a part of this organic development.)

This type of reform thinking was simultaneously national as well as liberal. It was national because it attempted to create or corroborate the components of national existence in the face of a power centre regarded as external, and it was liberal because the authority it stood against maintained an earlier social structure (the Estates) in all its important components with the help of an absolutist political system. In addition, this earlier social structure hindered the development of the indispensable conditions of the modern economy (such as capital circulation, a credit system, the free circulation of land-property, and free labour). No doubt several variants of this national liberal reform ideology coexisted at the same time, but ultimately they shared essential features and were more or less identical.

It is not easy to see without a profound knowledge of the Hungarian economic and social conditions how this reform thinking could find its vehicle in the comitat of the nobility, an element of the feudal Hungary of Estates, nor yet how some representatives of the aristocracy and a part of the nobility were ready to take up the idea of reform – despite their privileges – and definitely wished to modernize. These individuals had undoubtedly seen the numerous obstacles to modernization not only in the economy, in the political structure, but also in the way of thinking, in the deeply rooted customs and prejudices, in the narrow, local interpretation of politics, or in its utopian variant which nurtured dreams. It was itself a specific phenomenon when these aristocrats and members of the nobility became liberal.

It is not possible to present and analyse these conditions here. With some simplification it can be stated that the level of urbanization was low, no significant bourgeoisie, creating and protecting autonomy had evolved which could have been the social base of 'civil society', of civil publicity in Hungary, just as was the case in the other societies on the Eastern periphery of Europe. As a consequence of these shortcomings the comitat of the nobility, a political entity with some autonomy in the face of the central authority could become the forum of reform objectives, the 'publicity' of comitat politics could give a venue for efforts towards modernization. These objectives – however – appeared on the level and in the forum of politics (seeking – occasionally correctly – political solutions even for economic problems). The political conditions of the Habsburg empire actually could produce a disadvantageous economic situation for Hungary, and in other contexts they created such an impression. The reform thinking of the comitats took the form of the political ideas of the French enlightenment by the 18th century. (To give an example: Montes-

quieu's book on the spirit of law was accessible in Latin, the official language of the comitat of the nobility, by the middle of the 18th century in Hungary.)

The difference between the liberalism of Hungary, or generally of the eastern periphery of Europe from the Western one is explained by various factors. Apparently Andrew C. Janos has been able to get closest to the correct answer: "In the core area of Europe where it was born, liberalism did indeed originate with a class of agrarian entrepreneurs and merchants who, in their historical moment of success, wanted to be free to pursue their affairs without any outside protection or interference. The result was a doctrine built around the idea of personal freedom and the emancipation of the individual from the authority of the state. Not so in Hungary and in other societies of the European periphery, where liberalism became the ideology of a class desperately searching for alternatives to economic entrepreneurship. This class was ready to dispense with its erstwhile feudal privileges because they impeded this search. But at the same time, it wanted to strengthen rather than weaken the modern state, so that it would afford protection against the vagaries of the market, and, as a last resort, provide the bankrupt landowner security of employment in its bureaucracy and political institutions. This is not to say that the issues of personal freedom and individual rights were irrevocably thrown overboard. But in the years to come, concern for these issues was overshadowed by a mounting interest in the unification of the state, its modernization, and its emancipation from foreign, imperial tutelage." (Janos 1982:65-66.)

Thus the role of the state moved to the centre of east European action and liberal thinking because of this reason as well, as the activity of the state could not be disregarded in the creation of the conditions that were to allow the development of a modern economy based on enterprise, or some 'alternative' to it.

Therefore, the reform efforts, originally evolved through the 'publicity' of the autonomy of the comitats, did not only bear on themselves the specificities related to their origin, the efforts towards modernization were not only accompanied by historical limitations, such as the preservation of the comitat itself as an autonomous organization of self-government, etc., corroborated by the need for self-defence against Habsburg authority as a historically developed political organization of defence, but some of these genuine features, like the priority of politics over the economy, and a *confidence in legal solutions* (approaching the economic and social problems from a legal aspect) were maintained by the conditions of backwardness.

The organic basis of this liberalism in the comitats, however, was not civil society existing in the dimension of the society, but the landed nobility and the intelligentsia with moorings in the comitat were functioning as such, thus the significance of the comitat as a political organization was revaluated together with its limitations, moreover, as an organization mediating modernization based on an external pattern, it could even claim their local adaptation. Such a significance was only enhanced and made possible by the fact that historically it was the comitat which had represented and protected the Hungarian constitution against central government. Therefore, even the trend most emphasizing the centralization of the state (here the idea of a centrally organized state was accompanied also by an emphasis on the shaping role of the state) could not break away from it even for tactical reasons. One of the

prominent representatives of the so-called centralist litteral thinking also said that he would harm the homeland if he aimed at the "restriction of the rights of the municipa". (Szalay 1847:1/184.) József Eötvös, who was the most eminent representative of Hungarian liberalism, although he turned against the entire Hungarian political and social system of the gentry, and particularly against the autonomy of the estates in the comitats. In his book entitled *Reform* (published in 1846), "he attacked simultaneously the feudal imperial centralization and the consciousness of the gentry hidden behind conservatism, but generally influencing the thinking of the opposition as well" (Schlett 1987:103), and wrote that "our country cannot remain in her present state, every improvement is impossible if it is not profound". (Eötvös 1846:16.) Yet he saw a serious political force and the protection of autonomy in the introduction of the system of self-government, although only after the Hungarian War of Independence of 1848–49. "In the interest of restricting the power of the state. . . one should also see to it that *the individual should not stand isolated* in the face of the authority of the state. Therefore, in our age the only means of defence against the omnipotence of the state authority is the same which has been serving as defence against all kinds of unlimited rule for centuries, namely: that the community, the province, and the organizations in the state in general, which link the individual to the state, should allow some latitude for autonomous activity, so that solid limits of the state authority should be erected in this manner". (Eötvös 1981:II. 344–345.) Actually one of the components of Alexis de Tocqueville's contemporary influence in Hungary was the emphasis on the 'free system of communities' against the central authority, it was a demand to guarantee the activities of self-governing bodies limiting the central power.

Just as Hungarian liberalism, grown out of the reform objectives of the nobility, tried to unfold its concept of modernization, keeping in view foreign patterns (at first watching French, then increasingly British society, studying British economic and political institutions) by utilizing the comitat as a mediator, and tried to realize it within the framework of the opportunities deriving from the historical situation, so curiously 'complex' was *conservative thinking*, too. Hungarian conservatism was built upon loyalty to the Habsburg dynasty and to the unity of the empire, but with a certain reform of the existing system. Even Chancellor Metternich accepted the concept of Count Aurél Dessewffy, one of the leading thinkers of Hungarian conservatism that "the strengthening of the state and its external consolidation may be promoted by a certain degree of progress not damaging the basis of authority, to be supported by the government, and not by complete immobility." (Varga 1982:16.) The conflict between the central state and the comitat is reflected in an interesting way in Metternich's concept and in the conservative political thinking represented by Dessewffy, because while Metternich aimed at the trimming of the constitutional rights of the '52 revolutionary republics' (the number of counties in Hungary in the first part of the 19th century) under the pretext of modernization, the Hungarian conservatives supporting his administration did not want to restrict the comitat as the venue of constitutional autonomy, they only wanted to influence its internal power relations in keeping with the interests of the central authority, even by administrative means.

The fact that the modernizing efforts of Hungarian society started on their way in a society constituting a part of the Habsburg empire, and at a time when the political centre itself wanted to modernize to some extent, but its modernization wanted to achieve the complete political integration of the country, ultimately resulted in the incorporation of elements not always consistent within the various trends of political thinking, but occurring in every trend. Metternich's policy aimed at economic liberalization with a highly centralized but not parliamentary system. The liberals were aiming at economic liberalization, and simultaneously desired a constitutional political system by way of parliamentary centralism, but to some extent they also wanted to maintain an important element of the historically evolved political system, which was the autonomous comitat. But the autonomous comitat was something which the conservative political thinking, loyal to Habsburg rule, also wanted to preserve; it survived as a national characteristic even in the outlook of anti-Habsburg conservatives, who wished to maintain the feudal conditions.

In the political thinking related to modernization the *historical element* is usually assessed as a restraining, conservative one. The best known ideological opponents of historicity – like Nietzsche, for instance: “gegen die Geschichte, das heisst gegen die blinde Macht des Wirklichen” (Nietzsche 1903:357.), or Popper, identifying the historical approach with disarming historical necessity: “the future depends on ourselves, and we do not depend on any historical necessity” (Popper 1984:2) – saw the hindrance of unbounded human action in historicity and emphasized the rule of ‘is’ above ‘should be’, and also the ‘disarming’ nature of historical thinking. However, it is just the history of the processes of modernization (in the most diverse societies) which indicates that although the historical way of thinking does really contain a defensive element against change and novelty, this defence is mostly *justified* in the face of *unlimited* activity. After all the characteristic feature of unlimited action is just that it does not count with the existing, with the nature of the medium, of the phenomenon to be altered, with its internal mechanism and its conditioning by other factors, with the realistic interrelationships and specificities, particularly when it wants to transform a backward society, developed into something different by the introduction of *external* or *foreign patterns*, as has been the case frequently in the history of modernization.

I have already analysed the significance of the historical outlook of resistance against the artificial creation of legal systems based on an *external* or *foreign pattern*, or against the reception of legal systems far away from the conditions of the receiving country (which was manifest in the Eastern periphery of Europe just as much as in the case of the developing countries of today), and also the role of the historically evolved socio-cultural context in forming eventually distorting the received pattern. (Kulcsár 1987a, 1988.) Now I would only like to point out that this feature of historicity becomes active not only in the case of legal reception deriving from forced adjustment, but also against every political action started from outside, or from above, torn away from the actual conditions, and aiming at the transformation of the society. Thus historicity, usually assessed as conservative, or even irrational in European political thinking, has a significant corrective function in the face of an autocratic ‘transformation of the society’ (often distorted into an utopia

of fundamentalist nature) and its dysfunctional consequences. Yet another element may be added to historicity in the political thinking of the periphery, and this is the 'sense of mission'. Such a sense of mission lived, for instance, in the idea of the 'third Rome' in Russian political thinking. The same was expressed by 'the defensive bastion of Europe' in Hungarian political thinking, or in the 'continuous' maintenance of Latin culture in Romanian political thinking, etc. The relationship between the sense of mission and historicity deserves attention because it may lay the foundations of an entirely different 'mission' even in a changed historical situation. The Russian sense of mission, for instance, reappeared in the support of revolutionary movements, in spreading socialist ideas after the Revolution of 1917, and subsequently in the defence of the 'progressive' regimes after World War II, expressing in each case the ambitions of a great power.

During the period when modernization got under way for the first time (this period can be put at the last three decades of the 19th, and the first decade of the 20th century in Hungary) when the country could industrialize under favourable conditions in the dualism of the Austro-Hungarian Monarchy, even though the system of feudal large estates did not favour the real modernization of agriculture, a new element came into the political thinking as well. The bourgeois radical thinking unfolded beside the traditional liberal outlook, which expressly aimed at the establishment of a Western political set-up, the adoption of a Western type of pattern of economic and social development, while mainly relying on sociology. In other words, it wanted a 'classical' bourgeois democratic republic. A somewhat unexpected opportunity opened for these objectives with the dissolution of the dual Monarchy in the last phase of World War I. In the revolutionary situation, which evolved in the autumn of 1918, an attempt was made to create the often desired bourgeois republic of Western type, in the formation of which the radical sociologists and political thinkers had a large share. Given the situation, however, the leading powers of the Entente did not support such an opportunity and, by allowing for the wishes of the successor states established out of the Austro-Hungarian Monarchy, they created a situation where this effort failed, and the republic gave way to a short-lived political system based on the unfolding Soviet pattern, hardly taking the given circumstances into consideration.

With the failure of these two revolutionary systems, and disillusionment with the related political ideas the historical way of thinking and a system based on a 'neo-Baroque' pattern were revalued as a matter of course, in an effort to secure the continuity of the historical Hungary in the truncated country. Elements of authoritarian rule and thinking acquired a central role beside parliamentarism in this political system and which had a significant role in restricting radical thinking and movements coming from the right, as well as from the left. (The latter was rather weak.) Ultimately even Gyula Gömbös failed to develop a right wing radicalism, with thinking and objectives related to the idea of the Italian corporate state. He could not shake the position of the leadership based on conservative authority, similar to the change that had taken place in the other countries of the region.

This ideology, based on the principle of conservative authority, which produced only a single really significant political thinker in the personality of the historian

Gyula Szekfű, played a special role in the process of modernization, too. By and large it could not favour modernization – which was in difficult position anyhow because of the troubled economic conditions of the country partitioned by the Trianon peace treaty – because it represented those values which were rooted in the past, to a large extent by their traditional nature, and its values could not guarantee adequate conditions for enterprise, for the spread of bourgeois values. It did a great deal in some fields – like school education, the modernization of public administration, etc. – but overall it had no real alternative for the further progress of modernization. No real alternative could be offered by the leftist labour movement based on Marxism either, and its ideology hardly had any influence upon the changes in Hungarian society during the inter-war period.

Such political thinking developed, however, which, although it was not unique, did offer an alternative in the countries of the East Central European region during the inter-war period. An alternative which aimed at the *creating an indigenous way of modernization*, and utilized historical thinking not for self-defence against modernization, but for the creation of a pattern built on the internal conditions. This political ideology and movement was the populist movement, based primarily on young intellectuals mostly coming from the peasantry, and it primarily wanted to base itself on the study of the problems of Hungarian society. It offered a solution to these problems which could be called *populist* modernization using a current term.

The question is whether the populist movement really meant an alternative to the 'official modernization' which became stagnant and was even held back in Hungarian society between the wars.

In order to answer to this question, first the essence of populism as a political ideology, and its relationship to the process of modernization should be summarized in brief.

The significant, concrete historical content of modernization can be grasped in the context of centre and periphery during the past one and a half, two centuries. I have also attempted to show that such an internal, organic development, progressing automatically, evolved in the historically emerged centres, which was capable of accepting social change, of making the changes 'organic', of shaping adequate responses, including even the necessary adaptation to the continuous challenges deriving from its environmental changes and internal development. On the other hand it can be stated with some simplification that an inorganic, suddenly jumping and subsequently *stagnating development* is manifest at the peripheries of all times (as is proved by the situation of the Eastern periphery of Europe). Changes start from the outside, and usually try to eliminate the peripheral situation by the imitation of an external pattern. But the external pattern – in the historically evolved, special context of the given society – can rarely be adapted without distortions, therefore the development of the periphery would still be different from the processes and phenomena of the centre partly because of the original characteristics, and partly because of the modified and transformed survival of the external pattern. However, the success of modernization is not the successful adoption of the economic and social phenomena and institutions of the centre offering the pattern,

but the *development of such a social condition* which is capable of safeguarding self-movement, of successful adaptation. This movement lifts the given society from the condition showing peripheral characteristics, even if after a long time. In addition, its adjustment to the economic processes of the world, based on endogenous factors, further promotes the maintenance of this movement.

Though the dual impact of 'patterns' deriving from 'Western' development, namely its measuring of values and its provoking resistance have been much stronger in the process of modernization in the erstwhile colonies than ever in the historical development of the Eastern or East Central European societies, it has been alive here too, with a changing intensity, always linked to the given situation. Consequently the concept and model of *populist modernization* has been historically alive beside the concept of the so-called endogenous development, according to which the development of the society has to be based primarily on the internal factors, suitably utilizing the historically evolved institutions and values of the given society even if they are linked to traditional conditions. According to this model the traditional peasant communities are not only capable of autonomous modernization (though affected by the external environment), but they even promote the integration of the broader society. I have already quoted the following: "it is no exaggeration to claim that populist modernization has continuously sustained and strengthened the process of nation-building in India." (Ishwaran 1977: 119.) The original, basic element of this 'populist' modernization, which can be traced back to Gandhi in its Indian variant, is the 'self-sufficient' village. Thus populist modernization is new, but only as an expression. In reality the appearance of populism in the backward countries of the world, which can be characterized by a large proportion of peasantry and rural population, has always been linked to some experiment in modernization, to such an experiment which considered the 'Western' model (evolved in the European centre) somehow unsuited for adaptation.

Naturally several forms of the manifestation of populism have evolved, but its main features, namely that it is based on the peasantry or the urban poor, that it is under the influence or even leadership of the intelligentsia, that it wants to build the society on the basis of internal characteristics and rejects the 'Western' model with more or less radicalism, have been present not only in Latin America (where they had a significant political weight in the 1960s and to some extent in the 1970s as well), or in other developing countries. The role of the so-called incongruent social groups has been considered to be a primarily Latin-American feature. 'Incongruents' are the educated people, mainly university graduates, who, because of their economic conditions, unemployment, or simply because of the frustration of their work-related aspirations, or because of other reasons (impoverished aristocrats, the new rich not finding their place in the traditional structure, ethnic minorities, etc.), are incapable of fitting into the society, therefore they nurture hatred against the establishment. However, if social or economic 'rigidity' does not allow them to successfully fit in, then these groups may become advocates of new ideas challenging the status quo, leaders of new movements, and though their social status may be high above the average, and they may occupy a far more superior position in the social hierarchy if compared to the poor masses, their common

opposition to the establishment may link them to the populist movements. (Di Tella 1970:50.)

This phenomenon, however, did evolve in Europe as well, at least in a certain historical period. The fascist, national socialist movements after the World War I, for instance, also had a certain populist content in as much as they also attracted the groups of incongruent status. Moreover, the ideologies and movements summarized under the term fascism also tried to develop some alternative variant of modernization (more or less) different from the Western European centre. (Even the fascist movements of the centre had such an aspect, but there the sense of backwardness could not be effective in a social dimension, only in some strata as it was substituted by the feeling of being pushed into the background as a nation and by a consequent sense of grievance.)

However, those movements which also aimed at some populist variant of modernization in the Eastern periphery, or semi-periphery of Europe, one of which was the Hungarian populist movement of the inter-war period, should be separated from the fascist and national socialist 'populism'.

The populist movement in Hungary, despite all its internal trends and differences

- indicated a disillusionment with both the modernization model of the Western centre and the socialist pattern evolved in the Soviet Union. (The latter had been attempted to introduce in Hungary during the time of the Republic of Councils - in 1919 - and left behind profoundly negative impressions.) The always present defensive attitude towards an external pattern was transformed into the ideal of an autochthonous building of society based on internal characteristics;

- as a consequence of which the peasantry, constituting about 55 per cent of the active population at that time, was considered to be the most important force of social transformation; the peasantry was equated with the people and even with the nation, the peasant, the rural, was equated with the 'internal', with the 'specific', and the 'national';

- the transformation of society meant the development of the village and of agriculture, land reform, settlement, cooperatives and intensive cultivation, the education of an intelligentsia from among the peasantry, and, finally, basing the new society upon the values and customs of the peasantry [see for instance law making based on 'popular law' (Kulcsár 1988a)];

- the intellectual leaders with a few exceptions came from status groups that can be called incongruent with a significant base of young intellectuals behind them;

- finally, no trend of the movement counted sufficiently with the external (political, etc.) conditions until almost the so-called conference of Szárszó (1943) following the turning point of World War II, and had strong illusions towards the reality of evolving a modern society based exclusively on internal elements.

It can be stated with some simplification - the simplification disregards the time difference of the various conditions - that the efforts of the populist movement towards modernization saw, despite political differences, that the renewal of society required the transformation of peasant society. They considered the peasant society and its values to be the most important problem and at the same time a source of

renewal. Imre Kovács drew the following conclusion in his article published in *Magyar Szemle* (Hungarian Review): "In 1848 the liberation of the serf was brought about by the failure of the economic system of landlords besides many other things: now the failure of feudal agricultural labour will force the reform of agricultural social policy and the failure of the peasant way of life will force social reforms." (Kovács 1938:346.) It was practically at the same time that Ferenc Erdei also wrote: "one cannot anymore remain a peasant". (Erdei 1938:197.) Moreover, a few years later, when criticizing government measures for raising the peasantry in his book on Hungarian peasant society, he wrote: "This effort, however, disregards one thing. Namely, that a serious uplift of the society is equivalent to the promotion of emergence from the ranks of the peasantry. But this has no such means, and what is much more, it has general political and social conditions." (Erdei 1941:164.)

Changes in the peasant way of life – together with the changes in social conditions – could still take place in alternative ways. If the embourgeoisment of the peasantry is considered to be the way of uplift, then this social stratum would follow the Western path and be integrated into a more general bourgeois society, having already been freed from the characteristics of its own values and way of life. Several representatives of populist movement rejected this alternative outright. Moreover, they traced the crisis phenomena of peasant society at least in part just to embourgeoisment saying that the process was destroying those 'ancient values' upon which the transformation of the society could be built. Embourgeoisment, crisis and the disappearance of the way out resulted in a certain resignation and also the contradiction according to which "peasantry has been decaying, yet the destiny of the nation has to be linked to them". (Némedi 1985:190.)

The other alternative was the non-bourgeois way of development. It was perhaps most clearly stated by Péter Veres, who could not only see the development of the peasantry along the Western path, but criticized the negative phenomena of agriculture, starting from the same point in his book published in 1936: "All this is so, because our agrarian culture, just as everything else here, has not developed organically from the local landscape and from the characteristics of the people. It is precipitate and imitates the West, just as is done in every other sphere." (Veres 1936:11–12.) But in some form others – like Ferenc Erdei, Imre Kovács, Géza Főja, etc. – also saw a path of hardly defined 'community' nature as feasible, but who rejected the socialist way of development too, particularly in the form it had taken in the Soviet Union. Ferenc Erdei, though he was attracted by Lenin's idea of forming cooperatives, and by the Leninist revolution as well, but primarily as a social transformation based on the Eastern European characteristics, which had gone beyond Marx's international and Western European outlook by its 'Russian' nature.

It is hardly surprising that the proposition of a populist modernization based on the peasantry and its perspectives within the given social structure, was interwoven with utopian traits when embourgeoisment was rejected as something disrupting the ancient peasant outlook, values and behaviour, when doubts occurred (by the way, with reason) about socialist development, because there were disillusioning examples and because its only realization bore on itself the features of another

region and society. The idea of social transformation based on the agro-town and the farmsteads (later on replaced by building upon the bourgeois structural elements of rural society) in the case of Ferenc Erdei, and Péter Veres's Géza Féja's vision of the original 'collectivism' and 'ancient popular community' of the Hungarian peasantry derived essentially from the limitations of elaborating a real alternative. In certain cases the utopian traits were impregnated also by special illusions deriving from the given situation. Péter Veres, for instance, wrote the following: "Besides the unprecedented increase in the productivity of peasants working collectively there is no point in using expensive machines, because it is not profitable. Social and human considerations have nowhere hindered the mechanization of production and they would not do so here either, but here the machines are incapable of competing with the labourers of the Hungarian Plain or generally with the Hungarian labourers working collectively." (Veres 1936:187.) How far was the elaboration of this populist alternative, filled with illusions, hindered by the fact, that the popular movement could see the only realistic internal factor as the peasantry and in such traits which a number of them considered as disappearing, or by the hard reality that Hungarian society was incapable of any successful modernization with its backward agriculture unable to support even its existing agrarian population within the given social structure, or that the populist movement remained at the level of writings and could not become a political movement, may be disputed. Anyhow, history did not offer an opportunity even for an experiment in modernization based on the peasantry.

In Hungarian society there evolved various concepts concerned with populist modernization during the inter-war period. Ideas also emphasizing the role of the peasantry appeared as official policy as well. Moreover, Gyula Gömbös's reform programme and its advocates after his death even envisaged some kind of 'official' populism. Without discussing them now in detail, and not to mention the social democrat and other reform ideas either, I would only like to mention that László Németh's writings containing his concept of modernization agreed in some points with the views of the populist movement; he was a fellow-traveller in some respects. For instance, the importance of the transformation of the peasantry and the village, land reform and settlement with the help of intensive agriculture, even if these ideas occasionally appeared in an utopian framework, like the idea that Hungarians 'have to pull back to the internal courtyard of their traditions', have to enhance their own 'force', etc., or some parts of the programme of the Debrecen Catechism. (Németh 1940: Vol. IV. 10-13.) László Németh's reform thinking, however, was separated by traits particularly important from the point of modernization from the main trend of the populist movement. For example, its emphatic Europeaness, (his "Snobs and Peasants" remains instructive reading in this respect), and particularly the element of 'quality' closely linked to the sense of Europeaness, the socialism of 'entrepreneurs in touch with tradition'. (Németh 1940: Vol. IV. 177-178.) 'Quality', and the people based on it, the 'new nobility', the educated elite, etc., were all missing from the social consciousness of the peasantry; 'quality' meant for them work done traditionally and well in keeping with the accepted rules, but not more, the concept of the 'elite' was beyond the traditional peasant society. Change would

become possible with the disappearance of the traditional peasant society when the peasant would no more 'manage a household', but would become the 'farmer' of the industrial society. (Redfield 1956, 1960; Hagen 1962; Wolf 1966; Varma 1980.) However, the idea of 'quality' not only led to the significance of the elite in the case of László Németh, but also to the exemplary role of the 'ideal man' in the shaping of the society, thus finding a relative in Gandhi and his ideas, and grasping in a sense a special aspect of peasant societies, the *significance of the charismatic leadership* of external origin.

In fact, a coherent set of ideas on populist modernization was not elaborated by the inter-war Hungarian populist movement. In some fields (land reform, settlement, movement of popular colleges, cooperatives, etc.) writings discussing the basic principles were published, and political programmes were brought out (like for instance the programme of the March Front), but actually it was István Györfy's book, the "Popular Tradition and National Culture", published in 1939, the sole comprehensible attempt to lay the ideological foundations of populist modernization, which summarized some of the scattered ideas. I should add, however, that Györfy's book just as much influenced the 'national reform' efforts of the ruling circles (though it was published after the reform policy of Gömbös), as its message summarized and continued the ideas of populist modernization.

A *contradiction* in populist objective appeared in the Hungarian populist movement similar to those which appeared in the other societies of the Eastern region of Europe, relatively early in the history of populist modernization. The contradiction can be seen in the fact that the real content of modernization includes a mechanism based on internal factors, which is capable of adapting the society automatically to changes in the external environment as well as to the internal development of the given society, and it would really lead to the deeper historical aspects of modernization than the effort to merely adapt the patterns evolved in the technical, political and economic system and culture of the centre, because the internal factors can be easily identified with social strata, culture or ideological phenomena regarded as 'special' ones, or 'special' agents in the given ideological context, and the really important internal factors and specificities offer a chance not only for false identification, but this *false identification* may transform the given ethnic group, the ideological-cultural elements – such as the peasantry in the case of the Hungarian populist movement, and the 'ancient' values of the peasantry – into something *exclusive from the aspect of modernization*. Such a populist modernization falsely identifying the internal factors with an ethnic group, culture or ideology, is easily inclined to abstract itself from the external factors constituting the realistic environment of the society, to become extrovert, and even to transpose some of its features as a pattern for other societies and cultures.

The populist movement of the inter-war period as an effort towards populist modernization did not reach such extremes. This was to a large extent because the traditional sector in Hungarian society was no longer strong enough to hide the problem of the illusionary nature of any modernization based on it after the experience offered by realistic social science research (in which the majority of sociographic studies proved sufficient), which could expose the crisis of such

communities and the entire peasant society. By the time of the Szárszó conference in 1943, where the different views and ideas related to the future of Hungarian society were discussed, the events of the Second World War had created a situation, in which no opinion could disregard the increasingly realistic perspective effect of external factors. These were later commented on by László Németh: "History has grown above our heads and demands a future for the whole of Europe. There will be much less to be chosen by us, and much more to be received ready-made." (Németh 1980:769.)

One may argue about the recognition of the quality of external factors and its impact on the concepts related to the development of the society. An interpretation of the external factors as elements of a *uniform world system* did not appear even at the Szárszó conference, consequently the outcome was more defensive introversion than adjustment.

However, a few circumstances cannot be disregarded. One of them is the *regional orientation* of the populist movement. It derived partly from the nature of populist ideology, from an assessment of the international factors of the inter-war period, such as the German invasion, the menacing appearance of the Soviet Union as a great power, and from a realistic interpretation of the consequences of the Trianon peace-treaty that contacts should be sought with the neighbouring countries with a similar social structure, evolving various populist movements, and struggling against largely similar problems. This regional determinism developed a special sense of location in Eastern Europe, or the Danube region. This determinism also appeared in Oszkár Jászi's concept of a "Danube Confederation" [he spoke, for instance, about the peasantry as a potential internal defensive force "against the mechanistic formulae of industrial socialism" (Jászi 1938:73)]. This special sense of Eastern Europeanness indicated some reality in so far as it was put by László Németh, to quote his phrase: "God 'spoke about the Hungarians' together with the other peoples of the Südostraum just as was done by German political literature."

It is a question as to how far Andrew Janos's statement covers a general attitude of the populist movements according to which Marxism, populism and fascism did not appear as ideologies of modernization, but as ideas about restructuring the international system: "The populists dreamt of a global peasant village without the evils of the market and the industrial economy." (Janos 1982:169-170.) At any rate, this attitude was less significant in the Hungarian populist movement as it had a regional outlook.

3. The 'turning away' from the European centre of Hungary and practically the whole of East Central Europe (perhaps with the exception of Czechoslovakia for some time) which has become so critical today, had actually begun by World War I and increased after the peace treaties ending the war. In fact the borders drawn after the war were so arbitrary, they disregarded the historically evolved conditions and linkages to such an extent that they have unfolded problems difficult to digest for almost all the countries concerned, though with reversed expectations. The existence of these problems and their attempted solutions have strengthened the 'special', the 'national' everywhere. In Hungary, for instance, as we have seen, it

took a conservative form; the ideology and politics of a neo-Baroque 'restauration', and in the form of populist modernization as its radical variant; in Romania efforts were made to assimilate Hungarians and other minorities into a greater Romanian national ideology and politics, the extremist variant of which was to be the 'Iron Guard' movement. In Yugoslavia efforts were made towards some kind of unification of the numerous ethnic groups, while there were definite efforts towards independence in the case of some ethnic groups (such as the Croats); in Poland it was the unification of the population of the various parts of the country that had belonged to other states in history on the basis of a uniform, radical national ideology, etc. All these ideologies – perhaps the conservative Hungarian one the least – had become increasingly open towards the unfolding radical, rightist ideas and practice of the European countries frustrated in some way. This 'openness' was curiously enhanced, or reduced in the case of some movements (like Hungarian populism, or Polish nationalism) by the growing German imperial influence in the region.

During the period following World War II the region as a whole came under the military, political, economic and ideological influence of the Soviet Union, as a consequence of which the new phase of modernization was determined by the pressures for adaptation to the Soviet Union, by the Soviet model of the building of society as it had evolved by the thirties and forties.

The historical circumstances of the development of this model have not yet been analysed with sufficient depth so that the 'inevitable' traits of the process and those linked to the given historical situation can be separated. It can be definitely stated that this kind of vision of socialism was born out of the special traits of East European development – to which I have already tried to refer in brief – and of the intellectual output of the European centre. That means that it developed from a special meeting of the social and political theory of Marx and Engels, obviously always meant to be based on the development trends of the centre that of the reality of one of the European periphery. Therefore, and ultimately it could not break away from the conditions of development as had unfolded during the course of East European history. Usually it is reality that gains the upper hand in the meeting of ideas and reality, and the ideas adjust to the actual possibilities of reality sooner or later even if they acquire a dominant position in the process (or experiment) of the transformation of reality in a functional sense. A quick glance at the East European fate of the social and political theory of Marx and Engels may suggest a similar conclusion.

It hardly needs any argument to say that the appearance of this social and political theory in Russia (more exactly its 'utilization' by the Russian revolutionary movement) was equal to its 'further development' – or rather to a change which meant its distortion – as adjusted to the given conditions. That this 'further development' had been a conscious one right from the outset, was emphasized by Lenin himself during the preparatory phase of *Iskra*. It is natural that the historical characteristics of the given conditions – to the understanding of which the theory of Marxism was applied – influenced its 'further development', all the more so, as 'further development' itself was expressly functional in nature 'understanding' the socio-economic

conditions in the interest of political action. And since a theory developed in the centre had to be applied to understanding the backward society of the periphery, so this 'further development' was primarily significant in the study of the conditions of such societies, in their political analysis and in promoting the solution to practical political problems. The significance of the peripheral conditions was particularly emphasized by Lenin against the so-called 'Europeanizers' (for instance, he characterized Akselrod, one of the advocates of this attitude as a naked savage putting on a top hat, and imagining himself to be a European). Beyond the basic work, *The Development of Capitalism in Russia*, upon the analyses of which the fundamental ideas of Lenin's political theory were built, I see the major points of function, but I must stress: *exclusively from the angle of political theory*, the following:

- The analysis of the social position, articulation and possible political role of the peasantry, the definition of the relationship between the peasantry and socialism. (The weight of this issue in Lenin's social and political theory is indicated in a quite interesting way, namely that Plekhanov and the Mensheviks considered just this element of the Leninist theory to be anti-Marxist, and even as the revival of Narodnikism.)

- From this derives partly the realization and conscious acceptance of the historical relationship between the earlier revolutions and the revolution of the proletariat, and partly the great role of theoretical consciousness (the introduction of Marxist theory into the instinctive movement) as a factor laying the basis of further development.

- The role of a solidly organized party in accomplishing socio-political change.

- The organization of the revolution and the related theses in a country, which according to Lenin's view "was on the border line between civilized countries on the one hand, and such Eastern, non-European countries, which were brought into the sphere of civilization for the first time and irrevocably, by the war." (Lenin 1975:377.)

- The role of the party in the *realization* of the dictatorship of the proletariat has become dominant because of the backward conditions and the underdevelopment of the Russian proletariat: "...an organization comprising the entire proletariat cannot directly realize the dictatorship of the proletariat. The dictatorship ... can be realized only by the vanguard..." (Lenin 1974:195.) Thus the building of the specialist apparatus of the centralized state replaced the system of rule which had been accepted by Lenin in his *State and Revolution*, in his post-revolutionary articles, speeches, and particularly in practice, but the controlling role of the working class (and the creation of the related organization) was still stressed.

- The realization of the necessity for efficient economic organizations and of their state control, the analysis of the related practical problems.

After the death of Lenin, in the 20s and 30s the theoretical simplification and growing rigidity of 'Leninism' set in, primarily in the form summarized by Stalin, upon which subsequently, further, mainly dogmatic explanations were built. The simplification and further 'development by Stalin' is emphatically related primarily to certain conditions and demands of social practice on the one hand, and to the

political practice called 'personality cult' and its consequences on the other. (Perhaps it is as well to note, that the roots of 'personality cult' are strongly associated with the peripheral features and historical characteristics of a given society.)

The main points of junction of the changes can be summarized in the following:

- Stalin had already protested against Leninism as the adaptation of Marxism to the 'special conditions' of the Russian situation, though he added that 'there was some truth in this definition'. (Stalin 1951:7-8.) Later on not only this association of theory with the peripheral conditions disappeared, but the Marxism thus obtained became the 'true' Marxism. (A number of Marx's writings were not even published, or were treated as classified material.) Though Marx did not exclude the possibility of the development of a socialist revolution under conditions of backwardness in the *German Ideology*, he regarded this eventuality as a 'complementary form' of history. "The objective historical conditions, however, have realized just this complementary form and this is discussed in Leninist theory." (Rácz 1985:54.) For Stalin the 'complementary form' and its consequences already appeared as the only possible way.

- Stalin also protested against "the starting point of Leninism, which was the question of the peasantry, the issue of the significance of the role of the peasantry". (Ibid, 135.) This protest is also related partly to the changes of the position of Leninism, and partly to the economic and social policy pursued in the Soviet Union, which 'solved' the issue of the peasantry by fleecing it (in the interests of industrial development) in a sense, and by authoritarian methods with short and longer term negative consequences upon the position of agriculture and its productivity.

- One of the cornerstones of the political theory of 'Leninism' as represented by Stalin - in contrast to the ideas of Marx - was that the revolution of the proletariat could be victorious in a single country, and the building of socialism was possible in a single society.

- The stagnation of centralized state planning and direction in its extreme form, the unchanged continuity of the organizational form and activities of the party (with little regard to the new condition and tasks), the extension and the theoretical wording of the functions of the state to every sphere of life in the society.

- The doctrine of the sharpening of class struggle and the increased strengthening of the power of the state as a corollary, with an emphasis on its oppressive functions.

- The 'pure' normative nature of legal regulation, functioning as an instrument and as an expression of authority, had become an exclusive one with the strengthening of the centralized state, hence the autocracy of the so-called 'socialist normativism' in legal science and practice.

- 'Leninism' shaped by Stalin had ultimately become the 'dogma of infallibility', in keeping with the current, even if short-term needs of authority. This is when ideology - together with a special image of the socialist society and efforts towards its realization - had become the frequently exclusive legitimizing factor of political decisions. The "declaration of Leninism as the 'Marxism of our age' and the extension of its validity in international dimensions" (Rácz 1985:71) is related to

such a fundamental change in the functions of political ideology and to the growing strength of the sense of mission in the form of directing the international labour movement.

A new and significant phase of the change in Marxist social and political theory started with the 20th congress of the CPSU. This was related primarily to exhaustion of sources (in labour training, raw materials, etc.) which were able to start a kind of limited modernization, and to the fact, that the second stage of modernization demanded such social, cultural and economic factors, the appearance of which was impossible in a socialist political system. It was interesting that some theoretical change was started by the criticism of the political practice of 'personality cult'. The social necessity of the continuation of modernization – after minor or major fluctuations, detours and periods of stagnation – has become increasingly manifest in reforms, thus *social change*, adaptation to the changing conditions has become an essential, politically also valuable element of the society. Its consequences have appeared in Marxist social and political theory, and up to the end of the eighties they have eliminated the most important theoretical points of 'Marxism-Leninism' as evolved in so-called socialist societies.

That much is quite sure that social and political theory – with the contribution of such disciplines as sociology and politology, not cultivated during the Stalinist period, or the distorted science of history and economics, etc. – has been relying much more on the concrete analysis of reality. Consequently the specificities of the different regions and societies are becoming increasingly significant from both theoretical and political point of views. The past spread of a general and largely distorted Marxist social and political theory, the appearance of some socialist objectives in the building of societies with different levels of development, cultures, etc. in several regions before its obvious frustration could shape only superficial similarities. Changes in society led at the beginning to the problem of the changing image of socialism, later since the research could hardly be torn away from the changing reality of the society, even the results of this research questioned the very scientific basis of so-called socialist society, which had been formerly weakened obviously by the 'results' and frustrations of its own practice.

The *ideological vision of socialist society* as evolved in the Soviet Union had in practice *created a society based on autocratic rule, corresponding to the conditions of Eastern European development*. This has unfolded the first phase of modernization that can be characterized by take-off in some respects. It has torn away the society from the traditional linkages, it has built an industry and agriculture which has brought a high degree of mobility into the society and laid the foundations of the significant development of education and science, it has increased the level of culture and schooling, etc. However, it built factors into the society during its formative period which have hindered subsequent progress. Turning property 'public' during the revolutionary period, and subsequently during the autocratic rule of Stalin liquidated the opportunity of enterprise based on individual initiative and bureaucratized the operation of the economy. It excluded expertise and a significant part of the intelligentsia, the representatives of creative force; the sim-

plified social and political theory of Marxism which has acquired a kind of 'sacral' character hindered the development of social science as it itself became part of the political system; the centralized state and party bureaucracy of growing rigidity became an obstacle to any kind of movement and the most important channel for social mobility became a career in the party with a rigid 'socialization' of individuals, which meant a kind of indoctrination against any real change. The penetration of the historically dominant political system into the other spheres of the society grew continuously because of the political system and of ideology that had become part of it, until it had become so extensive by the thirties and forties that the *separation* of the various spheres of activity, necessary to the progress of modernization remains a problem and subject of theoretical disputes until the fall of the socialist 'system', sometimes even today. The traditional Russian great power political and military objectives have been supported ideologically by the development and protection of the 'socialist world system' which emerged after World War II, and these efforts have diverted considerable material resources from the general development of the economy and technology. Although the concentration of resources in the arms industry and into the development of the armed forces has created a rather important new technical base, this technology has not been able to, or has penetrated only very slowly into the non-military sector of the economy, etc. In brief, these traits have created a society *bearing upon itself certain traditional features* where the unfolding of the second phase of modernization not only has ultimately become impossible, but even has questioned some of the former results of modernization, resulting in increased falling behind. The gap has widened between the core processes of the world and the Soviet Union in technical, scientific fields, and also in the way of life.

Thus the deeper social content and context of the reform processes that have been launched in the Soviet Union, can be grasped in the following.

- That special variant of modernization which has appeared as the '*socialist building of society*' on the basis of Marxism sprouted from the Western centre and transformed under Eastern European conditions since 1917, has created an authoritative, strongly centralized political system, corresponding to the old characteristics of Russia even in its original form free of distortions. It has not broken up the paternalistic political culture characteristic of the region and has ultimately been lagging behind the rapidly progressing technical, economic, and cultural processes and lifestyle of the centre during the past decades. It has not been able to promote the unfolding of the second phase of modernization, autonomous growth, based on the internal conditions, which would smoothly and successfully adapt the society to the uniform economic and political world system.

- The model of socialist society evolved in this process has proved to be obsolete not only from the angle of the development of the Soviet Union, incorporating traditional traits into the society, but it has also partly lost the set of ideological elements accumulated during the Stalin years as a consequence of which it could pose as a 'socialist' society, and as a model of general validity for the whole world, and, on the other hand, its original function has also been challenged. Thus even

the 'opportunity' of the 'complementary form' to occupy the next phase of social development as a main form, inevitable, according to the Marxist interpretation, has been lost though the Soviet Union continues to be a superpower.

The societies of East Central Europe were forced to adapt themselves to the Eastern region during the final phase of World War II and subsequently, they have practically adapted the social model evolved there.¹⁰ We have also seen that the characteristics of the development of the two regions significantly differ from each other, even if there are a number of similarities. This fact and also the conditions of the development of the Stalinist political system – the political struggles of the years 1945–1949 in Hungary – made the functions which (as turned out in our days, have been performed by the model in its original place with a very limited efficiency) even more problematic in East Central Europe, because of its heavy dysfunctional consequences right from the outset. (Kulcsár 1986a: 37–369, 283–318.)

The dysfunctional consequences, the growing differences in technology, in per capita GDP, etc. in comparison with western countries finally have resulted not only in crisis situations in each East Central European country (repeatedly in the case of Hungary, Czechoslovakia, Poland), but in acknowledge of frustration of 'socialist systems'. Halting or isolated reform movements have been initiated the Hungarian one having made the greatest progress, even if not without obstacles and stops. These reform efforts have pointed towards the appearance of the second phase of modernization, but they have also exposed the dysfunctional nature of the original model, and made obvious the necessity of the change not only the economic system, but the political one. From our point of view it is very important the role of law in this transformation making possible the advance of modernization.

III

From Reform to Transformation: Change in the Political System in Hungary

The reform introduced in Hungary in the year 1968 was originally economic. The very fact that such a step could be taken reflected political change too. (Though according to some, the economic reform was in fact self-defence against political reform. However, it cannot be corroborated without a closer study, even though it cannot be excluded either, if the structural resistance of political systems to their own change is kept in mind.) Ultimately the essence of the reform was the transformation of economic management which was producing an increasing number of dysfunctional phenomena and becoming increasingly ineffective. Reform seemed to be an indispensable step for replacing the extensive economic development by an intensive one. In my view the economic reform had two basic objectives: partly to make the economy able to adjust better to the world economy after the reform, and to raise the living standards of the society as a consequence of the former.

The broad outlines of the history of reform are known, even if research could start in earnest only one or two years ago, and even if the real context of certain turning points have not yet been fully explored. (Berend 1988.) Thus one is forced to draw inferences, even though their verification is highly probable. Yet a few conclusions can be drawn from this story. If these 'conclusions' are collated with the characteristics of modernization following 'take-off', then interesting coincidences occur in the problems of reform and modernization.

Let us see some, by way of example. One of the basic ideas of the reform of the Hungarian economic management was the acceleration of technical development in the apparently efficient companies, which might have been able to be successfully integrated into the world economy on the basis of domestic conditions, and which were capable of continuous renewal. The idea was a dual one: partly to safeguard technical development, and partly selectivity. Actually both are related to the *application of knowledge, of science*, and ultimately not only in the technical processes, but in organization, in management, etc. As I mentioned in my introduction, one of the essential elements of modernization "is the growth in capacity to apply tested knowledge to all branches of production; modernity is the social, cultural and psychological framework that facilitates the application of science to the processes of production". Such a cultural and social sphere is the precondition of all this in which "a value system geared to the continual search for new knowledge, is coupled with a high tolerance for ontological uncertainty". (Nash 1984:5.) It can hardly be

doubted that Hungarian society struggles with just this problem among others, as it also cannot be denied that the reform (and even the political transition and its economic corollaries) have not proved able to solve the problem so far. The regulatory system of the economy does not promote the reception of tested knowledge, the economy resists, even structurally in many cases – partly because of the excessively bureaucratic and hierarchical organization of enterprises, and partly because of the specificities of the technological structure. Those structural conditions and mechanisms have not developed either, the operation of which would allow a real chance for the penetration of technology into the decision making processes at various levels. Naturally, problems located not only in the organizational system of science but those of industrial or other organizations cannot be disregarded either. At times they prevent the organizational system of scientific research from producing necessary and tested knowledge partly because of internal factors, partly because of the political, economic, financial, etc. environment, and also because of the characteristics of scientific activity (such as, for instance, its time requirement, the uncertainties of science, etc.).

The reform particularly emphasizes creativity in Hungary. It really depends on the existence of the creative minority and the degree of their creativity – as has been stated by Arnold Toynbee – whether the society develops by adequately responding to the challenges affecting it. The other side of the issue is: if the creative minority becomes a dominant one and the element of rule becomes the dominant one in its social position, pushing the significance of creativity into the background, then its responsiveness may diminish to a level causing the stagnation, and even possibly decline, of the society. (Toynbee 1962:I/195.)

Let us not dispute the general validity of Toynbee's statement in the philosophy of history. It can hardly be doubted that the responsive capacity of societies is shaped by a lot of factors, and it also cannot be doubted that changes in the creativity of the creative minority also depend on social factors. However, it also cannot be disputed that the social position of the so-called creative minority, either where the possibilities of its sphere of activity are concerned, the social 'payment' of its output, or where the environment it is supposed to operate in, is considered, promotes little the unfolding of creativity in Hungary. This question has been discussed extensively ever since Ferenc Erdei referring to the phenomenon of expertise being pushed into the background by political power. It is also known how far the external and internal system of hierarchical dependence of the institutions, reciprocity that can be sensed in personal relations, the patron–client relationship often underlying political relationships, and finally the bureaucratic organizational conditions hold back the blossoming of creativity and hence the society's capacity for renewal. I can only repeat that the progress of reform has not changed this situation significantly, but sometimes has even left earlier slogans of political origin unchanged. Moreover, such a supposition has arisen from the social recognition of the problems of the process of reform which assessed reform as a kind of gadget serving the interests of the intelligentsia.

A further basic, manifest idea of the reform is the *assertion of the laws of the economy*. More exactly a greater role was to be granted to market forces and

administrative activities were supposed to be replaced by economic ones in the sphere of the economy. In other words this idea also leads to a significant element of modernization, namely to the clear separation of those spheres of social activity which may subsequently result in organic cooperation. The basis of the isolation of the spheres of social activity is the hardly negligible fact that in all the spheres of activity of the society there is a *special set of interrelationships, special regularities function*, and on this basis *spontaneous processes* characteristic of the given sphere unfold. Consequently these spheres of activity produce their own rationality, hence one may speak about economic rationality, political rationality, legal rationality, etc., only to mention a few. The organizations (just as much as people) operating in the individual spheres of activity – provided they are expected to have rational behaviour – have to be built upon the rationality of these spheres, their regulation cannot be torn away (even though it inevitably gets removed to some extent) from the requirements of this rationality. If organization or regulation does not follow the rationality of the given sphere of activity, sooner or later such a spontaneous set of conditions evolves from the context of the sphere which diverts the behaviour of the actors – be they people or organizations – from the behavioural patterns expected by the formal rules. At this point one meets the well-known phenomenon of evading law, of the inefficiency of legal regulation.

The phenomena of the spheres of social activity and their rationality can be approached through a number of problematic elements. The best known and most frequently quoted issue is in the *relationship between political direction and economic activity* – but taking into consideration the historically evolved dominance of the political system in Hungarian society – the same question can be raised regarding the relationship between politics and any other sphere of social activity. The analysts of this problem have rather restricted its scope, and this has particularly been the situation in political disputes and essays. The issue was put whether politics should quit the economy. Unfortunately this simplification reacts upon the scholarly study of the question, creating opposition to even raising the issue. However, only the analysis of the essence of political rationality may lead to an understanding of the relationship between politics and the other spheres of activity, including the economy. It was already known by the young Marx that there was a separate ‘political rationality’ (the principle of which is will), moreover, it had been considered by some of the earlier political thinkers, too. The statement that the ultimate criterion of political rationality is to retain power, can hardly be refuted, from which unfortunately the unlimited use of the means of power, or, to put it more mildly, so-called power politics, relying only on power and its immediate means could also derive. However, there is another kind of component of political rationality, such as the adjustment of interests (even if weighted), and what is particularly important from the angle of modernization is *the adjustment of the rationality of the different spheres of activity*. Such an adjustment tries to shape or influence the conditions of activity in all the spheres by considering the rationality of the others, so that the dysfunctional effect of the activities or decisions made within a sphere upon the other fields are reduced to a minimum. Such an unfolding of the content of political rationality can produce the real activity, in keeping with

the nature of politics, which would make not only superfluous, but *also impossible the taking of decisions by one sphere of activity from the other, or the substitution of one rationality by the other*. The real basis for the realization of economic rationality, which could be a real obstacle to the implementation of political 'rationality' in economics, however, would be a complete change in property relations in Hungary and in the other societies of Eastern Europe. The dominance of private property (and a real civil society based on it) might be able to represent – by the due political institutions too – the rationality of economics. The dominance of state property can only promote the influence of state politics, which means a variety of political rationality, in the field of economics, too.

This is a further consequence of the separation of the spheres of social activity – and of the organic cooperation deriving from it. Also a condition of the latter is the *setting up of functional organizations* and the liquidation of parallel organizations without social function and those which are symbolic in nature but unrelated to the development of society; just as much as the purification of the content of roles related to the various positions. (The latter is also needed because a traditional role interpretation and the related behaviour is often associated with modern roles.)

The modernization of the political system also means the modernization of public administration. This is almost a commonplace just as much as the growth of the significance of the bureaucratic organizations in the process. It should not be forgotten however, that the emphasis is not on the epithet 'bureaucratic' in the pejorative sense, but on the type of organization in the Weberian sense of the term. This is an organization having certain characteristics, primarily based on expertise and rational activity, which can be more efficient if compared to the *earlier* types of organization. It can really only become efficient – and this would mean the reduction of the bureaucratic phenomena of pejorative sense – *if its structural characteristics are allowed to assert themselves*. In other words, if it is really based on expertise, etc., and even then its operation is influenced by the economic, political, cultural phenomena of the environment it is supposed to work in. (Kulcsár 1982:235–254.)

Bert F. Hoselitz, who was among the first to point out the importance of the organizational conditions of economic development, said that economic development is not linked to some specificity of government, or even to an ideology. (Hoselitz 1952a:8–21.) This statement provokes controversy at first reading although the impact of established sociology, hitherto achieved and insufficiently justified, such as for example, Marx Weber's theory of the decisive role of protestant ethics in the development of capitalism, cannot be determined. (In fact a number of authors have challenged the statement in the literature dealing with the sociological context of economic development.) However, I believe that this statement can be interpreted together with another by Wilbert Moore. His relevant sentence is the following: "If modernization is defined as the process of rationalization of social behaviour and social organization one avoids the vagueness of 'joining the modern world'..." (Moore 1977:33.) What and how much can be avoided by this interpretation – ethnocentrism for instance – is another, though at present less interesting problem. But if modernization is considered to be the unfolding of rationality, what occurs again is *déjà vu*, as Max Weber was always talking about unfolding

rationality. However, if this rationality is broken down into value, goal and instrumental rationality, as was done by Weber, although naturally their separation also has a function, but we also differentiate between the rationalities linked to the special regularities of the spheres of activity already referred to, then Hoselitz's above-quoted sentence also acquires a different meaning. Economic development and modernization respectively are not linked to a specific type of government, I would say political system or ideology in so far as it is capable of promoting the unfolding of the rationality of the spheres of social activity, or at least it does not hinder the process of unfolding.

Many people have put the question how far can economic reform be successful without changes of the political system? In other words, how far does successful modernization require a certain political system? According to Organski, for example, political development has to precede economic development (Organski 1965), while together with others Lerner (1958) argues for the primacy of economic development. (A similar dispute took place during the Hungarian reform period of the 19th century.) Eisenstadt emphasizes that the two may even run counter to each other. In a liberal system pressure from below may force such economic advantages – emphasizes Eisenstadt – that hinder the growth of the economy, whereas the beneficiaries of rapid economic growth may hinder the liberalization of the political system. (Eisenstadt 1966a: 144–146.) Several references have been made to some successful authoritarian political systems – for instance to Japan historically and to South Korea more recently – which not only did not hinder rapid economic development and modernization but promoted it while naturally neither of them took up economic activities. As one of the conclusions drawn by Sándor Kopátsy analysing the conditions of the successful Far Eastern economies states: “Political centralism and economic democracy can be coordinated, moreover the economy thus becoming dynamic may promote the stability of the political power.” (Kopátsy 1986: 13.) I shall return to the issue when discussing the problems of modernization in the ‘developing’ countries, here I would only like to mention that other authors refer to the repeated historical example of the liberal political system in connection with successful modernization, and they do it with at least as much justification as the already quoted ones referring to the authoritarian type.

The centralized authoritarian political system evolved in the first phase of the ‘socialist’ societies allowed for a rather strong concentration of energy. However, its dysfunctional consequences should be mentioned together with its successes just as much as its obvious failures in the process of modernization. Elsewhere I have tried to outline the positive and negative consequences which derived, in many cases, from the same phenomena or features of the political and economic system, and the successes accomplished during the phase of take-off did in some cases build in components that were to make the second phase of modernization more difficult. (Kulcsár 1986a.) However, there are also examples of the liberal democratic state ending ultimately in an authoritarian regime as a consequence of its own dysfunctions, and also that the latter have disintegrated with surprising speed, giving way to a liberal democratic political system (e.g. Spain), or have turned into a fundamentalist and authoritarian system, opposed to modernization (as has been the case, for instance, in Iran, or in Burma).

Historical examples indicate that presumably the problem cannot be solved in abstracto. It cannot be stated that only authoritarian, or only liberal democratic systems are able to promote the process of modernization efficiently, obviously a very significant issue is, *whether the economy is based primarily on private, or public property*. If the process of modernization – as I have done so far – is studied in the context of centre and periphery, then it becomes obvious that while the processes of the centre having created the modern society unfolded initially in the absolute monarchy and subsequently in a more or less liberal democratic political system (even if a revolution intervened), and they then created a system of institutions based on liberal democratic ideology *as a pattern* of political structure, the situation was not the same at the peripheries (semi-peripheries) not even in Europe. The modernization of the Scandinavian periphery followed this example, but in Southern Europe there were different phenomena, and East, and to a large extent East Central Europe show an entirely different image. Thus the historical development, the cultural characteristics, and the historical and social situation of the process of modernization of the given society should be considered.

It is of primary importance, for instance – and it is the same phenomena everywhere in the Eastern periphery and semi-periphery of Europe – that the historically recurrent reforms deriving from the pressure for adaptation have been built from top to bottom and done by the authoritarian political power in practically every situation. This statement, however, may again provoke controversy. One could refer, for instance, to East Central Europe, or to the example of Hungary; as the reforms implemented during the second part of the 19th century, following the Compromise of 1867 were realized in a political system that could be called liberal in principle, under conditions of parliamentary democracy on the European pattern. However, imperial rule bearing the traits of authoritarianism stood in the centre of the political system, a single party, almost impossible to be outvoted and making the ‘alternative’ parliamentary rule impossible resulted in a formally multi-party system, the paternalistic elements of which did not disappear either from the leadership or from the political culture of the society. Outside Europe the situation has been similar, for instance, in India. In India there is a constitutionally evolved democratic political system, however, it cannot function clearly enough to be able to eliminate the authoritarian activities of the central power, not to speak of the paternalistic traits and their consequences which characterize the entire political culture of the society. Thus apparently the authoritarian political system may be adequate for the process of modernization in the peripheries and semi-peripheries, at least in the phase of take-off (even if – I repeat – it may evolve unfavourable phenomena from the point of the subsequent developments, as happened in Hungary too during the decades after World War II).

It should not be forgotten, however, that economic development as well as modernization can only be successful *in the long run* if the mechanism, capable of answering automatically, responds to the new challenges by *self-movement* in the economy and in all spheres of social activity, if it is able of adapting itself to changing conditions and making the necessary changes accepted. Keeping in mind what has been expounded above, it is needless to emphasize that the *basis of the*

assertion of the rationality of the various spheres of activity is also the operation of such mechanisms, an indispensable phenomenon of the second phase of modernization. This can be realized – if at all – with great difficulty in an authoritarian political system.

The transition from an authoritarian political system to a democratic one is itself difficult. It is difficult, because the real democratization of the political system is problematic even for the subjectively best inclined people in the authoritarian leadership; it is not only hindered by the paternalistic outlook and specific interests they are used to, but also by the political culture, that evolved later (as turned out to be the case in Eastern Europe), the task is difficult, and may seem impossible given the legacy of building 'socialist' society. This is primarily because the authoritarian traits seem to be identical with the 'socialist' ones, the consequences in fact of historically evolved conditions in the Eastern periphery and semi-periphery of Europe (not to speak of Asia, or Africa). It is difficult, because such ideological principles and values have become ingrained in the various relationships of the society during its development, which strengthen traditional attitudes against modernization. Finally, the 'socialist' model did not even produce the kind of welfare society, which appeared in developed societies in Western countries, let alone those traits which were part of a 'socialist' vision of society.

I have to add, that a curious contradiction has evolved during the second phase of modernization, related to the process of reform. This contradiction derives from the fact that the political systems that have historically grown out of the conditions of these societies still continue to build from top to bottom, as they have for the past two decades. This is also because of their historically developed but still visible functions, and it necessarily further *strengthens the role of the centre* in the entire process, the methods, political and legal, of building modernization. Thus it maintains not only the organizational context and system of dependency adverse to independent, responsible activity, but also the political culture, which, in the Eastern periphery of Europe is rather paternalistic. Its intensity depends upon the historical development of the individual societies, therefore it hinders autonomous action.

An open question remained – even after the free elections which in the spring of 1990, produced a change of political system in the countries of East Central Europe – whether the socio-economic changes should be initiated and administered by the political centres, or, as is generally demanded, the role of regional and local government should increase. The activity of local government would also be able to promote a change in political culture.

I have discussed it in detail elsewhere (Kulcsár 1987a), therefore, here I would only refer to the fact that a further characteristic of a traditional political culture is looking 'upwards', the behaviour of 'subjects', a mostly apolitical attitude in the favourable period for the society, which, however, may be easily replaced by irrational, politically irresponsible radicalism, disregarding the existing conditions, and even violent action at a time of difficulty and social problems. Thus independently of the dangerous consequences, an authoritarian political structure mentioned above, which evolves, or maintains the hierarchical system of dependency,

which strengthens the element of dominance in the face of expertise in the institutions and organizations, which hinders rational action and limits the unfolding of creativity by any means, also creates favourable conditions for a type of behaviour which is *opposed to the mechanisms of spontaneous adjustment expected to develop in the society*.

And here the curious 'interdependency' of the various spheres of social activity, not influenced even by their process of differentiation becomes significant. In fact man *acting with economic rationality* – and this can be primarily evolved by economic reform in our society – *can become a politically rational actor much more easily*. Mutatis mutandis, the same applies to the organizations as well. Thus any 'encouragement' of people or organizations for irrational economic activity politically also endangers not only reform, or the complete change of socio-political system, but the process of modernization as well. This holds true also for legal regulations which at times contain contradictory norms and treat the private entrepreneur unfairly with too many, often changing and retrospective regulations, driving him rapidly towards simply accumulating wealth, and diverting enterprises both private, state and cooperatives from rational action in realistic situations. This is not to speak about such organizational practices which hinder, or make economically rational behaviour impossible. Gerschenkron refers to the importance of the 'social consent' of enterprise in the process of economic modernization on the basis of a historical analysis. He also points out that wherever this 'social consent' or agreement has been missing, and emotions and values have been strong against enterprise there the state has protected the entrepreneurs and their interests against the hostile environment with the help of its law courts and police as well as with law making. (Gerschenkron 1966:256.) However, if law making and legal practice in particular – as has been the case in Hungary, for instance, during even the past two decades – not only fails to protect enterprise from unfavourable social assessment, but it expresses much more a kind of 'popular jealousy' by a distorted representation of earlier values, and its most important characteristic is to try to make 'excessive' incomes impossible, then the development of a social atmosphere favourable to enterprise can hardly be expected. The effort made to avoid the legal norms is only one consequence which much reduces the effectiveness of law and makes the necessary management of the economy a relative one. The ultimate outcome of such regulation – particularly the impact of the subsequent syphoning away of incomes – may lead to growing uncertainty in the economy and may even provoke political opposition.

The solution to the contradiction between the reform or transition process building from top to bottom and the desirable mechanisms of automatic operation can be expected even after the change of socio-political system from the creation of *a critical mass of people who act rationally in politics as well as in the economy*. This cannot be accomplished only as a result of education or propaganda, though both of them are significant components. Its most important precondition is the necessary structural and organizational transformation of the existing economic, political, etc. system of institutions, and primarily the operation of a political, as well as an economic system which promotes rational behaviour in the long run, without

regressions. The essential transformation of the political system, the evolution of its new elements can be expected only from the social assessment of the changing political system and from its transformed, enduring operation. True, it also means the appearance of a critical mass of people acting with economic rationality. Thus the enduring operation of political and economic systems along their own rationality jointly shapes the politically as well as economically rational social behaviour which is the most important social content of democratic development even from the angle of successfully unfolding modernization.

The historical content of the present socio-political changes unfolding at the Eastern periphery of Europe the collapse of the former socialist systems can be understood as *a process that may safeguard the further development of modernization*. Naturally, they are not free of contradictions either in the whole of the region, or in Hungary. For instance, it becomes clear from an analysis of the phenomena of Hungarian society during the past two decades that the reform originally started as economic continued as a change of political system and that the unfolding of the present phase of modernization has identical aspects even if it helps change the political system, and the *opposition* provoked by it is considered.

The phenomena of opposition to reform and modernization develop from different sources even if they manifest themselves in a special context, even if they are linked together by interrelationships, particularly economic ones. (See Csaba 1988: 1041-1058.)

The phenomena of shorter duration, deriving from the *components of the given historical and social situation* can be most easily approached. Such a '*situative*' *opposition* was, for instance, manifested in the Hungarian political leadership, before and even during the transition from an authoritarian political system to a democratic one, in the late eighties. It was rather cautious in a general sense, but occasionally showed opposition when the neighbouring countries had anti-reform behaviour or when uncertainties appeared in the Soviet political situation. Such factors linked to a certain situation produced measures deriving from the set of economic conditions adverse to reform, such as the restrictive financial policy aiming at the maintenance of balance and its consequences. Such is the mood of society presently which associates the economic difficulties and their consequences (such as the price measures) unambiguously with reform – as adequate information is missing – and has nostalgia for the recent as well as for the more distant past. It is not subjective resistance which is the most important factor even in this context – though it may and does become stronger by utilizing such a situation – but the consequences of the situation itself. However, structural resistance may be reflected even in a '*situative*' resistance (and may even strengthen it). The related phenomena are more difficult to explore. Their impact materializes during a longer period of time, and they can be overcome only by the successful progress of modernization. *Structural resistance* was linked to the structural phenomena of the political system, before and during the political transition: e.g. demands to maintain the one-party system, or at least the constitutionally guaranteed position of the Marxist party, to the very fact that the interests are expressed by organizations because the political system has been authoritarian in nature (and here the real function of interest representation by

organizations may also be a problem) and not by individuals in general. This can be done by individuals only as members of the various organizations. Resistance has also been associated with that specificity of the political system, according to which the solution of conflicts is less done by extensive negotiations in social dimensions, or by subsequent law making therefore the conflicts can be solved in a rationalized way. Such resistance has come out of the structure of the economy, for instance, from enterprises which has been technologically and organizationally underdeveloped, as quite few of them remain even until now. However, such phenomena occur frequently on the level of consciousness as well: in the value structure that evolved during the past decades, in some components of the ideological system, in ideas that used to be the movers of action but which have become obsolete now, and even in findings thought to be scientific. Finally it should not be forgotten either, that the elite also utilized a set of modern ideas, but they may not necessarily be effective or in the interests of modernization in the long run (Weiner 1966:8-9), one should only remember the simplification of Marxism and the phenomena of its utilization as a scientific ideology in the different phases of the development of socialist societies. A few such traits also survive as structural phenomena which evolved as characteristic and also ideologically significant features of the first phase of the building of the 'socialist' society and have been characteristic of the structure for a longer period of time. The majority of the statements made in the international literature on the 'socialist' variant of modernization were in fact, related to this aspect. I have in mind traits like, for instance, the decreasing emphasis on consumption and services, with the exception of health care and education; or the 'anti-elite' policy (at a time when a narrow political, economic and cultural elite was evolving), etc. (Nagai 1984:190-193.). The phenomena of structural resistance are curious from another aspect as well. Partly they have their role in certain elements of 'situative' resistance, for instance, certain groups really succeeded in slowing down the process; forcing it to halt and even retrace its steps by utilizing the measures deriving from the situation and assessing them as more general and even as retrogressive, thus launching the process of recentralization in Hungary in the early seventies. On the other hand, the consequences of another type of resistance, of historical resistance may also be manifest in the structural elements.

Historical resistance is the consequence of historical continuity. It may appear in continuity living in the structural phenomena of the society, in the political, ideological, and administrative structure and traditions, in the many-sided traditional role interpretation of the status positions of modern structures, and in the socio-political significance of charisma, for instance, in this context. The consequences of economic backwardness, thus the supposition of rapid progress (without the realistic conditions) in economic policy (the upper limit is the sky) represent such elements. Economic development based on symbols, such as heavy industry, and particularly steel mills, modern airports, etc. as the symbols of development (Pye 1966:339), efforts to achieve spectacular success, while the realistic possibilities are disregarded, etc. are all related to it. The development of agriculture, for instance, had been pushed into the background in almost all the developing countries and in the 'socialist' societies, and even in Hungarian case where this view was

altered and practice has brought good results, this anti-agricultural attitude associated with 'ideological' or symbolic interrelationships recurs. I could continue with a series of other examples (unfortunately not unknown in the Eastern periphery of Europe either). It has become clear by now that economic development is related to the historically evolved attitude of the society towards knowledge, education and science, to the ability of the society to unfold or restrict the spirit of enterprise (Pye 1966:338), and also with the degree to which the society appreciates achievement, the element of dominance, etc. In Hungary the efficient functioning of personal relations in politics, in the economy and in practically every field of society is the soil of historical resistance. This fact indicates, for instance, the possibility of the reappearance of old traditions in a new form, e.g. the so-called 'client-patron' system, but one can also expect certain phenomena of traditionalism as well, which – as is commonly known – is the validation, or even legitimization of behaviour required by the given situation and time by norms leading to the past, "when the 'new' is linked with antecedent values". (Apter 1965:83.) Thus, it is an ideology which considers the past of a country or society as a 'reference situation'. (Hoselitz 1961:86.) All these were strengthened even during the transition, by the ideological effect of a special historical development, a belief in the security and unchangeableness of the image of the world. (Kulcsár 1986a.)

Once again I would like to stress that these phenomena manifest '*on three levels of resistance*' are interrelated. They strengthen each other – as interest relations are also in the background – even their exploration is extremely difficult, not to speak about their alteration.

In summary, apparently the 'socialist' and at least for a shorter or longer run even the 'post-socialist' societies of Eastern and Central Europe represented the consequence as well as continuation of a special path of socio-economic development of this region. Along this path the take-off of modernization could take place in some countries, whereas elsewhere the process was slowed down – under the impact of the specificities of the period following an earlier take-off – or even came to a halt, and a new take-off was generated. All this has taken place in a *new social system* that can be characterized by the radical change of ownership relations, by the creation of a specific political system, a cultural and civilizational phenomena, the birth and growth of which were interrelated with European global political factors and had consequences of global dimensions.

These consequences of global dimension have significantly influenced the system of world economy based on the capitalist socio-economic system, but the system itself, which has been able to adapt itself to the new conditions so far, has remained a basically capitalist one. During the past decade it has produced such technical development (by leaps in its most advanced countries) that the consequences cannot be comprehended as yet.

Two further conclusions may be drawn from all this. Partly that the societies of the Eastern periphery of Europe have to adjust themselves individually and collectively to the system of world economy based on capital, if the global processes are kept in view, and they have to adapt their external economic activities to the conditions shaped by that system. This, amongst other things, meant that, in order

to ensure a successful adaptation, these countries had to change their internal economies, the condition of which was a change in their political systems. In part also, rapid technical development has created novel differences between the developed countries and those on the Eastern periphery of Europe. It has widened the already existing technical gap in the broadest sense of the term, including the technology of management. Thus, a closing up in technology has not yet taken place, despite all the successes of these societies if compared with their earlier condition. Their peripheral or semi-peripheral condition in the better case, survives.

Taking into consideration the changes appeared in global level, the frustration of the 'socialist model' of modernization, the necessity of the integration for every country into the economic and more and more political 'unified' world system, the collapse of the former Soviet Union as a superpower, which firstly compelled it to withdraw not only from the continents out of Europe, but also from East Central Europe and some of Eastern Europe (finally – after the finishing of the manuscript of this book – reached such a level which compelled to give up the idea of socialist system even in the Soviet Union and resulted the possibility and later the reality of the dissolution of the Union itself) the 'surprising collapse' of the socialist regimes may be considered – from historical point of view – not a real surprise.¹¹ The real surprise has been the character of the transition, which in most of the countries of the Eastern region of Europe (at least until yet: let alone Romania and particularly Yugoslavia) turned out of peaceful one.

Maybe it cannot be considered a kind of 'hungarocentrism' if I stated, that this is in considerable measure due to the conditions, processes and events of transformation taking place in Hungary. Of course, it cannot be denied that the possibility of this peaceful character partly rooted in the revolution of October 1956, and partly in the though ambiguous reform movement started in 1968.

I do not think it is necessary to stress, that the peaceful transition, or a successful construction of democratic society (not only on the level of political system, but in political culture, and its basis in economics) already has been only partly secured. Some historical characteristics, traditions, the probes of political culture, the social consequences of economic transition, political tensions coming from the conditions of this region of Europe could appear as sources of serious dangers,¹² but this is a fact, that the countries of the Eastern region of Europe are not only seeming to leave a theoretically and practically distorted way of modernization, but they introduced important changes of a new course.

This is why I think it is important to outline the processes of transformation in Hungary, even if there were not clarified in every details and as to factors involved in it sufficiently just before the printing of this book.¹³

The year 1989 in Hungary, like in the rest of East Central Europe, was a period of fundamental change in society. It became evident that the party-state configuration, of the authoritarian political set-up with the single-party system as its corner stone and with its unity and omnipotent state power, was not endowed with the qualities that would have permitted Hungary to claim a place among the highly developed nations. What the country needed was a transformation of the political

system, in the wake of which parliamentary democracy would be reinstated, grounded in a multi-party system, along with division of the branches of power, suitable forms created for the popular will to be expressed, the legal and other conditions for a market-based economy called into being, and furthermore human and citizen rights advanced to occupy their rightful places within society.

This programme, concerned with changing the system required an almost full-scale transformation of the legal system and thorough amendment of the Constitution.

In political terms the main trend of change in contemporary Hungary has been the transformation of an authoritarian political system into a pluralistic-democratic one, similar to what is happening in several other European, Asian (perhaps in South East Asia), and Latin-American countries. Transformation of the political system in Hungarian society however – because its content is modernization though under circumstances which differ e.g. from those of the Spanish modernization (Tezanos 1989:62–115) – goes together with the transmutation or rather transformation of the economic system, in three aspects. First: the change in property relations from social, overwhelmingly state property (by strengthening private ownership) towards an economy mostly on private ownership. Second: establishing from a centrally planned and administratively organized economy, a market-economy. Third: transformation of the inner structure of the economy so that the former economy built up mostly on an external pattern may be embedded on the basis of Hungarian conditions and potentialities into the system of world economy and within that into the European economic system.

The simultaneity of these transformation processes – as in other East-Central European countries – is unavoidable. There has long been a close correlation between economics and politics, especially since the World War II, besides which the role of politics in the Hungarian economy has been always preponderant – to some extent the situation is the same today. This intertwining makes the transformation more difficult and complicated beside the fact that it is being carried out in a society burdened with heavy foreign debts and economically deteriorated. The realization of economic transformation and the framing of a market-economy will have consequences that will concern negatively – to be hoped in the short term – considerable groups, and strata of society. Moreover, the social and political management of these negative consequences cannot be but limited if the economy as a whole is to be kept on course along the lines mentioned above and its growth secured. This circumstance, however, gives rise to political difficulties, on the other hand it radicalizes a part of the population by furnishing changes to organizations which aim at radical politics, on the other hand it induces in the government continuous balancing. Economically or politically ‘pure’ solutions inevitably infiltrate the requirements of the other sphere.¹⁴

It was inevitable to create a consensus on making some basic legal institutions and rules which were able to secure a legal framework for the activity of the opposition political forces, and which gradually took shape during 1988 and 1989, finally by the summer of 1989 ripened the conditions for the establishment of a *political consensus*, on the basis of which the constitutional order could be transformed and the date of general elections could be set, to take place in the spring of 1990.

Discussions aimed at building a consensus assumed from the beginning that the legal framework of the transition would be safeguarded, and following May 1988 the former ruling party also accepted – though, of course, after heavy arguing – that the new political system would be established in a legal way, thus with the help of law. Indeed – without having illusions about the power of law over politics and agreeing with the standpoint according to which the risk cannot be removed from politics by dissolving politics in law (Neumann 1964:264) – it is appropriate after all to recall the question of Norberto Bobbio: “What is democracy other than a set of rules (the so-called rules of the game) of the solution of conflicts without bloodshed?” (Bobbio 1987:156.) The positive answer of this question always provided a considerable role for political transformation, which took place in non ‘revolutionary’ way.

It is an established fact too, that “the non-governmentally sponsored mobilization of society from below into independent social, political, and economic groups is a potentially crucial factor for the success of a transition. These groups’ independence is evident in both their grassroots origins and their autonomy from governmental control.” (Bonime-Blanc 1987:6.) This pluralization may be either a well organized, prolonged process, that is capable of maintaining itself even under an authoritarian regime, or rather one that has developed in a short time, in which case there is danger that groups originated this way are not stable enough to challenge the ruling regime and they cannot reach the necessary turning-point in the process of transition.

It is a characteristic of the transformation in Hungary that this spontaneous pluralization had been present in Hungarian society for a relatively long time, but it emerged as, and remained elitist until the end of 1989 or until the start of the election campaign in 1990. With reference to the most of its aspects it has kept practically the same character. The pluralization of the trade-union movement could not surpass this level either. By virtue of the Act on Right of Association enacted in January 1989, those groups became legal, but they have been characterized more by their firm central organization than by their striving after a great number of members. Nevertheless, the by-elections in the summer of 1989 demonstrated that they could effectively oppose the regime by moving the masses, and they were victorious – though mostly only in the second round where little participation was required – against candidates of the ruling party. But a peculiar pluralization process also took place in the ruling party (HSWP) itself, inside of which developed the reformist movement and later on the ‘people’s democratic platform’ that wished to counter the former’s influence, both having grouped together primarily to prepare themselves for the October party congress. But these groups, irrespective of their members kept their elitist trait. As is well known the party congress ultimately ended in the splitting in two of the party, both successor parties having far fewer members, and the bulk of the former party-membership either went in another direction or – and this was the majority – did not join in any political activity.

I have stressed already, that the inevitable characteristic of a peaceful transition, thus nowadays its ‘*conditio sine qua non*’, is the canalization of policy into a legal

setting, that is, the 'constitutionalization' of political activity consists of the democratic reordering and restructuring of political rules and institutions. Such democratic mainstays as regular elections, freedom of association, the separation of governmental powers and the guaranteeing of individual liberties are reintegrated into the mainstream of the policy." (Bonime-Blanc 1987:7.)

The 'reformist' forces in Hungary, after having been unfolded and more and more increased within the ruling party, tried to complete a transformation process of Hungarian political system by preparing a new constitution. The government, which had been reorganized in June 1988 – and quite a few member of which wanted a restricted political reform that time, and not a real change of the whole system – finally accepted the basic principles of a new Constitution, but also some very significant draft statutes. It was assumed that the constitutional reform would be carried out by the government, but based on scholarly work and on the activity of committees in which would participate, besides government experts and the representatives of the ruling party, independent experts and even representatives of the opposition movements. For the work of constitutional amendment Parliament granted the government a period of one and a half years. The parliament would discuss the guiding principles of the new constitution in March 1989, then the drafting would be finished, and admitted to social discussion, after which the government, having taken account of the discussion, would present the bill to Parliament. In addition, during this period a Bill would be prepared granting right of association to and legalizing the new political forces – which could then form themselves into political parties under a later statute. The Constitutional Court would come into being and also laws to repeal most outworn provisions of the Constitution. During 1988 it was discussed within the ruling party, whether, the leading role of the party – which had only been hinted at in the 1949 constitution (following the Soviet model) but had been made unambiguous by the amendment of 1972 – should be referred to in some way. Although in compliance with the draft law accepted by the government in the autumn of 1988 and passed by Parliament in January 1989 the multi-party system had thus been established in Hungary the central committee of the ruling party only acknowledged the fact during the spring of 1989, when several parties actually began their work in Hungary. According to the original plan during this period an Act on Elections would have been presented to Parliament and after the enactment of the Constitution a general election would have taken place in June or September 1990.

But the successful realization of the plan depended on several conditions.

The first and most important condition was the possibility of creating, by the process of constitutional reform itself, such a national consensus which, after the Constitution had been passed, could gather behind the new Constitution because the most important opposition forces that had no or little representation in the Parliament.

Second: It assumed the stability, and inner unity of the ruling party, its functioning as a force that was capable 'of having in its grasp' the means of framing continuous compromises with the recently organized political forces or rather, when this could not be done, to confront them successfully in order to have a democratic constitution before the elections.

Third: It supposed such a stabilization of the economy that would have stopped the decline in the efficiency of management and the decrease in the standard of life, and by at least starting the unravelling secure the necessary stability for political transformation.

Lastly: There was a need for stability in the international environment, as well as the continuous progress of the Chinese and Soviet reforms.

Opposed to these conditions, the processes accelerated both in Hungary and in the international environment. In the latter several elements of uncertainty appeared. By the autumn of 1988 the conditions seemed to come into existence but this was only in reality a wishful thinking of some of people working on transition. The development of the above conditions can be briefly summarized as follows.

The process of constitutional reform did not produce national consensus. Taking into account the other conditions, the new political forces that had organized themselves into an opposition, considered participation in the constitutional reform less and less in their interests, and they consistently took the view that the new constitution should be drawn up by the new parliament. Indeed, the situation of society and the formation of social forces in it produced such interest-relations, evolved such political meanings, whose reconciliation in the wording of a constitution would hardly have been possible on the long term, i.e. the reconciliation of political conflicts by means of the law was no longer possible.

The position of the ruling party weakened continuously. As I mentioned, various groupings appeared which began to take shape. They were different in essential matters (e.g. was a change of regime needed or simply a change in the model of socialism, what was the role of the party? etc.). The bifurcation of the HSWP in spring of 1989 could only have been prevented by compromise. The consequence of the split was a battle for power among the leading functionaries and uncertainty among party membership. The ruling party was incapable of shaping any lasting compromises with the opposition, since interests and opinions concerning the past, the present, and the future differed significantly within the party, and appeared as contradictory statements and actions. Due to these factors it was even less qualified for successful confrontation and one could not have imagined it capable of keeping in hand unaided the reform currents and of moulding them according to its own, not fully-fledged political views.

As regards the ruling party and the opposition political forces, the opposition became continuously stronger. This was indicated in the by-elections, and although the unity of the opposition became problematic too, in effect it succeeded in maintaining unity against the party.

The economic programme of the government, which was announced in 1987 and adapted to the new circumstances in 1988, had no success, and this could not be notably changed by the change of the government in the spring of 1989. The maintenance of stability in the country and solvency, were achieved, but difficult IMF conditions had to be accepted. (NB: these conditions, however, followed from the state of the Hungarian economy.) The condition of the economy meant that economic development ceased, the indebtedness continued, and the standard of

living fell. The political mood of the population increasingly favoured the opposition political forces.

By the autumn of 1989 the uncertainties on the international scene had grown (suppression of the Chinese reform-process, stagnation of Soviet perestroika and its lack of success meant an uncertain future), in the countries bordering Hungary or in distant socialist countries conservative forces continued in existence. The Hungarian policy had made more and more friends in western countries but this also added to the strengthening conviction (within the ruling party, too) that the political-institutional framework for transformation had to be established quickly, before external enemies could force a reversal.

Above all, mention must be made of the government's growing independence from the ruling party. (The government has got a new prime minister and significantly changed its membership, too). Alternative centres of power came into being, and the government which grew stronger and stronger, after the party congress of October 1989 formally declared its independence from party guidance. From the autumn of 1989 the government, and a grouping of opposition parties (although the latter was disparate) stood on the two sides of the power divide, and the governmental influence of the two successor parties of the former ruling party ceased to exist, notwithstanding that a number of leaders and members of the new Hungarian Socialist Party retained their places in the government.

In the changed situation it became obvious that the new constitution could not be passed during the term of the old parliament, but also at the same time it was necessary to have legislation which on the one hand would create the political institutions and rules of game that were necessary for the transition, and on the other hand abolish in the most important fields the contradictions between old and new legal rules, between old legal rules and real conditions. Since the end of 1988 a peculiar dual legitimacy had come into being in Hungary. Statutes connected with the old legitimacy and with the new one existed side by side, and now and then some disturbingly freakish examples came to light. I will mention only one. The Hungarian constitution (before modification in October 1989) laid down the leading social role of the Marxist-Leninist party. This statutory provision remained formally valid even, when that leading role was no longer admitted to by anybody including the government, and what is more, when even the ruling party had renounced its leading role. Although the characteristic features and main points of the political system had been transformed in reality, the former legal regulations remained formally valid: even the section of the penal code that contained the political offences remained unchanged. In principle then, everybody – the politicians of the ruling party included – who had been occupied with the transformation of the political system or had made propaganda for change, could have been called to account.

All these hazards were apt to call into question the peaceful character of transition, taking into account the likelihood that such unchanged legal regulation would lend the political forces which were against the transformation the formal appearance of legality. These dangerous contradictions were manifest enough for the major political elements in society – the ruling party, members of the Opposition

Round Table, other political organizations – to grasp the situation and to adopt in June 1989 an agreement to the effect that joint talks should be held to draw up statutes for fundamental laws, which the Government was to submit unaltered to the legislature for enactment. (This, by the way, was the last time the Government formally asked for the endorsement of the then ruling party and its acknowledgement of the decision as binding.) Serving essentially as a basis for the talks were the Acts that had been drafted by the Ministry of Justice or, in case of the Election Act, by the Ministry of Home Affairs, to wit: the Constitutional Amendment Act, the Constitutional Court Act, the Elections Act, the Penal Code Amendment Act for the section dealing with political (more precisely subversionist) crimes, and the Criminal Procedure Law Amendment Act. By late August early September the talks had come to an end, having led practically to a consensus. However, several political organizations (e.g. the League of Free Democrats, the League of Young Democrats) – though having actively contributed to drafting the statutes – declined to sign the closing document; neither did they exercise a veto against it, thus retaining specific freedom of action for the period after acceptance of the agreement.

The negotiations took on a distinctive character from the law-making point of view. Political negotiations of this type generally aim at laying down basic principles for the ‘professional law-makers’ to build upon. In this case, however, the mutual mistrust was so glaring, that all sort of suspicions and worries were present: especially the fear that the ruling party would attempt to ‘salvage’ power by means of some proposed new political institution: President of the Republic, bicameral type of legislature, Constitutional Court, etc. Furthermore, interests bound up with the then political situation predominated so heavily (e.g. the various traditional and fresh-established political parties direct interests in drafting the Election Act), that the discussion eventually deviated into a wrangle to formulate the law itself. As a result, the need for coherence – especially regarding the Constitutional Amendment Act, the Elections Act, and to a lesser degree also some parts of the Constitutional Court Act – was eclipsed. There remained in the body of law, contradictory and ambiguous wording – no wonder, since obscure formulations whose interpretation is open to doubt are always more susceptible to compromise. All this, coupled with the subsequent political developments, has produced the negative consequences we can clearly discern today.

Nevertheless, these laws – primarily the Constitutional Amendment Act which practically involved 90 per cent of the entire Constitution – eventually produced a completely different political system. From it emerged those essential institutions and legal sources of a constitutional state which provided scope for political activities in the period of transition, and moreover, which – in conjunction with laws of earlier and of later dates – would guarantee calm and normal public life in the post-election period, thus permitting the shaping of a coherent new Constitution.

The amended Constitution, which incidentally rests upon the ‘principles of regulation’ Parliament had accepted in March 1989, is notable not only because it changed the form of the state (calling into existence a Republic with a President at its head in lieu of the people’s republic under a presidential council acting as a collective head of state *but in reality substituting parliament*); not only for its in-

validating the leading role of the Marxist-Leninist party and dropping of the ideological elements which it had contained, but also for its changing of the outlook as a whole. That is to say: its character turned from 'state-centric' to 'man-centric', with the section on human and citizen rights shifted into focus and with legal guarantees incorporated to protect them; its keynote turned from restricted liberties to restricted state power, with corresponding provisions separating the branches of power and securing the organizational consequences in a balanced fashion, control over the actions of the state by the judiciary and the Constitutional Court and a guarantee of the autonomy of local government.

On the eve of the general election it was proper to state that the enacted sources of law provided an assurance that the transition would take place peacefully and predicted peaceful conditions for the power shift, in fact also for the system shift. As a warning and a worry for the future, it is also proper to state that the facts mentioned above which sprang directly from the given position, introduced certain elements into the legislative process which have subsequently proved problematic from the political point of view and are likely to prove more so in the future.

One of these problems is rooted in the fact that the notion that parliament should be bicameral was rejected by all the political parties. The second chamber had been meant not for party representation but to enable ethnic minorities, religious communities, regional and professional local government bodies, various centres of learning (Academy of Sciences, universities) to contribute their share to the political scene. In this country ethnic minority groups exist sporadically rather than clustered together in blocs which would justify their separate representation under the Elections Act. Furthermore, where the religious denominations on account of the part they have played in history can claim a role on the political stage [even though the Churches – be it for reasons other than in Spain (Marquez 1989: 173–178) – displayed neutrality towards the shift] – I say, amidst such conditions, the decision to reject the idea of a second chamber, partly on the grounds of actual, if at times only assumed, political interests (reference has already been made to the ruling party's attempts to salvage itself), partly for ideological reasons (positive and negative historical memories), has led to a political situation and has presented problems hard to resolve, given the enactment of an equally compromise-changed electoral law. To secure representation for the minorities, the Churches, the professional bodies, etc. is not feasible, no matter how closely we adhere to the Elections Act and the principles of the Constitution. Hence, it was inevitable that these principles would be encroached upon, with the introduction, for example, of positive discrimination where it is out of place, since it was originally not asserted where it could have been effective. Another relevant example is the President of the Republic. Political conditions in Hungary require that in the short to medium term, the office of President be vested with sufficient power and that the President's accession be effected by means of a general election. In the wake of the political consensus, however, the position of the President had come to be defined ambiguously, and even more so the procedure to elect him. A spectacular token of ephemeral political compromise was the constitutional provision that it was Parliament's prerogative to elect the President, yet for the first time – should this take place before the general

elections – a voting process by the population was still to be called. There upon the non-signatories to the political agreement initiated a referendum which resulted in a sufficient number of Ayes to elect the President of the Republic only after the general election, thus practically excluding his election by the direct votes of the citizens.

Changes in the political scene since the referendum made it increasingly obvious on the one hand that the worries and suspicions felt during the formulation of a constitutional solution (again attempts to salvage power, irrational fear of Bonapartism, etc.) were unfounded, and on the other hand that the political situation itself would perhaps lead – once the general elections had taken place – to a state of unmanageability, as occurred under the Fourth Republic in France. Such a state of unmanageability and its consequences would then have really had a chance – owing to the lack of suitable constitutional institutions – to conjure up the danger of Bonapartism. No wonder, therefore, that the call re-emerged for a Constitutional amendment in favour of presidential election by direct ballot, and that the February session of Parliament passed the Amendment bill to this effect. This amendment, however, was changed again by the new Parliament convened after the general election of March and April 1990, and in a later session it elected the President of the Hungarian Republic.

With the October 1989 amendment to the Constitution, a parliamentary democracy came into being in Hungary, marked by relatively restricted presidential power. With this the basic features of a European political institutional system were shaped offering the opportunity of modernization to other elements of the political system and other parts of society.¹⁵

IV

Modernization and the 'Third World'

If the separation of the general, special and individual traits of social development is difficult at the Eastern periphery of Europe, it is all the more so in the societies of the so-called Third World. I would not like to analyse and interpret the term itself. There must be some who regard it as less than precise, there must be more who challenge its justification and refer, for instance, to the 'Fourth World', evolved in the 'Third World', comprising the poorest of the poor. Yet, I believe, this is the only expression by which one can isolate those societies lagging behind in development which were forced to adapt during colonial rule or otherwise, primarily in Asia, Africa and Latin-America.¹⁶ At first they were forced to adapt themselves to a society with an alien culture and civilization which represented a Western centre, subsequently the process of adaptation increasingly went beyond the single – perhaps colonial – society representing the West and was directed towards the uniform economic and political world system. This fact was not altered by independence either. The 'Third World' countries continue to look for an answer to those challenges, sometimes with the 'intervention' of the former colonial powers (some of them having found the best solution), which, coming from this world system continue to force them to adapt.

Internally, these countries are extremely heterogeneous. They are not only divided by their location on different continents and by being associated with different major languages (and cultures) – thus they are linked to different original and Western traditions – but also by the existence or otherwise of developed early cultures, the origin and present impact of the so-called 'little tradition' and 'great tradition'. The fact that – on all three continents – there had existed highly developed civilizations as well, the majority of them empires meant – as I have mentioned – that for some time they played the role of centres. Elsewhere tribal societies with a rather lower level of development evolved, which played the role of peripheries to the early, endogenous centres which developed in their vicinity. These factors all had a definite influence on the development of these countries. A very significant difference between these societies is whether they were or were not under colonial rule, and if yes, for what length of time, and also how far colonial rule succeeded in neutralizing the effect of the erstwhile 'great tradition', or how far it promoted – deliberately or functionally – the survival of the earlier tradition.

On the Latin American continent, for instance, the way that the Spanish conquest and the spread of Christianity took place meant that the two endogenous 'high' cultures, the 'great tradition' of the Inca and the Aztec-Maya empires had practically no role in the subsequent history of the countries of the continent. In India the endogenous 'great tradition' survives – in a certain respect also with the help of a specific populism – as is the case in the neighbouring countries under the influence of Hinduism, or Buddhism. However, all these societies have more or less preserved the European 'great tradition' which reached them through colonization, and they also maintain the economic, technical, and cultural elements linking them to the present, uniform world system. In China the impact of the several thousand year old endogenous 'great tradition' is curiously mixed with two special forms of the European 'great tradition', namely with elements directly linked to the uniform world order, and also to Marxism made somewhat 'Chinese', although originally elaborated in the Western centre of Europe and further shaped at the Eastern periphery. There are those countries where the survival of the Islamic 'great tradition' is a significant factor. Finally, and in contrast there are those countries, where only a 'great tradition' unique to them evolved – to a large extent because of their being deliberately isolated from the outside world for a long time. Such is, for instance, the endogenous culture of Ethiopia, which was originally based on a mythology common with Southern Arabia, then built upon Judaism and unfolded under some Greek influence, but was shaped also by early Christianity, by Byzantine influence and subsequently by Islam. It is known that the empire of Aksum, which developed on the territory of Ethiopia was continuously in contact with the East Roman Empire. Moreover, when Christianity spread – incidentally not among the lower strata of the society, as happened in the Western world, but from the top downwards, 'importing' even a series of bishops – the position of the emperor in the Church was very similar to that of the Byzantine emperor. (Kobishchanov 1979.) In the later centuries, however, contacts with the 'external' world – due to a large extent to the spread of Islam, which threatened Ethiopia as well – had been limited, and practically terminated. Seclusion became natural for this special culture and its environment, even if temporarily it was forced to adapt itself to the Western world, and even had to suffer a short period of colonization. The cultural, and even to some extent national – and political – identity which had been based on the Amhara political culture for a long time, defended Ethiopia against the external world, even if it hindered modernization in some respects. (Levine 1965:245–279.) According to Levine this dual impact derives from the mentality of 'wax and gold', expressing the duality of Ethiopian (Amhara) culture, which makes room for evasion, ambiguities, yet for a pragmatic determination: thus it is able to serve modernization and tradition guaranteeing the stability necessary for catching up. (Levine 1972:3–16.) Thus, it was possible for imperial authority to in other respects, pragmatically promote adaptation, inevitable under the impact of the uniform economic and political world system after World War II. (See Levine 1965; Sergev 1972; Tamrat 1972; Levine 1974; Bureau 1981.) The authority of the emperor had a role in the introduction of cultural change, because while "the Amhara are basically resistant to innovations of any sort, they have expected the emperor to do what is necessary

to ensure the welfare of the realm and have tolerated his deviation from precedent when this has not conflicted with their ultimate values, such as allegiance to the Ethiopian Orthodox faith.” (Levine 1965:256.) Definite modernization following the earlier inconsistent and vague steps was started under the adverse conditions of war, with the experimental introduction of a kind of Marxism which had evolved at the Eastern periphery of Ethiopia, the achievements of which – with regard to the numerous dysfunctional consequences – cannot be effectively assessed, only questioned. That much, however, is sure that the Amhara culture “is not sympathetic to efforts to transform human society in accordance with abstract principles” (Levine 1965:280), which by definition makes the introduction of ‘socialist’ society as envisioned in Eastern Europe problematic. It has reached even Ethiopia as a consequence of great power ambitions – besides other factors (infighting), which, in addition, cannot be harmonized with the ‘ultimate values’ of the Orthodox Church. It has been only natural, that Marxist experiment collapsed also in Ethiopia.

The situation is the same – *mutatis mutandis* – in Tibet. In that country difficult of access for geographical reasons, the early endogenous culture had transformed even Buddhism itself penetrating from India. Although periodically it had been part of the Chinese Empire, but rather nominally, it succeeded in retaining its special culture practically untouched until the middle of the 20th century by its seclusion, despite the fact that Anglo-Indian troops occupied Lhasa in 1904 and the British influence was relatively tolerated even after the withdrawal of the troops. (Hoffmann 1986; Schuh 1984.) The character of this society, i.e. it could be considered a feudal society in the European sense of word has been seriously debated recently. (See: Michael 1986:71–76; Goldstein 1986:79–108.) Ultimately in this case, too, the country met its first brutal modernization (and a special form of it) during the restoration of the alleged Chinese rule, accompanied by the ideology of East European Marxism turned Chinese. In Tibet, however, efforts at modernization based on ideas totally alien to the local traditions were unambiguously supported by an external political dominance, which could not replace the Dalai Lama who expressed the identity of culture and people. Thus no relationship, necessary to development, could evolve between traditional culture and the objectives of modernization. The question – of whether the Tibetan society and culture would have been able to accomplish a successful modernization – has been put already, of course without the possibility of a real answer. There is the view, however, that even some religious factors, e.g. ‘Tulku tradition’, according to which the selection of incarnated lamas took place without the influence of family lines or any other interest groups, could have played a functional role in developing a special Tibetan kind of modernization. (Ray 1986:35–69.)

All these historical specificities – not to speak of the economic differences which have recently become particularly manifest – have created different conditions of modernization and have naturally produced different phenomena as well. Nowadays these phenomena have acquired such dimensions that they have been differentiated even in respect of the feature considered to be the most important common one of the ‘Third World’, namely *poverty*. Some countries, like for instance Taiwan, Malaysia, Singapore and most recently South Korea, and In-

Indonesia, the so-called Arab oil-countries, and even Thailand have quit the world of poverty, whereas others like Burma, Afghanistan, Bangladesh, the countries of the Sahel, etc. have sunk below the average living standards of the 'Third World', and more than one has become a famine region.

Thus the differences are great. Yet the 'Third World' has evolved identical, or in many respects similar phenomena in respect of modernization as a historical process. (Szentcs 1989: 9–90.) These identical or similar phenomena are rather significant from the standpoint of our topic, from the angle of the role of law in modernization. Therefore, it is worth surveying these phenomena in brief.

1. The first similarity is that the *initial phenomena* of modernization was already manifest at the early phase of colonial rule. More exactly, some institutions, or such components of the infrastructure (like the legal system, railways, modern postal services, means of mass communications, some elements of technological development, and last but not the least the educational system) were introduced or evolved parallel to colonial rule which started off or promoted the process. Despite the fact, however, that modernization had started during colonial rule and was able to reach different levels during that time, its vigorous development could only take place during the period after colonization. (Szentcs 1980.)

The fact that modernization – primarily in respect of the infrastructure – began within the colonial system, had, in certain cases, special consequences later. It is a commonplace, for instance, that the Indian national movement was led by intellectuals with a modern education – largely obtained in Britain – during the last decades of the 19th century. The universities became the centres of the independence movements in almost every colonial country. Thus it was mainly the colonial powers which created the strata of intellectuals, who have become the advocates and repositories of national sentiment and the leading force of the independence movements. I would again refer to the Indian example in respect of the other requirement: actually modernization and colonial rule jointly created even that populist movement which, again under the leadership of the intellectuals, did not associate national sentiment and the demand for liberation from colonial rule with staying in the main thrust of modernization but – as we have seen – with opposition to modern institutions. The intellectual and political movement launched by Gandhi, which was centred around the village, unfolded with connections and impacts at least ambivalent from the viewpoint of modernization, even if it largely contributed to the finding of a cultural and political identity not at all indifferent to the success of modernization. (Kalmár 1982: 411–535; Kulcsár 1987a: 284–286; Brown 1990: 385–394.)

2. Further, it is a common characteristic, that the *economically disadvantaged situation* of the vast majority of developing countries has not disappeared, their peripheral position and dependency survive. The factors of dependency are diverse: the lack of capital, industrial investment coming from outside, aid, the activities of the multinational companies in general, an unfavourable position in world trade, the pressure for the *adoption* of advanced technology, etc.

The unfavourable position occupied in the world economy, however, the continuity of which cannot only be sensed, but which has even deteriorated to a catastrophic extent in the case of certain countries (such as the countries of the Sahel), is not only a significant factor in the poverty of the Third World and in the development of the poorest 'Fourth World' within it, but it is in itself an outcome, and largely the consequence of internal phenomena.

Naturally the various countries have had and still have different opportunities for the elimination of their peripheral situation in the world economy, if not otherwise, at least because of their internal conditions. For instance, the existence and extent of oil deposits appeared to play an extremely important role under the highly different conditions at the time of the so-called oil price explosion. The enrichment and modernization of a number of countries has really started, some of them have developed further, whereas others have declined. The example of a number of Arab countries, and of Nigeria and Mexico illustrates such a difference in development. Wherever the unexpected opportunity was utilized for the development of the economy, there modernization not only progressed but much development and general enrichment also took place. Wherever investment was not primarily concentrated in production, but income was spent mainly on consumption and prestige projects, or in high spending for political purposes and armament, like in Libya, there the problems have not been solved, and even decline has started. It can also be stated in general that the modernization of consumption and its westernization only, without the modernization of production, and social attitudes is usually not sufficient for take-off. The erstwhile backward countries, which have shown spectacular development independently of the oil price explosion, such as some of the Far Eastern and South-East Asian states also indicates that the clever utilization of the possibilities of integration into the world economy may itself bring successful development coupled with the effective use of foreign capital.

All this indicates that *the possibility of changing the peripheral position occupied by certain countries depends on internal factors to a large extent*. It depends on how far the natural life style, and cultural conditions favourable from the angle of modernization can be utilized, even with the interference of the political system. Myrdal's well-known analysis (Myrdal 1974) of the context of the poverty of backward countries has rightly pointed out those internal factors – including the aid programmes and development plans which disregard the local, internal values and the differentiation of the receiving medium and its partially unsuited character for asserting the technology, rationality, etc. as the corollaries of development, as a consequence of which the earlier inequalities have grown; the specific internal conditions of the backward countries, the so-called weak state, the softness of social discipline (and I would add its selectivity, too), corruption, etc. – which are really the obstacles to modernization (even if Myrdal's analysis has been regarded as ethnocentric in these countries). The question is, however, what are those factors which have made a positive breakthrough possible for some developing countries, by neutralizing, reducing and even perhaps liquidating these phenomena.

As far as the political system is concerned among the conditions, I shall return to it. Apparently, however, the role of the cultural traits hidden behind it, the

specificities of the 'great tradition' can be identified in this respect, too. According to some analyses the Confucian tradition, for instance, which aims at harmony, at the reduction of tension, and the ancient paternalistic nature of which also includes the significance of obedience, of work performed, etc., could have some role in the operation of the East Asian authoritative systems promoting modernization. (Boyd 1988:6.) These values and cultural – social characteristics – from the point of view of modernization could be contradictory. India's "basic value system – e.g. – has several elements that could encourage and stimulate economic growth, but her structural inadequacies stand in the way of modernization and development. If a strategy for removal of these inadequacies can be devised, it should not be difficult to adapt many of the traditional values to the new ethos." (Dube 1965:54–55.) Considering the problem in a more general way (e.g. religion and progress), as a result of a debate it was stated: "Two conditions seem especially unfavourable for the religious encouragement of progress: too close a fusion between religious symbolism and the actual world and too great a disjunction between them." (Bellah 1965:193.) Indeed, the value-systems of different religions, ideologies in different countries and periods, connecting different politics could play different roles, and it is rather important too, is the focus of foreign influence. One example: "The British-sponsored educational system gave the Indian cultural elite an understanding of modern Western culture almost unique in Asia in its sophistication. At the same time, the cumulative growth of scholarly study of the Indian past contributed to a deepening of its varied resources." (Bellah 1965:208.) Another one: The direct impact of the American experts may have been significant upon the development of these countries, or that they have been dependent upon the acceptance of American influence because of security considerations, as indicated by the analysis of Boyd. The role of the special traditional traits of the pre-modern period, helping modernization are well illustrated in the case of Japan too (for instance, the degree of literacy, an organized system of schools, the institutionalization of bureaucratic organizations and human relations, and the 'civic' responsibility associated with them, the sense of modernization could be borne by the peasantry in the early and critical phase of the process because of the traditional features of peasant society, etc.) so much so that the modernizing impact of American occupation in the wake of World War II was successful because of these conditions. (Ward 1965:29–81.)

3. *The modernization of agriculture* is also problematic in general, partly because of the structure of land-property, and partly because of the low level of cultivation and the shortage of material means and of capital in particular. The percentage of people employed in agriculture is usually very high: in many cases it even exceeds the East European percentage at the turn of the century, and the development of industry cannot adequately absorb the redundant agricultural labour. (For this see Ágh 1989:98–104, 123–140.)

Despite the historical similarities, differences, and quite marked ones at that, begin to emerge even in the development of agriculture. Modern technology has become the characteristic feature of the agriculture of very few developing countries, but more or less development has become clearly visible in Asia as well as in

Latin America, even if selectively among the various countries and the different social strata within the countries. Of the former famine regions, India, has for instance, become self-sufficient in food, and the situation is the same in China too. But in places where the modernization of agriculture was attempted on the basis of 'socialistic' ideas and the earlier systems of cultivation and settlement were broken up artificially, it has been a failure. Moreover, regions which used to be self-sufficient (Tanzania, Burma, Angola, etc.) now not only depend on imports but even signs of famine occur at times. Besides the results of social development alien to the conditions, the authoritative nature of the social set up, which has totally broken away from the population in its objectives, interests and means, has contributed to the transformation of these regions into famine zones (like the majority of the countries of the Sahel). Finally the conditions of war becoming permanent may also contribute to forced agricultural development alien to the local conditions (as in Ethiopia, Mozambique).

Thus tremendous differences have evolved in the development of agriculture in the peripheral countries, where the masses are literally dying of famine on the one hand, and there are abundant, although unmarketable crops on the other. These differences are primarily the consequences of the political and social differences between the rational utilization of the local conditions, a modernization adjusted to the local conditions, and the forcing of artificial constructs divorced from them. The differences have become almost of a continental nature. Africa has become the continent of famine, where agriculture is on a sufficient level in only one or two countries, 'socialistic' patterns have not been able to direct the undernourished masses of Latin America towards a new road of development and those countries are stagnating with the exception of one or two. On the other hand, Asia is becoming known as the agriculturally prosperous continent.

I have already mentioned that the 'green revolution', wherever it has taken place, *has deepened social differences* within the agricultural society, as well as raising the average technical level and production indices of agriculture. Whoever had something has gained more, whoever had little, or nothing has gained little or nothing, or has even been ruined. Is it possible that the green 'revolution could turn red?' – this is the question posed by researchers. (Harrison 1982: 101.) The problem also arises how the consequences of machines and chemicals which provide social tension can be eliminated, particularly in countries with a large population. After all many people leave the villages and agriculture, go to the cities look for industry, or for the underdeveloped services, and become marginalized. These people are not only marginal because they live the 'transitory' life of the shanty towns at the periphery of big cities, but are slowly pressed to the periphery of the society in every sense, becoming a permanent massive reserve of socio-political unrest, thus endangering the life of the society just as it is on the way to consolidation. The marginalization of agricultural labourers who have been squeezed out of landed property is becoming an increasingly grave problem even among those who remain in agriculture. The question is: would land reform itself be a solution and would it not be accompanied not only by the halt of agricultural technology but even by its regression and by a drop in agricultural production to a dangerous level? China,

where there has been a quiet 'land reform' through the handing over of communes to family cultivation, indicates the opposite as yet. But the question is whether, with the growth of industrialization and with agriculture becoming a major exporter of labour, which way would the present agricultural production of small plots and great labour intensity go?

4. *Population growth*¹⁷ is also a general problem which heavily burdens the societies that are already poor, and it is rooted in poverty and related factors. The ways of cutting population growth have not yet become clear. The efficiency of individual means (sterilization, contraceptives, other methods of family planning) is significantly influenced by the backward economic-social-cultural environment. Therefore the reduction of population growth can only be expected together with the progress of modernization.

'Death control without birth control' – this is how the problems of backward and overpopulated countries have been described. In 1977 the population of the developing countries was three thousand million, but by 2000, when the population of the whole world is expected to reach six thousand million, that of the developing world will be five thousand million alone. The treatment of disease – even though it has been lagging far behind the advanced world in all respects and in efficiency – has nevertheless significantly developed since the beginning of the process of modernization (there are nevertheless also new phenomena, e.g. the effects of AIDS in Africa, which – according to some opinions – are menacing in some regions even with 'depopulation'), while the decrease in the number of births has been far slower in these countries. The factors involved are extremely complex. It is not only cultural traditions, or the lack of knowledge about methods of birth control, or the traditional – often religious – abhorrence of these methods that play their role, but also the conscious desire for population growth. Wherever children mean labour, people want more children, wherever the male child represents value, 'the birth of girls means nothing', says a Chinese proverb quoted by a researcher in the Third World.

In India today it is only the male child who can kindle the father's funeral pyre, and it is almost everywhere the boy who represents the survival of the family.

5. The *dual impact* of the 'patterns' deriving from 'Western' (and the former European 'socialist' countries have been also classified under this heading by the 'Third World') development, namely their being a yardstick of values and provoking resistance is much stronger in this process of modernization than in the historical development of the East Central European societies. Consequently – and also because of the political implications of Western aid – the concept of so-called *endogenous* development acquires a growing emphasis, according to which the development of the society should be based primarily on internal factors, adequately utilizing the institutions and values of the given society which evolved during the course of history, even if they are linked to traditional relations.

However, the concept of endogenous development is not identical to the already mentioned phenomenon of populist modernization, even if the endogenous charac-

ter is dominant in both. In fact populism identifies the 'endogenous' with the 'popular', and the latter with the peasant, or perhaps with the urban marginal strata, etc.

The starting point of a UNESCO publication which classifies development strategies is that the earlier colonial societies developed an inferiority complex because they had come under a technically and scientifically more advanced rule, they had become uncertain as a result of the conflict of traditional values, norms of behaviour and patterns of civilization. Hence a quest for a way out was a natural consequence, particularly after independence. A way out could be the total adoption of the dominant and thus alien culture, westernization, the so-called technocratic rational model of modernization, an artificial pattern of development directed towards the future and utterly unrelated to the present could unfold, the 'futuristic radical model' could be envisaged and followed, or the emphasis on the endogenous culture could grow. The latter has several manifestations. A special escape into the past can be observed, a return to the 'sources' just as much as the idealization of the culture, ideology and ethical values of the past. It can be curiously related to populist modernization, but it can also result in the preservation of the dominance of the privileged classes and strata, the survival of reactionary ideas and an elitist way of life. The reductionist model of ethnic development also belongs to this sphere, relying on the ethnic, anthropological specificities of the given society, often preferring only one, or other ethnic group, and it may even lead to the isolated development of a special ethnic group, to an apartheid-like practice. Finally, the most acceptable endogenous development is based on the complex totality of the culture of the society and it is centred around man, it may elaborate the perspectives of its own civilization, based on its own conditions, and where man is the real focus of development. (Huyn Cao Tri 1986: 1-16.)

Incidentally the 'endogenous development centred around man' is the official stand of UNESCO. The theme is recurrent in its programmes, in the debates of the General Assembly, and is increasingly acquiring a dual content: it means partly the growing prevalence of instruments that may be generated from the internal conditions, and partly such objectives which may directly serve man. The basis of emphasis on the instruments linked to the internal conditions is that man, as the focus of development, can be grasped ultimately as part of a given culture, as the product of the different relations of that culture and not as an abstract entity.

The conditioning features of local culture acquire a special emphasis with the adaptation of external means, technology, know-how, science instruments and strategies of communication.

6. The *adoption of ideas, institutions, organizations and means*, the 'transfer of knowledge', the implementation of results accomplished under different conditions, in a different social and cultural context, on a different level of technical and economic development is a special problem in the process of modernization in some countries of the East Central European region, and all the more so in the less developed countries of the Third World. Adoption is not simple in the case of technical achievements and technologies either. According to some views one of the

'advantages' of backwardness is that the backward society may create its industry with the adoption of the most advanced technologies, principles of organization, etc., thus it would be capable of higher output (Levy 1972:19), however, this supposition is hardly well founded. In reality, the most advanced technology is not always transferred (some holding back can also be sensed), on the other hand adaptation always takes place in keeping with the local conditions. Thus, under different technological circumstances, in an environment of different cultural and social characteristics, these conditions may adversely influence the operation of even the most advanced technology. The problem becomes even more complicated when different kinds of 'instruments', such as legal norms and principles of public administration are adapted.

The impact of the *structure receiving* the ideas, views, science and technology, organization and techniques, etc. upon the work of the element received is a problematic one even if the element to be received is of endogenous origin, thus leading to change either in the interest relations and existing structure of the society, or of its individual organizations. (Kulcsár 1986a: 365-393.) The social context and impact of adaptation from outside can be even more problematic. I will return to this issue when analysing the problem of the adaptation of law. Here I would only like to note that isolated elements – no matter how advanced is the technology represented by them – cannot safeguard the success of adoption. The fate of turn-key factories, aircraft imported with crew and technology, of means and methods of high-level computerization and mass communications in the receiving countries indicates that the issue is far from a solution. Technical transfer in itself does not launch change – as the earlier researches supposed – the problem of adaptation has to be approached in a complex manner, in its socio-economic and cultural context. (The consequences of this thesis are outlined by Chombard de Lauwe 1981:263-287.)

7. The *modernization of the political system* is also problematic, at least in two respects.

First of all because the political system built during the colonial period along the Western pattern – including the party structure, the organs of the state and particularly the institutions of public administration, the legal system, etc. – *does not function adequately* in most of the developing countries in the special cultural, social and political context. This political system has significant dysfunctional consequences, it has not been able to eliminate corruption, moreover, the economic policy of the new elite is often motivated by special interests. It must be added, that in some countries the elite tried to introduce a kind of new 'revolutionary' ideology which mixed the 'socialist' and traditional elements. In Burma, e.g., the constitution adopted after independence "contained socialistic features. The Land Nationalization Law of 1948 was advocated by U Nu on Buddhist grounds." (Sarkisyanz 1978:93-94.) From this 'ideological syncretism' followed that "independence from Britain increased the dependence of Burma's politicians upon a traditionalist majority for which the unfamiliar abstractions of 'democracy' and 'socialism' could become comprehensible only in the familiar Buddhist context. Thus Buddhism had

to leave deep imprints on the absorption of borrowed Western political concepts by the Burmese public." (Sarkisyanz 1978:94.) This is also true of other cultures and countries. Therefore but for other reasons too – I will return to this problem later – European-type political institutions have been limited in the achievement of their functions. In the meantime the traditional institutions and organizations are no longer able to function under changing conditions. As a consequence the political system becomes unstable, in search of a path, and the only truly organized force, the army often acquires a significant even decisive role.

The progress of modernization in the developing countries – as I have already suggested – is often measured by the evolution of a *political system of a liberal Western type*. As a reaction to this some countries make special efforts to establish such institutions even if only formally whereas in other cases (perhaps even together with the former objective) the pressure of the 'external' pattern provokes introversion, and the socio-political consequences of the revival of earlier, particularly religious traditions can also be felt. This is all the more possible as it is particularly true of the political systems of developing countries (which can be identified as characteristic of the East Central European societies as well), namely that *the political sphere is not sharply separated from the other spheres of the society* (Pye 1968:50), and it is often connected with religion or even with the Church, sometimes for legitimacy reasons. (See e.g. Smith 1978.)

Here I return to a problem which has occurred in connection with the modernization of the East European region, namely what is the relationship of a political system to this process, how can the role of the political system in modernization be assessed.

I will not repeat what I have written about this issue earlier and elsewhere in connection with Hungary. (Kulcsár 1986a, 1987a, 1988, 1990.) I will refer to only a single also already mentioned aspect: the significance of authoritarian and democratic political systems in the process of modernization.

Many authors have written about this issue, and I have already referred to some opinions in this chapter, moreover, I have attempted to outline the general features of the problem. These traits and interrelationships, however, manifest themselves in a special manner in the 'Third World'. Guillermo O'Donnell and his associates approached the problem by modelling these specificities. They reached the conclusion from an analysis of the changes in Latin American authoritarian rulers that the failures of the populist regimes discredited such political systems in Latin America (mainly because they were unable to resist the 'pressure of distribution' and undertook import substituting industrialization). Therefore, populist rule was often replaced by a coalition of the military, bureaucratic and economic leaders with export-oriented industrialization, the restriction of consumption and the attempt to attract foreign capital. These authoritarian systems can manifest themselves in military rule, in a political system dominated by a single party, but the form of dominance called 'bureaucratic authoritarianism' by O'Donnell is anyhow characteristic of all of them. Such regimes are followed by the tolerance of 'limited' pluralism, the elitist treatment of social tensions, and such a transition that preserves the interests of the upper and middle classes and prevents total democratiza-

tion by defining transition as 'social', or 'economic' democracy by which even 'socialism' can be accomplished. (O'Donnell *et al.* 1986.)

The model – though its internal relationships and specificities reflecting the changes in the interest relations of the society cannot be discussed here – has proved to be suitable, particularly if extended to aid understanding of the role of East Asian and South East Asian authoritarian political systems in helping to produce far greater economic output than has been the case in Latin America during the course of development.

This was the analysis of the Canadian researcher, Gavin Boyd in a lecture submitted to the 14th World Congress of the International Association of Political Science (Washington 1988). The starting point of the analysis is O'Donnell's model but with the qualification that the economic production of the democratic political systems that have been replacing the Latin American military regimes suggests – though not independently from the processes that have taken place in the world economy – that the technocratic capacity of these systems is at least as doubtful as that of the populist regimes prior to authoritarian rule. (For details see: Kulcsár 1989c, 1990.)

The achievement of South Korea and Taiwan can be assessed as extremely successful among the authoritarian regimes of East Asia, whereas that of some other countries like Thailand and Indonesia is more moderate. All four countries have been dominated by military regimes (though in Taiwan there is limited pluralism organized around a *single* ruling party), and combined with other elements as well. The main common feature of these regimes is *technocratic authoritarian rule* which has transferred serious responsibilities to a bureaucratic elite, primarily in the field of the economy, whereas the direction of social relations has been retained by the military leadership. However, apparently the Eastern authoritarian regimes enjoy a greater social support than their Latin American counterparts, therefore they are capable of a higher output even if the technological capacity of the latter might be stronger. Incidentally, the reason has been found in the analysis of those cultural factors which contribute to be building of solidarity, to a higher level of growth and in the equity of distribution, and naturally external ideological influences also have their role, together with the other specificities of political culture. However, there are other differences as well. The very fact, for instance, that the South Korean leadership vested the technocrats with great administrative responsibility and launched a nationally self-assuring export oriented policy can be regarded as the main components of successful achievement. On the other hand, the neo-patrimonial leadership of Indonesia, and to some extent even of Thailand, has produced far less.

The Confucian values working towards social harmony have meant a great deal in the dissolution of social tension, in the administrative contacts with the social groups in South Korea and Taiwan, factors such as benevolence and confidence are significant elements of Confucianism, promoting the development of social partnership. Even if authoritarian rule has been stronger in South Korea, it can be explained by the traditionally greater emphasis on the state, and partly by the neighbouring North Korean military power. The differences can also be explained by the fact that

the developmental problems of the two South East Asian countries referred to have been far greater, and their elites have been less capable of handling the problems (for this see Egedy 1989:335–374 in the case of Thailand), just as the less positive traits of the traditional political culture have been much more alive (such as clientelism in Thailand, and the lack of the idea of governmental responsibility and related norms, etc.). In the latter two countries the solution can be expected much more to come from external influence, which would resocialize the elite and would offer an opportunity for the learning of politics. (Boyd 1988:1–24.)

8. Boyd's analysis leads us to the specificities of *political culture* and I can agree with the significance of this interrelationship. The possibility of the utilization of the components of the historically evolved political culture in the process of modernization partly explains the existence and role of the different regimes in the various developing societies, and also to a large extent their success in that process.

Identical, or similar traits can be found in the political culture of the former colonies, which leads back to the period prior to colonization, but a considerable part of which was further strengthened by colonial rule.

The *paternalistic* nature of political culture is the 'common' source of identical or similar traits. Though the special features, social interrelationships and consequences of paternalist political culture are well known given their appearance in Asia, and particularly in the East and South-East Asian region – especially on the basis of Lucien W. Pye's analysis – yet apparently the features explored by him may also be characteristic of the different cultural and political media of other regions: as if the conditions that unfolded in earlier centres and peripheries different from the European centre (or the so-called Western culture) had kept alive the basic traits of this paternalist political culture irrespective of the cultural differences. (*N. B.* Even in the countries of the European centre for some time!) However, there are significant differences; to what extent and duration has paternalism survived the political system it evolved in, or which maintained it under changing conditions.

Lucien W. Pye considers that the Asian paternalist political culture and its special traits derives from cultural factors. He considers Confucianism a decisive factor in the *Far Eastern and some South-East Asian societies*. It appeared in China, Japan, Korea or Vietnam with different features as a consequence of the special cultural traditions and social structure of the given country, but the fundamentals of its interpretation of society – the ensemble of the moral pattern and paternalistic care in the model of a stable, continuous and harmonious society – are ultimately the same. In China the political system, built along the pattern of the family legitimized imperial authority at the top of the hierarchy as well as the mandarin bureaucracy below. Both were 'sanctioned' by Confucianism. It is true that political secularists "were often highly favourable towards the growth of social learning capacity and to undertake innovations in the political sphere, at least in the short run. Nevertheless, purely secular political rationalization in historic societies gave rise to serious political disruptions when the limit images of religion were too sharply abrogated. The typical case is the Ch'in dynasty of China, which under legalist domination, violated the interests and values of virtually every major group in Chinese society.

The dynasty rapidly came to an abrupt and disastrous conclusion, and it was no accident that during the following Han dynasty Confucianism attained the position of state cult and official ideology. The political innovations of the Ch'in were by no means abandoned. The great Chinese bureaucratic system was in major respects a heritage of Ch'in. But the stable incorporation of the new political system depended on establishing it in the context of a newly elaborated version of the traditional religious – philosophical system . . ." (Bellah 1965:187.)

In Japan the Confucian element evolved the paternalistic form of elitism which tolerated decentralized and competitive authority. In Korea the combination of the two appeared, complemented by the Confucian thesis of virtue obtaining its reward, hence the Korean elite are enterprising and ready to take risks. In Vietnam Confucianism has strengthened national pride, though it is true that the impact of Mahayana Buddhism and French Catholic culture can also be felt. One of the most significant traits of this Confucian political culture is that paternalist rule is built upon the governing activities of superior men the behaviour of whom is directed by classical wisdom and their power embodied in a hierarchically built authority. The aim of this political and governmental authority is much more the maintenance of respect towards status than the realization of an innovative policy. (Pye 1985:55–81.) In *South-East Asia* the uniform cultural background, offered by Confucianism in the Far East, was missing, the simultaneous presence of Buddhism, Islam and Catholicism has produced different kinds of tradition. The essential feature, namely that authority was part of the cosmic order (Hooker 1978:11), represented by the sacral king and a hierarchically arranged power structure below, also appeared in these societies, and colonial policy further strengthened it, because this hierarchy could manifest itself in the bureaucratic organizational system, which was strengthened during colonial rule and grew even more enormous after independence.

Naturally there were differences among the societies of the region, for instance, in the Burmese faith the omnipotence of the sacral king resulted in the refusal of all external patterns and in keeping away from learning. It created a rigid sub- and superordination which was full of tension as rigid dependency has always been accompanied by mistrust. In Thailand the king was regarded as a semi-god, but also the master and protector of his subjects, the guide of his clerks, the student of the Buddhist holy scriptures. There was less rigidity in sub- and superordination and the principle of mutual security was also present resulting in a more open political culture. In Indonesia too the authority of the sacral king evolved, but here the patron-client relationship grew more vigorous than rigid sub- and superordination only. (Pye 1985:90–120.) The *Indian* concept of authority was originally also based on the idea of the sacral king – it had penetrated the South-East Asian cultures from India – and behaviour was based on karma, according to which the rebirth of man was determined by his behaviour in his previous life. As life is only a station in a series of rebirths, the subsequent existence of man is determined by his observance of the law, his obedience to his superiors, his avoidance of pollution by subordinates, etc. Authority as something above all doubt was almost incorporated into the religious consciousness of the people. The separation of religious and secular authority was soon removed from this ideology – essentially by the caste system –

and the norms of right behaviour were linked to the castes, or more properly to the jatis (groups associated by birth). In the caste system status and authority could be separated, and the Hindu interpretation of authority derived from it. This became a hard authority of a Machiavellian type, to use a Western term. As Manu said: "The whole world is kept in order by punishment, as one can hardly find a man without sin." British rule was built upon this political culture, the British modified the clerical apparatus already deemed necessary by Kautilya, into a bureaucratically efficient system of organizations, even if efficiency was weakened by the original traits of the political culture. For instance, the fact that spiritual matters were considered more important than the 'objective' cases, or that the Hindu officials were automatically inclined towards the protection of status and rank, as one had to follow dharma, so one had to stick to the office regulations, etc. In India too – just as in the other countries of the Asian region – the family is of fundamental significance. But in the Hindu family the mother-son relationship is much more dominant than the father's role, and this has significant consequences for the attitude to authority. Such as, for instance, an inclination towards moralizing, towards behavioural uncertainties deriving from the ambivalent nature of the female role, which is further enhanced by the unambiguous socialization free of contradictions within the family (different from the Chinese family for instance), etc. The consequence of all this is an ambivalent relationship towards authority: the supportive, caring nature of it is expected, yet negative traits are also associated with it. The ruler's dharma is the maintenance of the secular order with the help of the punitive regulations of the danda, but authority – because of the above uncertainties – which has replaced the sacral rules with secular law making, cannot be really complete or satisfactory. The temptation, for instance, that man may, after all, escape the consequences of his deeds, is alluring even for those in power. (Pye 1985: 133–154.)

The pressure for adaptation which was inevitably manifest in the peripheral societies in the centre-periphery relationship, brought new elements also into the traditional political culture during the colonial period and subsequently after independence (in some countries without any colonial rule), and corroborated some traditional elements. Thus the political culture is also shaped by a relatively new pressure for adaptation beyond the consequences of the cultural content.

Two conclusions can be definitely drawn from these extremely simplified and sketchy characteristics.

First, though Pye's analysis identifies the cultural interrelationships of the cultural context of Asian authority (and I would argue with him in some cases), he does not reach the social base of these cultural interrelationships, the conditions which created the cultures described in the development of these regions. It would obviously require further analysis.

Secondly, several identical traits deriving from a political culture based on paternalism, still survive in the above-mentioned Asian societies despite all the differences.

If a brief summary is attempted – almost as if they were components of an ideal-type – then the following can be listed as the Asian characteristic features of paternalistic culture.

- Political authority is linked to status, and hence to legitimacy, it has little or nothing to do with the efficiency of politics.
- Authority is mystified and ritualized, people imagine that authority can solve every problem if it wanted to, if it acted in keeping with the rites; thus the 'ritual' may substitute for the real.
- Care and benevolence are associated with the idea of authority.
- The moral aspect of authority is expressed in personal example, which, however, strengthens the idea of a static and conformist social order and develops hypocritical attitudes in the bureaucracy.
- Consequently – as the concept of authority is unrelated to social utility, efficiency and representation, and because status in itself is the goal – it cannot be 'degrading' to have contact with utilitarian objectives. Further, as the agent of authority is the representative of the entire community and not a representative of partial interests, people subordinated to authority also avoid an open stand in public affairs. They rather turn to tactical manoeuvres and intrigues based on personal relations, which are better related to the conflicts and their solutions manifest in the stable hierarchical systems.
- It is also part of the special features that people learn how to deal with authority, they evolve patterns which help the efficient manipulation of authority.
- As a consequence of its essence the paternalist political culture emphasizes the group against the individual, and power relations are based on the model of the family (as in the Far East), or in addition they are also manifest in the form of a patron–client relationship. In Ethiopia Haile Selassie utilizing both elements of the paternalist political culture – tried to incorporate the Western trained strata of intellectuals into this system of relations emphasizing that they could study because of his personal benevolence. (Levine 1972:212–213.)

Now, if we wish to place the paternalist political culture in a broader conceptual framework, for this purpose the types elaborated by Gabriel Almond and Sydney Verba seem to be the best suited. Although these types – the parochial, the subject, and the participatory, and their subdivisions (Almond-Verba 1963:17–26) – are exclusively based on the presence or strength of an element of participation in politics, and can be criticized (Kulcsár 1987a:330), they can be analysed well even historically. In the 'parochial' political culture, for instance, where there are no specialized political roles, the political, economic and religious roles are diffuse, hence the social orientations manifest towards these roles cannot be separated from each other, where the people living in this political culture do not actually expect anything from the political system. This corresponds to the world of the African tribes. In the subject political power has been separated and it even provokes some sort of emotional–evaluative orientation of the subjects, yet the relationship between authority and subjects is a unilaterally passive, accepting one. This political culture continued in Europe too, and survived in the European peripheries for quite some time. Apparently, however, the paternalistic characteristics are particularly strong in the mixture of these two types, in the political culture of the parochial subjects. This type can be found in the early history of almost all the modern states,

but particularly in the great Asian empires (including the Ottoman empire), in the African kingdoms, etc. The charismatic leaders, the symbols that may promote the unity of the state, such as education and the achievements that make the government a successful one in the eyes of the population are particularly important for modernization, in moving away from this type of political culture. (Almond-Verba 1963:503-504.)

Thus paternalist characteristics are linked to historically widespread political cultures and are present even there where – as in classical Islamic-Arab political culture – the community (the Arab Umma) plays an outstanding role. The spiritual leader of the community is traditionally the caliph, the character of the religious and political leadership cannot be separated here either; the relationship between the Prophet and the Umma was originally of a homogenous nature, thus the Prophet held complete religious, political and juridical power in his hands (Al-Yuzebki 1984: 14); either he was selected by God, or his authority derived from the community (in this respect different views dominate the various Islamic trends), his relationship with the community was essentially a paternalistic one, even if ‘consultation’ with ‘scholars’, with the sages and ulemas had a role in the consensus. The ulema in fact represents the community but he does not reflect its will. Hence it is understandable why the one-party system is so frequently accepted in the political systems of the modernizing Arab countries, why the legitimacy of the ruling, single party is accepted practically without question and without doubt. (Flory and Mantran 1968: 132-149; Gellner and Vatin 1981: 212-280.) The acceptance of the ‘unchangeableness’ of the world, ‘the idea of the unshakeable order of the world’ are hidden in the background of all the political cultures containing paternalist traits, thus there is an element of the world view considered by Chesneaux as the intellectual specificity of the societies based on the ‘Asiatic’ mode of production. (Chesneaux 1982: 41 et seq.)

Thus in most of the countries of the ‘Third World’ where the traditional political culture, containing paternalist traits to a greater or lesser extent, still survives – depending upon the influence of the Western political systems and of their own ‘great tradition’ – theoretically speaking the conditions do not favour modernization, and definitely not its second phase. This is also a significant factor in the relationship between modernization and law.

Notes

1. Some features of the problem (Kulcsár 1986a, 1987b).
2. Jorge A. Tapia-Valdes goes even further, writing that in the European approaches a sort of ‘postmodernist ethnocentrism’ has developed “within which not only the supposedly superior and universal nature of the ‘own’ culture plays a role, but also the notion that the cultural differences between societies make impossible any kind of really universal values.” (Tapia-Valdes 1985: 1.) Snyder states that all modernization theories elaborated after World War II “reflect the ideological hegemony of Western capitalism and the dominant economic forces of contemporary imperialism.” (Snyder 1980a: 724.) For a general analysis of the relationship between ethnocentrism and the comparative method see Nisbet 1972: 95-114.

3. This movement is naturally related to changes in values, of norms behaviour and human thinking. The most important element in this transformation is the inclination to accept new experiences, openness to innovation and change, the faith in the capacity of man to rule over his environment in the interest of his objectives, that the world can be changed and there is 'faith' in its instrument which is science and in the development of technology; also some tolerance towards other people and opinions, a trust that others (other people and organizations) are also capable of meeting their obligations and responsibilities, that is to say, faith that a reasonably legalistic order can be evolved under human control. (Inkeles 1966.) Even if these elements and particularly those not mentioned here are perhaps not completely free of a certain projection of the ideal image of the present Western society, yet it is true – and it is convincingly demonstrated by A. Jha in an analysis of the process and failures of the modernization of Indian society – that modernization "means not only change in the external structure of social institutions, but also in the internal attitudes and beliefs of the members of the society in correspondence with the external social change." (Jha 1978:7.)

4. A number of authors deal with the relationship between modernization and individualism. For us Levine's distinction between individualism as the moral base of a relatively integrated society and an individualism which is the consequence of the disintegration of the society, in other words, which is a form of anomie is useful. The latter variant of individualism does not promote modernization. (Levine 1972:239.)

5. Some authors even challenge the organic development of the Western centre, primarily on the basis of the function of absolute monarchies. But the absolute monarchies could promote the unfolding of organic processes in the West, whereas they represented a certain substitute, efforts to catch up, in the Eastern and East Central regions of Europe. (Kosáry 1980:274.) On the 'regional' differences of the absolutist monarchy see Anderson 1974.

6. Y. Singh, however, stresses: "It is necessary to draw a distinction between social change and modernization, especially to evaluate changes in the traditional society. In traditional India there were continual instances of social change without implying modernization. These changes were from one traditional structure to another, without, however, transcending them for a qualitatively distinctive evolutionary differentiation." (Singh 1973:192.) It is true that even the most rigid societies change and structural changes had taken place in traditional societies too even though mostly under the influence of external factors (just as in India). But the new structure also remained a traditional one, unable to renew itself, thus naturally restricting the necessary changes, which are the corollaries of successful adaptation. It is not the fact of change in itself, but the acceptance of change as a normal feature, an orientation towards change (expressed in facts), the automatic mechanism of adaptation and renewal and its functioning, that are the characteristics of modernity.

7. Jenő Szűcs (1983) outlines and analyses the historical circumstances of the three regions of Europe, as a consequence of which the East Central European region shows a specific development in many respects, because it has been squeezed between the two others. This development would recurrently follow the Western model; reform monarchs, who wanted to introduce the Western pattern were characteristic of this region, though they can be found in Eastern Europe as well. Occasionally the establishment of one or other institution of the pattern was achieved more quickly than in the West, but in a disorganized way, among conditions mostly characteristic of the Eastern periphery, and these patterns were created while being conditioned by these circumstances. Yet, the region is also linked to the East European development by a number of threads. Hungary, for instance, was in such a situation at the time of the Turkish conquest even if opportunities for association with the Western region developed again after the Turks were expelled, and particularly so in the 19th century. But after 1945 the influence of East Europe was the dominant one. According to Jenő Szűcs it is not yet clear whether the societies of the region have the reserves of power by which the East European traits can be eliminated. On the original characteristics of the region see: Makkai 1976. The dispute on the opportunity and the characteristics of the two Eastern regions continued even after the manuscript was completed. (See Lengyel 1989:42–46.)

8. In fact agriculture and the food industry were built up they were a significant force for modernization during the first period of take-off, and the place of agriculture in this process in a sense influenced the progress of modernization. (Kulcsár 1985b.)

9. It is interesting that references were made to the special functions of legal norms in connection with backwardness in Hungary too, for instance by István Tisza, at that time the leader of the Hungarian Liberal Party, later prime minister – at the end of the last century. The case was – and this is a further interesting point – a Bill, which, if passed, would have been a framework within which the government could have issued orders. István Tisza said the following: “Under our special conditions legislation is more complex because of the nature of the matter, as it has to deal with many more tasks and more speedily than abroad, where they do not have to overcome the harmful consequences of centuries of stagnation by rapid progress and where they can develop rules and laws step by step, keeping pace with the development of conditions. Due to this circumstance, in my humble view, many more things have to be directed by order with us than in other states, where life, as well as the legal conditions have gradually evolved and the conditions are consolidated.” (See Pölöskei 1985:39–40.)

10. This model unfolded features both positive and negative from the angle of modernization. (Kulcsár 1986a.) Hitherto research has devoted relatively little attention to how a certain continuity of traditional elements has shaped the institutional set-up, the methods of state management and social practice in ‘socialist’ society. (For the initial hypotheses see: Golan 1975:19–39, and other papers in the volume: Eisenstadt 1975. On the theoretical aspect of the problem see Kulcsár 1985c and Kulcsár 1986a.) Research has just been launched to find out how well this model performed the ‘tasks’ of the first phase of modernization in East Central Europe.

11. The frustration of the effectivity, later even the functionality of the so-called ‘socialist system’ has been more and more forecastable, particularly in the East Central European countries in the late sixties and seventies. This was proved by the reform-efforts in these countries as well as the fall or slowness of the reforms. The role of the Soviet Union in maintaining this system in East Europe from the very beginning has been obvious, therefore, there were decisive from this aspect the changes of the Soviet positions in global development. The future of the Soviet Union from this point of view was forecasted by Brzezinski already in 1966.

12. Some signs of this possibility appeared relatively early in Poland, Czechoslovakia and even Hungary (see Kulcsár 1991, 1991a, 1991b).

13. I have mentioned already some of my articles dealing with this problem. Moreover, I am working on a peculiar analysis on this transition; peculiar, because as the Minister of Justice of these years in Hungary I was participating in decision-making processes, and as a researcher in political and legal sociology I was able to see and evaluate ‘from outside’ these decisions and the sociopolitical context in which they were made and accepted.

14. See Kulcsár 1991, 1991b.

15. How this opportunity would be used in these countries, it depends on a lot of factors in the present and future. I have presented a paper on this topic in Amsterdam for the Plenary Session of the Joint Meeting of Law and Society Association and the Research Committee of the Sociology of Law, ISA in June 28, 1991: “Politics and Law. (The Case of Transformation Process in Hungary)”.

16. Colonization is not necessarily the only form of pressure for adaptation to the case for modernization either. At times it is a very complicated process when even force may have a role, to a varying degree depending upon the situation. Such an example is the modernization of Japan launched by the Meiji restoration. Literature on the Meiji restoration (1868) is vast. Without even attempting an analysis of the problem I only refer to the fact that strict centralization has been maintained in the Japanese state and even traditional values were successfully put into the service of the new national objectives. These two elements are significant components of the success of modernization. But a very important factor of success is in respect of teaching and knowledge. In the Meiji Period such sums were spent on education that if a similar proportion of the national income were spent on education today Japanese primary and secondary education would improve beyond recognition. (Fukutake 1980:157.) Some trace back the success of modernization to the time of the Shogunate when – in contrast to China – no system of rigid stratification evolved (the institutional parallelism of Emperor and Shogun by itself promoted selective adaptation), landed gentry, merchants and the intelligentsia enjoyed a certain autonomy ‘functionally and in respect of their norms’, the family was not so rigid and was not the exponent of a value system making innovation difficult as in China. The family-centred value system was coupled with a devotion to the wider community in Japan, and so on. (Singh: 1973:208.)

Others call attention to the second, rationally planned process of the transfer of ideas and institutions, to the significance of the 'American period' after World War II. (Braibanti 1961:146-147.) For an assessment of Japanese modernization see Nagai 1984:87-121, 169-178, 194-195. Naturally it is clear that even if Japan was forced to adapt in the process of modernization this process has lifted the country out of its peripheral position and it cannot anymore be considered as a part of the 'Third World', now having found its location in the 'centre'.

17. In this respect the phenomena of the European periphery and semi-periphery differ from the problems of Asian or African population growth. In the European region fertility is decreasing (particularly in certain countries like for instance Hungary or the European regions of the former Soviet Union), whereas in India, China and in the African countries programmes have had to be planned in order to reduce fertility. Fertility, however, depends on other phenomena in the society, particularly on the situation of the family as a productive unit, on female labour, and so on. Therefore, different phenomena may occur within the same society. In China, for instance, the 'one child programme' has been successful among the intelligentsia and city-dwellers in general, whereas it has made slower progress in the villages right from its outset. Nowadays, however, when Chinese economic results are significant, the very same process has again increased the number of births in the villages, as family production even more strongly depends on the labour power of family members because of the lack of equipment, particularly that of machinery.

and the differences of legal cultures in the changing legal system are also taken into consideration.

Chapter Two

The Modernization of Law

Characteristics of 'Traditional' and 'Modern' Law

The role of law in the process of modernization can only be understood if an attempt is made to analyse the phenomena, if any, of 'traditional' and 'modern' law, while the appearance of this dualism and the differences of legal cultures in the changing legal system are also taken into consideration.

2. Literature related to the phases and trends of legal development has been growing ever since and has become almost boundless, as scholars beginning with Friedrich Karl von Savigny, studying the history of law at least to some extent from a social point of view, found themselves in need of 'periodization' of some sort. For the solution of our problem we can utilize the results of research which seeks to identify the specificities of the law of societies described as 'stationary' or 'changing'. This inference is a logical one if this contrast is accepted as the basic element to distinguish between traditional and modern. But if there is no stationary or changing society in the absolute sense of the term, the proportion of the two elements, the strength of the characteristic social attitudes towards tradition and change, the presence or lack of structural changes by the basis of the historical existence of the 'stationary' and 'changing' types.

In respect of law such a distinction, or more accurately, an attempt to set up types, appeared for the first time in Henry Sumner Maine's *Ancient Law*. It is beyond doubt, he wrote, that "Much the greater part of mankind has never shown a particle of desire that its legal institutions should be improved since the moment external completeness was first given to them by their embodiment in some permanent record." (Maine 1973: 24.) At times a series of customs were violently liquidated and replaced by others, the emergence of a negative code considered to be of supernatural origin was largely extended and subsequently distorted beyond recognition by the quibblers of priestly interpretation of the texts, but, with the exception of a small part of the world, nothing happened that could be compared to the gradual improvement of the legal system. There was progress in material civilization, but instead of extending over law as well, the latter rather hindered the former. (Maine 1973: 24.) Maine considered Indian society to be such a stationary type, which, in his view, failed to develop its law after the publication of the laws of Manu. Whereas the prototype of progressive societies would be Rome and England

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Characteristics of 'Traditional' and 'Modern' Law

The answer to the question whether there exists 'traditional' and 'modern' law – despite the apparently simple possibility of response – is at least as complicated as the distinction between traditional and modern societies. In fact the question arose almost simultaneously with the appearance of the problems of social and legal development during the course of the 19th century.

1. Literature related to the *phases and trends of legal development* has been growing¹ ever since and has become almost boundless, as authors beginning with Friedrich Karl von Savigny, studying the history of law at least to some extent from a social point of view, found themselves in need of 'periodization' of some sort. For the solution of our problem we can utilize the results of research which seeks to identify the specificities of the law of societies described as 'stationary' or 'changing'. This inference is a logical one if this contrast is accepted, as the basic element to distinguish between traditional and modern. But if there is no stationary or changing society in the absolute sense of the term, the proportion of the two elements, the strength of the *characteristic social attitude* towards tradition and change, the presence or lack of structural changes lay the basis of the historical existence of the 'stationary' and 'changing' types.

In respect of law such a distinction, or more accurately, an attempt to set up types, appeared for the first time in Henry Sumner Maine's *Ancient Law*.² It is beyond doubt, he wrote, that: "Much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment external completeness was first given to them by their embodiment in some permanent record." (Maine 1972:14.) At times a series of customs were violently liquidated and replaced by others, the competence of a primitive code considered to be of supernatural origin was largely extended and subsequently distorted beyond recognition by the quibbling of priests interpreting the texts, but, with the exception of a small part of the world, nothing happened that could be compared to the gradual improvement of the legal system. There was progress in material civilization, but instead of extending over law as well, the latter rather limited the former. (Maine 1988:24.) Maine considered Indian society to be such a *stationary type*, which, in his view, failed to develop its law after the publication of the laws of Manu. Whereas the *prototype of progressive societies* would be Rome and England

whose archaic law was laid down (although his critics complain that he did not indicate what he regarded as the equivalent of an ancient code for England), and the necessary modifications were successively executed at first by legal fiction, then by equity, and finally with the help of legislation.

I do not intend to discuss here the simplifications and inaccuracies in Maine's interpretation. I would question, for example, how far Hindu law was 'rigid', and I could postulate that legal fiction – not to speak about other mechanisms he also considered to be in the service of change – has a significant role precisely in the 'rigid' legal systems exemplified by Islamic law,³ or that the commentaries and the interpretation of law through practice introduced the most essential changes into Hindu sacral law. I would also note merely in passing that the instruments of legal change indicated by Maine have naturally not only existed in sequence but simultaneously as well. (In fact the possibility of the simultaneous existence of the first two was recognized by Maine too.) Finally, the 'ethnocentric' nature of his theory can also be challenged. His suggestions that the legal systems considered 'progressive' and 'stationary' can both be found in the Indo-European ethnicity, that the difference between the 'progressive' and 'stationary' societies belongs to the greatest 'secrets', that the 'stationary' is the general and the 'progressive' is the exceptional society, do not question the nature of his thinking. In fact cultural interrelationships appear in the difference indicated by him, thus 'ethnocentrism' is manifest in a curious 'cultural centrism'. His statement on the developmental trend of law from status towards contract, which has been most absorbed by legal thinking, and in which status is typical of 'stationary', and contract of 'progressive' societies, has also been much criticized. The reappearance of the significance of status in monopoly capitalist, or 'socialist' law – either in certain forms of contract, or the 'status bound' nature of the rights and duties of the wife, the shareholders, and even the social beneficiaries, etc. in the law of advanced countries – has raised new question marks. However, historically speaking the linkages of these characteristics cannot be simply rejected. In 'ancient' Chinese law, for instance – after it was permeated by Confucianism – status could be strongly felt as almost the most important factor from the 2nd century B. C. until the 20th century A. D., both as far as the position occupied within the social stratification is concerned, and in the family and in the network of relatives. (Ch'ü 1965:280 et seq.) The legal system was based on status to such an extent that Confucian law, 'li' was a hierarchical norm, more accurately a pattern of behaviour related to social position (Unger 1977:93), while the stationary nature of the Chinese basic social system and cultural specificities (even the changes initiated by outside influences, such as the consequences of the Mongol conquest and the adoption of the Mongol dynasty) could hardly be doubted during the period referred to. Naturally it should not be forgotten that such a hierarchical articulation of law bound to status also existed in feudal European law. However, between the Chinese and the European 'feudal' political structures there is the significant difference that the contractual element between the king and the princes, which served as a broad base for 'vassallage', and also as a starting point for resistance if violated, was missing from the Chinese system (Bünger 1980:442) whereas on the other hand, the spread of Roman law promoted the mobility and

development of the economy by its elaborate contractual characteristics among others, and ultimately it played a role in the process of removing, or weakening factors emphasizing status in the society and in its political-legal structure through capitalism.

However, the essential point is quite probably that all these features, described by Maine, beyond the significance of status, such as religious influence upon early law, the formalism of ancient law, the predominance of procedural rules over material legal regulation, or, as he later expounded, substantial law, first appeared with the discovery of the hidden things in the gaps of procedural law (Maine 1981:389), as characteristic elements of an 'ideal-typical' nature related to stationary society which can also be defined as an ideal type, where law is *not the instrument of change*, but *it registers slow change*.

Since Maine's studies, although it has become evident that there is no *automatic* connection between a given level of cultural development and certain legal techniques and ideas (Stein 1980:104), certain typical characteristics – naturally considerably influenced by the economic and cultural conditions, and the frequency of their occurrence is also a significant trait – can be found in the law and legal outlook of *typically stationary* and *typically progressive* societies. Legal science and anthropology dealing with legal phenomena have essentially collected those characteristics that can be assessed as elements of the traditional legal outlook. When analysing these elements Brietzke says that the only culture-neutral characteristic that distinguishes the modern legal outlook from the traditional one is its social and state recognition, i.e. that *law can be intentionally made* and not merely 'found' (Brietzke 1982:68), this characteristic, however, is of decisive significance. In fact there is the acceptance of changing social relations and of the possibility of changing them behind the interpretation of law made intentionally. In contrast, dharmashastra and the South-East-Asian, so-called sastric law attached to it, has been considered as transcendental, independent of human will. It represents a collection of legal norms which govern the behaviour and activity of men, *but are not, influenced by man*. (Baxi 1986:220.) The same is summarized by Hooker: "The Oriental laws are founded upon conceptions of law that are absolute in nature" (Hooker 1978:6), since the original texts are "descriptive of a natural and social order. The concept of law that the texts present is a regulation of human behaviour that is a part of the nature of things. (Kühnhardt 1987:157–158.) Law is not just concerned with an individual system of obligation, though all texts contain prescriptions, it is also an irreducible datum of the moral and social world. No individual can escape from law in this sense; it is authoritative by the force of its being." (Hooker 1978:98–99.) The Hindu dharma "should be considered as an attempt to explain a normative system based on the facts of moral life within the terms of a cosmological order." (Op. cit.)

The utilization of law for change is a general European tradition which has been enhanced almost to an irrational extent in East and East Central European society (in the historical development of both regions, but particularly in the latter). This trait, however – differing from the Soviet model – did not appear in the Chinese political system developed by Mao Zedong. Thus that feature of the traditional system and government which considered appeals, the 'psychological' means more

important than the commands of law survived in the Chinese 'communist' political system. (Bünger 1980:448.) And this was, and to some extent continues to be, characteristic of the 'socialist' countries outside Europe.

2. Some further features characteristic of the law of 'stationary', or *traditional societies* can be summarized in the following.

– The first and most commonly accepted characteristic is the *less differentiated system of rules*, i.e. a social mechanism of control in which legal, religious, and customary elements can be separated only with difficulty. In *China* such an element was the traditional 'li', and even the later 'fa', closer to the concept of European law also had this specificity. (Unger 1977:92–96.) This specificity was clearly applied in practice by the Privy Council Judicial Committee in the case of Indian law, when it stated that the old texts and commentaries were apt to *mingle* religious and moral considerations to produce positive laws. "So in order to study and understand properly, legal rules must be separated but not detached and isolated completely from moral and religious adjuncts. . . ." (Sri Balasu Gurulingaswaram v. Sri Balasu Ramalaxman, 22. I. L. R. 389.: Pandra and Clapman 1981:112.)⁴ However, the less differentiated state characterizes Islamic law⁵ and also the other traditional legal systems little, or not based on a cultural 'Great Tradition'.⁶

– *The traditional system of rules covers the totality of life*, leaving no sphere free of legal regulation. "The Hindu jurisprudence is . . . based on a concept of law" – writes Harish J. Zaveri – "which views life as an integral whole. There is hardly any other jurisprudence which has taken so comprehensive a view of individual and social relationships, identified potential areas of conflict so minutely, and prescribed effective remedies which are related to the state of conditioning of the concerned individuals." (Zaveri 1979:39.) However, in this respect Hindu legal thinking does not differ from the Chinese or Muslim, or from the outlook manifest in the legal customs of African tribes and clans. To quote only one example: in China the legal expression 'fa' was originally related to the major cosmogonical principles governing the world, indicating which principles should be utilized for the government of the society in the shape of rules. (Vandermeersch 1985:21.) Hooker could also rightly generalize when – despite all possible differences – he considered the concept of law found in the more or less sacral legal texts regulating human behaviour as part of the nature of things (Hooker 1978:96; 1986:4), and which, therefore describes a "social system and an ideal moral or ethical order conceived as a unitary whole . . . the foundation of these orders is not the principle of legality but rather the implementation of an ethical order." (Hooker 1978:108.)

– Though it was stated of the law of Oriental societies that it served conciliation rather than litigation in the Western sense of the term, it would appear that such a characteristic can be found, at least in some sense in all the so-called traditional societies. Mehren writes in relation to Japanese law: "... Eastern societies have a mediational approach to the settlement of disputes which differs fundamentally from the Western litigious approach by which the plaintiff gets all or nothing at all." (Mehren 1968:1489.) This attitude was totally alien to the Indian political and legal

culture as well, where the traditional way of settling conflicts was conciliation. (Weiner 1965:214-215.) With the introduction of the modern legal system – where conflict is limited to certain components, namely the ones that can be legally grasped – law has not been accompanied by the solution of conflicts but has often resulted in their expansion. (Cohn 1959.) Thus an obvious conclusion could be drawn from the data of a survey of Indian law, according to which “Respondents from almost all section of society seem to prefer conciliation to adjudication.” (Sharma 1976:43.) Attitudes – like, for example, where litigation is considered to be shameful as it is in the present Thai legal culture (Kasemsup 1986:284-285), or where a lawsuit against another person is considered almost war and a contribution to bureaucracy as in Korea (Friedman and Macaulay 1977:1026) or as immoral, as in traditional Japan where a law suit threatened harmonious relations. (Kawashima 1969.) In China the entire legal system reduces litigious inclinations – these attitudes derive from the fact that the *dispute is not separated from the social context*, hence its solution also aims at safeguarding the undisturbed harmony of that context. (Baxi 1986:277.)

In a certain sense this basic characteristic and its presence in the modern legal life of the ‘Eastern’ societies is also justified by the fact that the number of *lawsuits* is *much lower* in most of these societies than in the so-called Western ones. In Japan, for instance, which has reached a high level of modernization, the number of lawsuits is still lower than in Hungary. “It is generally admitted that the Japanese do not like to bring a lawsuit.” This is for partly psychological reasons – people have a feeling of discomfort when they are in dispute, so they try not to recognize even the existence of the dispute. The psychological burden, however, is less in cases where the grievance is directed against a corporation or organization. But there are economic reasons as well, namely, the “availability of money and the time needed to go to court”, finally a proper legal service which may also be deficient or lacking. (See Taniguchi 1984:34-35.) I could continue to quote statements on the significance of the conciliatory nature and the mediating elements in relation to legal systems built into different cultural contexts, on law based on the African tribal and clan relations⁷ as well as in relation to the legal culture that has evolved on the Latin American continent.⁸ But I think that this typical feature can be considered as a generally verified one even if, for example, in certain African cultures, litigation expressly takes the form of a ‘struggle’, and even if the element of conciliation and negotiation is not missing, but has been increasingly present during the past few decades in the legal life of the advanced Western countries, too.⁹

– The greater weight of the element of negotiation and conciliation is obviously related to another feature considered to be generally characteristic of traditional law, i.e. that the *individual* is relatively *pushed into the background*. More accurately the cultures which evolved the majority of the traditional legal systems lend less weight to the individual in the interest of undisturbed and harmonious conditions. The effect of community tries emphasizing status which shows the place of man in the world, naturally emphasizes the *primacy of duty as contrasted with right*. Hence the lack of right as a concept registered by several scholars.¹⁰ Some authors explain the phenomenon with the argument – as was stated by the Upanishads and affirmed by modern psychology – that since the genesis of conflict lies in the sense of

insecurity, the primacy of duty over rights, i.e. the participation of the individual in the entire life of the society reduces this sense of insecurity which may lead to conflict and thus jeopardize the stability and progress of the given society. (Zaveri 1979:40.)

Similar explanations are given in connection with legal systems influenced by Confucianism. "In Confucian thought the desirable condition of universal harmony and stability is not attained by law or the balance of rights and duties. The central notion of 'li' envisages a society, centered around duty or responsibility." (Choi 1990:372.)

This outlook is reflected in the various legal institutions as well. Perhaps the best example is the Hindu joint family. According to early Hindu law the acquisition and keeping of property could take place only through the institution of the joint family, as the family as a whole was debtor as well. According to the Mitakshara school¹¹ all property of the Hindu joint family is held in collective ownership, the joint family property is held in trust for joint family members then living and yet to born. (Sharma 1978:91-117.) Linkage of landed property to larger units or even land as the property of the entire society (clan, ruler, etc.) is also known. It is sufficient to quote Gerard Conac's statement to see that this is not only a characteristic of Hindu law. Conac pointed out that European jurists, following the individualist interpretation of law were literally shocked by those African system "in which people existed only for and by their collective, and which first of all strived for the protection and safeguarding of group cohesion and for fitting the individual into this environment." (Conac 1980:VIII.) In the Ethiopian legal system the Emperor's paternalistic law-making – the children were not to question what was best for them in the father-child relationship – again derived from the respect of authority by the Amhara political culture the psychological bases of which also go back to the family. The patriarch of the family, the local chief, the rich landlord, the church dignitary, the political leader, the army officer all figure in the portrait of the imaginary father who may demand obedience, but from whom some benevolence can be expected. (Levine 1965:250, 251.) Consequently the "state institutions did not merely act *in loco parentis*; they were direct manifestations of the parent's will." (Brietzke 1982:96.)¹² In this legal system the emphasis on duty recalls the spirit of the Prussian Allgemeines Landrecht of 1794. Although the Ethiopians rapidly turn to the lawcourt with their grievances, juridical authority is so much part of the authoritarian culture that the ruling pronounced is accepted just as quickly by the losing side. At most he might appeal to a higher court later on. (Levine 1965:252.)

The relegation of the individual into the background, the regulation of his position primarily by means of 'duty' accords with the ideological characteristic of societies based on the Asiatic mode of production (or developed under the influence of such elements), i.e. the insignificance of the individual, but also the primarily objective of stability, the idea of the motionlessness of the given world order. Such a legal and social position for the individual could in fact promote the stability of the society, but one can hardly agree with its being the guarantee of progress as well.

A further and highly significant feature derives from the characteristics described so far, namely, that traditional law does not serve as an instrument of change, even

though the element of change is not missing from it.¹³ For Hindu law this was most markedly stated by N. Subrahmanian: "Law in the Hindu context is not an instrument for social change. . . it is merely a recorder of already occurred social change, it is redundant. . .", however, the introduction of change is allowed in Hindu society.¹⁴

The fact that the traditional legal system is a *model* is not independent of the above features. The model value of law can be discovered in Asian societies with an advanced culture as well as in the tribal-clan societies of Africa, almost independently of the cultural context. The basis of sastric law is authority and it shows the path man should follow. (Lingat 1973:253) Or, as it was put by Hooker, dharma not only contains the rules of the normative level of the world of what 'exists' and what 'should be', but also the rules governing the relationship between these two conditions. (Hooker 1986:4.) The sacred "Hindu scriptures, which lay down the social norms, are theoretical treatises which inscribe the aspirations and ideals of the society in their texts in absolute terms as prescriptions set forth in their dharma sastras" . . . The dharmasastra is not law-making, it lays down social principles under which various rules may exist, but ". . . man-made laws cannot have the same validity as revealed prescriptions". (Subrahmanian 1976:109.) The dharmasastra, "the science of just behaviour", actually contains two types of regulation. *Dhishtarttha* is a regulation the grounds for which are clear, visible and can be deduced from reason, from common sense. The second type is *adhishtarttha*, the reasons for which are not evident. The 'visible' rule serves secular purposes, for example, the son enjoys priority over the widow in inheritance. The 'invisible' rule is related to transcendent 'spiritual' objectives, for example, a man cannot marry a girl whose paternal ancestors have a surname identical with his own. The rules of the first type may be ignored if there is an adequate reason to do so, whereas those of the second group can never be disregarded. Therefore dharmasastra could be lenient towards local customs and the law-making of the monarch in some of its rules, moreover, it could enforce the principle that law without equity leads to injustice in the case of the 'visible' rules. In a sense this possibility was utilized by Anglo-Indian law-making and administration of justice, moreover, it is not insignificant even in contemporary Indian legal life, as indicated, for instance, by the provisions of the Special Marriage Act. (Derrett 1968:92-101.) Dharmasastra appears to have amalgamated and dissolved the duality of 'natural law' and 'positivism'. A similar function is performed in the face of the various customs and the multiplicity of the administration of law by the shari'a as a symbol of the ideological unity of the Muslim world. (Coulson 1969:55.) Even the concept of the Chinese 'fa' which represented the duties confirmed by the imperial edicts in the legalist tradition, did not contain the concept of *lex* of Roman law in an unambiguous interpretation. It can be considered rather as a legal model. (Vandermeersch 1985:32.)

That this was specific to not only Hindu, Chinese, or Islamic law, is shown for example by René David's analysis of the sources of the Ethiopian civil code. The ancient Ethiopian code, the *Fetha Negast*¹⁵ was also more a collection of ideas than of legal norms. It was regarded as law but it was hardly observed. It represented a moral aspect of law for the Ethiopians, by which law was eliminated from everyday

affairst right from the outset. Society was actually held together by a specific system of equity. In this context it may be presumed more generally, as suggested by David, that law was viewed as the idea of a superior, perfect condition, which could not be realized in an imperfect society, it could only make acceptable and perhaps justify regulation aiming at a more just society. (David 1967:342–343.) But this holds true not only for Ethiopian law, but for the entire law of Africa, which is “a vision of the world, a philosophy first and foremost, and not a technique”. (Conac 1980:XXVII.)

Most of the traits mentioned above could be interpreted – as Masaji Chiba did (considering the universal applicability of Western *jurisprudence*) – that the conception of non-Western law... the boundary between norm and fact is too often regarded as non definite, rather, the world of law is ready to accept interference by the world of fact. The principle of separation of norm from fact thus may function in Western law to maintain itself against the challenges of social realities whether political pressures, customary practices, or social forces.” (Chiba 1989:47.) Though M. Chiba rightly recognized in this Neo-Kantian separation of the worlds of ‘sein’ and ‘sollen’ one of the characteristic problems of Western legal thinking, legal system and jurisprudence, and rightly indicated the problems of ‘absorbing mechanism’ of social reality in connection with this separation, I think that this separation is not only a defence against the reality. Sometimes it was: by the ‘socialist normativism’ e.g. the state has really defended itself against the social and economic reality. Generally, however, this theoretical concept of separation of ‘sein’ and ‘sollen’ promoted the introduction of the *intended* changes into the legal system.

– It follows from all this that the *symbolic element predominates* in this law. Conac says of African law that its “significance is ambivalent, sometimes it is rather more symbolic than operational”. (Conac 1980:VII.) However, the adverb ‘sometimes’ seems to be an ‘underestimation’. The symbolic nature which rather emphasizes the *orienting* feature of the ‘rule’ can be found naturally in contemporary, modern law as well. However, the basic characteristic of the latter is its *positivism*, or rather its *normative* nature, concretely directing behaviour. Thus the decisive factor is whether the orienting and normative elements are typical or not in a legal culture (similar to the case of legal systems with other characteristics mentioned earlier). The mass of legal norms may and does change, as in most societies with a traditional legal system, a legal regulation considered to be an instrument and definitely striving for concrete normativism developed quite a long time ago (usually already present during colonial rule). But legal culture changes slowly – and this is already a contemporary problem – as it may remain an orienting one despite law-making which is normative in its intentions. This is particularly the case if these legal norms are too far removed from reality and therefore cannot be implemented or only partially. (Such a legal culture of an orienting nature may contribute to the process of the retraditionalization of societies already on the way to modernization.)

A kind of pragmatism derives from this interpretation of law, despite its apparent rigidity and ‘transcendental’ nature. This pragmatism has partly allowed for the assertion of local customs, or for the law-making of the monarch in the given case, as the assertion of the dharma is the duty of the ruler according to the basic

principles of sastric law, the 'products' of which could even rise to the level of sastric law with the help of interpretation and the interference of the term 'good custom' in India, Thailand, but also in Burma. With such an absorbing capacity sastric law could promote change, and even modernization as some hold, because it provides some certainty, relative reliability and security. (Derrett 1968:316; Rudolph and Rudolph 1967:274; Baxi 1986:228-230.) The significance of change is illustrated by the initial ignorance of law in commerce as found in the *Dharmasutras*, the first Aryan law books, which was subsequently elaborated by Manusmriti, incorporating the impact of Buddhism, and by its later commentators. (Shrirama 1986:20.)

A very significant trait of the legal cultures of religious foundations derives from all this, as described by Kasemsup especially the Thai legal system concerning the royal assertion of dharma, but with a broader validity: "The role of the King . . . was not as the creator of law, but as the administrator of law to enforce temporary measures to keep social order." (Kasemsup 1986:282-283.) More expressively: "Kingship was a symbol of *Dharma* itself whose function was not legislation but the presentation of the sacred laws." (Hooker 1978:31.)

Two further remarks should be added to this statement: partly that the royal decrees were valid only for the reign of the given king in the Thai legal system, and partly the dharmasastra itself recommended the kings to consider the customs. The monarch had a significant role in the assertion of the Chinese 'li' as well in the sense that government was the task of man, of the 'great man'. Hsün-tzū said: "Without a great man, even if the law is complete, the sequence of application will be in disorder will be unable to meet the change of events, and will lead to disorder." (Ch'ü 1965:257.) In other words: "The ideal government is not one that is ruled by good laws but by superior men whose mission consists in teaching people through word and by exemplifying how to live virtuously." (Choi 1990:372.) The significance of interpretation is also known in the Muslim legal culture where theoretically divine revelation has always been above rationality, yet interpretation could co-ordinate revelation with the demands of the day. This is why it can be said of Muslim law that it is both a divinely given law and a jurists 'law'. (Hooker 1978:104.)

Thus the other side of the need for regulation, the ordering of *daily life* was satisfied partly by custom partly by the orders of the monarch, and partly by legal interpretation. Law, however, functioned to realize the theoretically abstract, ideal social and moral condition. Hence this second level of regulation can also be less assessed as normative in the present, western sense of the term, therefore it has not evolved such legal principles which could have made some foresight and normativity a component of '*calculating*' human behaviour. I would just like to mention that the principle of '*nulla poena sine lege*' hardly means anything in these societies. In China, for instance, the secret nature of law until the 6th century B. C. made the realization of this principle impossible right from the outset, moreover, the principle of *nulla poena sine lege* was disregarded to such an extent that even a later code ordered the flogging of everybody who acted in a way he should not have done. (Vandermeersch 1985:203.) I should add, however, that there is not complete agreement on this point. According to some authors this principle was indirectly

realized, and it was even set down in the code of the Western Chin dynasty, but the later codes 'neglected' it. (Fu Mei Chang Chen 1970:212-213.) As the imperial codes really represented one aspect of bureaucratic administration, their direct task was administration: the maintenance of government and the preservation of the social order. (Hooker 1978:107.) The codes were designed to punish every (not always predictable) act which could endanger order and its philosophical base (the order of Confucianism and the formalized difference between status and roles), and they did not penetrate into the conditions of everyday life independent of, or less relevant to them. (Hooker 1986:5-6.) "Offences against the state and offences against the family order were, in a very real sense, connected parts of the same legal continuum. (Hooker 1978:107.)

The work of interpretation maintaining sastric law including academic, and later even juridical interpretation, was essentially done far away from the entire society. People were not expected to know the law, only learning of it when they appeared in court, which was in any case unlikely. It is interesting that various attitudes appeared in the different cultures as a consequence of various influences and of pressure for adaptation. In Thailand, which was never colonized, a curious reluctance is expressed towards law and even the legal profession is not held in high esteem. It is said that honest people need not know law, they need not go to a lawcourt, it is enough if they respect customs and moral norms. (Kasemsup 1986:284.) The situation is approximately the same in China, where legal regulation in the Western sense of the term appeared only very late, and could not even strike roots, and it was again pushed into the background after the 'socialist' revolution. Nowadays there are some efforts towards modern legislation in China, but they have been primarily related to the modernization of the economy. In India, however, early British legislation has ultimately exercised a special impact upon the Indian legal culture. Governor-General Warren Hastings still attributed great significance to sastric law in the second part of the 18th century, and he incorporated experts in traditional law into the newly established juridical system. However, Cornwallis, appointed Governor-General in 1786 strove to build a modern legal system. This could not be realized without dispute. In contrast to Cornwallis, who ultimately represented Benthamite principles in terms of law-making, Munro favoured the 'paternalist' model and a government based on personal authority, a judiciary based on the panchayats and incorporating local customs, etc. Ultimately the codes and juridical system of the second part of the 19th century saw the unfolding of Cornwallis model. Consequently the authority of the judiciary and the prestige of the legal profession found a place in the Indian legal culture almost as high as was the case in Britain, and thus the image of the 'litigious Indian' evolved. (Mendelsohn 1981.)

– Finally the special state of the *organization* of law-making and administration also belongs to the characteristics of traditional law. A few anthropologists – with some artificiality – have claimed to find organizational differentiation characteristic of the legal system of modern society (the separation of the law-making bodies from those concerned with administration of law, more exactly the judicial and executive ones)¹⁶ in the clan and tribal organization, too. Yet these experiments can be

characterized by two specificities. First, organizational separation, which some scholars have argued has been the *differentia specifica* of law right from the outset – which is wrong in my view – and second to describe these organizational differences in their potential, hardly developed, rudimentary stage. The differentiated nature of an organization – and I shall come back to it later – has no *conceptual* position in considering a system of norms as legal, and the outlook emphasizing this is retrospective in nature, and in reality it can be justly regarded as ethno- or rather culture-centric. However, it is logical that the characteristics indicated above require an organizational system different from the modern legal system in some components. Therefore, if *no* elaborate apparatus of law-making (Hooker stressed that, for example, the Thai Kings may have been legislators, but this did not mean the existence of a consistent body of legislation; Hooker 1978:32) and implementation is attached to a traditional legal system; or the organizational components have a lesser significance, this is not a standard of value, but a consequence. (Sometimes it was so in spite of an eventually 'highly specialized' bureaucracy: e.g. in the fifteenth century Thai Kingdom; Hooker 1978:28.)

– Finally: I have mentioned political culture identical, or similar at least in its most important traits as one of the characteristics of 'Third World' societies: similarly traditional legal *culture* also has identical, or similar features.¹⁷

The most general feature of the traditional legal culture is its *orienting nature*. Whereas modern legal culture – as will be seen – is of a *normative*, 'legal' nature. In the orientative legal culture law is typically *not* normative, it is not by itself obligatory and it is not the sum total of the required behavioural norms, which should be followed and enforced directly by its content. Law rather has an orientating significance and this 'original' feature attached to the characteristics of traditional law hitherto described has been strengthened in a certain sense after independence (to be discussed later) with the growth of the number of legal norms that are often beyond implementation and hence symbolic. The dysfunctional consequences of the apparently normative legal regulations representing the modern element but impossible to implement have maintained orientative legal culture to a great extent which by itself limits the effectiveness of modern legal regulation.

The orienting nature of traditional legal culture contains one rather important element, which is – on the one hand – 'dysfunctional', if you like, because it weakens the force of normativity of accepted or independently made 'modern' legal rules for intended change, is on the other hand 'functional', because it promotes the adaptation to changing conditions. This element, which is called by M. Chiba 'amoeba-like way of thinking', "which enables people to behave flexibly so as to adapt themselves to changing circumstances and insofar as it is possible, to maintain their individuality identity." (Chiba 1989:156.) Chiba added in relation to Japanese political culture: this "would allow people to behave in such a manner as to override the regulation of official law without defying its authority." (Chiba 1989:95.)

This is a possibility in some political cultures and indeed should be taken into consideration because the traditional orienting nature of legal culture has been further strengthened and has resulted in specific phenomena together with a few other elements in the 'Third World' countries.

Let us consider, for instance, the problem of the 'soft state' (Myrdal 1974:273-296) which may be placed at a different level of interpretation in relation to the orienting legal culture as a component.

Though Myrdal's argument can hardly be challenged as he describes the traits and social implications of the 'soft state' (even if some Indian researchers regard his analysis to be an ethno-centric one), yet his statements occasionally seem to be simplified. He finds the basic explanation of the 'soft state' that all power is in the hands of the upper class; while it can allow itself to have laws based on equality and the corresponding political regulations, at the same time it is undoubtedly in the position to hamper their realization. (*Ibid.* 290.) So it is not surprising that the system of regulators guiding private enterprises is arbitrary and it is the traditional interest of the public administrators and politicians operating the arbitrary administrative regulators to maintain and multiply them. (*Ibid.* 296.)

The phenomena of the 'soft state' described by Myrdal are – to greater or lesser extent – manifest in all societies in the process of modernizing, and not only in the so-called developing countries. The phenomenon, for instance, that in the soft state resistance against state regulatory orders and their implementation is general and much broader in every stratum of the society (*Ibid.* 274.) cannot be explained primarily by the absence of discipline, because the same phenomena occur in autocratic states (in South-East Asia) as is pointed out by Myrdal himself. Thus 'softness' is not identical with the liberal nature of the state according to Myrdal, and this is justified by the examples of the countries modernizing – and having already advanced in the process – at the eastern periphery and semi-periphery of Europe. Actually these phenomena can be found in these countries too, even if their intensity may vary.

Though it would be tempting to derive the characteristics of the 'soft state' solely from the fact that power is in the hands of the upper classes, this explanation does not seem to be satisfactory. It is more probable that other factors also have their impact besides the excessive weight of the political system the phenomena of which – and particularly the preponderance of the centre within the system – can be found in all these countries. The constant efforts made to justify the legitimacy of power have led everywhere to the setting of over-ambitious objectives and tasks (varying in accordance with the ideological systems directing revolutions and independence movements, but carrying their general features as well). The 'upper classes' not only 'do not want' to achieve these objectives, they not only 'hinder' the solution of these tasks by their own interests (this is also a factor, even if it is not always linked to classes), but they are even incapable of achieving them. The social and historical context in which the process of modernization takes place in the various peripheral and semi-peripheral societies of our age, more or less forces those holding political power to set over-ambitious goals, to hope for too spectacular results, even though they are less important from the angle of real social development, as the economies of shortage which have evolved have necessarily given birth to corrupt phenomena irrespective of the extent to which the given society was a traditional one.

The progress of modernization is indicated precisely by the weakening of these mechanisms of pressure or even by their discontinuance. But these mechanisms of

pressure produced by history do not disappear with the changes in the conditions which have created them. Their functioning and consequences are maintained – at least for some time – by strata and group interests, customs, routine activities, the ideological elements built on them, and so on.

The impact of the legal norms promoting the process of modernization is considerably affected by the traditional legal culture or its remnants. Legal culture, however, is related to the social environment receiving the legal norm, its cultural specificities, the values and norms alive in the society, and the world of traditionally functioning institutions. But this group of factors is an extremely complex one; its analysis would require a separate volume. May I refer, by way of example, to a group of Tanzanian MPs opposing certain provisions of the new Act on marriage and divorce from the angle of traditions in 1971; for instance, they criticized the provision under which, the husband, if he wanted to obtain a new wife, first had to ask his first wife's permission. It was even argued that monogamous marriage was the product of European capitalism and ran counter to the survival of the mutual solidarity and support of the African extended family. (Rwezaura 1983:8–9.)

The question is further complicated by the fact that some elements of modernization may evoke a phenomenon which may appear to be 'traditionally' characteristic. For instance, the 1925 report of the Rankin Commission, investigating the administration of civil law, in India pointed out that the image of the "litigious Indian" (accompanied to some extent also by the image of the failure of the civil judiciary) did not derive from the conflict of the judiciary of British pattern and Indian cultural specificities, but from the interference in land ownership relations by legal norms: the British administration had drawn land relations more tightly into the web of government than any other facet of social life and by legal regulation it had opened the way for adjudicating in disputes over land. Whereas in other colonies, for instance in a considerable part of Africa, "the British courts were heavily preoccupied with matrimonial matters. This was presumably a consequence of the British intervention in domestic relations which they regarded as uncivilized" and wanted to regulate. Whereas in India British rule – with a minor exception – did not interfere with the traditional order of marriage. (Mendelsohn 1981:844.)

Besides the world of values and customs – to which I shall return in connection with an important aspect – the way of life is an important factor in a society undergoing modernization; the related legal norms, conditioning effectiveness. The conditioning force of the phenomena of the way of life (and the related factors from the needs to the values) in the process of the realization of legal norms is manifest in all respects. Some of the legal norms sometimes cannot reach even a considerable part of the addresses precisely because of the specific phenomena of the way of life which are not 'perceived' by law. Though in the majority of modernizing societies there is no need to 'conceal' law – as was done in the early Roman legal development, or in China until the 6th century B. C. [it is known that when in 513 B. C. the Chin state promulgated certain rules pertaining to criminal law, Confucius predicted the ruination of the dynasty (Ch'ü 1965:171)] – yet legal norms, particularly those related to development, barely reach those who are concerned. (Chatterjee, Singh and Yadov 1971:210.) This was supported moreover, by the surveys conducted at

the eastern periphery of Europe, which indicated the 'knowledge' and much more the over-estimation of legal regulation related to the traditional values. (Kulcsár 1967:429-450; Kulcsár 1980a: 197-220.)

Factors hampering the knowledge of law have also had their influence besides numerous others; in the failure of the functioning of the civil code introduced in Ethiopia, for example. (Allott 1980:207-208.) The more a society is 'traditional' the less scope is allowed by the institutionalized components of the way of life for so-called calculable behaviour, which consciously takes into consideration wishes and opportunities. But law related to development is in fact opposed to the traditionally institutionalized modes of action and would require just such *calculating behaviour*. (Seidman 1978:100.) In the duality of 'traditional' way of life and 'modern' law the courts cannot mete out justice realistically either, because they do not know the reality in the way of life of the litigants. Those who argue for indirect rule and for keeping the lowest rung of adjudication in the hands of public administration primarily emphasize that the High Courts applying modern law do not know customary law which regulates everyday life, and they especially do not know the reality of African rural life. (Morris and Read 1972:79-102.) Raj Kumari Agrawala, when criticizing the adjudicating practice of the Indian Supreme Court in marital cases, also suggested this: "The Supreme Court has been oblivious to the extra-legal elements at play while determining marital disputes. Decision-making, resultingly, is ahistoric, asocial and apsychological. . . . Dispute-decision of marital cases has been totally anormative. It has neither provided policy direction to law nor to society." (Agrawala 1974:124.)

The analysis of this group of factors, however, requires further detailed study. All the more so as it is not only significant in the developing countries, but similar experience can be found in the functioning of the 'socialist' model as evolved in the thirties. (It is sufficient to recall, for instance, that the legal norms on compulsory delivery of agricultural produce to the state produced 'crime' as an almost inevitable phenomenon in the Hungarian peasant society of the 1950s.)

3. The same degree of difference experienced in the actual phenomena of law called 'traditional' because of heuristic considerations, can be seen – as contrasted to it – in *modern law*, even if the traditional elements, surviving in the modern legal systems to various degree, depending upon the given society, are disregarded. But as traditional law can be described by its ideal typical content, similarly those factors of modern law which constitute its ideal type can also be collected. These components form a picture in general, which is in contrast to the image of traditional law. One or two elements, however, should be emphasized separately as well.

These elements are essentially related to the characteristic features summarized and also criticized (to which I shall return later) in certain respects, by David Trubek. According to him this "conception views modern law as a specific social process emerging from the overall process of development. Modern law has three principal characteristics. It is primarily *a system of rules*; it is *a form of purposive human action*; and it is *simultaneously part of, yet autonomous from, the nation-state*." According to this conception "modern societies achieve order primarily through

law, that is, through a system of rules" as it is "also viewed as an *instrument* through which a variety of possible social goals may be achieved." (Italics added.) (Trubek 1972a: 4-5.)

It cannot be emphasized enough that modern law has grown out of a legal culture having identical features in many respects to the great Asian religious cultures at least in Western legal development. In many respects, but not in everything. For example, the duality of natural and positive law was far more markedly separated in Greek society – a source of European culture – than in the Oriental legal systems at any point of time, and this separation was strongly present even in the subsequent legal systems with religious foundations. (Kulcsár 1987a: 86.) The most important, and one may say characteristic component of Western legal development was classical Roman law [though it regarded itself as the manifestation of rational natural law (Kulcsár 1987a: 87, 91)], and it not only maintained a definitely elaborated legal system and normative legal culture in the classical period with its calculable rationality, but reviving, it again became an organic part of unfolding Western European law, upon the essential features of which the pattern of modern law was built.

If the legal systems of the later Western centre are studied during the centuries after the fall of the Western Roman Empire, the characteristic features of traditional legal systems can be found in many respects. For instance, in these legal systems the legal norms and procedures could be less separated from customs, from the political and religious institutions; they did not have an autonomous structure, the rules were not arranged consciously, there was no professional juridical organization, and a legal profession as an autonomous social group did not evolve either. (Berman 1983: 50.) Yet it was in this medium where modern legal development started, even if often the framework of the old institutions was used in the struggle for the new against the old content.

The period that can be considered the starting point of modern legal development came in the 11th and 12th centuries. According to Harold J. Berman its most important event was the so-called 'papal revolution', when Pope Gregory VII created the sovereign papal power, the 'secular', autonomous state of the Church and its legal system. Thus it was the development of Church administration and the system of ecclesiastical law which was the first pattern of the 'modern' state and law, creating also the legal profession, the hierarchy of lawcourts, and law as an integrated and developing system of principles and procedures. (*Ibid.*: 85-119.) The Church, possessing law-making, interpreting and implementing authority and administration set the example for the state organizations just as its 'universities' systematizing, interpreting and teaching law also promoted not only the development of canon law, but also created the institutions, rediscovering and further developing classical Roman law, in keeping with the demands and conditions of the age.

Besides the 'papal revolution' of political character and simultaneously with it the prosperity of the trading cities, the growth of commodity production and commerce required calculable rational law. Max Weber discovered the uniqueness of Western development in economic demands and in legal security based on rational and

calculable law, which ultimately has created modern law with the unfolding of capitalism. Thus some characteristics of modern law were brought forth jointly by the economic processes and political conditions already in feudal society and they themselves contributed to the dissolution of that society, always strengthening the processes 'leading out' of that society and the framework gradually limiting political power itself.

I have already quoted Berman's analysis of the significance of the 'papal revolution' for the modern state and law. In addition he also identifies the features which have unfolded as parts of the Western legal tradition but go back to several centuries and may characterize modern law. These are the following:

- The relatively sharp separation of legal institutions from others; though law continued to be strongly influenced by religion, morals, politics and customs, yet they could not be considered as law - whereas the contrary was the case in other cultures.

- The legal institutions (including those related to law-making and implementation) are operated by a separate occupational group, the members of the legal profession, usually trained to a high level.

- The rules and institutions of law are systematized, handed over and explained by the legal discipline, and the writings of legal scholars on law constitute part of the legal system in a certain sense. (It should be added here that the latter feature unfolded not only in the 'Western legal tradition', but it is also characteristic of Oriental law of a sacral nature.)

- Modern Western law is not only a system, but it is such a system where the factors of its own change are also organically incorporated, thus its capacity to change safeguards the survival of the system.

- Thus law grows in keeping with its own internal logic; change does not only mean the adaptation of the old to the new but also constitutes part of the pattern of change.

- Such an interpretation of the 'historicity' of law is also linked to the idea of its dominance over politics, over the political 'authorities', hence it is separated at least partly from the state in the long term. The very idea of 'constitutionality' accepted almost everywhere indicates that it goes beyond politics at least in a few important respects.

- It derives from a differentiation between secular and ecclesiastic politics that Western legal thinking accepts the existence and competition of various legal systems, and also the side by side existence of different jurisdictions. Thus the complexity of the uniform legal system contains various legal systems; hence the sophisticated complexity and elaborateness of law.

- Finally tensions may occur within the legal system between the ideal and the real, the dynamic elements and those related to stability, and tension is occasionally dissolved by a violent revolution, casting away one legal system, or another. Legal tradition, however, which is more than a concrete legal system, survives revolutions and is even revived by them. (Berman 1983:7-10.)

Generally speaking the specificities of Western law, present also in modern development, described by Berman, are correct, however, they can be complemented by a few important features.

Once again I stress the separation of law from other institutions, because:

– Though modern law also refers to rules – mostly moral ones – beyond law, law is supposed to strengthen precisely these norms at least according to the former 'socialist' interpretation of law, yet it can be generally stated that *modern law can be separated from other groups of norms governing behaviour* by its typical features. In fact works analysing the separation of law and morality and their difference appeared in the history of jurisprudence as products of a period when the specific elaboration of law was complete, in respect of the European centre. It was not accidental either, that the 'classic' separation leaves the outer sphere of human behaviour to law, while it identifies morals with internal conviction and the values deriving from it. (Kant 1870: 12–18.) All those particular features which appeared as fundamental elements in the unfolding industrial capitalist society, did not require else but *behaviour corresponding to law*, no matter what the motivation was.

– A particularly important feature of law already referred to, but all the more important as a feature of modern law, namely its *elaborateness*, is related to this circumstance. The first historical basis of elaborateness was the earlier centre of European development, i.e. the Roman Empire and Roman law. Roman law – as is well known – later on played an important role after the collapse of the Western Roman Empire, in different forms and at different times, but definitely during the period of the development of commodity production and of the early capitalist elements in Western European legal development. A view generalized theoretically and even from the point of the philosophy of history of the increasing elaborateness of Western legal development, that can be traced back to Roman law and to its reappearance is expressed by Max Weber's concept of the *growing rationalization and formalization of law*.¹⁸ Here, however, one should be reminded, as is rightly stressed by David M. Trubek "that Weber's notion of legal rationality really measures the degree to which a legal system is capable of formulating, promulgating, and applying universal rules." (Trubek 1972b: 752–753.) Therefore, this rationality is a particular *instrumental* rationality which is inclined to overestimate formal rationality, the calculableness of law in advance, and thus to underestimate its instrumentality in a more general sense. (*Ibid.*: 752–753.)

– The *normativity of law*, as a basic characteristic is naturally linked to the characteristics mentioned above. Although the presence of the symbolic element can also be observed in the Western development of law, and occasionally it even grows, normativity is accompanied by a legal culture which considerably differs from the legal culture of orienting type precisely because it acknowledges normativity as a force directly guiding behaviour.

– The *organizational elaborateness* of the legal system found its place in Weber's conception too in a sense. Actually the appearance and differentiation of those organizations which create and implement this mass of legal norms also derive from increasing formal rationalization. Weber also emphasized the fact that in the

modern state law becomes separated from the other, mainly political activities of the state.¹⁹

The criteria of 'modern' law described ideal typically, and even an attempt to identify such criteria may be easily challenged precisely on the basis of the content of 'modernity' expounded earlier.

M. Chiba has observed this ambiguous character of Western law, too: "the self-consistent normative structure is examined for its inherent connection with the rule of law ideal, the most apparent trait of Western law. The question as to why and how such a rigid conceptual system can be maintained in constant contact with, or challenge from varying and changing social realities evokes a number of answers." (Chiba 1989:49.) I have indicated above one possible answer in connection with the concept of modernity elaborated earlier. That means, *the most important indicator of the 'modernity' of law could be the extent to which it is capable of promoting the social changes that become necessary in a given society, how far it can be able to ensure the necessary stability and change of the society.*²⁰ In other words, *how far does it serve the functioning of the internal mechanisms which guarantee the continuous adaptation of the society and adequate responses to challenges.* Naturally, this is primarily a question of content but it would appear that the criteria I have described as the elements of modern law have assisted the legal system in a historically demonstrable manner to ensure the success of this 'service'. Undoubtedly sociologically this requires the society and the government to acknowledge that "law can be intentionally made rather than merely found, imperative rules can be uncoupled from the dogmatism of tradition and consciously formulated to serve social ends. . . The minimal juridical requirements for a progressively modernizing legal system are predictability and flexibility. . ." (Brietzke 1982:68-69.)

However, in law considered modern, traditional elements can also be found. They are particularly important in the contemporary Eastern or East Central European societies, into which such elements were built or 'preserved' from the past curiously enough precisely by 'socialist' legal development. But it can also be stated that in the legal systems of other countries and of the so-called developing world following the path of modernization, the characteristics of modern law multiply precisely because they are being produced by the process of modernization. But the question is: can traditional and modern elements be found to such an extent in the various legal systems that they *pluralize the legal system itself?*

II

The Mixture of 'Modern' and 'Traditional' Law in East Central Europe

At the Eastern periphery of Europe the traditional elements were mixed into modern development to such an extent – largely related to the phenomena of a political system and culture of a basically paternalistic character – that the local legal systems, carrying simultaneously the specificities of the modern and traditional, cannot be unambiguously classified under either heading. Moreover, there are differences even between Eastern Europe and East Central Europe.

Two legal cultures differing from each other in many respects evolved at the Eastern periphery of Europe. One of them was the East European one of a *stronger orienting* nature which has survived in many respects until today. The Byzantine influence – through the moulding of political culture, where, as I have already indicated, the paternalist nature of the political centre was enhanced by its association with the Church – specifically strengthened a legal culture of orienting nature by the legally less limited operation of the central authority. As a consequence of pressure for adaptation the law-making role of the political centre had a vigorous development later on, but its effectiveness weakened in the receiving social context. Whereas, the political culture of the East Central European region was different in many respects and its historically continuous adaptation to the Western centre and the penetration of Roman law shaped legal culture differently beyond those features already mentioned.

While not dealing with the East European legal culture, the basic features of the legal culture of the East Central European region can be summarized as the following.

The pressure for adaptation – which had been effective ever since the initial phase of the settling down of these peoples in Europe – was also manifest in a continuous and deliberate law-making. The function of law-making shaping the society was expressly manifest and it often openly meant the reception of foreign legal elements or norms (though not always stated as such). These legal principles and rules are the result of a special development even in the European centre. The relationship of European legal development with the evolution of capitalist conditions, the growth of trade and the appearance of the professional estate of jurists has been known since Max Weber. Reference has also been made to H. J. Berman's analysis according to which the so-called 'papal revolution' of the 12th century paved the way for the appearance of modern, systematized law. This 'revolution' not only laid the founda-

tions of the reception of classical Roman law, revived because of the development of the economic conditions, but also spread the idea of the 'rule of law', of law as the conscious regulator of social relations, and that within the limitations of legality. The country should be built on law, says the first Scandinavian law book, which includes the view expounded by the English, French and German legal scholars of the 13th century, namely that the laws are binding on the king as well, subjects may lawfully resist unjust royal measures. The various elements of the evolving feudal legal system – canon law, royal law, urban law, etc. – constituted a uniform system in a delegated manner and were arranged so that the supremacy of law was theoretically safeguarded. A mutually dependent order of obligations appeared in this legal system, even among those who were located one above the other in the social hierarchy, reducing the possibilities of the autocratic assertion of authority. (Berman 1983:528–537.) This development transformed the views on king and state. Earlier the king had been the guardian of 'good old law', he implemented it and meted out justice. In the mid-13th century, however, a new interpretation appeared according to which the German–Roman Emperor (Frederick II) was simultaneously 'pater et filius Justitiae', the creator of law as the father of justice, but subordinated to it as its son; ratio, the source of all law was obligatory for him, too. The same process took place in England with Bracton's lawbook (*De legibus et consuetudinibus Angliae*), according to which the king governed independently, but was obliged to respect the 'old freedoms' when meting out justice. Finally, the image of the 'law-making' monarch obtained its marked features from the philosophy of St Thomas Aquinas: although the monarch was free of the compelling force of law, he was subordinated to the guidance of natural law of divine origin. Incidentally the acceptance of the principle of the 'common good', of *raison d'état* also gave the acknowledged opportunity of law-making to the monarch in the 13th century. (Bónis 1972a:71–81.)

Urban development and the unprecedented growth of trade which was its foundation had a significant role in the unfolding of these principles of Western legal development. (Between 1050 and 1200, the population of Europe doubled, the urban population grew about ten fold.) This demanded legal protection and the legal wording of transactions, etc.

East Central Europe, which had adapted to the southern, central-western and western regions of the continent by the time of the papal revolution, was capable of adapting such a legal culture which carried in itself all these features of development, to its own conditions (moreover, this adaptation was almost continuous due to cyclical features), but it preserved a number of structural characteristics which also shaped the adopted elements during the course of legal development. Only to mention a few: the idea of the rule of law had its impact on royal legislation, but – as is shown by the history of Hungarian law – royal law-making produced legal norms valid during the lifetime of the king until the early 16th century, and even later on there are so many repetitions in the text of Acts, that obviously they had to be confirmed repeatedly until they could be effective. Earlier, when outlining the political culture of the region, I mentioned the defensive behaviour against reforms coming from the top, which significantly limited the possibilities of the paternalistic

type of leadership, and in the bases of resistance in Hungary and Poland in the autonomy of the so-called comitats or voivodeships distorted them from the reforms started from the top. The nobility (together with the agencies implementing law attached to them) jealously guarded their rights against royal authority, practically succeeded in letting laws become lasting legal norms only if *customary law also accepted them*. In Hungary, for instance, neither judicial rulings, nor deeds referred to the law, but to the old customs of the country (antique regni consuetudo) up until the 16th century, and if there was any such reference then it was a rather ambiguous one such as 'according to the most recent laws of the country' (iuxta novissimas regni constitutiones), without any specification of content.

The principle of mutual obligation had already appeared in the royal bulls containing the privileges of nobles, but it did not go much further, and the structure of the judiciary made litigation by individuals occupying a lower rung of the hierarchy against those above extremely difficult and at times even impossible.

Although the East Central European region was under the influence of Roman law, and the principles of Roman law appeared in the most different lawbooks and even in royal legislation, a real reception did not take place. However, the absolute power (absoluta potentia) of the king could be justified on the basis of the principles of Roman law as against custom. The king, "in certain cases could go beyond the limitations of customary law otherwise respected by him" (Bónis 1972a:§ 7), or he could even disregard law. In practice, however, subjects often pressed the king to deviate from certain laws, but the king's *actual* power only rarely meant the real basis of absolute royal authority. But whenever it did – in Hungary, for instance, during the reign of King Matthias in the 15th century – the idea of the doctrine of hierarchical legal sources, even including codification was worded in contrast to 'old law', along the pattern of Roman and canon law. (*Ibid.*: 70–80.) The principles of Roman law – and ecclesiastical law as late as the 13th century – promoted the settlement of customary law and also to some extent its preservation, until the creation of the *Tripartitum*²¹ in 16th-century Hungary, with the adaptation of a number of concepts and solutions, but without a complete reception. This situation diverted Hungarian legal development – and legal culture – from the Western legal systems to some extent, later on raising again the necessity of adaptation.

These features of legal development laid the foundations of two, subsequently strongly influential traits of legal progress in Hungary, but also in a broader sense in Eastern and Central Europe.

The first is the ensemble of *normative legal thinking* and historical attitude, deliberate 'reform law-making' and resistance, relying on customary law, and the second is an emphasis on *priority rights*, which originally meant a reference to the rights of certain strata (nobility) and local communities (cities), but which also effectively strengthened by implication, the sense of their rights in individuals, too.

The above derives from the features so far described, e.g. that the social position of the lawcourt and the judge is ambivalent in this political culture. This ambivalence is illustrated by the fact that, for instance, the word 'bíró', meaning 'judge' in Hungarian, originally stood for a person with authority, a person whose power position gave him the right to mete out justice. (Kulcsár 1980: 103–126.) Although

naturally jurisdiction was usually little separated from other forms of power in the tribal and clan societies, in the East Central European region jurisdiction and the other forms of exercising power were practically interwoven over time. (In Hungary for instance, jurisdiction was separated from public administration only in 1869, when the independence of the judiciary was also laid down.) The jurisdiction of landlords – the so-called manorial courts – survived until the mid-nineteenth century alongside the state judiciary which had begun to evolve after liberation from Turkish rule. During the time of the Habsburg monarchy, together with the jurisdiction of the comitats linked to public administration, the juridical practice of the municipalities, and even the elected leader of the village administration, the so-called judge also had judicial rights. The situation was the same in those parts of Poland which belonged to the Habsburg empire, whereas there were slight differences in the regions annexed by Russia.

As a result of the developments outlined here in brief, the judge could never achieve the significance of his counterpart in, for instance, the Anglo-Saxon legal system. At best he worked as a high level official even in the modern system. It was so even after the judicial system was made autonomous and its independence promulgated by law, as its independence was strongly influenced by the fact that the appointment and promotion of judges practically depended on the minister of justice who made recommendations to the head of state. Hence features of the political culture influenced judicial activities as well. For instance, the political lawsuit evolved as an 'established' practice in the solution of political struggles. Thus, the ruling regime could identify the interests of the 'homeland' or the state with its *own* interests on the basis of the relevant articles of the Penal Code dealing with treason and the like. Thus opposition, already difficult to build, could be eliminated by criminal courts also, if it appeared dangerous.

The inclination towards litigation manifest in the legal culture of the region, and particularly of Hungary – which is illustrated by the lawsuits of the gentry in the comitat and royal courts as well as those of the serfs in the manorial courts during the time of the 'traditional' society – indicates the significance of the lawcourt as an institution participating in the settlement of disputes. Though no data are available on the existence and operation of institutions of a different type for the settlement of conflicts, from the nature of the cases brought to the different courts (including the ecclesiastical ones, which enjoyed exclusive rights in matrimonial cases among others for a long time) – often disputes of minute significance only – it can be inferred that the excessive weight of the lawcourts was important in the settlement of disputes. In addition, disputes were brought to court because of the strong sense of rights, consequently law interpreted as rights had to be corroborated by the lawcourts.

Penalty was also a significant element in the legal development of the region even though it did not have such overall importance as in China and it was not so unambiguously worded as the basic law of 'danda' in India. However, penalty as a political instrument was built into the paternalistic political culture, and its impact was naturally manifest beyond the direct political context.

The growing pressure for adaptation was also coupled with internal pressures during the course of the 19th century. The evolution of the *internal* elements of a capitalist economy and society also required new legal regulation. It is a special feature that this development and the related legal regulation appeared in certain cases as a *foreign* element in legal development – also because of the ethnically alien imperial framework – and this feature, or rather such an interpretation of these traits was further strengthened as a consequence of the suppression of the various national uprisings and revolutions. It was in this process of law-making that the principles of natural law, developing into rational law as corollaries of Western legal development appeared somewhat more effective and played the role of legal postulates. Rational law-making as an idea was the corollary of objectives desirous of developing society along Western patterns particularly from the second part of the 19th century onwards. The most important ideological basis of resistance was reference to historical legal development right up to the mid-twentieth century, the demand for the maintenance and revival of legal regulation considered to be a local, but mostly stretching back to feudal private law. An interesting manifestation of this phenomenon was the collection of popular legal customs still alive among the peasantry in the thirties and forties and the demand that it be considered as a basis for law-making in Hungary. (Kulcsár 1980:79–102.)

The impact of legal culture as a receptive medium, which had become a normative one, emphasizing individual rights against the collective, and increasingly pushing the family behind the individual, created an interesting situation when the region again found itself in a situation where it was forced to adapt. During the period after World War II, when the economic, political and legal systems (and consequently also the structure of the society) were transformed by the adoption of institutions and even political cultures corresponding to the Soviet model, considerable law-making began. The basic features of this legislation can be described as follows:

- the demand for a breaking away from the old – including even the basic principles evolved by legal development;
- unlimited law-making (even without the participation of legal experts) as the means of solving social problems, laws that could be used almost without limit, regardless of the consequences;
- the rapid growth of symbolic legal norms, and legal regulation of a technical, bureaucratic type at the lower level of the law-making system as a consequence of the distance between the economy of shortage and the ambitious goals;
- consequently the norms actually regulating human behaviour were pushed behind the symbolic and technical regulation.

Such legislation, which, in addition, directly employed the instruments of criminal law as a means of implementing political and economic decisions when the conditions for implementing them were missing, produced extensive dysfunctional phenomena. These dysfunctional consequences in part further exacerbated the social and economic difficulties, partly they brought new features, into the legal culture. (To quote only one example: criminal law created a considerable amount

of crime in social groups where it had been unknown earlier. Further: the penalty meted out by carelessly applied criminal jurisdiction for acts not considered a crime by society turned the social reception of crime and punishment to the opposite of that intended.) The authority of law and the social prestige of the legal profession further deteriorated because of the artificially conceived lawsuits serving political purposes – not only the so-called show-case trials but also the less public ones against entirely innocent people.

The effectiveness of law has been further reduced by short-term legal norms of often retrospective applicability which not only make the expected (mainly economic) behaviour impossible – as they have broken away from realistic conditions – but in practice they cannot be observed because of their contradictory nature and large number. Thus people could be arbitrarily brought to account in the lawcourts even after the period of the so-called personality cult, and it was often used as a tool of the frequently changing policy. (In the 1970s in Hungary, for example, some of the chairmen of the profit-making agricultural cooperatives were taken to criminal court for the violation of the economic regulations; this at a time when temporarily, an anti-peasant and anti-agricultural policy was being followed. Later, in the early eighties such lawsuits were held to be a cause of the animosity to private enterprise.)

As a result of these developments traits showing a trend of transformation have appeared in legal culture. After a reduction in litigation for some time, the number of civil cases started to grow, primarily because of the large number of matrimonial cases. In fact it is difficult and has not appeared to be necessary either to avoid the judicial way until very recently (because of the legal regulation allowing for the easy dissolution of marriage and judicial practice) for the parties involved in disputes related to marriage. Yet the signs of the avoidance of law and the judicial system have also appeared, mainly in the case of conflicts and disputes concerning economic issues.

Empirical surveys show that legal knowledge is greater in the case of legal norms related to traditional values (human life, property, family, etc.), whereas it is less if the rules concern the field economy, public administration and the like. This is an unambiguous indication of the fact that the cognitive element of legal culture is weak precisely in the case of legal norms that were intended to shape society. The problem, however, indicates deeper interrelationships as well. If legal regulation breaks away from reality – either in the case of a process, a phenomenon, or organization – if it is contradictory, incomprehensible and impossible to observe, then the given process, phenomenon, or organization would spontaneously evolve a regulation suited to its own specificities and conditions, which would appear in behaviour and become a real guiding force despite, besides or below law, but reducing the effectiveness of the latter. This would obviously not pass legal culture without a trace and would not only weaken the cognitive element but might even change attitudes towards law in a negative direction. Surveys indicate that the prestige of law has been decreasing in East Central Europe.

Our surveys on the knowledge of law have unambiguously indicated knowledge and approval of the legal norms embodying traditional values (sometimes even stronger than guaranteed by the legal norms in force), but at the same time con-

contradictory behaviour can also be observed. For instance divorce, almost independently of the legal regulation, is condemned as a social phenomenon in principle (in a survey 83 per cent of respondents answered that the increase in the number of divorces was a "bad thing"), yet in fact the real value judgement of society is expressed in the high number of divorces. The separation of abstract judgement and real behaviour is manifest not only in the case of divorce, but it also influences the assessment of the survey data indicating the high prestige of law. Apparently people *generally* accept and even require the observance of legal norms, yet they readily seek loopholes and even more, personal connections (sometimes in the form of corruption) characteristic of the political culture, whenever it is a question of realizing their own interests.

The question of course can also be put in the form of how far legal regulation has contributed to the spread of the values constituting its base. According to the Hungarian data whenever traditional values are acknowledged even by the new legal regulation, their strengthening can be generally observed (though in the case of theft the assessment of the crime committed against social and other property is not differentiated), even though the separation of abstract judgement and concrete behaviour is also a fact. Wherever law is contradictory or uncertain, so will social judgement be. In Hungary, for instance, medical care has been free, yet people try to overcome the problems of treatment resulting from health organization and care falling behind demand by the so-called gratitude money given to doctors. So far this essentially corrupt phenomenon has been ambivalently treated by the relevant legal norms, social assessment is also uncertain, yet in practice it is a fact that gratitude money is given, accepted, and in some cases almost demanded. The legal regulation of economic risks has been also uncertain. Risk-taking, for instance, was expected by the legal norms born in the process of economic reform (and particularly the new interpretation of economic management behind them), but the practice remained until the transition in process more or less unstable, and till the recent statutes the relevant regulation of the Penal Code made it expressly dangerous. This can be particularly observed in the case of legal norms regulating economic life; the general context of the legal norms is known but it has not been possible to develop approval of their content as well. A potent example of this is the production of articles in short supply, without authorization. According to 81 per cent of respondents such production should be punishable, but approval is not so great, only 25 per cent demand punitive action. It is perhaps in family law that certain changes in values are most manifest. Although the proportion of those regarding the man as the head of the family is high – 75 per cent of the respondents gave a positive answer in the survey – 27 per cent expressly held the view, in keeping with the intentions of the legal regulation, that in present Hungarian law there is no such thing as head of the family. More than 57 per cent knew that husband and wife may have separate property, and most of them gave a correct assessment of the contents of such separate property.

The data cited and other data not mentioned, allows only supposition but not well-founded conclusions on the basis of which unambiguous answers could be given to the questions. Presumably such unambiguous answers cannot be given at

all since the value content of a legal norm can expect social acceptance – and legal regulation can only be one instrument in this – if it is compatible with the entire value system (and the present values of Hungarian society are quite contradictory), and secondly, if practice confirms its application. But this presupposes that legal regulation, and even more legal practice are free of contradictions.

Montesquieu stated once that “Comme les lois inutiles affaiblissent les lois nécessaires, celles qu’on peut éluder affaiblissent la législation.” (Montesquieu 1973:II. 269.) To continue with Montesquieu’s words “Il y a des lois que le législateur a si peu connues, qu’elles sont contraires au but même qu’il est proposé.” (*Ibid.* II. 283.) In other words: “Il n’est pas impossible”, he writes about Lex Voconia – “que le législateur eût obtenu une grande partie de son object, lorsque sa loi était telle, qu’elle ne forçait que les honnêtes gens à l’éluder.” (*Ibid.* II. 203.) These statements can hardly be considered obsolete, they rather warn us that there are, or there may be elements in the functioning of law – in its genesis as well as application – which unfavourably influence changes in the legal culture. The examples quoted from the immortal *De l’Esprit des Lois* indicate three such elements, which are actually related to one another. Thus, if rules are made which can be circumvented – and they even force people to evade them – then these can hardly be regarded as well considered norms. It has a particularly unfavourable impact upon legal culture if the legislator himself, or the court, or other law enforcement organization is obliged – because of different circumstances – to ‘circumvent’ the legal norm. Such a phenomenon is produced, for instance, by over-ambitious law-making, when the legal norm created on the level of an Act remains essentially an orienting, symbolic one and the real normative content is given by the rules made at a lower, vigorously contracting level. However, this is essentially not different from circumventing a legal norm with another one. Legal regulation and the judicial and administrative system associated with paternalist political culture and particularly with its ‘second’ phase characterized by a pressure for adaptation (Kulcsár 1991e) often produces this phenomenon and infuses uncertainty and doubt into the legal culture.

During a time of great social change legal culture has a problematic career anyhow, because law-making or legal practice frequently turns against the legal principles of centuries, against principles that may have become general values. Thus the new legal regulation is in a disadvantageous position in many respects, but if it adds to the already disadvantageous position by legal regulation which may and should be circumvented, moreover, if the legal norms are violated by the machinery of functioning law, as an almost regular practice, then this circumstance partly strengthens the traditional values alive in the legal culture, partly reduces the normative force of legal regulation and changes a legal culture ‘legalistic’ in nature into an ‘orienting’ one in the long term.

Apparently the characteristic features of the orienting legal culture are strengthened to the extent that the paternalist political culture survives, and largely because the legal regulation is intended to be normative but does not take into account the social conditions.

III

'Traditional' and 'Modern' Law: the Plurality of the Legal System

A long debate on the unity and plurality of the legal system has been going on in the discipline of law and actually neither of these terms can be interpreted unambiguously. Niklas Luhmann undoubtedly rightly points out that in fact tacitly every system is considered to be based on some unity, moreover as a construct deriving from a single principle. (Luhmann 1983: 129.) Subsequently this interpretation was 'loosened' and the function of the system acquired an increasingly serious role in the definition of the unity of the systems functioning within the society. Luhmann wishes to dissolve the problem of the unity and differentiation of the legal system by saying that law is a closed system in its normative aspect, but it is open as a cognitive one, thus the internal process of 'self-production' is combined with the openness of its relations with the environment. Acts can function as norms only if they are foreseeable, if they are applied in the decisions and these decisions can only regulate the situations because they can be foreseen in Acts: thus normativity appears in the circular relationship of norm and the decisions applying the norms. (*Ibid.* 139-140.) This dual nature of the legal system by itself removes the problem of the unity of the legal system from formal legal thinking – which could reach only some kind of congruence of norms anyhow – as there is no such principle upon which the entire legal system can be built with uniform coherence. An adaptive and 'responsive' law, largely capable of learning has to avoid discrediting its own normativity, otherwise it would be reduced to an instrument of the bureaucratic realization of the political authority. (*Ibid.* 154.)

Luhmann does not write about the impact of the cognitive element on the closed system of norms, though it derives from the logic of his own theory that the system of norms can only be relatively closed and also that being the 'instrument of the political authority' is ultimately a component of each legal system, at the most it cannot be reduced to this component only. Naturally, the legal system also presupposes a uniform political authority, but this can hardly be found, unless the differentiation of the power relations and the different foci within these differentiated conditions are not regarded merely as the delegated parts of the central authority – which cannot be accepted from a sociological point of view – or only in a homogeneous society of which very few are known. Although it is improbable that each focus of power is accompanied by the creation of norms in the political systems

containing different foci of power, it is also not likely that such a creation of norms would necessarily take place on an identical level.

However, several systems of norms coexist in a complex society and the question cannot only be put whether the legal system is a uniform one, and what is the origin of this uniformity (this is a problem of legal theory and sociology which can hardly be discussed here), but also to what extent the several coexisting systems of norms are legal ones, and how plural this legal system is. Clearly, can the system of legal norms created by the state in itself be regarded as the legal system, or is some other normative system a component of it, thus making the legal system itself a plural one.

1. The idea of the plurality of the legal system – together with the extension of the concept of law – has been a corollary of thinking in legal sociology ever since its genesis. Although the basic idea – expressed by a noted American legal sociologist, Karl Llewellyn – was that whenever we see an inoperative legal regulation we are immediately faced with a further problem, namely what is it that works and how, he was referring primarily to the duality of law in books and in the practice of implementation. Later it appeared as the idea of several legal systems living side by side one another (particularly in Eugen Ehrlich's basic work – Ehrlich 1913), and subsequently as a result of researches into the sociology of law with an anthropological outlook, which explored the world of traditional normative systems in general from Bronislaw Malinowski to Pošpisil. (On the problem see: Chiba 1989.)

In fact the *pluralism of the legal system* means that the *different 'communities' of a given society* – be they ethnic, local, or organizational communities – *possess a specific set of values and authority, besides those of the state, which can be manifest even in autonomous law-making.*

With some simplification it can be said that the idea which appeared in Eugen Ehrlich's logic, which considered the norm creating activities of 'human links' as law-making and the norms thus produced as legal rules, was expounded in this interpretation. This understanding appeared, for instance, in François Génys's work; he derived plurality primarily from the co-existence of the two formalized state and ecclesiastic legal systems; and in Maurice Hauriou's approach for whom legal reality manifests itself in those 'institutions' which – like the different public and private organizations – have their own acknowledged authority and corresponding procedures.

The modern sociology of law follows the same logic in many respects: in modern society such huge 'associations' evolve which, starting from their own interest relations, may create norms and even formalized systems of rules in the service of their own activities, and which have sufficient authority to assert these norms. I would only refer to W. M. Evan's theory on the concept of so-called public and private legal systems. (Evan 1962:167–184.) According to Evan's theory a '*public type*' of legal system is associated with the state, which is not identical with public law in the traditional sense of the term, whereas the so-called *private legal systems develop in the internal structure of the big companies and associations* (primarily pursuing economic activities). Such a so-called private legal system would also have the 'division of power' characteristic of the state legal system. (Here Evan regards

the classical concept of the enlightenment as the criterion of the legal system: namely that power is divided between a separate legislature, judiciary and executive.) Separated organs would correspond to the division of authority, and Evan even supposes the existence of a few principles (such as the due process of law) characteristic of the Anglo-Saxon legal systems in them.

The idea of the plurality of the legal system is essentially kept on the agenda by two social processes in contemporary society.

– There are the processes which create *organizations* with considerable economic and other power in the society. Hence the acceptance of the rules of the big organizations as law.

– On the other hand – and this is the more important from the perspective of my present work – there is the process of *modernization* of the countries lagging behind, where the basis of pluralism is constituted by the simultaneous presence of the *traditional systems of norms*, the *received modern legal systems*, if any, and new law-making.

The first phenomenon is fairly well known. The large economic organizations – despite the increasing rigorous regulation by the state (usually by legal norms) even in the societies of monopoly capitalism, such as the spread of collective contracts, but also the spread of labour laws in general, etc. – enjoy a fair amount of freedom in the regulation of their internal order of work and conditions, and these rules may affect people in their significant interests. ‘Separated organs’ do, or may operate in these organizations which can be regarded as the embodiment of the ‘division of power’, an important element even if it cannot at all be considered as the conceptual criterion of law.

In these organizations the making of rules and the solution of disputes on their basis, in other words activities analogous to those of the judiciary is done within the *framework of state regulation and the permission of ‘state’ law*. (Thus in this case – even if the simile is a surprising one – the same thing happens as happened at a certain period in the development of Roman law, when law regarded the family as a whole, as a unit of broad internal autonomy and granted the right of jurisdiction to the *pater familias* within the family.)

The second social process and its consequences seems to be more complex.

It is not at all a new problem that legal items of diverse origin may be alive and constitute a legal system temporarily and because of identifiable historical reasons. Jean Carbonnier, who deals with the problem of legal pluralism in his sociology of law (Carbonnier 1972: 145–176), himself mentions a historical example: *the reception of Roman law in Germany*. He says that there existed two legal systems in rivalry within the German legal order after the reception: German customary law and the system of received Roman law.

However, the problem occurs in a somewhat more complex manner in the backward and primarily erstwhile colonial countries. The *traditional system of norms* survives almost everywhere and asserts itself in the different fields of life such as the family first and foremost, the relatives, inheritance, the more simple relations of exchange and labour. This traditional system of norms [particularly in the former

British colonies, on the basis of the concept of so-called indirect rule (Morris and Read 1972)] was incorporated into the legal system evolved by the colonial power, together with the traditional mechanism of conflict treatment (such as tribal jurisdiction) linked to it. Thus the rules of the traditional systems of norms which affected a large part of life have become or remained parts of the legal system as *acknowledged by the state authority* in these societies.²²

In some countries where the subcultural differences are also great, *the traditional system of norms is in itself multilayered*, a part of it may be linked to the so-called 'Great Tradition', or to one or more cultures nurturing 'Small Traditions'. In India, for instance, the traditional Hindu law (mostly of sacral origin), Muslim law, the legal norms originating from English common law or from British-Indian law-making, also legal rules deriving from modern Indian legislation the law-making activities of the contemporary Indian judiciary, and finally the legal customs of tribes and clans, coexist. In this case it is coexistence in the literal sense of the term, as for instance those who live in traditional rural (or even tribal) regions almost never come into contact with 'Western' law applied by the modern judiciary – and if at all, it is mostly in relation to criminal law – moreover, as Muslim law is implemented by the Muslim ecclesiastical courts for family and related issues, Hindu, or the modern Indian law means little for the Muslim population.

The destiny of the traditional system of norms and that of the received one, or the legal system evolved during the course of modernization essentially *depends on the size and developmental perspectives of the traditional sector*. This is clearly indicated by the fate of two experiments distant from each other in time and space.

In Hungary during the inter-war period a movement which even reached the Ministry of Justice and appeared in Parliament as a programme wished law-making to be based on the so-called legal customs, or popular legal customs still manifest at the level of what was regarded as traditional Hungarian rural society. For this purpose even a 'cadastral survey' of these popular customs was launched. In reality, however – with the exception of some few cases –, law-making did not result. It could not be done as these popular legal customs could not regulate modern life. *The section of society still maintaining them was on the way to dissolution, transformation and diminution*.

In contrast the attempt to introduce a *modern bourgeois legal system* in Ethiopia during recent decades failed. Legal reform was attempted through the elaboration and introduction of a Civil Code which reflected the most modern, most advanced legal principles in this extremely backward country. The experiment failed. The main reason for failure was the size of the traditional social sector, which practically embraced the entire Ethiopian society with the exception of a rather thin strata. *The conditions of this traditional sector naturally did not suffer modern legal regulation*. The rules proved to be partly meaningless, partly impossible to implement under the given social conditions, and one may add: neither an adequate judiciary and public administration, nor the necessary number of trained legal personnel were available for the purpose. (David 1967, 1971; Beckstrom 1974.) Thus, the duality based on the modern and traditional elements of administration and law survives even today in Ethiopia. (Levine 1972:148 et seq.) However, the problem of the adapted,

received legal systems is a separate issue to which I will return. Here I would only mention that it was precisely the large number of unsuccessful experiments which induced one noted researcher of African legal systems to declare that the reception of law impossible. (Seidman 1978:29 et seq.)

The foundations of systems of norms of historically different origin can be laid primarily by *the equalizing process of social relations*. The significant factors in the process are the modernization of the traditional linkages, the weakening and disappearance of subcultural phenomena, and last but not least the strengthening of the normative system (generally the legal norms born out of state legislation) representing the trend of development. The latter means that *the social base of the possibilities of conflict between the different normative systems grows weaker, and the evolving conflicts are solved to the advantage of the 'state' legal system*.

It is a question, however, as to whether the existence of normative systems of different historical and social background means the pluralism of the legal system in a given society. Is it really a case of legal systems living side by side and complementing each other?

Formally, the problem can be 'easily' solved by saying that if the state expressly or tacitly tolerates the existence of several systems of rules within the same society, and particularly if it applies these rules through its organizations, then the different systems of rules can be considered to create a uniform system, at the most differing as subsystems. This solution definitely functions if the system of norms constituting the various subsystems can be interpreted *hierarchically*. But such a hierarchy of norms, as noted by Conac, is associated with the rationality of the modern state. However, this model, satisfying positivist legal thinking does not really function from the angle of legal sociology even in the 'oldest' Western states; moreover, 'hierarchy' becomes increasingly doubtful in the process of the realization of law. It is even more illusionary in those societies where the 'experience of statehood' is still quite new. "In Black Africa the legal systems are often pluralistic, the rights are less ordered than they are in rivalry." (Conac 1980:VI.) Thus the formal solution is incapable of grasping the real problems, all the more so as the various systems of norms frequently contradict one another. It is only a partial solution of the problem if their legal nature is regarded as a function of their realization only (particularly if the tolerance or even permission of the 'state' legal system occupying an upper position within the hierarchical order almost constitutently determines their realization). In so far as the precondition of the legal nature of the legal system is its implementation in reality, it is a solution, but by no means all effective rules of behaviour can be considered as legal ones.

A solution is offered by considering as legal those systems of rules, in addition to the mass of norms created or enforced by the state, which were legal in *origin*. Such was, for example, the Hindu sacral, or Muslim law in colonial India, and after independence, besides the legal norms created later on. Such is Muslim law in the East African countries, or the customary law of the clans and tribes which was accepted by the colonial administration as well. In this case, however, the contradictions and conflicts – within the legal system formally regarded as a uniform one – are permanent even if Conac's observation is acceptable, namely that "the situations

are not always antagonistic but are also in alliance, state law may support the customs as well and may offer them shelter against the dangers threatening them." (Conac 1980: VI.) The conflicts may be resolved and surmounted by the recognition of the association of the various legal systems (subsystems) with certain regions, or with some segment of the society (such an association may derive for instance from the traditional village society, from a religious community, from the lifestyle of clans and tribes, etc.), by the constant mediating and slow unifying activity of the supreme law-enforcing organ.

Though not all of its elements can be accepted, the Japanese legal sociologist Masaji Chiba's conception of the three-level structure of the law and its connection with legal cultures (Chiba 1986: 5-7; 1989: 131-140; 1991: 283-306) may be close to reality, in the uniform theoretical framework it offers. Chiba's hypothesis starts from the so-called *broader meaning of law* which goes beyond strict, 'official' law, i.e. law mostly or typically created by the modern state, but moulds the effectiveness of law in the strict sense by supporting or modifying it as 'unofficial' law. (Chiba 1984: 17, 1986: 6; 1989: 89-118.) However, official law in the strict sense of the word is also complex in Chiba's interpretation. It is the ensemble of the rules which are sanctioned by the legitimate authority of the given country.

Thus, on the one hand *official law* is law expressly and directly made or sanctioned by the state, 'official' law related to local communities, occupations or ethnicity, which is primarily sanctioned by their *own* legitimate authority, but on the other hand also by state authority which is interested in ensuring harmony between the state law and other official laws existing in the country. *Unofficial law*, encompassed by the broader meaning of law, is the sum total of rules legitimized by the consensus of *a part* of the society and thus sanctioned in practice. But it can only be regarded as having legal nature if it influences the effectiveness of official law. (Chiba 1984: 18, 1986: 6.) Thus essentially the legal nature of these 'unofficial' rules manifests itself in their relation to and in their efficiency in moulding official law. Giving an example the legal meaning of status in traditional legal systems – according to Chiba – "is further respected in temporary types of social situations as in the order of seats in a meeting. The unofficial legal postulate of the status order thus justifies behaviour more or less different from official legal rights." (Chiba 1989: 98.) He stressed that some channels taking the unofficial elements to official law, are formally authorized even by official law." That is, by the general clause as to the specific authorization to adopt 'custom' or 'customary law' in place of official provisions, etc. (Chiba 1989: 109-112) as there are informally working channels too, e.g. the institution of "giri". (Chiba 1989: 113-115.)

It is true, however, that one of the highly significant criteria of the legal system – even its *differentia specifica* – is of functional character in this case (a clear influence upon the effectiveness of official law). Yet this separation from other norms present in the society is strong enough to be applicable in the researches of legal sociology.

The question is where and in what can the social base of unofficial legal norms (but those acknowledged by consensus) existing beside official law be found. This is a problem for the sociology of law in 'modern' society as well, and those standing for the plurality of the legal system offer various solutions. William M. Evan – as

we have seen – has placed the traditional normative concept of law ‘outside’ the state and claimed to find it in the mass of rules of all formalized organizations. (Evan 1962: 184.) Whereas Jean Carbonnier says that the legal system is not pluralistic, only the phenomena of pluralism live in it in the most diverse ways so that their classification can only be attempted. These phenomena are linked to various components; he, for instance, considers important the local differences manifest in the norms which appear in daily legal routine (contracts) and in the practice of the judges. (Carbonnier 1972: 146 et seq.)

As far as modernizing societies are concerned, the internal pluralism of the legal system can hardly be doubted. All the less so, as the traditional legal system is already a pluralistic one: systems of regulation have been and are linked to blood relations, to the territory and to the religious order as well, which follow various types in their arrangement: for instance, they may be linked to one another as in a symbiosis, they may exist without connections, or in opposing positions, and finally may be ‘stratified’ hierarchically. (Verdier 1984: 109–122.) An essentially similar view is held by Gyula Eörsi (Eörsi 1979: 460–465) too, though he separates the so-called duality of law from the sphere of pluralism, as something that serves the requirements of dynamic development and stability, permanence, behind which one part of the society represents the old, and the other part the new and developing. Hooker, who perhaps studied the problem most profoundly emphasizes that the term legal pluralism is associated with a situation in which two or more laws conflict. This interaction, he continues, has been most studied in the context of colonial law and in connection with the legal modernization of the developing countries. From this point of view state law is decisive, the ‘dominant’ one which determines the relationship which exists between the laws is interaction and state law. Consequently ‘servient’ law may matter only in so far as state law offers a change from it. This view, however, stresses Hooker, though he himself accepts it as a hypothesis of his work, may be attacked for at least two reasons even though it may appear to be justified from the point of view of state law. First of all it obscures activity pursued at the ‘lowest level’ of state law, particularly the activity of the lowest-level law courts, where the principles of conflicting laws are mixed and which have to pay attention to the legal culture in which they function. Moreover, as students of the two or more legal systems study these systems from the outside, the element of comparison is also manifest in the study, whereas it is *not* a problem of comparison. (Hooker 1975: 6–7 and 454.) However, the most important point in the study of legal pluralism is to keep in mind that formalized state law as well as the customs falling under the heading of legal ethnology ultimately concern the same people. (*Ibid.*: 53.)

In the relationship of ‘dominant’ and ‘servient’ law there is a general problem, as particularly shown by British colonial law, namely the *ad hoc* character of the implementation of servient law. This means that although attempts were made to clarify the content of the different legal systems, nevertheless the assumption survived that such rules could only be rationally and exactly identified and applied in the English ‘legal process’. (See Elias 1962: 93–120.) The clarification of the rules of servient law was selective, and during the course of their enforcement they were

subject to distortion precisely because they were selectively applied, but also because the content of these rules (at least to some extent) was ultimately separated from its origins in the subject society. "That is to say, the original bases for legal rules were, in some cases, very largely ignored, but the once dependent rules themselves were not uncommonly related. The retention of such rules thus took place in a vacuum which was rapidly filled with English legal concepts, most notably the 'justice, equity and good conscience' principle. In some areas, notably in India, English legal concepts did not have such an influence, primarily because *English law was affected by the servient law* in its operation and rules." (*Ibid.*: 117.) (It must be noted that Hooker was later criticized for using the concept of 'servient' law – as the expression of his 'colonial' attitude (Chiba 1989: 42–43), and in his recent books he did not use this expression.)

If, however, the individual components of the pluralistic legal systems – quite justifiably – are linked to a *basis created by the specific social conditions*, the question arises of what is the social basis in the process of modernization, upon which legal plurality develops and survives.

The most general answer to the question is the 'bi- or multisectoral' nature of the society and its economy, which keeps alive elements of the traditional – mainly peasant – society and the consequences of regulation.²³ In fact the traditional patterns of behaviour lift primarily the specificities of the village, the family, or extended family and the relatives, and the production culture associated with them to the normative level, naturally with the transitions in the process of the modern means of production becoming general. The appearance and strengthening of the elements of modern economy hidden in industry, commerce, in the banking system, etc. increase and promote the social weight of those groups in the population (workers, intellectuals, petit bourgeoisie, etc.) which are linked to it and in which changes in lifestyle also take place. The contribution of 'bi-sectoralness' to the coexistence of the modern and traditional legal systems is beyond doubt, though the latter as suggested, would primarily characterize the peasantry (see, for instance, Pospíšil 1971: 97–126), but it is also true that the appearance of modern capitalist conditions does not transform the legal system automatically only after a certain period of time. (Snyder 1981: 295–299.) Therefore, the old traditions can hardly be regarded as 'empty shells'. (Davidson 1969.) For instance, in Africa about 80 to 90 per cent of the farmers, constituting the majority of the population, live in an entirely traditional manner caring little for the new legal norms (David 1977: 465), 80 per cent of the people of the Congo know only the traditional law (Alliot 1965), the old legal system continues to be the old 'frame of reference' for 80 per cent of the African population (Le Roy 1971: 53–71), and even in the field of penal law old rules and traditional procedures hold fast (Brillon 1985). Essentially the situation is similar in India, where the social life of the 'populistic' communities is to a considerable extent regulated by customary law, even though the role of modern law is increasing even in local life. "Thus customary law and modern law have to be seen as part of a coordinated system in which they complement each other to promote the common function of social control and regulation. It is in this sense that Shivapur (the imaginary name of the village where Ishwaran conducted his survey

– K. K.) like any other Indian populistic community, is bi-legal.” (Ishwaran 1977:97–112.) Allott holds the same view about African law (Allott 1968:138–139), and the situation is similar in other countries of Southeast Asia as well.

This problem also occurs in the advanced societies, even if not necessarily linked to the ‘bisectoralness’ of the society or economy. Jean Carbonnier refers, for instance, to the phenomenon of legal folklore which differs from the totality of folklore in so far as the former reflects phenomena of law, and the latter moral phenomena. (Carbonnier 1972:154.) However, he does not link legal folklore expressly to the peasantry, he only notes that it is more alive in the rural areas than in the cities. This is the situation in Japan too, a result of the administrative modernization of ‘feudal’ villages. (Chiba 1989:69–72.)

I have already mentioned that research into popular legal customs was quite widespread in Hungary as well, particularly in the 1930s and 1940s, but a really convincing, theoretically sound interpretation of them has not been done. To a certain extent such an interpretation may be based on Ferenc Erdei’s concept of the peasant society as a ‘submerged society’ (Erdei 1973:13–14, 36–40; 1980:237), but this view was not utilized in the research of Hungarian popular legal customs.²⁴ Hungarian researches have also almost exclusively approached the villages and the peasantry, but have not excluded, and even offered data on the popular legal customs existing in the cities. The social bases of these customs were only very rarely linked to peasant society or to some remains of it (though it cannot be excluded either, one need only think of the institution of the bridal dance spreading in the towns by way of example), but much more as phenomena of earlier autonomies and surviving rules of ‘delegated’ law-making. Actually in Hungary – and this may be the case elsewhere, too – the revival of earlier popular legal customs can also be noticed with the disappearance or restriction of the traditional way of life, and even their infiltration into ‘official’ adjudication may be observed.²⁵

The influence of colonial rule, and even of the growth of a modern economy upon the pluralistic legal system is not without ambiguity. Modernization has invigorated some traditional elements from a certain aspect, and the colonial influence kept alive the traditional legal system out of political considerations, moreover, it even clarified and put it into order. (Snyder 1980a:776–777.) Keeping alive the traditional legal system in the British colonial territories of Africa, for instance, had been an expressed political objective almost since the beginning of colonization (from 1912 onwards in East Africa in a formalized manner, and at different dates in the various regions). The so-called indirect rule, which, based on tribal customary law and indigenous adjudication, ‘doubled’ the legal system, continued unbroken, essentially until independence, and efforts towards its transformation appeared only after World War II. (Morris and Read 1972:15 et seq.) There is even a view that the ‘African’ law of modern Africa was born and developed precisely during the colonial period, as with indirect rule a great proportion of the implementation of law by judges was transferred to people who had reason to determine, and what is even more important, to apply law in a restrictive and authoritarian manner. (Chanock 1978:80.)

After independence indirect rule was theoretically ended and the established system of courts, from which the ‘indigenous courts’ disappeared, had to take

customary law into account as well. Moreover, the Court of Appeal for Eastern Africa, intended to guarantee the 'uniform' application of law in the successor states of the earlier East African British colonies, has shown an increasing awareness of the importance of local customary law, and has been less inclined than in the past to follow unquestioningly the decision of the English courts regardless of local circumstances. (Morris and Read 1972:105-106.) Thus *formally* plurality has been eliminated, but in practice it continues to exist in Africa, as well as in India. Moreover, certain traits of the traditional lifestyle (primarily in the family and within blood relations) survive even in the cities in most of the earlier colonial countries. These traditional elements can act against 'modern' legal development as well. The Indian Constitution, for instance, provides for the creation of a Uniform Code to regulate civil legal conditions. But it has not been possible to achieve this during the period of more than three decades since the Constitution was promulgated. Legal norms have been passed on the family relations of religious communities (see for instance the Hindu Marriage Act of 1955, The Hindu Adoptions and Maintenance Act of 1956, The Hindu Succession Act of 1956), but there has been no passing of a uniform code because of the resistance of the population, including the urban intelligentsia.²⁶

A factor contributing to the survival of traditional law could be the fact that a good number or newly independent states sooner or later have included in their revolutionary programme the revitalization of traditional law because of ideological and political considerations. This can be demonstrated not only with the well-known Islamic examples, but it can be found in India as well as in the African countries.²⁷ It is true, however, that in reality this 'revolutionariness' revitalizing the traditions has not been successful, at least in so far as the rules of traditional tribal law are concerned. At least it is difficult to regulate modern relations with them, therefore the dominance of alien law, reflected in theory as well as in new law-making, continues to exist.

The social bases of the plurality of the legal system are therefore controversial. But it can be said in summary and also in the interest of further research, that presumably this basis itself rests on several components, the influence of which is usually manifested jointly.

The clearest example of this is the bisectoral economy. Though the theoretical possibility of the bisectoral economy has been doubted by some, it cannot be disregarded that the *consequences* of the penetration of the modern economy are not unambiguous either. If, for instance, in certain cases they promoted the survival of the traditional legal system, on the other hand they also laid the foundations for the European type of legal system and have created a stratum, the so-called *marginal stratum* (leaving the village and agriculture but not integrated into the cities), whose *lifestyle and behaviour show strong disintegrating traits*, and whose behaviour is considered deviant by the traditional as well as the modern legal systems.

The extent and significance of the traditional rural (primarily agricultural, but rural industries and commerce may also be considered here) society is again an important factor for the survival of the traditional legal system. Moreover, in a certain sense one may even say that in societies which until recently were largely

agricultural, rural and traditional but are now on the road to modernization, certain aspects of the traditional legal system survive in behaviour and in the observance of rules – mainly based on religion – and in the legal culture as well. Indian surveys prove, for instance, that though people living within traditional bonds know about the existence of a ‘national legal system’ and occasionally even use its institutions when the village cannot settle certain types of conflict, and moreover the gradual acceptance of changes in Hindu law can also be observed, yet at present basically local customs prevail in human behaviour. But the growing litigation that can be observed in the Indian lawcourts is not only taken as a sign of the disintegration of traditional communities, but also as the prelude to the birth of new, modernized, populist ones. (Ishwaran 1977:21, 112.)

The existence of *different religious communities* greatly differing from each other (for example the Hindu–Muslim, Copt–Muslim, Christian–Muslim, etc.) is also a significant factor in the survival of legal norms rooted in religion.

Finally, it should not be forgotten either, that although man as a person is a single entity, thus he cannot be split into his various qualities, yet the statement by Hooker as a consequence of an examination of African customary courts in urban areas, has a more general validity, namely that the *legal behaviour of Africans living in an urban context is also pluralistic*. “This means, in effect, that, while family matters may very well be subject to indigenous obligation systems, matters such as employment, financial transactions, and so on may be subject to the demands of the dominant (Western) system.” (Hooker 1975:477.)

The question after all this is: what will the fate of these pluralistic legal systems be? How long will the mass of traditional rules survive with the related organizations, to what extent will the ‘dominant’ legal system of external origin become indigenous, how far can the two systems influence each other (mutual influence, as I have already said was felt earlier, too), and what does legal development mean? Will the Western legal principles, as the products of the legal development of the centre, continue to influence the modernizing process of the peripheries, or will this process produce regionally entirely new phenomena and globally mould the already existing and still formative principles of the centre? These are questions which it is hardly possible to answer at present, even if the outlines of certain tendencies may be observed.

2. Hitherto I have indirectly acknowledged the usual category of legal discipline when using the term ‘legal system’, which means the *systematization of the legal norms*, its division into branches, and the *articulation of law* on the basis of the normative phenomena of law.

In the sociological sense, however, the concept of the legal system is a system of *law* which means more than the *articulation of law* (though it is also included in it). Starting from the concept of the sociological system it organically comprises not only the legal norms and the organizations related to law (primarily the law-making and implementing ones), but also the phenomena of roles and human behaviour affecting the evolution and realization of legal norms.

In the sociological sense the legal system (that is the system of law) is the *functionally interlinked system of the legal phenomena of the society*. Its elements are:

the legal institutions, legal norms, the organizations of law-making and implementation, and also those social statuses with role expectations and human behaviour realizing those attached roles which evolve in the making and implementation of legal norms, in the process of law becoming social reality.

The political element, and consequently the political system also has its role in the process of the objectivation of the system of law to an extent and dimension depending upon the changing functions of the political system. Consequently the historical and social environment of the system of law influences it through political mediation to a significant extent. In addition, most of the organizational elements of the system of law – those meant to make and implement law – are political in character, hence they constitute part of the political system as well. Thus the legal norms going through these organizations acquire a political character also because of this, even though originally they were not objectified through such organizations, or were directed towards phenomena outside the political system, and were supposed to regulate them. (Kulcsár 1987a:413–462.)

It is in the system of law where the *specificities* of the system deriving from its own development are accumulated, which do not only grant the specificity of the legal phenomena in contrast even to the political ones, but also determine *the place, the possibility and limitations on the use of legal norms within the society* to a considerable extent. The social and historical environment has a *direct* effect upon the system of law and its internal elements, through the legally relevant human behaviour, legal norms and values, and even through legal discipline, similar to what we have seen in the case of the political system.

Georg Lukács – according to whom the system of law is not the unity of theoretical theses, but “the uniform of the positive and negative management of practical action” (Lukács 1976:224) – stresses that therefore the system of law “has to constitute a unity excluding all contradictions from the angle of social practice”.

The exclusion of all contradictions, however, is partly a requirement, and partly it is a process (Kulcsár 1982:124, 135) in which the factors involved such as law-making, the modification and interpretation of legal norms, etc., strive towards excluding all contradictions. In reality – and to a considerable extent as a consequence of the direct relations of the elements of the legal system to the environment – there are permanent conflicts and tensions within the system of law which also contribute to the safeguarding of the movement and development of the legal system. The phenomena deriving from the incongruity of the normative material and organizations of the legal system are rather special. The process of modernization abundantly offers examples of such incongruities in all the peripheral regions. Two examples should be given. One of them is the problem of the incongruity of the legal norms pertaining to the economy and of its organizations operative in it in Hungary, and the other is the problem of the organizations serving the implementation of law in the process of modernization in the developing countries. Let us see the first example.

Legal disputes among the majority of the economic organizations were relatively soon removed from the competence of ordinary adjudication in Hungary during the course of the nationalization of the means of production, and particularly with the develop-

ment and strengthening of central economic management. The Govt. decree No. 9830/1948. (IX. 28.) "on the organization of arbitration committees for the settlement of legal disputes between state and public economic organizations" clearly indicates the theoretical basis of this measure in that the Secretary-General of the Economic Council and the Minister concerned were commissioned to organize these conciliation committees. It is obvious that not the legal norms but the direct state management of *economic interests* became the primary issue in these legal disputes and their settlement, but even this was contradictory. The number of cases brought to the economic arbitration committees – which has a growing trend until 1964 – indicated the frequently unrealistic nature of the central plans. For instance, the deadlines of performance were usually adjusted to the plan period irrespective of the realistic opportunities, hence the failure of performance was followed by 'litigation'. As the assessment of the enterprises depended on the quantitative realization of the plan, the delivery to the parties involved did not mean any special 'value'. This also resulted in an increase in the number of cases. As is commonly known, no legal dispute could emerge between companies in the post-revolutionary Soviet Union right until the NEP-period, when the arbitration committees were set up beside the organs of the Council of People's Economy in April 1922. (Rácz 1972:78.) The objective of the committees was to settle the legal disputes that might have evolved under the conditions of NEP, to safeguard the economic interests and not to allow the disputes to be brought to a lawcourt. Although later on the arbitration committees were temporarily put under the regular lawcourts, in 1931 they were separated from the juridical organization and subsequently the administrative nature of state arbitration was further enhanced. Later on the Hungarian organization for economic arbitration was also based on this model.

The concept of the settlement of legal disputes between state enterprises along the lines of *public administration* proved to be so strong, with the objective of safeguarding economic interests behind it, that changing the system was disputed for a long time even after the introduction of economic reforms in 1968, under changing conditions and despite legal regulation directing economic activities in a new way.

Although a demand that the lawcourts be used for the settlement of legal disputes between economic organizations was made at a discussion held in 1967 (on the legal issues of the new system of economic management), this principle could not be asserted for years. This was despite the fact that the falling number of cases submitted to the economic arbitration committees clearly indicated that they were unsuitable for the settlement of legal disputes. In 1964 there were 99,429 cases submitted to the committees, but only 17,622 in 1968, most of those being monetary claims, while demands for compensation for non-performance, which still constituted half the cases in 1964 fell dramatically. Incidentally it is interesting that the preparation of the reform and particularly the birth of the political decision – with certain measures taken and principles published – could already be felt in the turnover of clients, as the number of cases was significantly lower in 1966 than in earlier years, and it dropped to 37,546 in 1967. The arguments for the maintenance of the economic arbitration committees were rather associated with the ideological

aspects of the already existing organization (like for instance that juridical procedure should not be made a 'fetish' of), or, if juridical competency was accepted – in most cases because of the specificities of the cases – the setting up of a separate economic court was demanded. (Rác 1972:87–88.) After several years the arbitration committees were incorporated into the organization of regular lawcourts as its economic department. The 'clumsiness' of law in following the economy is remarkable. (Act IV of 1972 on the lawcourts, promulgated on January 1, 1973.)

Such a delay in the settlement of legal disputes of an economic nature outlines a number of problems worth studying when one is in search of the relations between law and social change. Here inertia related to the solutions of the past, and affecting not only legal thinking, has been a problem (the ideological aspects and those of interests would be worth investigating separately in this case), but much more the role the system of *fori* related to the command economy played under the new conditions. It is a question how far this administrative system, linked to the command economy was effective in *recentralization* – besides the lack of other organizational solutions – which took place in the early 1970s in contrast to the principles of the reform of 1968. It is beyond doubt that the unfolding of the behaviour of the enterprises that were to be made economically autonomous and encouraged to adjust to the conditions of the market was only made more difficult if not hampered, by the system of administrative tribunals.

The other example, though it may seem to be a specific one in the relationship of modernization and law, carries lessons of general validity.

The realization of legal norms is influenced first and foremost by the eventually *lack* of the organization of implementation, or enforcement of law. In many cases the modern administrative, or judicial organization based on expertise, which would be necessary for enforcing the legal norms serving modernization, is missing. The evolution of a modern judicial and administrative organization began only a little more than one hundred years ago in the Eastern and East Central European countries. In Hungary, for instance, jurisdiction was separated from public administration only in 1869, when the organization of public administration, based on qualification began. In the other countries of the region too, organizational reforms were started only in the second part of the 19th century (in some places even much later). But even during the inter-war period many features of traditional juridical and particularly administrative organizations survived and were further strengthened during the period after World War II. (For instance, pushing expertise into the background, the relationship between the status of birth and 'political reliability', the growth of the significance of personal connections, the replacement of efficiency by bureaucratic growth, etc.) The official sense of hierarchical subjection remained strong in the judiciary, and the considerations of day-to-day politics frequently proved to be stronger than the legal norm and the human principles of judgement. (Kulcsár 1985a:317 et seq.)

Although in some of the earlier colonies the 'sala' type of administration²⁸ was theoretically or formally replaced by the modern organization or its more or less advanced frame either during colonial rule or after independence, the content of this public administration still keeps the traditional elements alive. The conclusion

drawn regarding the Indian public administration according to which the bureaucratic structure is more developed, that is to say, the relevant rules are more elaborate than their manifestation in actual behaviour is acceptable in general. (Panadiker *et al.* 1971.) I shall return to the special 'deviance' of administrative organizations on the Eastern periphery of Europe and in the 'Third World'.

In the developing countries, the creation of the modern organizational system 'serving' law was generally begun on the basis of the organizational principles of the earlier colonial rule. In India an almost full-fledged organizational structure continued 'unbroken' the public administration of the independent state (a large number of trained experts were also available), but elsewhere many things had to be created. Reorganization, however, was directed less at the structure, at least during the first period of independence, than at personnel changes if trained or seemingly trained experts were available in sufficient numbers. Subsequently the unchanged structure 'served' the new objectives while it remained subordinated to its earlier characteristics, as the structure was only slightly or not at all modified in the interest of the objectives. Thus the aims – however revolutionary they may have been – remained mostly on paper. As it was put by an African researcher: "In so far as the independent African states continue to maintain the colonial bureaucratic structure, with its incremental style of action" the revolutionary objectives can only be realized with difficulty. (Ocran 1978:234.) Unique transitional measures were also taken. In the former East African British colonies, in Tanzania, Kenya and Uganda for instance, attempts were made to maintain the functioning of the modern legal system, alleviating the shortcomings and their consequences by the operation of a joint court of appeal. The modernization of the traditional state machinery of Ethiopia, which remained independent for a long time and suffered only a brief spell of colonial rule, has been almost completely lacking, so that analyses of the failure of the introduction of the modern civil code could justly emphasize the inadequacy of the courts implementing the code and of the public administration participating in its enforcement.²⁹

Even if the organization was theoretically created, trained jurists or public administrators were not available in sufficient numbers, or (and this has been a significant problem – particularly between 1948 and recent years – in the East and East Central European countries too, which had a well-developed administrative and juridical organization) they performed their job with an expertise of *incomplete value*. In addition the 'quasi' existence of expertise, which is the most important element of an organizational system based on specialization, in itself decreases the efficiency of the organization and generates bureaucratic phenomena.

It has also become clear from experience that *traditional or quasi traditional institutions cannot be entrusted with the implementation of modern law*. Such illusions have existed in different societies, on the basis of different ideologies. In India, for instance, the report of the Asoka Mehta Commission pointed out the 'role disturbances' and the consequent poor functioning of the so-called Nyaya Panchayats (the elected body created as a small district court). The findings of this report were further corroborated by the conclusions of an excellent survey which was conducted by C. S. Meschievitz and M. Galanter at Bharatpur and which was complemented

with the analysis of the data of the functioning of Nyaya Panchayats in Uttar Pradesh. It was found for example that, compared with 1960, the number of civil cases filed had dropped to about one-eighth by 1972, and the fall in the number of criminal cases was almost the same, at a time when the number of law suits in both categories, particularly criminal cases in the 'state law courts' had grown considerably. (Meschievitz and Galanter 1983: 62-63.) This in itself is already a 'judgement' on the functioning of this organization, and a judgement 'passed' by those who are the most concerned, against which the functioning of these organizations is 'only' supported by the official political ideology. The Panchayat ideology – the authors write – is one that politicians and legal policy-makers can safely support without having to implement it effectively. (*Ibid.* 56-57.) However, the most profound analysis of the Nyaya Panchayat is given by Upendra Baxi, who clearly identifies the roots of the contradictions manifest in its establishment and function. Particularly instructive is his remark that the Nyaya Panchayat swings back (in the ideology creating it) "to the historic past and . . . deep rooted sentiments" of India, when it strives to promote the process of democratization. It is a traditional institution though it represents a modern principle, the separation of executive from judiciary right from its conception (it is separate from the village panchayat which has administrative tasks and which functions perhaps more efficiently). It would realize a secular, egalitarian, modernistic legal ideology, "thus assisting desired social transformation". But as the lowest rung of the state system of administration of justice it performs its task as the law court of the villagers, relying also on the local traditions. (Baxi 1982: 324-327.)

Partly because of the absence of adequate juridical organization and partly due to a special revolutionary manner of action such law courts of a social nature have developed elsewhere too, such as the so-called *kebelle*-system in Ethiopia,³⁰ or the workplace courts in Mozambique, and out of ideological considerations such quasi traditional organizations were even created in the European 'socialist' countries. The effectiveness of these comradely, social, etc. courts has been variable but by and large rather doubtful.³¹

While the organizational and procedural problems of the administration of justice and of law enforcement have been clearly outlined and doubt over their general accessibility has grown, with consequences which again have had a negative impact upon their effectiveness, practice increasingly dispels those illusions too, which were attached to the functioning of the modern administrative and juridical organizations in the developing countries. Indian surveys have shown, for instance, that local politics links the administration of justice to the political structure in the rural areas, though primarily in the traditional jurisdiction, but modern political thinking and democracy, from which a change in the traditional juridical decision-making process was expected, has in a way strengthened local power: with modern means but in a traditional context. Locally in many respects conditions and methods which can be concealed by the relevant explanation of the constitution survive from pre-colonial times. In fact in India a great deal was expected from the constitutional judicature of the Supreme Court. However, this Court sometimes proved to be an obstacle in the way of modernization, though there have been important exceptions,

and the number of the unsettled, pending cases has been increasing to such an extent that its simple effectiveness is also challenged. (See particularly: Dhavan and Kalpakam 1978.) Thus "the juridical supervision of the Acts and of the decisions of the executive power has proved to be an expensive luxury." (Derrett 1980:528-530.) In a sense, the concern voiced by Sir Charles Newbold who considered it unfortunate that the Indian Supreme Court wanted to follow the model of the US Supreme Court by extending its authority even to the extent of annulling legislation, seems to be justified. (Newbold 1969:132.) The question remained, however, much deeper and broader one. That is, the prize, which have to be paid by the modernizing societies for a lawfully and constitutionally organized transition, would be indeed too high? My firm opinion, that no! The modernization must be going on among the constitutional framework, not hurting the human rights, and even the constitutional review by the court is not 'luxury', though might be expensive financially, and 'politically'. This is the experience drawn from the 'after transition' phenomena of the former 'socialist' countries, too. (See Kulcsár 1992, 1992a.)

As the process of modernization *itself* has political aspects, the related decisions (either legislative or serving its realization) directly concern interests which are also articulated politically. Thus the political struggle is far from ended with the making of a legal norm which may have a favourable chance to influence modernization. I could refer to the factors involved in the cyclical nature of the reform of Hungarian economic management (I have already mentioned the effect of the public administration and state arbitration on the resolution of economic disputes in the process of economic re-centralization), but it would be hard to imagine that these factors operate only in Hungarian society. Upendra Baxi, for instance, when analysing the crisis of the Indian legal system, mentions that those who participate in law-making and the implementation of law are themselves not legality-oriented; that group interests interfere not only in legislation but also in its implementation, that because of the weak forces of opposition both the government and the opposition are inclined towards repressive direct action; that law courts also participate in the struggle of the political forces, and they even challenge the legitimacy of the government,³² and so on. All these factors together, as well as others not mentioned here, particularly the special structural characteristics of the legal system ultimately lead to a crisis of the legitimacy of the legal system itself. (Baxi 1982:4-10.)

Although it is true that another Indian author draws the conclusion that the Indian law courts are capable of causing considerable change in the national political system as exemplified by the subsequent events related to the lawsuit against Indira Gandhi, in the long run the illusions attached to juridical activity have not been confirmed.

In respect of their attitude towards modernization the law courts of African countries are in many ways similar. Bryde – whose opinion on the *political* preconditions of the realization of legal norms in the service of modernization I will deal with later – has stated regarding the modern juridical and administrative organizations of African societies, that in these countries the elites participating in legislation, jurisdiction, and in public administration are skilled, therefore their interests and ambitions desire primarily the promotion of modernization. But he also adds

that *for precisely this reason* the present "African law does not necessarily mirror African reality. It rather reflects the normative ideals of a highly differentiated minority." (Bryde 1976:83-84.) Facing the law-makers who are devoted to modern values (among whom the number who act consciously as Africans is on the increase) there are the judges representing similar values (at least in the higher courts). Yet the judges' behaviour is different. They generally insist on received law and treat customary law in an innovative manner, but they show signs of strong resistance to the constantly changing policy of social transformation. (*Ibid.* 76-77.) This behaviour has positive consequences too, as it may weaken the practice of applying law as a *momentary instrument*. (Conservatism manifested in this way cannot at all be regarded as some kind of pedantry.) It was none other than Sir Charles Newbold, President of the Court of Appeal for East Africa, who warned, in a rather tragic tone, of the dangers of the law court participating in politics. "I believe firmly that the courts should seek as little as possible to base their decisions on any political philosophy or to regard their decisions as policy making. . . . Let us never forget that in this day and age when the activities of government fill an ever-increasing place in the household of the individual, the courts, by insisting on the rule of law, are the last bastion of the defence of the freedom of the individual. If the courts cease to be independent of the executive that bastion disappears." (Newbold 1969:132-133.) In this and similar viewpoints, *interest relations* obviously have their role in the judges' attitudes too, which already have political ramifications.

Where independent 'judicial behaviour' is weaker in the courts – that is to say the interpretation of the judge's role is different, which is obviously rooted in the different processes of socialization and in the place occupied by the judicial organization within the totality of the political system beyond the historical reasons – the judiciary is more exposed to changes in the policy of the application of law, or simply to those of politics. In Ethiopia for instance – during the imperial rule – the interference of the executive in the judiciary used to be of an institutional nature with the help of the institution of Chilot.³³ Even beyond that the judges were regarded more as 'functionaries' than as independent judges, and the lawcourts – being markedly political organs – could not oppose the merciless practice of the executive authority. This became particularly clear when the lawcourts tried to take "seriously a rule which the executive promulgated for symbolic or propaganda purposes only". (Brietzke 1982:107.) The Ethiopian courts never succeeded in establishing the institution of judicial review even though article 112 of the 1955 constitution stated that legal norms contrary to the constitution were invalid.

Regarding judicial work as an administrative task and the operation of lawcourts as similar to the daily political activities of state organizations may have extremely dysfunctional and even tragic consequences as was the case for instance in Hungary from the late 1940s until the end of the 50s. (Kulcsár 1985a:292 et seq.) Dysfunctional consequences, however, may occur also as one of the most important components of the evasion of lawcourts at the lower levels of development, where the traditions are less vulnerable. Some leading jurists have called the attention of the author to this process, for instance in Tanzania.

The changing interpretation of legal norms, particularly in those societies where certain concepts are still new and their practical content changes in keeping with changing politics, is in itself sufficient to reduce the prestige of these notions and for society ultimately to reject them.

Another very important set of factors affecting the problems of the organizations participating in the realization of law is the *survival of traditional elements*. Norms and attitudes incompatible with the functioning of the modern organization may survive, and forms of behaviour that cannot be adjusted to the modern rules may also continue to exist. In Ethiopia, for instance, the *ratio decidendi* of many judicial decisions continued to be bribery, and as in Japan, case decisions favoured the status quo or *faits accomplis*. (Brietzke 1982:107.) Corruption – as an organic element – was built into Tibetan judicial practice as well; people accepted it as the normal corollary of the administration of justice. (Cassinelli and Ekval 1969:161, 181, and Norbu 1974:80–100.) ‘Traditional’ corruption was then reproduced or strengthened by the *economy of shortage* accompanying modernization or brought to the surface by it in places where corruption was traditionally tolerated or even required; moreover it was even promoted in places where the situation was different.

IV

The Challenge of the Centre to the Legal Development of the Periphery

In Part I I have already spoken about the organic nature of the development of the West European centre. Here I would complement the summary given there only with the addition that the organic development of the society – in which, I would like to emphasize, revolution is also an integral part as it helps unfold structures that have begun to emerge earlier (Tocqueville 1866:30–31) – has also shaped legal development organically. In this development political legal ideas advocating conscious social change and rational human action have appeared. At first almost unlimited opportunities were presumed, later on the dysfunctional consequences were also sensed or even pointed out (Sajó 1988:44–47), and in many cases illusion were nurtured regarding law as well.³⁴ But ideas have also appeared – in liberal as well as in conservative garb – which express the impossibility or the limitations of conscious change, of rational human intervention. The socio-historical limitations of these ideas are obvious, as in the preparation of, or in the course of a revolution clearly a greater significance may have been attributed to conscious shaping and hence to law in its ‘creative’ and ‘repressive’ sense capable of breaking down opposition, whereas turning against the revolution, or at the time of restoration, it was the *limitations* of deliberate, rational moulding of law-making which came to the forefront. However, the complexity of the interrelationships is indicated by the fact that restoration and the related efforts aiming at balanced action allowing also for action promoting conscious progress, turned to reason (and this is possible because of reason, or more precisely because of the different characteristics of various reasons) just as the revolutionary ideas did earlier, whereas irrationalism has taken up the advocacy of unrestrained human action.³⁵ In another context ideas born within the sphere of ideology opposing revolution could serve as arguments for reforming and planning development of society in the course of restoration. (Kulcsár 1966:46–49.)

Less conscious of the struggle of ideas or perhaps ‘below’ the ideological level, however, Western legal development has been an essentially balanced one if a few incidental moments are disregarded. In our case this does not mean that law played a *regulative* and *not a constituent* role towards social relations. More exactly, it has promoted the processes and phenomena already markedly present in the society and helped their unfolding by creating rules in the interest of these processes and phenomena, but *has not created* them. Following Anthony Allott, this legal regula-

tion was of the *nature of a model* at the most (securing an alternative in the interest of change), but definitely not of a *programme*. How far this circumstance is related to the specificity analysed by György Lukács, according to which the 'capitalist subject-behaviour' is of 'contemplating' nature (Lukács 1976:340-341), and to what extent this contemplating behaviour set the practical limitations "to the transformation of the society and correspondingly to law-making deemed adequate to the realization of this transformation" (Sajó 1981:317), is an interesting question which may be studied, but it only shifts the problem into another sphere. The basic question is *what society demanded of law*, i.e. for what function, or more precisely for what role it provided scope in the long run. In this context, in relation to the social 'requirement' towards the constituent or regulating role of law there has been no fundamental change at the larger phase of the development of the centre either. Although the regulating role of law has definitely increased, and occasionally even certain constituent elements may have arisen with the unfolding of monopoly capitalist society, and subsequently with the realization of any variant of the welfare state, there has been no fundamental change of role. Not even when the rational transformation of society and, together with it the instrumentality of law, has in fact gained strength on the ideological plane, and the interpretation of law in the relationship of ends and means has become practically a part of Western legal theory too, actually since Rudolph Ihering and Max Weber.³⁶ Consequently the statement that the way law is used in the welfare and in the 'socialist' states is an essentially identical one, is highly controversial. We have to agree with Paul M. Brietzke, who emphasizes on the contrary, that though 'socialist' law as well as the Western practice of 'social engineering' utilizes state-supported legal institutions in its attempts to transform the economic structures, there are significant differences between the two. But it is hardly acceptable that the most important difference is the supposed high standard of consensus in the case of 'social engineering'. On the other hand it can be stressed all the more that while 'social engineering' uses law for introducing gradual changes, largely to maintain the existing equilibrium, the 'socialist' states – at least definitely during the first phase of their development (K. K.) – have promoted changes through significant conflicts of interest, by the suppression of the interests of the bourgeoisie (Brietzke 1982:66). Here I only indicate the question: do the 'socialist' states show this characteristic of law-making after the fundamental economic, social and political changes, during the second phase of their development?

The influence of the development of the Western centre upon the changing legal system has unfolded the following characteristics.

- An important element of the changing legal system is continuity, in the process of which the legal system as an 'autonomous' social sphere has gained strength. In this process the reception of Roman law unfolded *ius modernum* as against *ius patriae*, traditional law. (Coing 1980:762.) In this process those principles had developed already prior to bourgeois society which subsequently appeared as a routine, as of indisputable validity in the later phenomena of consciously shaped law (for example, the principle of the *lex posterior derogat priori* was refined in the

14th–15th centuries),³⁷ and the consciously made legal norms have organically taken the place of the former norms of traditional type (either in the form of law-making or codification, or of conscious judicial development of law). In this sense Max Weber's hypothesis on the rationalizing process visible in law reflects a realistic picture.³⁸

– This organic nature of the 'rationalizing' process of the legal system was not only capable of preserving a certain continuity in the changes of the system, it not only emphasized law as an 'autonomous' social sphere, but simultaneously promoted the unfolding of the previous latent social attitude in the political organizations of authority and in the government as well, which restricted the conscious and unlimited utilization of legal regulation.³⁹ It is partly due to this fact (but naturally primarily to the organic development of all spheres of the society) that legal regulation was generally *not used as a substitutive means*, to make up for the *lack* of other instruments. Legal regulation helped the socio-economic processes already in progress, but did not attempt to replace them.

– Consequently, the interpretation of law as an instrument – which is usually regarded to be characteristic of Western legal development – has travelled a path of its own. This interpretation essentially gained strength during a later phase of legal development, with the unfolding of monopoly capitalist society, with the growth of state intervention, when law penetrated into fields hitherto 'left open'. This phenomenon challenged the extremist interpretation of the autonomy of law in Western legal thinking, but finally it has led to a certain levelling. Some legal theoreticians have linked the instrumental interpretation only to one part of law, to the so-called 'political law' by the artificial division of material law.⁴⁰ The instrumental nature of law was actually manifest with adequate limitations as – since legal norms as instruments were not used to supplement some deficiency – law generally intervened into some already socio-economically existing or emerging process mostly at a time when the economic and social conditions required for its realization had already unfolded. (If the case was to the contrary, then the legal norm could not be realized over the longer term.)

– The changes in the legal systems of advanced Western countries are nowadays also characterized by efforts towards the uniformity of law. The social basis of the effort to achieve the uniformity of law is the high degree of the strengthening of complex economic, social, cultural and political relations. An interesting consequence of this is that the impact of the social processes, which are similar in many respects in the advanced Western countries, begins to blur the differences between the so-called continental legal systems and common law.

The fact that the legal development of the Western centre has been hitherto in most cases adequate to the progress of the economic, and more or less to that of the social processes of the centre and has been able to 'guarantee' – more in a regulating than constituent sense – the social changes indispensable from the point of view of the survival of the system as a whole and necessary as a consequence of development, essentially indicates that the characteristics of law summarized in brief can be safely assessed as the results of this development.

However, the question arises of how far the challenges of the centre to the periphery are those of the legal system, and how far they have been directed towards the legal system of the periphery.

It is easy to answer the first part of the question, as even if one could identify the direct influence of the specificities of the legal system (and legal ideology) of the Western centre on the legal thinking of the periphery, the challenge appears primarily of an economic and political nature. Moreover, on this point the peripheries should be differentiated. The legal development of Eastern Europe, and more particularly of East Central Europe considered by some as a semi-periphery only, has evolved features identical or similar to the legal development of the centre in some of its elements, even though with some delay. It is sufficient to mention that Roman law was *formally* not received in these societies (excepting the semi-peripheral regions of Prussia, where the general German reception of Roman law was naturally accomplished), yet its impact could certainly be felt.⁴¹ Russia is a separate problem as it is not the signs of the influence of classical Roman law received in Western Europe (though already complied in the East Roman Empire), but those of the Byzantine 'Roman'⁴² law subsequently modified in comparison to the former, which manifested themselves because of the early Byzantine contacts with the country. (Pieler 1980:720; Völkl 1980:738.) But of this only little is known. As has been indicated by Obolensky (1982:V. 11.) the secular Russian law shows little sign of the direct Byzantine influence, yet any attempt to distinguish it from the already existing legal traditions can only be tentative as long as our knowledge of Slavonic customary law remains fragmentary. Though the Church influenced medieval legal development, even through this 'channel' it was not the classical Roman law which arrived, but its variant distorted into a 'Byzantine' law. This is true in spite of the fact, that from "the beginning there was a special preference not for the great theologians and law-makers of Byzantine, but for its preachers". (Billington 1966:9, Kaiser 1980:172 et seq.) Hence there is also an opinion according to which the role of law was different in Russia than in other parts of Europe. Here law meant either the command of the monarch or the consensus of the community, and no significance was attributed to clear definition, or predictability so important in Western legal thinking, just as the interpretation of law did not become a socially highly esteemed activity either. (Seton-Watson 1967:731.) In any case it is interesting that the present Russian historiography dealing with the Byzantine influence – with rare exceptions and even then in the context of the whole of Eastern Europe (Soloviev 1959:431–479) – does not study the possible influence it exercised on law. So ultimately one can accept Udal'cova's general conclusion that the degree of Byzantine influence was highly divergent depending upon the various cultural spheres – in some regions it produced a synthesis with the autochthonous culture, elsewhere it was superficial or even lacking – and that the received Byzantine intellectual values, ideologies, etc. were considerably transformed on the soil of the recipient country. (Udal'cova 1981:438–439.)

The answer to the second part of the question actually depends upon the nature of the challenge by the centre. It depends, for instance, on whether the challenge is a comprehensive and general, or an occasional and partial one.

If the challenge was general and continuous, as for instance the Western political, economic and cultural challenge towards the East Central, and later on towards the East European countries, then it had a deeper effect on the changes in the legal system as well. Thus the development of the Hungarian and Polish legal systems shows – at least in the main features and principles – fewer differences than if they are compared to the Russian system. In fact the Western influence reached it later, consequently – and not least of all due to the Byzantine influence and to the influence of the challenge coming from the East – it could unfold its own institutional system allied also with Eastern elements in a more enduring manner. (To some extent the same happened in the field of law too, as while the extent of the influence of Byzantine secular law cannot be reliably determined, the presence of canonical law is all the more obvious.) However, traditional traits survived in these East Central European societies too at least in some parts of the legal system and hindered the evolution of a modern economy as late as the 19th century. It is commonly known, for instance, that the Hungarian civil law of feudal origin with its rules on property and holdings – particularly in the field of big estates – together with its legal rules on inheritance, and to some extent even with its norms pertaining to the family, impeded modernization even during the second part of the 19th century. (It was precisely in this connection that a very interesting and significant debate developed in the law during the late 19th century.) It is also known that the legal principles necessary to the functioning of a capitalist economy were born mainly in commercial law during the development of Hungarian civil law, and it was from here that they were transferred with the help of judges and included among the regulations of civil law in the classic sense of the term. Similarly to Hungary, in Poland too the traditional rules related to inheritance and the family survived the longest even on territories which belonged to the Austro-Hungarian Monarchy.

With the growth of the economic dominance of the Western European centre there was an increase in those incidental effects which, in various parts of the world, have been expressed legally too with the promotion of economic expansion and trade at the peripheries, or in societies not yet really peripheral but which would become so later on. Some, ever increasing, privileges were enjoyed, for instance, by the British trading houses in India under the Mughal Empire; with the decline of the Ottoman Empire consular jurisdiction appeared, together with the system of formal concessions on Turkish territories, and subsequently in China, too. Part of these phenomena survived in the state of formal independence as well, though in practice the economic and political dependency continued (for example in Egypt), and elsewhere changes took place in the legal system together with the transformation of the entire society of the periphery. Turkey, for instance, set out on the path of the transformation of law with the reception of the civil law of the European centre after World War I; in India the British Raj succeeded the Mughal Empire, bringing with it a series of codes, the introduction of British lawcourts, the building of an efficient public administration, and practically reshaped the 'modern' law of India along its own pattern, but at the same time retained and ensured the survival of Hindu and Muslim sacral law and even to some extent the customary law of tribal and village community origin.

Thus it can be generally stated that the incidental impact has become a lasting one – and this is related to the world economic system becoming comprehensive – the challenge of the centre exercises an overall and transformative influence upon the legal systems of peripheral societies. But the form and depth of this general and moulding influence may differ, and shows variations in the case of societies falling into colonial status, remaining independent, or gaining independence after having been colonies.

In all the societies which were reduced to colonial dependence the law of the colonial power appeared, but with a few exceptions it was precisely this legal system which contributed to a limited 'survival' of the traditional legal system as well. For instance, British colonial rule, particularly by its 'indirect' variant created parallel institutions in many respects, most characteristically in Africa, and did not replace the old ones.⁴³ The proportions depended upon the level of cultural development of the colonized societies, upon the manner of colonization and not least of all also upon the economic and political interests of the colonial power.

The independent states of the periphery were also forced sooner or later to adopt at least to some extent the principles and sets of rules which had evolved during the legal development of the centre. This could take place by formal reception – the success of which depended upon the 'preparedness' of the receiving society – (examples are the already mentioned Turkish, Japanese, Ethiopian receptions and that of Thailand); or it could take place gradually, by the acceptance of certain legal regulations as patterns.

The former colonies, after having become independent, mostly developed their legal systems by retaining the specificities of the legal system of the colonial power. "The basic law of the new African States today is either English law or French law, depending on the colonial history of each State... Their local statutes enjoin the courts to apply 'the common law' of England and the doctrines of equity together with English statutes of general application of a specified date." (Ogwurike 1979:9.) After independence many English statutes passed perhaps even before 1900 were reinforced and modernized by later English rules. (Ogwurike 1979:39.) In Africa the legal norms imported from India – created for India during British rule – proved to be less lasting after independence. However, it is true that a large number of them had already been replaced by purely English statutes prior to independence, and it is also true that in *content* some such legal norms survived the change of regime. (Morris and Read 1972:126–130.) In fact efforts were made to avoid legal uncertainty through the unchanged or slightly modified adoption of the law of the former colonial power. (Ogwurike 1979:191–192.) This is particularly clear in the field of criminal law, as after independence the penal codes were almost everywhere based on the legislation of the former colonial power, reflecting the demands of the struggle against the new phenomena of crime occurring primarily in the cities and related to the break-up of the traditional order and to the consequences of growing modernization. (Brillon 1985:8–10.)

After independence the effort to 'break away' grew stronger. In fact in some countries the 'servient' status of the 'servient' legal systems was retained beside the 'dominant' law as had been the situation during colonial rule – but in some cases

certain specificities of the traditional legal system were incorporated into particular *revolutionary* objectives, an attempt at 'the modernization of tradition'. In India, for instance, this is represented by the revival and attempted development of the system of panchayats. In Tanzania there has been the attempt to codify the tribal legal customs, the ideological and practical linking of the common ownership of land to the development of the ujamaa system.⁴⁴ These are the efforts towards 'Africanizing' the entire law, about which a student of the question has written that this involves both the adjustment of African customary law to English or more generally Western legal principles, and the Africanization of the principles of English law.⁴⁵

However, the consequences deriving from the influence of the Western centre and subsequently from the reality of the entire world economy evolving almost as a system may be grasped better in the process of the *modernization of law*, than in the efforts *towards modernization by law*. I have mentioned that the two cannot be separated, yet the economic and political penetration by the centre of the 'dependent' countries was primarily followed by the evolution of legal frameworks, adequate to the penetration. In so far as this has contributed to the totality of modernization, it can be regarded more as a latent consequence. But modernization by law manifests itself in the use of law as a specific (and in a sense distorted) instrument. The distortion is largely related to that specific attitude which I characterized as the acceptance of *law as an instrument of substitution* when I spoke about the belatedness of the Eastern and East Central European countries, and which also includes an excessive trust in law. The excessive confidence in itself is conducive to misunderstanding the functions and tasks of law in a manner which lays the foundations of the extremist, normativist interpretation of law.

It is not by chance that the most pregnant wording of this excessive confidence appeared historically precisely in Prussian social thinking, as that society spectacularly embodied law, as command, as a set of obligations, as an instrument (from which even the specificities of law could be belated) of authority, generally regulating the life of the society in the Allgemeines Landrecht. This was largely the product of the period when Prussia was under the rule of Frederick the Great. (Kulcsár 1986a:256-265.) The above comes from the work of Heinrich von Treitschke in 1859, namely that all social problems are state and legal problems. (Treitschke 1927:57 et seq.)

The social (and we may add: legal) problems of law as a substitute instrument become truly manifest in relation to belatedness, catching up, pattern imitation and unsound socio-political programmes. This problem has been present in practice for centuries in the East European, and perhaps even more – due to the pressure to follow the Western pattern – in the East Central European societies. And in last decades – in connection with the frequent contradictions between the pressures deriving from the patterns desired or forced or from the internal programmes and the economic and social possibilities (with special regard to the phenomenon of 'shortage') – it manifested itself in producing similar phenomena in the 'socialist' societies and in the former colonies. (Of the latter particularly in those where there was a desire to promote modernization with the help of some kind of 'socialistic' ideology.)

V

Forced Adaptation and Law-Making

In the earlier discussion I mentioned that the adoption of law is an extremely important phenomenon in the process of the modernization of law as well as in the role of law in modernization.⁴⁶ This phenomenon is directly related to adaptation and to the various forms of adaptation which have evolved in the adjustment of peripheral societies to the centre.

Two expressions have become commonly used to describe the adoption of foreign, external legal principles, norms and systems. One is *reception*, the concept of adoption, which has been used for a long time. The 'classical' meaning of the term originally covered the adoption of Roman law in Europe, more exactly in Western Europe, or, in a narrower sense, in Germany. The other concept is that of *juridical acculturation*, which originally appeared as an ethnological-sociological term, and spread primarily in French sociology of law (*acculturation juridique*, see Alliot 1968 : 1180-1246; Carbonnier 1972 : 166-175). Juridical acculturation includes the concept of reception, but it goes beyond its usual interpretation. The term comprises the psychological, sociological and cultural spheres related to law as well, in other words, it extends over the changes in legal culture as well as changes in law. Comparative law (normative in nature, I would say) utilizing classical methods applies the concept of reception in relation to the adoption of law, but comparative sociological studies cannot dispense with the study of the implications of acculturation either, even if the concept itself is not always used (see for instance Chiba 1986a).

Though the two concepts refer to two types of adoption of law right from the outset – reception may stand for adoption as a single act, or of a shorter process, whereas acculturation is a longer process of the adoption of law – yet a real differentiation between the two concepts is not justified. The 'classical' form of reception, that is the reception of Roman law into Western Europe took place over a long period of time, due to a large extent, to the work of jurists who studied in the first universities teaching Roman law (for instance Bologna), and returned to their respective countries, and also through trade. The reception of external law by a single act usually reflects one or other of the two. Yet it is true that different manifest forms of the adoption of law can be established as types. However, the basis of such classification is constituted by those historical circumstances and conditions which 'motivate' the adoption of law, and which are the components of the socio-historical situation of adoption.

Two types of adoption can be distinguished on the basis of the analysis of the differences in the socio-historical context of adoption, even if ultimately identical or similar phenomena occur in the later life of adopted law, in its functioning in the receiving society. The two types are the following:

- the adoption of law together with cultural contacts and the spread of cultural elements, when *law* strikes roots as *one element of culture*, together with other elements, and linked to them; or

- *reception deriving from pressure* on the society to *adjust to the external environment*, when the receiving society is forced to adapt, to accept external legal regulation, or to observe it because of political and economic factors, or invasion.

These two types of reception were referred to by A. B. Schwarz, when he differentiated between forced reception, which he linked to colonial rule, and voluntary adoption based on cultural conditions. (Schwarz 1960:150.) Gaudemet also differentiated between the two types of adoption on the basis of *ratione imperii* and *imperio rationis*. (Gaudemet 1976:47 et seq.) However, I am of the view that their socio-historical background would require a more profound study, especially given that A. B. Schwarz's work was published for the first time in 1938, when the precise definition of certain historical processes was still missing.

In fact both cases of reception are explained by the *centre-periphery relationship*. In the first case the *cultural impact* of the centre is an express one, which is supported by the changes in economic conditions as well, whereas in the second case it is *pressure* deriving from the economic and political power, or even expansion of the centre which provokes the adjustment of the peripheral society.

Perhaps the best example of legal reception together with the cultural context is the spread of the dharmashastras in South-East Asia⁴⁷, with the Indianization of the societies of the region (for instance the development of the Dhammathas in Burma or the Thammasat in Thailand), and the spread of the late Byzantine Roman law – significantly transformed in comparison to the classical one – in Eastern Europe and in the Balkan peninsula (Soloviev 1959). Several examples of legal reception as a corollary of forced adaptation are offered by the colonial societies. In legal literature the expression the 'imposition of law' was used – for instance by Burman and Harrel-Bond 1979. This expression is – in fact – suggesting that law was superimposed and forced upon society. In a certain sense the transformation of the legal systems of the East and East Central European societies along the Soviet pattern was also a consequence of forced adaptation during the two decades after World War II.

Naturally, forced adaptation always contained cultural elements as well, but in one of its historically more recent and general examples the pressure of the political and economic elements is in a sense also accompanied by cultural pressure. The uniform economic world system in the Wallersteinian sense has been developing ever since the second part of the 16th century, but as a consequence of this world system it was first the earlier centres which became peripheries (for example the Asian empires), and the central nature of the regions representing the Western type of development was consolidated. However, the centre which evolved in the socie-

ties which showed a Western type development partly spread the characteristics of *this* centre and expanded the centre itself to reach almost global dimensions. As a result of the development of the global system (from Japan to the societies of the Scandinavian Peninsula), the characteristics of the centre have become typical to such an extent in the world system which has now grown into global dimensions, in which technical, political and cultural elements have acquired a growing role besides the economic one so, that the pressure on the peripheral societies for adjustment – in the process of modernization – becomes manifest not only in comparison to one central region and society or another, but *suitable answers have to be increasingly found to the challenges of the world system as a whole*. Actually this new situation, together with the failure of the modernization processes of the individual societies and the resultant frustration, have produced the strange fundamentalism which is manifest also in the revitalization of endogenous law, or law considered as such, in its totality or in part. The new example of forced adaptation is also demanded by the societies of the centre to some extent, though with different intensity, and this is a particularly important phenomenon for comparative legal studies.

I. As I have indicated above, particularly clear examples of the adoption of law, together with a given culture complex can be found in the Far Eastern and South Eastern regions of Asia. The historical and cultural context of the spread of the legal systems which evolved in the three major religious and philosophical systems, 'Great Traditions' (Hindu-Buddhist⁴⁸, Chinese and Islamic) has been explored particularly during the recent decades. The researches of Ishii (Ishii 1986), Lingat (Lingat 1949, 1950), Hooker (Hooker 1978, 1986); Kasemsup (Kasemsup 1986) – not to mention the multitude of earlier and present-day studies of detail – into the Thammasat of Thailand based on the dharmashastras interwoven with Buddhist elements, the development of the Burmese *Dhammathas*, again under Buddhist influence and their relationship to the earlier endogenous legal systems – studied by Lingat, Hooker, Okudaira (Okudaira 1986) – bring to the surface those problems almost 'ideal-typically' which appear generally in the course of this type of reception, even though with varying intensity.

These questions can be approached in the following way as has partly been done by Hooker (Hooker 1986):

– *How does the cultural tradition of which law is a part enter the receiving country?* In the case of Burma and Thailand Hooker considers religious acculturation to be the most important means, including the role of literate priests who introduced law into the religious system, or closely linked law to it. In the reception of Islam by Indonesia the merchants played a role, whereas the adaptation of the bureaucratic forms of a near and huge neighbour (Hooker 1986:17) was instrumental in the appearance of Chinese law in Vietnam.⁴⁹ If this series is continued then the role of religion was predominant elsewhere too, such as with the penetration of Islam into Egypt and into the other regions of Africa, the impact of Confucianism in Japan, the appearance of Byzantine orthodox Christianity in Eastern Europe and the

Balkans, the spread of Catholicism, of Western Christianity in East Central Europe, Coptic Christianity in Ethiopia, etc. The adoption of these 'Great Traditions' was always accompanied by the acceptance of a broader cultural heritage including the interpretation of law, and even legal regulation.

– Hooker's second problem is *how received law was actually adopted and how was it modified*. Modification can be studied in the broader process of 'translation', that is in the linguistic and symbolical content, but also in the social content of legal regulation and in the changes that took place as a consequence of the receiving cultural conditions. (To some extent this process is the content of the problem called negative assimilation by A. B. Schwarz; 1960: 154–155.) According to Hooker the law thus evolved is Burmese, Thai, Vietnamese, etc. by its text and not Indian, Islamic, or Chinese. As he states in respect of Indianization, but obviously in a broader context, the spread of Indian culture can only be understood in the light of the characteristics of the receiving culture. Moving to the east or south from the west we find a diminishing significance of the Indian legal technical forms. Formal reception took place in subordination to the local culture, more specifically the Indian heritage was redefined by the local conditions. (Hooker 1986: 19.)

– The third problem is actually part of the previous one. Although Hooker did not define it with such lucidity as earlier problems, in another work dealing with the cultural adaptation of legal reception (most recently Nguyen Ngoc Huy *et al.* 1987: 1–19, 54–56), and even in some papers by Hooker the following consideration can be traced: *how do the conditions of the receiving medium* – including the earlier legal traditions – *transform the adopted legal systems* that had been mostly shaped at a higher level of culture. The fate of the legal code of the Chinese T'ang dynasty in 7th and 8th-century Japan is a good example. The Japanese cultural environment of the day significantly differed from that of China and it made the assimilation of law difficult. Most of the rules were soon used differently, and an increasing number of administrative and judicial customs developed out of the texts of law, consequently the basic texts became obscure and were forgotten. (Noda 1976: 24; Chiba 1986a: 304–305.) This problem appears in similar European processes as well either in the case of the Western European reception of Roman law, or even more in the case of its reception in East Central Europe. For instance, the principles and rules of Roman law acquired a special content in the context of the Tripartitum attempt to codify medieval Hungarian customary law and royal legislation. The late Byzantine, 'distorted' Roman law appeared, together with the religious reception in the Russian principalities and survived in the emerging Russian empire as well, but in everyday life it was forced to defer to Slavonic tribal customary law and the lawbook based on it to such an extent, that Slavonic customary law practically 'swallowed' the legal principles which had come from Byzantium.

– The fourth problem is adoption of the 'Great Tradition' in which *law is only formally received*, rarely, or not at all exercising any influence upon the life of the given society, or, *the legal aspects of the Great Tradition do not appear in the process of adaptation*. The destiny of the Fetha Negast in Ethiopia is a curious example of the first case. The Fetha Negast was not translated into Amhara, the language of the country, thus it only became known to a limited extent. Tibet is an example of the

second case where the adopted Buddhist tradition was significantly transformed, but the dharmashastras 'accepted' by Buddhism – and which were taken to the east and south by Buddhist tradition (Hinayana)⁵⁰ – did not appear in Tibetan Buddhism (based on the Mahayana). Tibetan law – as far as it can be studied – is a curious, hardly elaborated, endogenous product showing Mongolian influence at a later phase.

– Finally – though at present few research results are available – *the transformation of the legal system spreading together with great Tradition* as a consequence of the effects of *receptions*, contacts, if any, with other Great Traditions, and also the influence of some Little Traditions is a specific problem. The changes in the attitude of Indian Islamic law coexisting with the dharmashastras is an interesting example, or there is the case of Buddhist influence upon the code adopted from China in Vietnam. (Nguyen Ngoc Huy *et al.* 1987:13, 18–19.) There is even less research into the reactions of contacts with the periphery, with the different 'Little Traditions'. (For Chinese law see Franke 1981:215–233.)

The general theoretical solution of these problems requires further research. Besides the cultural and legal conditions of the receiving country presumably such shaping effects should also be explored like the consequences of the political system and political culture receiving law. There is also the question whether a special legal system and legal culture is linked to a given type of political system or political culture and whether it carries the features of the latter. (Kulcsár 1989a.) The degree of difference between the social conditions of the receiving country and received law appears to be a decisive factor in the success of reception (there is a likelihood that such a factor was effective in that Hinayana Buddhism introduced Hindu legal development based on the dharmashastras, whereas Mahayana did not do so, and in its Tibetan variant even the Dharma, saturated with Tantric elements, underwent significant transformation). The analysis of the adoption of law as part of cultural reception and of its special problems would require a separate volume. Thus, I could hardly venture upon such an analysis here, though excellent research results are available in this respect (on the Chinese or Indian influence in Vietnam see, for instance, Hall 1964:183–189; Coedès 1967; Coedès 1968; Wolters 1982; Woodside 1971), whatever I have said was outlined rather in the interest of comparison, but I cannot deal with the research results so far published, which would help us to understand further interlinkages.

Masaji Chiba wrote recently that "transplantation of foreign law is nothing less than a cultural crisis for the transplanting people because of the possibility that their cultural identity may be seriously disturbed or even obliterated. The choice as to whether foreign law, or some of its features, is to be adapted, with or without reformulation, must be made in a way which permits the continuation of cultural identity in law . . . The Japanese modernisation of their legal system shows evidence of their efforts to maintain their cultural identity in law by accomodating transplanted foreign law and indigenous law." (Chiba 1989:155–156.) According to Chiba the 'amoeba-like way of thinking' provides the flexibility for this adaptation, and makes it possible for the people to maintain its cultural identity. This might be one of the

factors of adaptation, it is also true, however, that from the first hypothesis of Savigny the relationship between the reception of foreign law and cultural identity (called by Savigny *Volksgeist*) was not possible to solve only on a cultural level without taking into consideration socio-economic conditions and their transformation.

2. Naturally the separation of the reception of law deriving from cultural, or from forced adaptation is an 'ideal-typical' one. In other words, just as the element of violence is not missing from the process of reception of cultural nature – as referred to by Koschaker in general – and when reception is not traced back to the quality of the adopted legal system, but considered to be an issue of authority "*Machtfrage*" (Koschaker 1947: 138) such as the presence of Chinese law in Vietnam, or the example of the spread of Islamic law which can be explained in a similar way, so the cultural impact upon the receiving country, accompanying the process of forced adaptation, is also a significant one. Further: regarding the impact of forced adaptation expressed in the adoption of the legal system and the legal norms it is not insignificant when such an adaptation was *historically forced* upon a society, or whether, in relation to this, the society became peripheral, losing its earlier central position. On the basis of the assessment of the 'historical situation' the following types can be identified:

– *The first type of forced adaptation* is the adjustment of the peripheral societies to the 'original' characteristics of development following political, economic, and at times military effects from the centre. Such a forced adaptation took place in the provinces of the Roman Empire as well, even though this issue is a disputed one. In fact the spread of Roman law appeared also as a 'cultural mission', as the law of the conquered territories was considered to be imperfect and unjust, hence one of the most important gifts of the Empire to the conquered was Roman law, just and right by nature. Thus – as Gaudemet writes – Rome did not force its own law upon its provinces, on the contrary, the provinces, or at least their urban citizens sought the possibilities of 'Romanization' (Gaudemet 1976: 32) by Roman law. This became possible partly by the acquisition of Roman citizenship and partly by the evolution of *ius gentium*. Thus Roman law spread rather on the basis of '*imperio rationis*' in the provinces, though it took a long time. I myself do not consider the fact of conquest to be of primary importance, but the impact of the Roman Empire as the centre demanding adaptation. The adjustment of the peoples arriving in East Central Europe, the westernmost region of the East European periphery was such a forced adaptation to the *already* developed Western European feudal society in the 8th, 9th and 10th centuries A. D., etc. This process of adjustment – and this was particularly true for the societies of East Central Europe – was generally characterized by the transformation and continued existence of the adopted external forms under the conditions of the receiving medium.

This fact, together with other elements has resulted in developmental features different from the Western ones hence, and also because of specific turns of history (such as the presence of the Ottoman Empire for one and a half centuries in the region) *these societies were repeatedly forced to adapt themselves to the changes*. The

reception of the Western legal systems and legal regulation was a recurrent problem in the process repeatedly pressing for adaptation. The modernization of the societies of the region had not been completed (though their integration into the capitalist-based world economy was quite advanced and it was reflected in their legal systems too), the remnants of their specific development were still alive when – as I have already mentioned – the societies of the region were pressed into yet another adaptation during the period after World War II, with inevitable political consequences, but this time to the East, with the adoption of the ‘socialist’ model of society that had evolved in Eastern Europe. This situation for some people in power temporarily brought the illusion of a total break from the old legal system and Western legal thinking, towards the development of an entirely new legal system.

– *The other type of forced adaptation is the process of colonization.* In this process the erstwhile centres which had a ‘Great Tradition’, though different from the Western one, found themselves in a peripheral position with the growth of the European centre into a world economy, and, on the other hand, societies with a system of tribes and clans, or kingdoms just developing from this stage towards regional organization were colonized following the exploration of territories which had previously been unknown in Europe. In both variants the legal system of the colonizer, or part of it occupied an increasingly significant place in these societies partly because of the military, political and economic pressures, and partly as a result of the evolving public administration and juridical system. As we have seen, the characteristic consequence of the process was the pluralization of the legal system, ‘indirect rule’ and its variants, but with the dominance of the colonizers’ legal system and legal principles everywhere. Another characteristic of this reception is that it did not contain the political and civic rights and the ‘welfare’ type of legal norms, the corresponding administrative organization of which did not evolve either. (Seidman 1969:71–78.) ‘Modern’ legal regulation or its principles may have appeared in the form of codification, as in India, or in British East Africa (with the adoption of the Indian–British codes), or as a result of legal practice, and primarily of juridical interpretation, or as an outcome of the joint activities of codification, legal regulation and implementation. (Seidman 1969:47–85.) As is commonly known, the ordinance elaborated for the Gold Coast (Supreme Court Ordinance, 1876, Sect. 14, No. 4. of 1876) was valid for the entire colonial period in respect of customs, which prescribed the implementation of common law, equity and statutes. The implementation of local customs was possible if they did not run counter to the general principles of equity and morality. The principles crystallized by the end of colonial rule were summarized by Lord Wright, Judge of the Privy Council: “The policy of the British Government in this and in other respects is to use for purposes of the administration of the country the native laws and customs as far as possible and in so far as they have not been varied or suspended by statutes or ordinances . . . The courts which have been established by the British Government have the duty of enforcing these native laws and customs, in so far as they are not barbarous, as part of the law of the land.” (Hooker 1975:129–130.)

Such characteristics of received law (according to Seidman only a ‘truncated law’ was received in Africa) were present also in the building of the post-independence

legal system. Although after independence most of the countries made efforts to abolish even the traces of indirect rule, wanting to eliminate the plurality of the legal system, ultimately it could not be accomplished anywhere. The statement that the legal system of the erstwhile colonial power constitutes the basis of the legal system is still partly valid, but the norms, and in places even the organizations, of the traditional legal system survive. On the other hand, human rights have not really struck root, particularly not the system of safeguards evolved by British law, nor the realistically interpreted rules of the state based on law.

– *A further case of forced reception*, the reception of the legal system of European countries was relatively rare and rather ephemeral. Alliot for instance mentions, that the Code Civil was adopted by the Italian Kingdom (1806), by Naples (1812), and by the Rhine Federation (1808), etc. under direct French pressure, but with the fall of the empire the adoptions and codes lost their validity, and resistance had manifested itself during the process of reception. (For its causes see Alliot 1980a:205–206). In fact the French Code remained in force only in Belgium and Holland where it was received under more or less political pressure. (Gaudemet 1976:49–51; Alliot 1980a:170.) The forcing of the Austrian civil code upon Hungary after the war of independence of 1848–49 was such a forced adaptation (the code remained in force until 1861).

– *Finally, adaptation to the increasingly strong, united economic and political world system is also a forced one.* The legal principles occupying a dominant place in this world system and concerning mainly the economy and trade, were already significant in the second part of the 19th century for countries which were in a peripheral position if compared to the core, but succeeded in retaining their independence fully or nominally. At first such legal principles penetrated these countries in the form of certain privileges; the system of territorial concessions, consular jurisdiction, etc., subsequently the reception of *legal regulation characteristic of the centre*, or law-making on the pattern of the codes of the centre also began (for example Japan 1880: Penal Code, Penal Procedural Code, Code of Commerce, etc.; Egypt: the drafting of legal norms of French origin in 1883, the acceptance of supplements containing modern regulation in 1904, Civil and Penal Codes; Turkey: Ottoman Commercial Law in 1850, Civil Code in 1926; Iran: law on civil procedure, law on the organization of justice in 1911, law on criminal procedure in 1912, law on commercial procedure in 1913, commercial law and penal law in 1923–1926, Civil Code in 1928; Thailand: Civil and Commercial Code in 1923–1935; Chinese attempts to create civil and penal codes and procedural ones between 1929 and 1935; Ethiopia: Penal Code in 1930 which was still to a large extent translation of the Fetha Negast, a Constitution in 1955, Civil Code in 1960, etc.). These cases of reception were accompanied by a certain modernization of the political system or with such experiments, and mostly meant the transformation (secularization) of the earlier legal systems based, on the ‘Great Tradition’, together with the spontaneous or conscious acceptance of another ‘Great Tradition’, the ideas represented by Western enlightenment.

The decades following the independence of the earlier colonies represent a new period – and new dimensions – in the process of adjustment. In these decades conscious, though mostly unsuccessful attempts were made to get rid of the law of the earlier colonial power in many places, to revive the principles of endogenous law, and to develop the traditional organizations, etc. These experiments were generally based on predominantly ‘socialistic’ ideologies evolved during the independence struggles. On the other hand there were also attempts at the legal integration of bigger units (such as the experiments aimed at the creation of a unified African law).⁵¹ Paradoxically though explicably, these experiments became more vigorous with the growing strength of the uniform economic world system, at a time when the world system itself had been forcing each country of the world to adjust even more strongly by its economic and political effects. I do not agree completely with the statement by Wallerstein according to which the totality of the world system develops and not the individual ‘societies’, and it is senseless to analyse the numerous national ‘societies’, as if they were really autonomous structures evolving from inside, when in reality they have always been and remain structures created by the global processes or by the responses to them. (Wallerstein 1986:11,14.) Yet it is beyond doubt that the pressing impact of these global processes upon the individual societies is increasingly manifest. (Where I do not agree with him, derives from my view that the individual societies, perhaps even because of their specific development on the basis of their original characteristics, *do possess* such characteristic features which mould the responses to these global processes, thus they retain their internal, specific traits even if they are also moulded.)

But if we accept this global system as a fact, with its economic base primarily resting on capitalist production, then the functioning of world economy is basically governed by capitalist characteristics (though certain regional influences, carrying other elements cannot be denied), then it becomes clear that the consequences are expressed by legal development as well, and the pressure for adaptation also moulds the legal systems. This fact could be felt in each region of the world, in the changes of the legal systems based on the ‘Great Tradition’, as well as in the case of societies which wished to build an economy different from the capitalist one (such as the East European and East Central European former ‘socialist’ societies until their recent transition or China). In the latter case some further interesting phenomena were also be observed: for instance, the internal reforms launched in these countries even before their transition had been hardly independent of the challenges coming from the world system, as the conditions of reaching the second phase of modernization and of survival as a modern society have been partly produced by just that world system.

It is a question whether legal development related to forced adaptation can produce problems *different* from reception together with the cultural context, and if yes, then what are they?

The trait fundamentally different from cultural reception derives from the element of ‘pressure’. In fact cultural reception generally means the introduction of a broader context, in which law is only one part, but because of the longer duration of reception and its acculturational nature the receiving medium is favourable to law.

In a reception related to pressure this favourable medium is usually missing, moreover, even reception can be successful only if the received elements are based on a process of more general change, or they are capable of launching one (which of course in itself indicates the 'readiness' of the society to change).

The best examples of this are the two receptions that took place in Iran (Persia), representing just the two types discussed here. The first reception, the adoption of Islamic law begun in Iran, more exactly in the Persian Empire in 640 A. D., as is commonly known. It was after the fall of the Sassanian dynasty, but naturally the process took centuries. As "Islam is more than a religion, it is a way of life" (Lippman 1982:72), and law is its significant element "since the believers were in effect those who subscribed to such a notion of (divine) law" (Donner 1986:292), which was really the legitimating of authority, Shari'ah became dominant over the earlier, mostly particular legal customs. The role of the Iman as law-maker and divine spokesman also expanded with the spread of the Shiite sect, almost totally excluding the secular element from legal discipline. (Nezami Taleh 1986:87.) This development ultimately laid the foundations of a conservative legal outlook. Shari'ah and the Islamic system of the judiciary totally permeated the receiving society during the centuries, and the endogenous customs were incorporated into the received legal system during the formative periods of the Shari'ah itself. In contrast, the second reception under which the already Islamic society was forced to adapt Western law – essentially as a consequence of the series of defeats suffered from the Russian empire during the 19th century and because the necessity of some Westernization was recognized – did not permeate the entire Iranian receiving society. Although some experiments were made in the 19th century and the noted Iranian scholar, S. H. Taquzadeh wrote in 1920 that "the only cure for Iran was to become Westernized internally, externally, psychically and spiritually" (Nezami Taleh 1986:136), this reception did not penetrate deeply and in a formative manner into the society either through constitutional reform, or the Penal Code promulgated in 1926, the Civil Code promulgated in 1928 and expanded in 1936, and through the subsequent legal norms, or even by the modernizing law-making of the last Shah and the renewed juridical system. The incongruity between society, culture, the political system and law ultimately resulted in the failure of the legal system, and beyond this the failure of Iranian modernization, due to a number of factors, some of which are mentioned in literature, such as: "... (a) the failure of the new system to properly co-opt the members of the old system, the *ulama*, hence alienating a most important power group in society; (b) rampant growth of a bureaucratic labyrinth with increasing inability to keep up with the realities and functional necessities of an increasingly alienated society – a point repeatedly brought up by the critics and the public at large: and finally (c) failure to preserve a minimum degree of judicial independence, to uphold justice, as well as susceptibility to such corrupting tendencies as bribery, nepotism and favouritism, which have perhaps been among the rules of the game in the Persian judiciary throughout the country's history." (Nezami Taleh 1986:139.)

The fate of Western law received through forced adaptation in other countries with 'Great Tradition' has been similar to the Iranian reception, only the degree and

intensity may differ. The difference in intensity depends upon whether the receiving society was able to develop its *other conditions and elements* which guaranteed a favourable medium to the received law (such as the transformation of Japan after the Meiji restoration, or to some extent India, with the development of her modernized sector, etc.). The incongruities between received law and the phenomena of the receiving medium may be of many kinds, but here I would only refer to a few of them:

- an *incongruity* may develop among *some elements of the normative material* of the evolved legal system (Westernized law, law linked to the earlier 'Great Tradition', legal customs of tribes and clans, etc.);

- *between the normative material of the legal system and its organizational elements*, such as the lack of a judiciary or modern public administration, or because of the traditional functioning of modern public administration (for greater detail on this see Item II of Chapter Two);

- *between the full fledged normative and organizational elements of the legal system and its social, cultural, economic and political environment*, the stronger the element of pressure is in the process of adaptation, the stronger the incongruities will be.

The removal of incongruity was not successful under the colonial conditions even when the juridical system expressly tried to accomplish it. To give a single example of the efficiency of French African lawcourts: "...one may say that the judiciary did not succeed in creating a Pretorian law which could reconcile the African tradition with the essential principles of French civilization. The needs of colonial public order were preferred by those Africans who had been inclined towards law inspired by the big cities – they interpreted their subordination to customary law as the symbol of their subjugation – so they permitted French law to be victorious over the customs." (Sarr 1987:67.) Outside the big cities, however, a contrary phenomenon occurred even in the post-independence development of the former colonies – at least the African ones – where the modern lawcourts did not even succeed in asserting the regulations of penal law in the traditional environment (Brillon 1985:9–10 and 104–107), and even the functioning of the Indian judiciary, developed along the British pattern, has become problematic. (Baxi 1982:58–83, 209–243.)

The special and complex appearance of this incongruity, the problem of the reception of Soviet law by the *East Central European* societies during the course of adaptation after World War II is a special issue.⁵² There has been less research into this problem, but it is sure that incongruities have developed, for instance in Hungary, *within* the received legal system, between the traditions present in the old Hungarian legal system and new legal regulation, and between the received legal system and some elements of the Hungarian legal and political culture. The adopted political system and the legal one together with it, however, was linked to a definite phase of development, and to a specific concept of the management of the economy. In other words, it served a concept of an economy planned and commanded from the centre, which almost totally eliminated the private sphere from economic life, and which was nourished by the vision of a 'socialist' society. Equally, this concept

carried traces of Western European utopianism, ideas from the Enlightenment, and some elements of the Marxist philosophy of history, which pointed towards the future. Added to this mix were the specificities of Russian development and the day-to-day requirements of the political situation in the decades after the October Revolution. Finally, all this was condensed into an ideology simplified and grown rigid according to the requirements of authority. All this carried in itself consequences as well, as with changing conditions, such as the introduction of the system of new economic management, the legal system fed by the sources indicated above, was also forced to change even if not without conflicts (which were essentially conflicts of power). With the failure of the earlier economic conception a significant part of the legal system has also become obsolete, and a number of its fundamental elements have been 'evaded' in practice anyhow, even if they have not been formally repealed, or 'creatively interpreted' by judges as juridical law-making is euphemistically called (see the fate of the so-called plan contracts and the related state arbitration in Hungary – Eörsi 1979).

However, this reception had another trait very similar to the fate of legal systems received as a consequence of forced adaptation. It is commonly known for instance, that 'modern' law – particularly in Africa (Alliot 1980a:215–22), but in backward territories elsewhere too – appeared as an expediency of general validity, as an ideal. Such law regarded as ideal remained on that level even after independence, even if theoretically it was supposed to break up the conditions of the old society, but in reality it remained as the height of ideal law, it contributed less to the modernization of society as a *real instrument*.

The Soviet pattern of 'socialist' law – particularly after the immediate post-war years, from 1948 onwards, and practically until the mid-sixties in Hungary – also appeared as 'superior' law, which functioned (together with local legal regulation) as the ideal system perfect beyond any doubt, producing the ideology of so-called 'socialist normativism' (Kulcsár 1987a: 115–120). Built upon the consequences of the development of the region, and the possibilities of the autocratic state, the adoption of the Soviet model significantly transformed the conditions of Hungarian society, but it also maintained and corroborated some earlier, traditional elements. It further strengthened, for instance, the earlier paternalism of the political and legal culture and its consequences. Finally, it could not eliminate the elements of Western legal development that had taken root here (in legal regulation and in legal thinking), but on the other hand, it provoked resistance towards the reception of foreign patterns. During that period resistance came from research in field of legal sociology which challenged 'socialist normativism'; in the exploration of the low efficiency and dysfunctionality of law realized formally, or not in keeping entirely, or even partly with the original normative content, and thus created relatively favourable conditions for new legal regulation when the reforms began.

May I mention finally, that a special function of comparative legal research has also evolved in the process of reception in the wake of forced adaptation.

Earlier comparative legal research was considered to be essentially the concern of Western legal science. (Eörsi 1979.) Today, however, the stress on comparative legal studies is more linked to the legal development of the centre. With the regional

widening of the centre (Japan amongst others has joined it), even if the discipline of comparative legal studies is linked to Western development by its basic principles (in the sense pointed out by Berman; Berman 1983:143-164, 520-558), it is no longer the exclusive product of the Western region. The principle and process of legal unification, and particularly the idea of European legal unity, even if it expressly originally meant a defensive instrument in the face of the 'Soviet bloc' (Ulmer 1959:7), is essentially a corollary of the uniform world system and of efforts towards European economic and political integration.⁵³

Nowadays the development of a uniform economic and political world system has become increasingly manifest, or rather the inevitable realization of its existence and impact during recent decades, about which I have already written and which forces every society to adjust. As capitalist elements dominate the economic aspect of this global system, and formerly the reform process of the 'socialist' countries later on their transition has made these countries increasingly open economically and commercially, all those legal principles and regulations which represent weighty elements in the functioning of the global system have necessarily come to the fore, serving as models at first in trade, and in monetary transactions, and later on in the organization and operation of enterprises, etc. To some extent in the societies of the periphery, there is legal regulation in the interests of a more open economy.

However, this is not only true in the case of societies on the Eastern periphery of Europe.

In the most widespread historical type of forced adaptation comparative law had no real function in the receiving societies during the course of the adoption of the legal system and regulations of the colonial power, because of the transfer of law by the dominant political authority. Such a reception at most gave a push to anthropological and ethnological legal comparisons, yielding undoubtedly significant work from the time of Henry Sumner Maine until today. At that time, however, comparative legal studies could really only be the concern of the 'Western legal discipline'. After independence a special trend of research, partly building upon this anthropological approach, was launched, in order to protect identity of the former colonized societies, which at first attempted to collect the regional customs into codes, like in Tanzania, and later on attempted to create some kind of uniform African law out of endogenous African and modern elements. (For this see the material of the conference held at Ibadan in 1964, Allott: 1971a.) Nowadays, however, as a consequence of the pressures from a uniform world system demanding economic and political, and to some extent even cultural adjustment, comparative legal studies increasingly deals with issues of the *received 'modern' law and the receiving medium*, and, on the other hand, *modern law, as a pattern of law-making* itself has acquired a significant function, hence comparative legal studies have become a part of the daily routine of legal work, serving law-making.

Notes

1. See the summary in Stein 1980.

2. Henry Sumner Maine's book was published in 1861, and shortly afterwards it also appeared in Hungarian, translated and supplied with excellent notes by Ágost Pulszky (Maine 1875). In the present work I have referred to the 1988 Hungarian edition. For the outlines of the legal theory of M. B. Hooker based on separation of the status-type and contract-type of legal systems: Hooker 1978:9-14.

3. On the historical development of the techniques of the adaptation of law see Sajó 1988:40-44. On the role of legal fiction in Islamic law see Eörsi 1979:41 et seq., and Makdisi 1985:63-92. On problems in the interpretation of Islamic law see Coulson 1968:63 et seq., and 74-75. It is worth noting that the principle of *ijtihad* is now regarded as not only a right but also a duty for the modernization of Islamic law. (*Ibid.* 74.) It is well known, that the analogy also had a significant role in changes of law, and it is true for Islamic law, too. (See: Shehaby 1982:27-46.) On changes in Hindu law by interpretation see Derrett 1968a:82-95. Derrett points out that though dharmaśāstra was accepted as 'real' law, this did not mean that it was enforced automatically in all of its ideas without change. "The judicial process took the teachings of the scholars into account, but no judgement could be given unless general questions of public policy had been considered. The stability of the kingdom, the security of the state, and the effects of a particular ruling upon valid local, guild, or even family customs must always be looked to. Upon this the *dharmaśāstra* itself insisted." (*Ibid.* 93.) "It ultimately accepted that righteousness is ever valid, but that the day-to-day practice had a temporary, secular validity irrespective of its truth or falsity in transcendental terms." (Derrett 1973:13.) This, with the help of legal scholars interpreting law and with that of the courts, guaranteed the practical, continuous adaptation of Hindu law to the changing conditions until the 20th century. Masaji Chiba approached this problem from a more general and - I think - really useful point of view. He considered such legal techniques as fiction, interpretation legislation, as devices, which are part of the 'challenge-absorbing mechanism' of law, by which the facts are introduced into the normative world. He mentioned further means of this mechanism in traditional systems, e.g. the complementary function of the concept of rights and duties the flexibility, of legal ideas, the alternative function between principal and exceptional rules, etc. (Chiba 1989:46-47.)

4. Indira Pandra writes that in *smṛiti* literature the word expressing positive law is *vyavahara*, which is the result of judicial procedure, and this was already differentiated from *dharma* at that time. The limited sense of the word is civil law, positive law, legal procedure, lawsuit. Particularly the later '*smṛitians*', like Narada and Brihaspati made the distinction more clearly and devoted their works to the nature and application of Hindu positive law. The religious element, however, did not fade away; its influence may be clearly observed in the implementation of law. (Pandra and Clapman 1981:114-115.) The literal meaning of *smṛiti* is 'whatever is to be remembered'; thus in practice reference to positive law is made either to *smṛiti* or to the *dharmaśāstras*. Of the two Indian authors mentioned above Narada was active after Manu, and referring to Manu he compiled the first law book far less bound by religious and moral principles. Brihaspati clearly distinguished between punitive and civil justice, between judicial organization and procedural law, moreover, he called attention to the local tribal and family customs as well, particularly if these were also observed by the secular, state rules. Debate has continued about the religious nature of legal regulation. According to Derrett in some old law books religious (and even superstitious) commands can be found alongside legal regulations, which does not mean that the author could distinguish between the two, but that it was almost impossible to separate the obligatory nature of these two classes of regulations from each other in the society, therefore both had to be taken into account for practical purposes. What was prescribed in the name of religion, was usually required for other purposes as well, so it is hardly surprising that the progress of civilization, which loosened social bonds, accordingly increased the initiative and independence of the individual (who was the sole focus of religion), simultaneously decreasing the role of compulsion in the religious context. (Derrett 1968:VIII-IX.) "...religion encapsulated, and enhanced the reality of law in the minds of those subject to the *śāstra*." (Derrett 1973:21.)

Law under religious influence is a separate problem in so-called Black Africa. Disregarding some countries, where Islamic law was valid at least for some groups of people or in some parts of the country, here traditional law (with the exception of Ethiopia, where the Emperor was a secular as well as religious

monarch, see Brietzke 1982:101–104), being tribal, was linked to animistic religious phenomena in some of its elements at least (for example some sanctions). But this legal system also had a moral aspect and it was precisely this moral aspect which was lost with the law created and enforced by the law-maker standing above law (either colonizer, or the post-independence ruling elite). (Ogwurike 1979:194.)

5. “Islam is more than a religion, it is a way of life.” There is no difference between religious doctrine and law or – until the most recent times – the Church and state. Originally such expressions could not be found in the Arabic language. (Lippman 1982:72–73.) Coulson refers to the same. (Coulson 1968:54.) The basis of this unity is to be found in the traditional Islamic society, which did not know the term ‘people’, and substituted it with the concept of the ‘community’ (Umma). “While the people is composed of all the citizens who have the right to vote, Umma could only be defined by its relationship to God.” Thus the community is a religious one which comprises the totality of social life under the guidance of the Koran. (Flory and Mantran 1968:136–137; Lapidus 1991:27–28.) It is characteristic, however, that in Sudan the son of the Madhi formed the Umma Party, 1944, in which the ‘national’ element was at least as strong as the religious component and fought against the planned union with Egypt, after the independence from British (and formally Egyptian) rule. (Lapidus 1991:857–858.) The relationship of Islamic law and religion is a rather emphatic one (Johansen 1981:281–303; Deprez 1981:315–353), in some cases – even today – there are states whose legal system should be considered social one.

6. In the case of African law Conac calls attention to the fact that prisoners of the European ‘pure’ approach attempted to reject those customs which they considered to be beyond law according to their own concept, but in this manner they did not succeed in defining the legal customs either. (Conac 1980:VIII.) Allott says that the attempt to separate the legal norms from those which are only moral obligations presupposes a state of society in which the correspondence between the behaviour deemed correct by the common members of the community towards one another and that prescribed by the official organs of the society is seriously missing. African traditional law was different. Law expressed the common moral code of people; if this code was changing, law was automatically transformed. The situation was the same in the case of religious beliefs and practices. There was no conflict or opposition between the religion of the community (the religion was the system of beliefs accepted by the members of the community), and one may say between the state religion and its legal institutions. (Allott 1968:135.)

7. Gulliver differentiates between the settlement of disputes by negotiation and judicial procedure even in the case of the so-called primitive law. The latter ends with an obligatory ruling by a third person of authority, in which he refers to accepted standards of behaviour. This person, however, may be approached in various ways by both parties: they may argue in front of him, may influence him, may refer to irrational factors, may suggest a compromise, but they do not participate in the decision. The typical outcome is some kind of compromise. (Gulliver 1969:17–18.) But when the parties negotiate, that is, the dispute is not settled by a ‘judge’, even the most serious cases, even homicide can be settled in many places in such a way. (*Ibid.* 26.) In the following Gulliver analyses such a concrete case from the life of a Bantu tribe. Appeasement and bargain are related to the possible elimination of offended interests and to compensation. In the traditional African criminal law compensation to the benefit of the offended individual and his family is such a significant element that the assertion of the modern penal rules – either colonial or made after independence – often meets difficulties. The criminal procedure hardly assesses (with personal compensation) the offended interests of the victim, the plaintiff, and the punishment which is usually imprisonment is in no way related to the elimination of the offence against the plaintiff’s or his family’s interest. Thus – as is shown by the empirical surveys too – the population strongly differentiates even today in the choice of traditional or modern legal services. (Brillon 1985:2–5, 98–107.) The Ethiopian legal culture may be an exception in a sense, because although the judge was actually nothing but a ‘functionary’, exposed to the influence of politics, and lacking any real authority – the true *ratio decidendi* was the size of bribe – litigation has been popular in Ethiopia. There is approximately one judge for 20,000 people in Ethiopia (not counting the local courts of customary law), whereas this proportion in the also ‘litigious’ United States is 1:50,000. (Brietzke 1982:107.)

8. Although in the Latin American countries it would be more justified – perhaps precisely because the legal system of Spanish origin has been established on a higher level, if compared to other developing societies – if the element of appeasement could be pushed into the background, yet the settlement of disputes presents a picture similar to that of the other developing countries, particularly in the rural

areas. Gessner (1976:101 et seq.) points out the significance of the different forms of appeasement and reconciliation. Gessner also says that the characteristics of the institution influence its use. Thus the modern lawcourts of rational procedure attract the segment of the population thinking in a modern, rational way, whereas reconciliation and appeasement attract the other segments. (*Ibid.* 164.) Perhaps we may add that the element of appeasement is present in the original Spanish law too, moreover, it haunts even today. Actually according to the data (see Toharia 1976:33 et seq.) in Spain itself the orientation of disputes towards the lawcourts has been decreasing, but this is not the case with legal interference in so far as the parties frequently agree through the mediation of lawyers, evading judicial procedure, or law has become technically so refined that the parties, knowing their rights and obligations may assess better the possible outcome of a lawsuit too. Friedman (1976) also refers to the growing weight of the legal element and to the decreasing trend in lawsuits taken to court. On the totality of the problem and the appearance of the non-formal element in the different legal systems, see: Abel 1982.

9. On this see the results of the international survey entitled *The Role of Law on Conflict Treatment*. The first volume summarizing the results is Cain and Kulcsár 1983.

10. This characteristic is again unanimously referred to by students of the Asian and African legal systems. (See, for instance, Takeyoshi 1968:429-448; Derrett 1968a:81; 1980:526-527; Conac 1980:VIII-IX; Kühnhardt 1987:139-141, 148-149, 160, 172, 190-208.) It is quite possible that the lack of the concept of human rights also facilitated the acceptance of that constitutional phenomenon which is characterized by Conac who says that "a number of African constitutions subordinate (for instance) citizens' rights to the construction of the nation, and to the priorities of economic development, and in a revolutionary perspective to the needs of the construction of a new society." (Conac 1980:390-391.)

11. The Mitakshara school is followed practically all over India with the exception of Bengal. It is based primarily on Vijnaneswara's 11th century commentary, which summarized Hindu law in brief and comprehensively, with 'great professional skill'.

12. For instance, Haile Selassie distrusted Western-style political processes and the paternalistic nature of his policy was based on a long tradition, just as in Russia. Its consequences are manifest even in a political system which came to power through revolution: "Ethiopian socialism arose in a backward country and in opposition to an autocratic regime, leaving it with an autocratic taint." (Brietzke 1982:175.)

13. "...customary law was not static but flexible, its mutations reflecting the often dramatic changes in the political or social life of the particular society: conquest and defeat, migration and absorption, famine and disease, triumph and disaster - change in traditional life was often hardly less familiar, if generally less cataclysmic, than in the twentieth century. ... customary laws appeared in a new form in those social situations which were themselves the results of the new social or political development. In every centre of colonial administration, settlement, or trade, new mixed communities developed, which, whether or not officially, stood outside the arena of traditional customary law to some extent. ... The urban native courts generally administered (apart from local by-laws and other minor legislation) the customary law of the dominant urban group or of the court itself. ... General principles of the proper mode of behaviour in the town tended to develop, owing less and less to traditional standards, and amounting in some areas of life to a virtually new 'urban customary law' devoid of ethnic reference." ... "Unofficial modes of settling disputes would also be resorted to, where, as a result of modern developments, people faced new situations which neither traditional nor colonial authority adequately controlled. Thus, with increasing urbanization, immigrants to the towns often formed associations which, in addition to fulfilling other functions, settled disputes between members, applying the customary rules of behaviour as best they might in the new situations which arose." (Morris and Read 1972:170, 201, 186-187.)

14. Therefore - as is stated by Derrett - Indian law has no 'directing force' moreover, it does not contribute unambiguously to the shaping of the nation's life. (Derrett 1980:530.) A similar phenomenon in respect of the relationship between social change and law can be identified in Europe too in a certain sense, particularly in the feudal societies, as changes were often justified precisely by the restoration of the old conditions. (See Sajó 1981:312 et seq.)

15. The Fetha Negast, the 'Kings' Justice' was originally written in Egypt in the 13th century and it was translated from Arabic into the liturgical language of the Coptic Church in the 16th and 17th centuries. But it was never published in Amharic, in the official language of Ethiopia. It is highly

doubtful that it could ever have been applied regularly in the Ethiopian judicial practice, yet the Ethiopians regarded the Fetha Negast to be *the law*, which, however, could not have much connection with common reality as the latter was imperfect. In Germany it was published twice in the last century and in Italian in 1899 and again in 1936.

16. See, for instance, the research of Llewellyn and Hoebel (Hoebel 1964; Llewellyn 1940; Hoebel and Llewellyn 1941). Among the criteria of modern law Galanter too expressly mentions the separation of the branches of authority. (Galanter 1966.) This is firmly criticized by Brietzke (1982:69–70.).

17. Some remarks on the concept of legal culture. Just as with political culture, legal culture cannot be regarded simply as a phenomenon which is 'learned', but both consist of the social group (in a broader sense) and individual processing of historically accumulated experience. The cognitive, the emotional and evaluating elements and those of attitude carrying behavioural patterns can be found in both. Lawrence Friedman, however, when analysing legal culture, separated *internal* legal culture, I would call lawyer's culture, which would mean the set of attitudes and values of those in the legal profession, from the *external* legal culture, which is the set of attitudes and values of lay people, of the society, related to law. (Friedman 1977:76.) This differentiation is really justified. When we remember Otto Kahn-Freund's statement which has become a maxim today, according to which the ends are set by the society, and the means by legal tradition (Kahn-Freund 1966:45), then lawyers' culture occurs to us first. Lawyers' culture, however, is inseparable from the legal culture characteristic of the given society, which contains and conditions lawyers' culture as well. When writing about the 'spirit' of common law, Roscoe Pound said that "it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules" (Pound 1963:1), he had lawyers' culture in mind. The 'spirit' of common law, however, reflects a broader legal culture, in which, for instance, the authority of the judiciary is far greater than in other legal cultures, where conscious law-making has been of subordinate significance if compared to judicial practice, where the place of the individual, the protection of his freedom and property is of outstanding significance, where litigation has retained the possibility of 'fair struggle', protected by safeguards, etc. Naturally all this is a historical product, as every culture is, and it does not only differ from other cultures with traditional foundations in its own characteristics, but also in many respects from the so-called continental legal cultures as well. If I accept the bifurcation of this legal culture – though their mutual impact and relationship to the legal system naturally makes this separation a relative one – then I have to suppose that such a differentiation can also be made within the political culture as well. This conclusion has to be accepted even if, as is commonly known, politics as a profession has been historically much less separated from lay society than the legal profession. However, in the duality of politicians' culture and political culture the difference in attitude and values related to politics between the 'professional' politicians and those who do not deal with politics as an occupation can be definitely sensed. But there is yet another point which should be considered at the duality of the internal, professional aspect and external, lay aspect of legal and political culture and this is the location of the two professions within society. With the development of the legal profession the jurists – in keeping with their internal stratification – occupy different levels within the hierarchical relations of the society. Their location also depends upon the specificities of the legal system. (For instance, the social position of the judge is entirely different in the legal systems that are based upon the Anglo-Saxon legal tradition than in those characterized by a continental one; because of the effects of the political system the position of the judge is different in Germany from his counterpart in Hungary, though both belong to the continental legal system and there are a number of common traits in their legal traditions. Let alone the position of judge in traditional societies. (Miyamoto 1991:343–350.)

The social position of the lawyer – and here already the specificities of the economic system have their say – differs from that of the jurist working in public administration in every legal culture, etc. The politician's profession is less closed than the jurists' (a politician may come from a number of professions), and on the other hand – again depending upon the characteristics of the political systems – the politician is more forced to be in direct touch with the society than the jurist. The professional characteristics of the politician are more pliable than those of the jurist, however, relationship with authority is rather significant (even if outside any dominant position), a factor separating him from the outsider. As subcultures appear in culture, so they appear in political as well as legal culture. For instance, subcultures within the political culture may be related to ethnicity, to the social classes and strata, may be effective through regional specificities, etc. One of the subcultures – usually, though not

always of the politically dominant ethnic group, class, strata, etc. – may become dominant, and may characterize the political culture of the *whole* society. This is how the subculture of the gentry characterized the entire political culture for example in Poland or in Hungary with features present even today (Kulcsár 1987a), or the subculture of the ‘literates’ in China and to some extent in India (Nandy 1972:115), etc. The individual subcultures can be differentiated within the legal culture as well. Moreover, as the plurality of the legal system is more or less a fact everywhere, a legal subculture can be developed and maintained even by the components of the legal system, though – and this is again a question yet to be answered – the components of the legal system do not always have such an impact. In India, for instance, where the legal system is extremely complex, apparently the two components of sacral origin, the traditional Hindu and Muslim law have not so far produced such differences in the legal culture as have the penetration of the British legal system and the more recent Indian law-making based on it. An obviously specific subculture becoming dominant in many respects is associated with the latter (even if this dominance is more conspicuous than extensive). It is also doubtful whether the differences of legal culture associated with sacral Hindu and Muslim law are so great as to constitute a legal subculture. It is a corollary of the plurality of the legal system that more than one legal subculture may exist within a society. In the East European and East Central European regions for instance – the traditional peasant society lived (and lives) in poverty – the so-called popular legal customs maintained and to some extent do so even today not only a specific set of rules, but also the subcultural elements of the legal culture. I would also mention that there are experiments which approach the legal culture only by those of its characteristics which could be translated into indicators in a quantitative way. (See Blankenburg 1985:255–273.) As to the concept of legal culture, to its relation with legal systems and political system or political culture see Baxi 1991:267–282; Kulcsár 1991a:321–342.)

18. See Weber 1960:217 et seq., 275 et seq., the problem is analysed in Hungarian by Peschka 1975:110 et seq. David Trubek points out that Max Weber was less able to prove his theory in the development of English law. According to Weber’s theory the calculability of law was a real component of economic development, and he acknowledged the fact that the development of English law was less rational than the European one. “The English legal system offered a low degree of calculability but assisted capitalism by denying justice to the lower classes. . . . The English legal system, while far from the model of logically formal rationality, was sufficiently calculable to support capitalism since judges were favourable to capitalists and adhered to precedent.” (Trubek 1972b:747 et seq.) According to Trubek “Weber had no clear image of English history in mind”, including the development of English law, whereas students of English law adequately justify the rational nature of English law despite the system of precedents.

19. It is commonly known that Weber rejected the fundamental significance of economics in the changes of law just as he regarded the inability of other civilizations to create a rational legal system to be an important factor in the development of modern industrial capitalism in Europe. D. M. Trubek summarizes with good insight those elements of Weberian legal sociology, which, affecting legislation, stress the differences between law and the other political activities of the state. (Trubek 1972b:724.)

20. This consideration first appeared in the work of the American sociologist of law, Roscoe Pound, but primarily concerned the function of legal theory. (Pound 1923:2 et seq.)

21. The *Tripartitum opus juris consuetudinarii incliti regni Hungariae* is a Code drafted by the Lord Chief Justice István Verbóczi in 1514, which was passed by Diet and even the King approved it, but it never entered into force as it was never promulgated. Later on it became one of the most important sources of Hungarian customary law. First published by Johann Singriener in Vienna in 1517.

22. This could be identified, for instance, in the British-Indian practice of courts, particularly of the High Courts. But the problem is naturally a broader one. In the case of Africa, for example, non-state law is classified into the following types: norms legitimized formally also by the state, such as the rules applied by the rural councils of Senegal; norms not directly created but maintained and acknowledged by the state, this is the typical customary law; and finally norms and institutions the legitimation of which can be traced to political and economic ‘sources’ which are not acknowledged and maintained by the state, for instance a norm originating from the pre-colonial period but not formally acknowledged by customary law. (Snyder 1980b:260–261.)

23. Though several researchers challenge the multi- or bisectoral nature of economy and society, those who accept legal pluralism derive it mostly from bisectorality. It was during colonial rule that the

'economic enclave', bringing relatively modern technology and exploitation too, appeared beside the traditional 'subsistence' economy, and created an industry which extracted profit from the given colonial territory, as well as an infrastructure which served this activity and naturally produced new phenomena in the ways of life as well. The rules of customary law remained in force in the case of the suburban economy, whereas the legal servicing of the new 'economic enclave' was performed by received English (Anglo-Indian) law. Customary law, for instance, did not know the general concept of contract (with the exception of the marriage contract), or the relationship of servant and master, which proved to be indispensable in the new 'economic enclave'. The primacy of received law was important from the point of view of the economy, but wherever it did not disturb the economy, the maintenance of customary law proved to be necessary for political and administrative reasons. (Ogwurike 1979:177-181.) This phenomenon has been appearing recently in rather interesting way in some of the islam countries. (See Nezami Taleh 1991:43-72.)

24. On the research into popular legal customs in Hungary see Kulcsár 1966:429-450 and 1980:197-219. The most recent comprehensive product of this research is Tárkány Szűcs 1981. Ferenc Erdei, when he described peasant society as a "Society forced below the society", explained also that this is accompanied by the acceptance of the situation and as a consequence by the development of a specific order of customs. (Erdei 1973:13-14, 36-40 and 1980:237.)

25. In Hungary such is the institution of the bridal dance. It has already spread in practice beyond the rural areas into the towns and its consequences have been dealt with even by the Supreme Court. (Kulcsár 1978:7.)

26. The survey exploring the behaviour of the population was conducted by Dr. Raj Kumari Agrawala in the Poona district. (Agrawala 1978.)

27. Conac mentions that the revival of African traditions after colonial rule means turning against the alien influence, it is part of the achievement of 'cultural liberation'. Thus "the legislator, the importer of modernity may be succeeded by the nationalist who wants to renew with the help of traditional values." (Conac 1980:VI.) One variant of the 'revival' of tradition is 'simulated traditionalism', which wants to substitute for the lack of real traditionalism by giving new content to an earlier institution, or rather to its form. (Nelson 1980:144.)

28. The 'sala'-type administration characterizes a society, called 'prismatic' by F. Riggs. In other words a developing society in transition from agrarian to industrial phase but which has a wide gap between the urban and rural sectors. (The 'prismatic' society is a diffuse, 'fractured' society, which essentially represents the transition from a 'monochrome' society towards a multicoloured one, having many kinds of structure, just as white light is refracted when passed through a prism.) In the administration following the sala model official policy actually means the autocratic opinion (and interests) of the elite. The legal norms are inefficient, the officials are more interested in circumventing legal norms (by corruption for instance), than in implementing them, nepotism is the decisive factor in appointments although officials have to pass formal examinations, etc. An overall consequence of these factors is the ineffectiveness of norms. (Riggs 1964:297.)

29. On this see Beckstrom 1974. This situation has hardly changed since the Ethiopian revolution: the competence of the public administrators and the criteria of their assessment have not been clarified, moreover "... administrative law has not been used as a transmission belt for conveying politics to society and the economy: ... A vague and ill-digested ideology cannot serve as a guide to rational decision-making. ..." (Brietze 1982:211-212.) All this is in harmony with Levine's opinion according to whom the educated Ethiopians constantly demanded the clear manifestation of administrative competence and responsibility, which was, however, contrasted to the 'wax and gold' mentality of Amharic culture. (Levine 1972:10-11.) However, such and similar problems manifest themselves not only in Ethiopia. Literature related to the development and administration of African countries in particular emphasizes the lack of adequate administration.

30. The kebele system was organized in the phase of the Ethiopian revolution when the ideological influence of the radical left-wing intelligentsia, supporting local self-government, was strong (perhaps also because it was clear that experts were not available in the required number to construct a centralized state organization which would function well. The kebele is originally a co-operative based on the neighbourhood (the 47th Proclamation of 1976), covering an area in which personal contacts are still predominant. The kebele collects taxes, registers the residents and collects rent, acts as registrar, issues

identity cards, and so on. According to the 104th Proclamation of 1976, the institution of the kebele would take over the entire administration in order to eliminate bureaucracy and to involve the people directly in the 'revolutionary process'. They organize shops and small-scale industry, they build and rent houses, do police work, and so on. The kebele has a judicial function, too. It is authorized to rule in civil cases up to 500 Ethiopian Birrs, and in all criminal cases that do not fall under the jurisdiction of military courts or special courts-martial. It can also make valid judgements that can be executed on the spot by the 'commissions of public security' formed within the kebele. Although the officials of the kebele are elected, in practice the most important ones are appointed by the Derg. Self-management exists in appearance only also in that the system is efficient in the implementation of the central ordinances.

31. When expressing their doubts about the Western ideological bias of legal modernization, they stressed "the relationship between legal development and professional development" and two roles for lawyers were emphasized: the establishment of 'rule of law', and the creative use of law as an 'instrument of development'. The 'rule of law' themes bristled with professional chauvinism. A strong, independent profession and judiciary could assure the autonomy of a legal system ... (Dias *et al.* 1981: 14-15.) The significance of the legal profession in developing countries was growing in spite of the experiments introducing traditional aspects and elements into the 'inevitable' state legal system. (*Op. cit.* 17.) The papers included in this volume proved the importance of the legal profession even in relation to the rural poor population, that is in the less 'civilized' section of society combined with the possibility of 'alternative development'. (*Op. cit.* 349-378.)

32. Several justices of the Supreme Court of India said the following in the justification of their ruling in which they denied parliament the power to alter the Constitution: "...our Constitution was framed on the basis of consensus and not on majority votes. If the majority opinion is taken to be the guiding factor then the protection given to the minorities may become valueless. Therefore, the contention on behalf of the Union and States that two-thirds of the members in the two houses of Parliament are authorized to speak on behalf of the entire people of this country is unacceptable." (Quoted by Baxi 1982: 18.) Incidentally, Baxi holds the view that the ruling of the Indian Supreme Court, as a political group, showed a populist tendency during the state of emergency (1975-1977); expressions like 'the people's will', 'the people of India', appeared in their interpretations. The Supreme Court, with the political support of the populist elite, can be the sole guarantee against the 'machinations' of party policy. But if the Court misses this political opportunity then it undermines its own legitimacy. (Baxi 1980: 246-248.) Such an assessment of the Court, however, contains illusionary elements: one - already overburdened - element of the political system is hardly capable of reshaping the entire system.

33. The 'Chilot' was the Emperor's traditional right to supervise discretionally the otherwise valid judicial decision. The institution was maintained even by the last imperial constitution. (Paul and Clapman 1972: I. 395 *et seq.*)

34. This illusion - as András Sajó writes - the illusion of the effectiveness of far-reaching regulation and of compulsion is almost inseparable from the world view of the advocates of reason. Even D'Alembert proposed that the city of Geneva "pass severe and adequately implemented laws on the behaviour of actors". (Sajó 1988: 45.)

35. On this see Seemann 1959: 208 *et seq.* In connection with De Bonald's activities, and with the analysis of the problem as related to the genesis of sociology see Kulcsár 1966: 45 *et seq.*

36. Allott analysed the barriers influencing the effectiveness of law precisely in connection with the modernization of developing, and particularly African, law. (Allott 1980.)

37. Attention was called to some aspects by Bónis 1972a: 49, and Csaba Varga refers to the role of civil towns in the development of the Western legal outlook. (Varga 1979: 60.)

38. Although András Sajó states that it was Ihering who regarded law as the instrument of the realization of social objectives, he holds that this outlook had been known in criminal law, and that German law acknowledged social objectives which could be promoted by legal means only in the field of criminal law after Ihering and "not at all independently" from him. But I think we can rather agree with the statement of András Sajó, according to which "Ihering's interpretation ... was after all paradigmatic from the angle of change in the continental understanding of law." (Sajó 1988: 67-68.) Although Sajó remarks that he was 'without followers', the identification of his influence and following cannot be measured in the short run. And once his teaching had become paradigmatic, his comprehensive influence on the development of the science of law can hardly be rejected even if this influence has

been similar to an underground stream. Max Weber's ideas, for instance, on the relationship of society and law had evolved quite probably on the basis of his acquaintance with Ihering's attitude.

39. Max Weber essentially dates the process of the rationalization of law from the appearance of consciously made norms referring also to such elements as the materially rational arrangement of law, casuistics, the appearance of the 'modern' logic of law as such, without which the products of bourgeois law-making could not have been born. According to the Weberian theory the legal honorations also had a significant role in the development of these concepts and this kind of thinking. (See Weber 1960:74, 277 et seq. and para 6.)

It is appropriate to note here that, however, 'irrational' Savigny's view on the historical limitations of law may seem (as is commonly known, he represented this view against Thibaut who was the advocate of rational legislation along the lines of the Code Civil), and even today many people are of this opinion. Even if he represented this limitation in a mystic form, as a limitation by the 'Volksgeist' – but in keeping with the romantic ideology of his age – Savigny's view not only proved to be a lasting one, but has even been confirmed by practice. (On this see in detail: Kulcsár 1976:42 et seq.)

40. Wolfgang Friedmann has made this distinction in positive law (Friedmann 1964:51 et seq.), but it also recurs in different forms. One may meet, for instance, with the differentiation between the rules of law as legal norms solving conflicts and those "serving social engineering" and so on.

41. For Hungarian legal development see Bónis 1972a:61–109, for Polish law Sondel 1983:621–714, in general: Coing 1980:755–778.

42. As is commonly known, Roman law in its classical form was summarized only in the East Roman Empire. But in the later Byzantine Empire Byzantine law obviously underwent a complex transformation and did not retain the classic purity which subsequently influenced the legal development of Western Europe. (Husey 1967:55–77.) Byzantine law was not formally received even in the countries which may be considered as parts of the East European (Southeast European) region, but its significant influence can be identified in Romanian legal development (Georgescu 1981:337–356; and particularly: 344), in the early Serbian state (Mihaljcic 1981:375–386, and particularly: 384), and also in medieval Bulgaria. (Colov 1981:339–405.)

43. Allott also refers to the rapid disappearance of the African parallel institutions after independence, together with the quoted statement. (Allott 1965:221–222.) In Indian law, however, the parallel institutions in respect of marriage, for instance, survive. (Hooker 1975:79.) But I think that it is quite natural that new problems have been demanding new legal solutions; and if these problems seem similar to those phenomena which are connected with those which were the consequences of earlier modernization, the effects of law of the former colonial power are inevitable. This effect is particularly strong in the legal problems of urbanization. (See e.g. Kanyaihamba and McAuslan 1978.) Sometimes it is so even if the old system of colonial power became dysfunctional. "East African countries still cling to the much criticized English system whereby every serious offence must be inquired into on two different occasions, once by a magistrate conducting 'P. I.' and again by the court of trial. When there is a national shortage of magistrates, it is surely a needless luxury to cling to a system which even in England is under such heavy criticism and reform." (Read 1966:49.)

44. The ujamaa system (the term means 'familyhood') is based on the Arusha Declaration of February 5, 1967. It stresses self-management in the villages created, but this principle has been often violated. President Julius Nyerere has referred to this in several speeches. (See Nyerere 1973:8–9, 67–68.) In 1971, in his speech assessing ten years of independence, the President reported on 2700 ujamaa villages, and though he carefully avoided an evaluation of the successes or shortcomings of the movement, he confirmed that the true socialization of rural regions depended on the rapid spread and success of the ujamaa villages.

A phenomenon of Tanzanian 'socialism' is the attempt to collect the local legal customs. In a sense similar objectives are contained in 'Malgash socialism' (Madagascar) which has further developed the so-called fokolonolona communities. (Gaudusson 1980:337–357.) The special characteristics of land ownership have been used outside Africa too, to evolve a special social model. (James 1976:1–26.)

45. On this see Allott 1965:240, and 1968:139. In fact the Africanization of the principles of English law has also appeared in a very specific form. According to the provisions of the Indian Evidence Act (1872), also applied in East Africa, a husband and wife cannot be forced to make any statement concerning their marriage, during its time, in any lawsuit. Yet in 1917 Justice Hamilton rejected this

provision in the *East African Protectorate v. R. Amkeyo* case with the argument that marriage by customary law did not approach in any way the legal notion of marriage. (Martin 1969:102.) The same principle appeared in Article 161 of the Nigerian Evidence Act, in Article 119 of the Ugandan Evidence Act (amended, 1955) which obliges those living in a *non-monogamous* marriage to give evidence. Thus a clear distinction was made between marriage by 'law' and by customary law in regard to the rights and duties of the parties. (On this see Ogwurike 1979:185-186.)

46. The reception of law is naturally more general than to be understood only in relation to modernization. However, the centre-periphery pair of concepts allows for a more general approach to reception, and even for outlining its different types. On certain general features typical of modernization as well see also Eörsi 1979:532-582; Sajó 1988:193-200.

47. Baxi justly criticizes the widespread view – as an example of the Eurocentric legal attitude – that one of the 'proudest achievements' of British rule was the 'donation of law' to India. (Baxi 1987.) This statement evokes the same attitude that lived in the consciousness of Roman lawyers, namely that the conquered peoples of barbarian and irrational thinking received rational Roman law along with Roman imperial rule. The reception of traditional Indian law – similarly to the Roman – also shaped the law and legal thinking of distant societies. This example indicates that such an ethnocentric interpretation of law which – with the intervention of 'socialist normativism' – has been spread by Hungarian legal education, cannot be maintained. Baxi – incidentally relying on an analysis of Berman's book – speaks about the 'genesis amnesia' of Western legal discipline, which puts law of 'folk' character into parentheses. Western law had similar traits to a non-Western legal system before the 'Papal' revolution, and he considers Western law as a legal system, together with its capitalist and colonial content, as beginning only with the development of rational state law.

48. On the relationship of Buddhism and the dharmaśāstras see Lingat 1949; Kane 1977:938-945, 1003-1009; Derrett 1973:22-23.

49. The development of the Vietnamese state and law is a particularly interesting problem. On the one hand it is beyond doubt that the fact of Chinese conquest was also a significant component besides the political and cultural influence of China, even if the political culture associated with the Vietnamese empire had endogenous components as well. (Woodside 1971:9-18.) On the other hand, even if the influence of Confucianism, Taoism, or Mahayana, the 'official' Buddhism arriving via China was overwhelming, the expansion of Vietnamese society towards the south resulted in an increasing 'Indianization' of Vietnamese Buddhism. (*Ibid.* 30.) Although the 'Indianization' of Vietnamese culture never reached the degree of the 'Indianized' Southeast-Asian kingdoms (See: Hall 1964; Coedès 1967, 1968; Wolters 1982, and for the legal aspects Hooker, 1978 and 1986) yet the elements related to this process, and endogenous if compared to the Chinese ones, appeared in Vietnamese law-making following the Chinese pattern or received from China. (*Ibid.* 45; and Nguyen Ngoc Huy *et al.* 1987:2-19, 56-59, 70 *et seq.*)

50. Besides the many forms of Mahayana Buddhism well-known among European scholars is the more conservative form of Buddhism based only on the old canons the Hinayana. This name, however, involved a kind of 'underestimation'. Therefore among its followers it more generally used the name Theravāda. It was widespread in Sri Lanka, Burma, Thailand, Kampuchea, Laos and in some parts of East Pakistan, South Vietnam, etc. (The Theravāda part of Southeast Asia is 85 to 95 per cent Buddhist.) For Theravāda Buddhism see: Bechert 1966; Lester 1973.

51. "The clock cannot be put back." – writes Allott. The 'tribal' legal system of pre-colonial past cannot be restored. The economic conditions and social organizations have changed, etc. But even if this is impossible, he continues, "it might be suggested that the answer is to try to recapture the essence of these institutions and to build that essence into new laws which have been consciously and scientifically constructed for such countries." (Allott 1971a:172-173.) However, this theoretically attractive thesis has failed in practice according to him. He also considers uniform African law-making, mixing modern needs and traditional elements to be the solution. Another great student of African law is more sceptical, he considers mistrust towards law and the growth of suspicion as the values of African legal development saying that the example of the new African law may perhaps attract the attention of Western jurists who are inclined to trust law, and then perhaps they would behave with more reservation in this respect. (Alliot 1980a:489.) Thus Africa is on its way towards the creation of its own law, presumes Conac, and this has its own traditional elements such as community spirit, an inclination towards appeasement,

distribution, etc. (Conac 1980:XXXIX.) In any case, comparative law has a significant function in the evolution of the new African law. (Conac 1980:XXXIII-XXXIV.)

52. Hitherto the analyses of the reception of Soviet law have ventured only to see if there were such general principles that distinguish it from the so-called continental group of European law, and if so, can they be assessed as socialist traits *in general*, against which the national societies produce special elements. For such an analysis see, for instance, Péteri 1987:1402-1412. However, it is difficult to reach adequate conclusions without a study of the historical circumstances of reception, the socio-historical development and culture of Eastern Europe and East Central Europe, without the definition of their common and different features, including the place and role of law. (On this see Kulcsár 1987b.) The doctrine of the 'superiority' of Soviet law, which was almost generally accepted by the legal discipline of the East European region (including East Central Europe) during the period after World War II, and particularly after 1948, survived the 'classical' period of political practice called the personality cult in Hungary, too. After 1956, however, the main argument for the doctrine was that the Soviet Union was already building communism, whereas the other socialist countries were only building socialism, and that in the Soviet Union "there was a widening circle of those conditions where regulation itself was the task of social organizations, and further, that specifically new social organs had come into existence and function, which were supposed to implement some of the legal norms, and the new kind of social norms" (see Szabó 1975:165, 177), thus advances were made towards Marx and Engels' vision of the withering away of the state.

53. It is commonly known that the continuous integration of the European Economic Community, which originally was planned to be completed by 1992, has legal consequences as well. These consequences manifest themselves not only in fields related to the economy, but increasingly in public law and in constitutional law as well. Hence the principles and institutions that have evolved in the mainstream of European constitutional development are becoming increasingly dominant in the periphery as well. This trend was also markedly manifest in the preparation of the new Hungarian Constitution. (See Kulcsár 1991b, 1991c, 1991f.)

Chapter Three

Law as an Instrument of Modernization

The relationship between law and modernization can be interpreted in two ways. First of all as a problem of the *modernization of law* – in this case the criterion, or criteria of the ‘modernity’ of law should be clarified in general – and secondly as a question of *law as one of the instruments of modernization*.

Though the two problems are interrelated to a certain extent, they require separate analysis. The first task, the modernization of law at the Eastern periphery of Europe is a process which has been going on for quite some time. The profound historical-legal analysis of this process would probably enrich legal theory and sociology with many lessons. In our times this very problem appears in the form of legal aspects of the integration of peripheries into the processes of the centre (for instance, in the challenge of the legal integration of the European Economic Community), towards the Eastern region of Europe, or, in the form of using those elements as a pattern for the recent constitutions transforming former ‘socialist’ societies, which have crystallized in the mainstream of European constitutional development. Yet it is a far more acute problem in the so-called developing countries, where the ‘modern’ transformation of the legal system, its relations with the old one and to traditional values has become the problem of the day permanently and in a broader sense than in Eastern Europe. In the process of the modernization of these societies, just as historically was the case in Eastern and East Central Europe, the specificities evolved during the course of Western legal development could particularly serve as patterns ‘taken for granted’. In East Central Europe, and to some extent in Eastern Europe as well the distance between the legal order in force and the patterns evolved in the Western legal development was much less, all the more so as the impact of these patterns was continuously present in the Eastern region for centuries, though with changing intensity. In the ‘developing’ countries, however, the former colonial powers tried to close the gap between the given legal order, and the Western pattern but only in certain fields even during the colonial period, and that too was only attempted during the last two centuries. I have to add that precisely because of this “pattern-character” the *instrumental nature of law was overestimated* in these experiments. In fact beyond the more or less mechanical adaptation of a legal system, code or even legal norm (together with the related institutions and organizations) which have evolved during the course of the Western legal development, a tacit conviction has been hidden – if not expressed – that

adapted, received law is capable of reshaping society, or one or other sector of it. Although the historical criteria of modern law summarized in brief in Item I of Chapter Two have in fact developed as the organic elements of Western law, because of this organic linkage and the relationship of society and law their viability may be questionable in other societies. One thing is certain: their mere transplantation into another society does not in itself make a legal system a modern one. Therefore, the doubt that a 'highly developed' law, in the Western lawyerly sense, has anything to do with development is quite justified. (Brietzke 1982:67.)

This doubt leads us to the second problem, precisely reflecting in its complexity the *complicated relationship between law and society*. While analysing this problem we encounter essentially all those questions which are the 'traditional' problems of legal sociology in respect of law and social change, the instrumentality of law, law and the economic and social context of the society, the possibilities and limitations of law-making, etc. But these 'traditional' questions are manifest in this context with new phenomena and with such sharpness that they may promote the solution of traditional theoretical problems as well.

I

The Basic Situation of Law as an Instrument of Modernization: the Conscious Shaping of Society and Law

The basic problem of the relationship between modernization and law has been described in the colonial condition of African law by one of its students of sociological outlook: "The law-making power was alien to the society for which it legislated and until the rise of independence movements it was not under much pressure to accommodate demands from the colony's inhabitants, at least if there was no significant settler population. The colonial situation seems, therefore, to be an ideal case, a simple, instrumental model for the use of law as a tool of development: an enlightened law-maker, not constrained by the need to satisfy a constituency which might not want progress, is able to use law as an instrument to mould the society according to criteria of technical and economic efficiency towards the goal of modernization." (Bryde 1976:9.)

The use of law as an instrument in the process of modernization is an unavoidable – even though occasionally dangerous – phenomenon. Law as an instrument does in itself contain certain characteristics, which limit its utilization as an instrument, even if this autonomy has its limitations; in fact this autonomy derives from the historically evolved values of law, and from the characteristics of law as a social phenomenon. The 'internal rationality' of law is based on the values, 'regularities' and characteristics evolved within law. However, internal rationality may only manifest itself in a certain context. In other words, the use of law based on its internal rationality can only lead to positive results, if the context in which, and the objectives in the interests of which it is utilized, are also rational ones. Thus *the assertion of the internal rationality of law depends on external rationality*, or more precisely, *on external rationalities*. Consequently the efficiency of law as an instrument is conditioned by two basic groups of factors:

- the characteristics of law which have evolved during its autonomous development, and
- the rationality of those objectives and decisions for which it is used, and the knowledge of those processes which have been legally worded. (The rationality of objectives, decisions, etc. naturally includes the assessment of the environment in which the legal norm has to function.)

It is clear from what has been said that the *ideologies* (and social theory forming the basis of ideologies) effective in the definition of aims and tasks, and promoting

and restricting the understanding of social processes and phenomena are of extremely great importance from the point of view of the utilization of law.

This question arises with special emphasis in the case of all law-making in the wake of a revolution, and in this way it becomes a specific one in the process of modernization.

Revolutions have occupied an integral place in the development of the European centre, too. Their actual function is the rapid advancement of the processes already unfolding, of the institutions already taking shape, and in the case of law, giving form to all of them. In the peripheries, however, revolution, the possibility of which was built into their development (precisely because of belatedness and differences), in this respect (and not from other aspects) has performed a function which was identical in many ways, in the East European, the East Central European and in the developing countries. Revolutions, whether they contributed to the liquidation of colonial rule, or whether they strove for the creation of a new society, with this liquidation or subsequently, they have historically come into existence in different contexts. Considering the problem only from the angle of the subject discussed here it is beyond doubt that these *revolutions were directed towards overcoming the disadvantages deriving from backwardness, towards the upgrading of economic development and the creation of qualitative changes in society, and a new political order*. From the functional point of view it is also beyond doubt that these revolutions, particularly at the Eastern periphery and semi-periphery of Europe, have promoted the process of modernization only in some aspects, and in a limited sense. This is because that – beside the basic ideas without sufficiently reasonable foundation and logic – during the revolutionary changes or subsequently, elements were also built into the society (or certain traditional elements were activated, even though occasionally in a different form) which later on, hinder the advancement of the process of modernization, or reduce the adaptive capacity of the society and its capability to adjust to rapid changes. This is why the so-called ‘socialist’ political systems disappeared during modernization.

As a consequence two special attitudes may be observed in the wake of revolutions. One is the *rejection of law*. Every revolution necessarily turns against the existing state organization and legal system, and this is often couched ideologically as the rejection of law and state *as such*. (Essentially this was expressed by the ideology of Marxism too, though as a more distant perspective.) One of the corollaries of revolution, however, is that the dominance of principle is expressed and asserted in it and by it – even though occasionally with longer or shorter transition period –, as the essence of the revolutionary situation is its consciousness (Kissinger n.d.: 3), and by the dominance of principles even the short-term practical task is elevated to the general ideological level. In this case, however, another general influence can easily have its play, namely not only certain cognitive specificities from the theoretical-ideological coherence together with their possibilities and limitations, but also the additional phenomenon that the coherent theory shows the possible in a different light. Consequently, it may associate illusions with the rejection of law, and in other cases with the utilization of law, too. In fact the other attitude towards law, manifest after a revolution is precisely the unlimited use of law as an instrument, the elevation of Treitschke’s view to *state policy*, the growing

dominance of the law-maker's autocracy (when law-making is understood in the broader sense of the term).

The first attitude, the *rejection of law* has appeared practically everywhere – even though in different forms and with varying duration – in those revolutions, where in some ways the ideological influence of Marxism can be shown. In the first decade of Soviet rule, for instance, the rejection was manifest in a theoretical form (in the identification of law and social relations, in the law-substituting role of legal consciousness, in regarding the existing law as being 'bourgeois', etc.) (Kulcsár 1976:353–360; 1987a:114–16; Sajó 1988:70–72.) In the East Central European countries which were forced to accept a new social order as a consequence of World War II, the rejection of law was expressed partly by the theoretical refutation of old law (though the pre-war legal norms were utilized quite extensively), and partly this 'role' was also performed by the rejection of jurists, of legal expertise.¹ In the former colonial or dependent countries the complete rejection of law appeared in practice too during the course of revolutionary transformation following independence (for example in China, Cuba, Vietnam), elsewhere, the at least partial rejection of modern legal principles, and legality (including the principle of the rule of law) was followed by the creation of 'popular' organizations (Cuba, Ethiopia, South Yemen, Mozambique,² etc.). It cannot be ignored, however, that – at least temporary – efforts to become independent of modern legal principles have occurred in other situations and countries as well.³

After either a long or short period of time, however, the rejection of law has been replaced by the demand for the strictest 'legality' almost everywhere, even if this 'legality' manifests itself in practice only, or primarily, in a *one-sided* manner, in the form of the citizens' obedience. But this is again a characteristic of the periphery; it is sufficient to recall Max Weber's analysis of the nature of the Prussian Allgemeines Landrecht (Weber 1981:158–159), and together with it the view according to which law may be utilized almost without restriction in the process of introducing social change, appears (or is revived) almost naturally. Max Weber also pointed out, and it is also indicated for instance by the Hungarian practice which developed after World War II, that pushing legal expertise into the background also facilitates the application of law as such, as an unlimited and distorted instrument. Max Weber also associated these phenomena with paternalism in politics, and in fact, revolutions have sustained, and occasionally strengthened and enhanced, the paternalism which developed at an earlier stage of society, as in the Eastern periphery and semi-periphery of Europe and in the so-called developing countries. Where the monarch was the father of his people, this role was taken over by the post-revolutionary leadership. A good example of this is Ethiopia, if one thinks only of recent decades. Several authors have emphasized that the paternalistic nature of the Emperor's rule, in which Haile Selassie turned the father-child relationship into a basic moral justification for the system of rule (Brietzke 1982:96), did not change after the coming to power of the Derg. (Brietzke 1982:174–175.)

But the rejection of law is only characteristic of a shorter period in the process of modernization by way of revolution; it is worth focusing one's attention on the second attitude, on the conditions and consequences of an *excessive trust in legal regulation*.

Certain and not insignificant differences are also found even between the Eastern periphery and semi-periphery of Europe,⁴ and even more in comparison with the former colonies, yet the phenomenon is a general one. At the Eastern periphery and semi-periphery of Europe – though I would like to emphasize once again that there are differences between the two – the use of law as an instrument and a substitute has historical antecedents and certain traditions. These antecedents and traditions derive from the millennial historical phenomena of the region, from the constant efforts of the belated and different societies to catch up, from the almost periodically recurrent need for reform, in the process of which law functioned expressly as an instrument mainly during the course of mediating external patterns and also largely in defence against them. Consequently, and also because of the phenomena already mentioned in relation to European legal development, here the normative force of the legal order had a greater role than in the other peripheries, though this specificity characterizing the legal culture definitely diminishes if we progress from the Eastern semi-periphery towards the periphery, towards Eastern Europe in the strict sense of the term.

In contrast, neither East African, nor Indian legal development paved the way *prior to colonization* for such an expressly instrumental use of law (the situation is similar in the majority of Asian and African legal systems, too). Undoubtedly – as I have already mentioned – colonial rule did use law to some extent as a means of modernization, and some are even of the view that it was precisely this practice which gave the pattern to post-independence law-making. “How should one go about modernizing these countries”, asks René David, “and by which means can one assure their orderly development? Quite naturally”, he answers, “one turns in many instances to legislation as a means of achieving this. After the French revolution legislation played a great role in modernizing the political and social structure”, he continues, “thereby opening the way for the formation of modern states, through the use of codes; the African states which are familiar with this technique for development are quite naturally inclined to use this example as a model. The tendency to reform through legislation is no less marked in the English-speaking territories . . . At the other extreme, one can point to the Soviet Union and the ‘socialist’ countries as examples of states where the law, completely identified with the will of the government, recognizes legislation as its primary, if not its sole, source. In consequence the African countries see, no matter which way they turn, the same phenomenon – societies and states which aspire to develop and transform themselves by recourse, essentially, to the techniques of legislation, the latter being understood to include not only laws passed by the legislature but also administrative regulation. . . This is how legislation has become a *panacea*, a remedy by which one can cure all maladies, a means by which one may obtain, through social planning, all that the society desires.” (David 1971:44–45.)

This ‘panacea’, however, was faced with a different legal culture in the African and Asian countries from that in Europe, either in its Eastern periphery, or semi-periphery. The specificity to which I have referred while analysing ‘traditional’ law, i.e. the *orienting nature of regulation, its symbolic and even pattern-giving significance*, as this was built into the given societies, has strongly challenged the rules of

'modern' legislation which were intended to be normative. Thus reform legislation and the substitutive nature of law are historically developed characteristics, with blurred contours due to their long history, in the Eastern periphery and semi-periphery of Europe, whereas this is a pattern *in itself* for the majority of African and Asian countries; these characteristics have a brief past in these societies which have different cultural traits (including legal culture).

Further similarities and differences are that the phenomenon of economic shortage provoking the use of law as a substitute is also manifest to varying degrees in the peripheries studied here. It is gravest in the African countries – as it extends to practically all spheres of life and harshly moulds even the basic conditions of life (though here the circumstances and degree of shortage are also influenced by a lower level of needs). In the various social strata of India, for instance, shortage manifests itself with enormous differences. Here the intensity of shortage (though again subdued by the low level of needs among the majority of the low-income brackets) is very great in two-thirds of the society, while it is far less evident in the remaining one-third 'on the surface', participating directly or indirectly in the management of the state. Finally, shortage is characteristic of the former European 'socialist' countries as well – to a considerable extent as a relative shortage, i.e. deriving from the difference between ambitious objectives and actual possibilities – but far less than in Asia or Africa, and primarily as a consequence of the limited resources of the economy.

All these elements, namely: the utilization of law as a substitute instrument, the contradiction between the at least 'broad' coherence of the ideological-political ideas expressed during the period of liberation and the reality to be transformed (in some countries these ideological-political ideas had already developed during the struggle for independence, or immediately after independence, while elsewhere they have been shaped more recently as a kind of reaction to the Western pattern of modernization); the dominance of principles which is the corollary of practically all revolutionary transformations including the revolutionary act manifest in the achievement of independence, the 'pressure' felt by the newly independent political regimes still requiring legitimization to accomplish spectacular successes, and the impatience expressed for the immediate realization of long-term objectives; the phenomenon of 'shortage' facing all this, which has been generally enhanced by the economic policies aiming at spectacular successes but not reckoning with the economic and other possibilities of the given society; and finally an attempt to realize the chosen pattern irrespective of the given conditions. All these have created a special situation for legal regulation in the service of modernization.

The situation has been similar in many respects to the colonial one already described, in so far as law has been more or less just as much an instrument of power in the hands of the 'enlightened moulders of the society' as earlier. Of course there are differences, too; for example, there were no coherent theories behind the introduction of the principles and rules of Western law in the colonies, while there was a marked economic policy, and law-making was to a large extent technical in nature: animal hygiene, plant protection, amelioration of soil, transport, etc. (Bryde 1976: 14–15.) Although legislation could not and cannot be really influenced by the

subject masses at the European periphery and semi-periphery either, in many cases this society or some part of it could be convinced for a shorter or longer period of time that legislation was in their interest.

The instrumental use of law to such an extent usually presupposes the acceptance of two basic ideological theses. One is that the *given political system breaks away from the past*. It rejects the past, the essence of which is that the society was subjected to the colonial or exploiting regime, or to both, and accepts the new society to be created as a superior one solving all problems. (The 'chiliastic' belief, allowing for the acceptance of the awkwardnesses of the present in the interest of the future is related to this.) The second thesis is the *more or less complete rejection of the values and constraints evolved earlier in law as a relatively autonomous process*. Consequently, to the layman, law appears to be applicable in the interest of any goal, it becomes an instrument 'solving' all problems. David Trubek has already mentioned that "increasing instrumentalism in legal thought decreases legal autonomy" (Trubek 1972:19); I would only add that the more law is used without regard for the characteristics evolved during its autonomous development, the less it can be an instrument in accomplishing social objectives.

Here I do not intend to discuss in detail the problem of the ideological-political and socio-economic foundations of the legislative practice evolving in the process of modernization. The questions appearing on the general level have been indicated in some of my other writings, and the analysis of the legal realization of the decisions in the various countries could not be accommodated within the framework of the present work.

Yet some questions *in general* can be asked, and at least the outlines of the possible answers should also be drawn.

The first question is the legitimacy of the legal norms intended to achieve modernization. Naturally the legitimacy of legal regulation primarily appears in the acceptance of state authority making and using law. Although the *strength* of state authority to make itself accepted is a very significant factor and it is hidden behind every type of legitimacy (Weber 1987:221-251), yet ideology as a component of legitimacy is not insignificant, and it is even less insignificant what social forces provide *actively* the legitimation of this regulation in their own behaviour. Sometimes this can be manifest in a highly controversial manner. Let us see an example.

The legitimation of the legal system was a largely obscure and uncertain phenomenon during British rule in India. Technically it was enforced by the support of state authority, sociologically, however, it got its confirmation from the new elite layer and from the new middle classes growing up in the cities. The new ideology of modernization permeated this new class through Western education. The ideology of independence was built only later, but the largest part of this elite considered the cultural and social transformation of India by the legal system to be the precondition of political independence. (Singh 1978:147.) Such a social base of the legitimacy of the legal system was obviously not independent of interests, as this urban middle class profited a great deal from the administrative, economic and commercial opportunities offered by British rule, as it also corresponded to the

interests of colonial rule. Yogendra Singh also refers to the fact that the British legal system mainly hurts the principle of inequality before the law primarily in the villages with respect to caste interests, and the traditional elite in general, and in this respect the egalitarian ideology of Gandhism essentially promoted the broadening of the social base of the British legal system, while it rejected the possibilities of the same legal system though civil disobedience.

The situation changed after independence: the idea of participation did not simply remain an ideology of adaptation, but was integrated into the whole and ultimately the legal system became oriented towards adaptation without protestation. (Singh 1978:151-152.)

How deep legitimation is found by the legal system of modernization, more precisely by the legal regulation serving it, depends on the efficiency of the legal system itself and on its dysfunctional consequences (the interpretation of which is by itself a differentiated one and it depends among other things upon the assessment of legitimacy) besides the ideological and interest relations (which may be inter-related, or may exist with a difference in time) of the society in transformation. The case of the societies on the eastern periphery of Europe which followed the 'socialist' vision shows how complicated is the relationship between ideology and law. (Kulcsár 1980a.) Even if ideology may help in the acceptance of legal regulation as legitimate it weakens legitimacy at least as much if not more, if the social acceptance of ideology disintegrates because of its own social consequences (possibly also mediated by law).

Therefore, besides why and how the legal system created in the interest of modernization is realized, it is equally important to see why and by what factors its rules *are not* realized. But in summary it can be stated that the ineffectiveness, reduced impact, or latent and dysfunctional consequences of legal regulation intended to realize the tasks of modernization generally lead to the following problems:

- the lack of real power behind the programmes drafted and also legally expressed; it frequently happens that the power of one or other interest group is sufficient to create a legal norm, but it is insufficient for concrete regulation during the course of implementation, or for the procurement of means necessary for realization (see for instance the case of the African agricultural programmes: Bryde 1976:44 et seq., the Indian laws of positive discrimination: Imam 1972:147-162, and within it particularly Agrawala 1972:199 et seq., Galanter 1984a:547 et seq., Agrawala 1985 in Hungarian; such a phenomenon has been more or less recurrent in the process of Hungarian economic reform and even some experiences of law making of the economic transformation right up to the present);

- the difference between reality and the over-ambitious aims; (the more backward economically a society is the more state authority turns to the temporarily legitimating force of over-ambitious aims) (Kulcsár 1986a:283-309);

- the lack of, or insufficient knowledge of reality, its interrelationships, processes and phenomena, or the neglect of such knowledge (it should be noted here that research, if any serving the exploration of reality may be easily misled by the

ideological element in the process of modernization launched on the basis of a special ideology) (Kulcsár 1986a:350–394);

- the lack of the exploration of the consequences of the intentions to be realized, and the one-sided way of thinking, incapable of evaluating multi-dimensionally the consequences of the given decision and of coping systematically with the necessary measures related to the decision (a frequent consequence of which is the contradictory and even mutually cancelling effect of the consequences of decisions put into legal norms for the various spheres of the society);

- the neglect of the significance of historically evolved social phenomena, cultural conditions, religious and customary traditions, etc.⁵ and, finally:

- a normative approach to law, the failure to grasp its systemic nature (including the related organizations, experts and even the legal personalities of the given society), and in consequence the lack or inadequacy of the organizations meant for the implementation of the legal norm. This is true even in the case of the Constitution. As Baxi wrote: “the constitutional values of equality, fraternity, liberty, justice and dignity have all been to some extent overrun by the culture, working habits and styles of the major institutions of the Indian legal system.” (Baxi 1982:30.)

It should be noted that the consequences of the purely normative interpretation of law are necessarily problematic. Actually law is not only social technology; but an aspect of culture (and ideology, if you like). Law as a system reflects values and ideas, it corroborates, changes and innovates them whether they are of the ruling groups of the society or of the people in general. Law may be regarded also as a social system – as a system of social conditions, roles, status and institutions. Through the network of legal institutions – having its own ‘subcultures’ – the interaction evolving between the law-maker, the interpreters, those who enforce, obey and violate the law, the beneficiaries, creates law as a social system. (Baxi 1987:4)

Whether we analyse the political programmes and decisions, or those legal norms which include objectives and tasks to be realized in the society programmatically or expressly symbolic in nature both at the Eastern periphery of Europe and in the so-called developing countries of Asia and Africa, it is conspicuous that quite a number of them *have not been realized even over a long period of time*, usually because of the above-mentioned circumstances. If these decisions are not given a legal form, or become legal norms only on the level where the special interpretation of law, mentioned by René David, can be tolerated, i.e. that it draws only the perfect, the optimal image of the society or a segment of it which should be achieved, then they are not worth analysing from the angle of legislation intended to promote modernization. It is not so much legal nature – or in some respects only – if legal regulation *does not* follow the political decision correct from the point of modernization. In Hungary, for instance, in April 1984 a political resolution, containing acceptable principles, was passed for the further development of economic reform, for the assertion of the principle of performance in the economy, for the effective promotion of technical development, etc., but the financial regulatory system created in the wake of the resolution did not help the realization of these principles,

and occasionally it even acted in the opposite direction (taxing, for example, the monetary allocations for technical development).

Our problem becomes really manifest when we are faced with legal norms intended to promote modernization in whatever ideological context. If these legal norms can be truly realized within the given society, that is to say, they really prove to be effective, they may still be problematic from several aspects, in relation to other legal phenomena, yet they are basically functional, promoting the process itself. But if the legal norms are not adequate to the reality of the society, and here I would emphasize: to the real *processes*, and they are expressly substitutive in nature and have been divorced from the given cultural environment, they lead to significant problems that should be analysed from the angle of the sociology of law.

It is a general phenomenon that the legal norm, formulating the political decision into legal rules – at a high level of the legislative system – already differs from the basic political decision to some degree. Many factors may be ‘blamed’ for the difference; among them the ‘technical’ one, in itself not insignificant, deriving from the inherent character of the two – political and legal – ways of thinking. The *legal* wording of the contents of the decision – however general, yet supposedly a normative one – necessarily narrows or shapes the text, too. This is so, even if the legal norm is ultimately in the nature of a programme or a symbol.

The problem becomes grave, influencing the process of modernization negatively *if tasks which cannot be realized in the given society* – because of one or other phenomenon described above – *are expressed in legal norms*. In the East, or East Central European societies the consequences of this phenomenon manifest themselves in two ways as functions of the internal specificities and traditions of the legal system. One consequence is that such legal norms are neglected and forgotten in practice. The organizations of the legal system as well as people regard such norms as staging certain principles or tasks, but that actually do not have to be taken seriously. Naturally it may happen that in certain situations an account of their implementation is called for, or the implementation of the legal norm may even be forced for a long, or more commonly for a short period of time, but reality generally proves to be resistant. It is more frequent and more characteristic, particularly of the semi-peripheral societies, that the gap between the high level legal norm divorced from reality, and reality is closed by further law-making but on the lower levels of the sources of law. This case is characterized by the evolution of the normal and the inverted pyramid, which leads to two apparently different, but in reality fundamentally related problems of law-making.

At the apex of the normal pyramid there is for instance an Act stating major principles and identifying tasks, in the realization of which an increasing volume and multiplicity of enactments appear at the lower levels of the hierarchy of sources of law, such as e.g. the order of the Council of Ministers, ministerial decrees or orders, etc. in Hungary. The highest level of legislation related to the given problem (naturally it was not necessarily an Act, in Hungary, for instance before the recent political transition it could be a resolution of the Parliament, a resolution or a law decree of the Presidium, or even a legal norm framed by the Council of Ministers) left the truly normative regulation largely to the lower levels. Legal norms created this way

multiply by nature, and consequently may become contradictory, thus becoming one of the sources of the phenomenon of 'over-regulation'. (Later I shall return to this question.)

Phenomena of the 'inverted pyramid' are less known. Here the legal norms created at the highest level are of the broadest, most comprehensive character regarding goals, tasks and ambitions. The 'lower-level' legal norms, ensuring real normativity, gradually narrow these principles until rules which can be implemented are reached, but which in keeping with their confrontation with reality, contain only a small fragment of the principles and tasks so loftily worded above. This process can be observed in Hungary too, recently complemented with the element that the 'shift' in time is already contained in the high-level legal norm itself stating the principles.

The problem is naturally more general than its appearance in Hungary. This phenomenon is almost generally manifest, for instance, in the wording of constitutions. In the case of the developing countries one may meet two typical variants. In the first case the constitution follows the Western pattern but without the law-maker really thinking of its realization. Such was for instance the imperial constitution of 1955 in Ethiopia which "was little more than a monument to feudalism – an elegant status symbol – as exemplified by numerous *lex imperfecta* provisions, escape clauses such as 'in accordance with law', and the 'organic' law techniques that were used . . . Many of the yawning gaps between law and practice in Ethiopia can be explained by the fact that there was little political interest in the implementation and enforcement of rules that were intended to have no practical effect." (Brietzke 1982:110.) The other type is based on Julius Nyerere's opinion that developing states should not import Western constitutions. These constitutions are based on 'socialistic' elements with endogenous roots, but their realization is frequently impossible or has dysfunctional effects. Here too, the 'escape technique' appears, mostly by referring to the implementation of legal norms, or the constitution itself differentiates its own provisions right from the outset. (Such is, for instance, the situation of the directive principles meant to guide state activity in the Indian constitution.) Marx's comment on Louis Bonaparte's constitution, which contains freedom in the general phrase and the liquidation of freedom in the gloss (Marx and Engels 1962:117) is a truly instructive one for the analysis of such types of constitution. (NB: In many respects certain features of the 'socialist' constitutions were similar, or, rather resembled programmes.)

The problem, however, does not appear only at the level of constitutions. Yogendra Singh considers the "verbalization of a welfare ideology without its diffusion in social structure and its implementation as a social policy", to be one of the structural contradictions in the process of modernization in India, and he refers to Gunnar Myrdal who wrote that "there developed a long gap between verbalization (even enactment) and implementation of policies of reform". (Singh 1973:210–222.) Myrdal has in fact expounded that "Social legislation pointed the direction in which society should travel, but left the pace indeterminate. Many of these laws were intentionally permissive. In banning dowries, child marriages, and untouchability, the government did not vigorously seek to enforce its legislation. Laws that were

compulsory were either not enforced at all or were not enforced according to their spirit and intention." (Myrdal 1968:I.276.) Analysing the shortcomings of the implementation of Indian social legislation Sinha notes that the Acts are superficially worded, much rather desiring some kind of morality than indicating the possibilities of practical enforcement. (Sinha 1976:38.) A specific feature of the inverted pyramid is that no concrete right (or even duty) can be based on the legal norm enacting principles and tasks at the highest level.

This feature of legal regulation – the phenomenon of the 'inverted pyramid' – is always accompanied by the economy of shortage, and it becomes specifically marked when the leadership of the society and the dominant political power is particularly forced to employ law expressly as a *substitute instrument* as a consequence of the lack of other means, mostly because of historical and ideological reasons.⁶

This almost general phenomenon of varying intensity of the Eastern periphery of Europe was strengthened when dominant politics wanted to realize the objectives of modernization, the elimination of backwardness and the consequences of social development into 'differentness' on the basis of the 'socialist' vision. 'Socialist' society thus developed – on the basis of development considered to be the side-track of history by Marx – bore such features upon itself which have produced the constantly present *contradiction* between the ideological principles and aims regarded as socialistic and produced originally under the conditions of an advanced society, backwardness and economic underdevelopment, and partly they have evolved and maintained such characteristics in the political system and political culture because of the historically developed features (Kulcsár 1988), as a consequence of which there was an attempt to bridge the gap by means of the political system and legal regulation.

The phenomena of shortage, as Kornai describes them, might affect the daily life of people in hundreds of forms. Shortage might upset the realization of the consumer's shopping plans and may cause difficulties in supply. It consumed a lot of leisure when having to wait in the doctor's anteroom, or in the shop. It could be said without exaggeration that a housing shortage might decisively affect the destiny of the family, and the shortage of places in the institutions of higher education affected the future of the young. In addition, of course, it could be experienced the consequences of shortage not only as consumers but also as producers. The director, the foreman, the worker, repeatedly met the disturbances caused by the shortage of material or labour and the stresses accompanying it. Shortage ultimately affected the relations among people, the relations between the producer and the consumer, the salesman and the buyer, the person who decides upon and who receives an allocation. Shortage, either as the cause of other phenomena, or as a consequence, was linked to the other constituent elements of the economic system by myriad threads: to prices and wages, to planning and market, to monetary and credit policy, to financial and moral incentives. (Kornai 1980: 17–18.) Consequently, but also because of its purely economic nature, shortage has been a factor generating the growth of administration and regulation.

However, there was another aspect of shortage which has unfolded between the ambitious policy of shaping society and the economy and society characterized by

shortage. The king of shortage which cannot be satisfied but has been apparently guaranteed even by legal norm, which appeared in the societies of the Eastern periphery of Europe (and in a large number of other, so-called developing societies as well, whether they followed a 'socialistic' path, or not) between the set but inaccessible goals and reality as *relative shortage*. Thus it has been such a shortage, which evolved between the aims set and the possibilities of their realization.

The question is how far has the new process of modernization, combined with the 'socialistic building' of society in the East European, and particularly East Central European social medium – and especially those phenomena of the East Central European 'socialist' societies which manifest themselves as the dysfunctional consequences of the adoption of the socio-political (and naturally economic) model developed in the Soviet Union – deepened the historical economy of shortage of the region, and how far has it hindered – with a series of wrong decisions largely linked to the adopted political system, and its consequences – the elimination, or reduction of shortage? It is beyond doubt that – although to a different degree in the various countries – the traits of the economy of shortage are still present after more than seventy, or more than forty years of 'socialist development', and even they are to be eliminated very hard in the changed or changing economic and political context on the road toward the market economy.

Be that as it may, the existence of 'relative shortage' was also one of the significant sources of legal overregulation, and its ultimate consequences were intertwined with those of 'common shortage' described by János Kornai.

Let us take an example. In Hungary a considerable part of the housing was destroyed during the last phase of World War II. During the post-war period a large number of apartments belonging to people who had fled to the West for good or temporarily, or who were considered unreliable because of 'class considerations' and thus exposed, were utilized for 'public purposes'. Such utilization meant that the apartments were converted and no longer used for their original purpose in a large number of cases: the mushrooming parties, the various social organizations, the expanding offices, etc. housed themselves in former apartments. This trend was further strengthened as a consequence of the nationalizations, when the nationalized economic organizations (and the offices running them located themselves in apartment houses which were also nationalized (Law decree No. 4 of 1952). The housing shortage nurtured by such actions and the possibility of using the apartments for other purposes naturally produced the 'office' and the rules of distribution. Administrative allocation, abbreviated by Kornai with the R^{adm} symbol⁷, strengthened the position of the offices and regulations as against those 'standing in the queue', whose behaviour was easy to regulate from this position. (This is not to mention the possibilities of evading the regulations, the advantages to some under the rules themselves, or the impact of connections and corruption.) This situation was accompanied by an objective the state could not accomplish, namely to guarantee apartments for everybody at a nominal rent. On the contrary, the quality of the existing stock of houses kept on deteriorating precisely because of nationalization, low rents and the lack of financial interest. The legal norms produced in sequence on the issue of housing naturally could not grant apartments (beyond the division

of the already existing ones, with the creation of shared apartments, and by promoting the development of small apartments out of big ones), thus regulation kept on growing, and the situation was not improved by the subsequent massive housing programmes of the state and even when private house building was supported. The mere demand for flats was in fact accompanied by an increasing demand for quality apartments, thus tension did not decrease. The greater the normal intensity of tension is – warns Kornai – the greater the role of the administrative and allocating authority will be, together with the queueing of the customer and user. (Kornai 1980:452.) As is commonly known, now not only the state-owned, rented flats, but even some of those built by private effort (with state subsidy) can be obtained by allocation (in this respect it does not make much difference whether the procedure of allocation is performed by the National Savings Bank or the councils), thus regulation has further increased. Since the government decree 1/1971 (II.8.) considered to be the basic legal norm, which in itself consists of 153 articles, and the ÉVM decree 1/1971 (II.8.) (ÉVM = the former Ministry for Construction and Urban Development) promulgated with it within the same structure, consisting of a further 106 articles, a number of legal norms at various levels were made modifying the original decrees in 1974, 1978, 1979, and 1982. Those legal norms which – although not made within the field of housing, such as the Act on youth, or the resolution of the Council of Ministers related to population growth – established advantages in the procedure of access to housing in the interests of some socio-political objective (such as the favourable position of families with three or more children, or newly-weds), also resulted in the growth of regulation. In some respects these legal norms already appeared in the governmental decree 1/1971 and in the ÉVM decree 1/1971 (for instance, according to para 1 of Article 4 of the basic decree councils were to indicate in their apartment distribution plans how many apartments were planned to meet the needs of young married couples), but the norms did not create rights that could be directly asserted.

I could mention a number of examples of the creation of relative shortage (and the subsequent proliferation of legal norms). Such a relative shortage was created by the already mentioned Act VI of 1971 on youth, Act II of 1972 on public health, Act II of 1976 on the protection of the human environment, etc. It is a common characteristic of them all that ambitious goals and tasks were stated on the level of law, general principles were set out which, however, could not be realized directly.

For instance, Article 21 of the Act on youth states that “Youth – particularly children in need and young people not having an income of their own – must be granted social support in case of need.” Para 1 of Article 22 states with the same generalization that the state organs and the co-operatives allocate financial support for the objectives of youth policy in accordance with the legal regulations, or, according to para 2 “The state – with the help of co-operatives and social organizations – promotes the creation of the conditions necessary for the young to start a family, it gives priority to meeting the housing demands of young married couples.”

I would quote only a few Articles of Act II of 1972 on health: according to para 1 of Article 24: “Effective measures have to be taken for the improvement of the health condition of the population and their impact has to be continuously con-

trolled and assessed. The causes of illness and mortality should be regularly followed with attention." It is commonly known that the signs of the poor health and high mortality of the Hungarian population have become manifest particularly during the two decades since the promulgation of the related Act. The measures taken – beyond the statistical survey of the causes of illness and death – could hardly be effective, as the overwhelming majority of the causes leading to illness and death are related to social problems far beyond the capabilities of the Act on public health (and of the legal norms which specify the tasks in a far narrower way). The ruling set out in para 3 of the same Article is realized in an equally narrow sphere, according to which "It should be guaranteed that the population has access to the necessary and up-to-date curative and preventive care in due time, irrespective of the conditions of settlement, if possible."

Finally, and again by way of example and without comment, a single passage from the Act on environmental protection, with its nice general principles: para 1 of Article 43: "Whoever causes the pollution, detriment or damage of the human environment with his activity or omission, is obliged to (a) limit or terminate environmental pollution, detriment or damage caused by him, further (b) to develop adequate protection. Para 2: If the activity continues to cause significant environmental pollution, detriment or damage despite the protective methods and procedures employed, then the limits of the activity have to be decided, or it has to be prohibited." The next Article 44 then sets out the related penalties.

I have quoted it without comment, yet something has to be added. The norms ruling the implementation of the Act were only promulgated much later, from 1981 onwards. These legal norms, such as the order of the Council of Ministers No. 56/1981. (XI. 18.) on the neutralization of hazardous wastes, the announcement of the National Office of Environmental Protection No. 1033/1981, the joint declaration of principle by the Ministry of Health, the Ministry of Construction and Urban Development, the National Authority of Environmental Protection and the National Office of Water Conservancy, No. 8001/1984, and the 9001/1987 announcement of the National Authority of Environmental Protection not only created an impossible situation in respect of the technique of regulation, but, though they corresponded to the international norms in rigour, they disregarded the real Hungarian situation. Hence they are impossible to implement to a large extent even today, because of the present level of the economy, and particularly of industry and the technical conditions thereof. The impossibility of implementation – as has been shown in practice – itself gives 'exemption' if the norms are violated (even the violation of the legal norms that could be implemented). Legal regulation is too general – even in setting the fines, for instance quantities between 100 and 1000 tons are treated in the same way – further, the technical (incinerators, dumps, sewage farms and equipment) means of enforcement are missing, not to speak of the systemic development of waste management, and the level of training and organization. At times the number of public administration personnel is also inadequate. I would add, that the whole concept of regulation is a mistaken one as it does not incorporate environmental protection into economic activity.

Thus the uniform characteristic of all these legal norms on the level of Acts – and of similar ones not mentioned here – is that it was the task of the legal rules made during the course of their implementation, to transform these general and ambitious principles, objectives and tasks into norms that might be realized, in keeping with reality. This is how the specific, *inverted pyramid* was created.

What I have attempted to show with some Hungarian legal norms as examples, is not only a Hungarian or East European phenomenon. The same inverted pyramid appears in the states of the 'Third World' wherever the 'absolute' shortage is complemented by a 'relative' one caused by state measures and legal norms made because of ideological considerations, in the interest of aims and tasks far from reality.

II

The Social Interdependence of Modernization and Overregulation by Law

First of all we have to answer the question as to when a society should be regarded as overregulated, and why is it a separate problem in the process of modernization. In fact the mass of legal regulation has been constantly increasing all over the world during the past few centuries. This growth has been particularly rapid in the 20th century, and especially since World War II. Those countries where law has been temporarily pushed into the background because of some revolutionary situation – be it a socio-political revolution, independence, or the possible combination of the two – are exceptions, as they did not wish to limit their ideological foundations by law, and considered the shaping of the society possible without the interference of law. These countries – such as China, Cuba, Vietnam, Mozambique – had different legal traditions and cultures, yet with a special ‘Marxist’ interpretation of the place of law they assessed the ‘withering away’ of law to be a real process already taking place. This attitude restricted the development of law for some time in these countries, but nowadays the conditions of life demand legal regulation. The ‘anti-legal attitude’ – I have already referred to it – appeared in post-revolutionary Russia, and in some respects in Hungary, too, primarily in the form of opposition to the legal profession in the latter, only to make room for the other extreme with the interpretation and implementation of law as a mere instrument, and for the development of a special concept of legal theory, the so-called ‘socialist normativism’. (Kulcsár 1985:320–332, 1987:114–118.)

The mere quantitative growth of legal norms does not necessarily mean overregulation. The changes of the quantitative indices in themselves are not enough to enable us to identify overregulation, as the number of legal norms necessarily grows with the growing complexity of the society, and with the increasing role of the state. Presumably the decrease in the efficiency of regulation can be one of the qualitative indices of overregulation. Roscoe Pound stated in the first decades of our century that the more the quantity of legal regulation grows the less effective it is, simply by the very fact of quantitative growth. The changes of efficiency *in themselves* cannot constitute a criterion, as the insufficient extent of legal regulation, the ‘under’-regulation of some problem, phenomenon or process may also produce ineffectiveness.

The large quantity of legal norms and their lack of effectiveness is already *one of the indices of overregulation* if only in so far as newer and newer regulation is needed.

The other index already suggests a more complicated phenomenon. In fact a significant feature of overregulation – as is indicated by Roscoe Pound's statement referred to above is the *impossibility of implementation*. One of its components is detailed regulation (moving from the typical level to the direction of the individual case), which naturally lifts the individual and occasional traits to the level of the typical or even general. On the other hand *contradictions cannot be eliminated from regulation* just because of this tendency, and it can also be assessed as an index of overregulation. The growth of the *self-regulation* of the society (on the level of process, phenomenon, or even organization) can be a consequence of all this. In other words such norms may appear in human behaviour which were born out of practice, independent of legal regulation, and the tendency of avoiding legal regulation, together with evading the organizations which are meant to settle conflicts and legal disputes also appears. The third index of overregulation can again be grasped in a complex manner. This index expresses a phenomenon mentioned earlier – but studied relatively less – namely: *what is the relationship between the norms and the stage of the organizations which are supposed to implement them within the legal system*.

If the phenomena outlined above are markedly present in the society – even if their quantitative manifestation cannot immediately be translated into a set of statistical indices – one may justly infer the existence of legal overregulation.

The consequence of this statement, that overregulation – even if it can be approached with such generalizations as my question suggests, namely with legal overregulation – can be studied better within certain branches of law, or within certain spheres of social action, social processes, phenomena and problems. Thus it is possible for the same society to be overregulated in a given field, whereas regulation lags behind the necessary level in another field.

Actually it cannot be accurately stated what extent of overregulation is indicated by these indices in Hungarian society. It can only be regarded as probable – partly on the basis of data, and partly of other exploratory work – that these phenomena manifest themselves with a greater or lesser intensity. Perhaps the incongruity between the normative material and the organizational components of the legal system is the least manifest.

The phenomena of overregulation can only be understood together with the exploration of their source. The 'sources' can be classified even if it is clear that the interrelationships cannot be separated from each other, if the actual operation and impact of the individual 'sources' can be identified even less in the production of the same phenomenon.

The sources of legal overregulation can be classified as follows again using the Hungarian example:

- Those factors which are the characteristics of the economic and political system of 'socialist' society, which can be regarded as *system specific*. (However, some of them can also be found in the process of modernization in the 'Third World'.)

- Those factors which are related to the *developmental characteristics of the Eastern periphery* of Europe, of the East European and East Central European region. (Here it should be noted that – as the 'existing socialist' society has been the

product of the Eastern, and to some extent of the East Central European region, and in connection with the modernization of the region – the specificities that can be grouped under this heading can only be isolated from the factors belonging to the first group with some difficulty, whereas some of its elements appear in the legal system of the peripheries outside Europe as well.)

– Finally there are the factors which appear everywhere, in each society, the differences only being due to the specificities of the legal system. These factors may be the consequences of an identical or similar historical and social situation, therefore in this sense they are bound by the situation, and may be quite informative about the legal development of the peripheries with their specific features different from the first two groups.

1. Of the *system specific factors of overregulation* the phenomenon outlined in Chapter One should be mentioned first, according to which one of the characteristics of the 'socialist' economic, social and political system during its more than seven decades has been partly the *excessive weight of the political system* penetrating into the other spheres of social activities, and partly the *excessive weight of the centre* in almost all the systems of the society which were governed by such centrally planned way which appeared particularly in the economic, political and legal systems. I have described elsewhere (Kulcsár 1983b, 1986a, 1987a) that this phenomenon is not only associated with the 'socialist' socio-economic formation at the East European periphery, but it is a phenomenon of historical dimensions. I will return to it during the course of an analysis of the region-specific factors.

The excessive role of the state, which was inevitable, though not in harmony with the original ideological principles of Marxism, has been developed by the fact that a kind of an economy had to be created by means of the state. This was meant to rapidly eliminate backwardness in the underdeveloped societies of the Eastern region of Europe, and in the somewhat belated societies of some countries of the East Central European region.

As is commonly known, the original model of 'socialist economy' first appeared as centralized management (as an economy functioning as 'administration') in Russia. Again, somewhat differently from the classical Marxist theory of history, social and political science. (Kulcsár 1987a: 160–162, 281–284.) This was rather significant because this model, which played an important role during the period after World War II, represented a model which was 'adapted' by other societies and consequently resulted in phenomena causing major problems. As the circumstances and conditions which originally produced it were not present, or were not fully developed in the 'receiving' societies, adoption and the political conditions of its development further strengthened the excessive weight of the central political will. Other, non-economic factors, the consequences of the already mentioned function of the political system, the elimination of the forces offering alternatives, the traditions of the political system, the structure of the political party playing a central role in the power mechanism, which was linked to a special political culture and traditions rooted in the conditions of underground work in an autocratic political system, etc., further enhanced centralization deriving from the post-revolutionary situation.

In Hungary at least, yet another factor should be mentioned which made the legal consequences and conditions of the centralization of the economy relatively easily acceptable; this was the centralized war economy and its legal corollaries. It did not only mean that the war economy necessarily increased the number of legal norms related to the economy – naturally this also took place, as was the case with other belligerents, and even neutral countries – but the direct intervention of the state in the economy went so far as to prescribe the production of the different goods by legal norms. These legal norms offered an opportunity for the organizations of economic management to issue such and similar orders on the basis of authorization born of exceptional times, and this authorization was granted to the government during the post-war period as well. (Kulcsár 1985a:303.)

However, the system specific factors of legal overregulation go well beyond the conditions created by the period of war, though undoubtedly the circumstances of the historical situation – which are always related to the conditions of war with some minor exceptions (like Cuba), including the first, ‘socialist state’, the Soviet Union – were accompanied by the strengthening of central management and the extensive utilization of legal regulation right from the outset. Yet the essential issue is how the state management got into such a strong position which ultimately became characteristic of the emerging ‘socialist’ societies, although highly centralized state management did not derive from the original Marxist theory.

Although I have already spoken about the historical conditions of Eastern and East Central Europe which resulted in legal overregulation in Chapter One and in some of my other writings, it has to be repeated and emphasized that the system specific features of ‘socialist’ society which evolved in this region (and elsewhere too, under conditions of backwardness) cannot be separated from the concrete needs of the region and especially not from the special features of the process of modernization. *The over-emphasis on the political system together with the excessive weight of politics in comparison to, and penetrating into all the other spheres of social activity* is just as much a characteristic of this region as of any other society desiring to emerge from conditions of backwardness.

The illusion of the ‘independence’ of politics appears in every revolutionary situation. A special example of it is the Jacobin dictatorship during the French revolution, or the illusions accompanying the entire revolution, according to which it was the revolution which created a new society, a new economic, political and legal set-up. However – as I have repeatedly mentioned – Tocqueville had already pointed out that the revolution actually opened the way for trends and practices which had evolved or already existed during the ancien régime. This illusion – the reality and essence of which only becomes manifest in the long run – had to face historical reality in a somewhat modified form in the revolutionary situation and in the subsequent efforts towards building a new society on the East European periphery. During this process *the political activities got a real opportunity to initiate change* because of the belated, slow, and at times held up process of modernization, and because of the development of a favourable historical situation as a consequence of war. The opportunity was grasped to create a situation in which the promotion of modernization could be done by consciously chosen means. The analysis of the

opportunities deriving from this situation, and the manner and consequences of their utilization would lead far and is not within the scope of the present work, yet a few features can be outlined in relation to our topic.

First of all politics proved to be realistic in so far as it was able to promote trends of modernization already – though faintly – present in the region and while this activity corresponded to the realistic opportunities and demands of the society. But it contained illusionary elements in so far as it strove to transform the society in a way not corresponding to the possibilities and needs as determined by basic processes because of an abstract, theoretical approach, and in so far as it did not recognize the real processes and their consequences. Voluntarism was the outcome of both which produced such situations by its impact as well as consequences which would lead to further voluntarism. Because of factors that cannot be analysed here (Kulcsár 1987a: 172–177, 321–349) the political systems that have evolved at the Eastern periphery of Europe historically have not ‘organized’ adequately the regular feedback of their own activities. Consequently, the social environment is linked to the political processes more as *an object to be moulded* than as a source of regular feedback or not distorted input. This can only strengthen further the false image of the autonomy of politics within the political system, and more so within the political leadership, the illusion of its shaping anything separately from the social processes and phenomena. Hence the overestimation of the possibilities of the means ‘serving’ the shaping of the society, including the wrong use of legal regulation, is only one more step ahead.

This is how the specificities related to the historical conditions of the Eastern periphery of Europe became the system specific features of the model of the ‘socialist’ political system which evolved by the thirties. The justification for the special features becoming system specific can only be challenged by the lessons of the future history of the system, particularly given that such political systems have so far evolved in backward, or at least semi-peripheral societies if the East European model is taken as a pattern to be followed. Today it is clear that the elements evolved on the basis of linkages to the East European periphery and its developmental traits already have dysfunctional consequences for the functioning of the ‘socialist’ political systems.

In any case, it can hardly be denied that the activities of the centralized state evolved on the basis of the above interrelationships, particularly the development and functioning of the so-called system of central commands in the economic spheres have resulted in extraordinarily active legal regulation and in the growth of the number of legal norms.

Let us look at the example of the economy. *The economic activities have necessarily become acts of public administration* with the introduction of the system of centrally planned and command economy, with the development of this system and its organizations, the excessive nationalizations and the direct interference of ministries and national authorities in *the management* of the economy. The organizational units of production and distribution were integrated into the organization system of public administration as units managed by public administration. The organizational system of public administration was built hierarchically, and its contacts with

the productive and distributive units were established by a legal institution, the so-called plan contract rather than by a contract in civil law, finally their disputes were not settled by the lawcourts but by the so-called economic arbitration courts, which themselves bore the features of public administration.

The 'plan contract' – writes Gyula Eörsi – is not an entirely passive function of the planned economy. "Economic planning transmits a binding plan *vertically* from the centre through intermediate agencies to the enterprises concerned. Planned contracts, however, organize the realization of enterprise plans *horizontally*. Enterprises must provide for their total plan by such contracts. Plan assignments are translated into individual contracts concluded with various contracting parties, prices and sanctions adding *incentives* for their implementation and serving as a means of *controlling* progress towards the fulfilment of plan targets. In the course of concluding such contracts, not infrequently mistakes in planning come to light." (Eörsi 1979:328.) According to Eörsi at least that much is sure that the system of plan contracts is one means of state management of the economy, although here too commodity relations manifest in the form of corresponding wills are involved. However, these commodity relations are of a special nature (their prices, for instance, do not depend upon their being commodities but upon the decision of the respective authority), and the 'will' of the parties to sign a contract is also based on regulations. Finally – as I have already indicated – disputes resulting from the contracts are also brought to state arbitration in the nature of public administration. All this suggests that the '*ordering*' element of public administration is of *excessive weight* in these 'plan contracts', consequently they are nearer to a legal norm than to a real contract, and they function almost as the extended 'arm' of command. Actually this is expressed by one of the elements of Gyula Eörsi's statement quoted above, namely that the plan contracts organize the *implementation* of the plan horizontally, within the relations of the enterprises.

Such a structure and functioning of the economy which *practically excluded economic activities and substituted for them public administration* was achieved by the growth of legal regulation and the transformation of its content. Hence law produced dysfunctional results in a dual sense: partly it broke its own logic and rationality in the process, and partly it made the functioning of the economy along its own rules difficult by transforming into administrative functions its planning, organizing and managing. By this way legal rules were substituting true economic activities. Finally, it contributed to the development of the view which was described by János Kornai as paternalism. He writes that the social ownership of the means of production is accompanied by the active role of state authority in the economy. This activity may be broad or narrow, but it asserts itself anyhow. The central leadership takes responsibility for the economic situation, and for this purpose it reserves the right to use all the means of public administration considered expedient. A large and influential apparatus for the multilayered regulation of the 'socialist' economy evolves, which grows and strengthens by its own rules. Its members identify themselves with their jobs hence they feel an internal compulsion to actively shape the course of economic life. All this shows why paternalistic tendencies appear at the 'top'. This is complemented by the demand for paternalism

from 'below'. (Kornai 1980:579–580.) Kornai also points out that the managers of the enterprises demand paternalism because it means absolute protection and security, but they also resent it because of the socio-psychological demand of wishing to become an adult. As the paternalistic relationship leads to the lack of independence and helplessness of the subordinated, hence the demand for autonomy is also manifest in resentment, complaining and cooling one's needs in waiting-rooms instead of the resourceful handling of problems.

Law – of course – cannot be blamed for the paternalistic relationship which has evolved between the organizational (and human) participants in the management of the economy and economic activities. This relationship derived from the basic situation (social ownership, command economy), however, the ideological-political drive of their exaggerated realization has shaped it stronger than 'necessary'. Law is not 'flawless' in the latter phenomenon either, though here the political will behind it was the decisive component. Until the expression of a basic situation is involved, law is really *ancilla politicae*. However, law (and it should be stressed that not necessarily the legal profession) is more of a participant, than a servant in the decisions deriving from exaggerations and subjective elements, particularly at the lower levels. When paternalism reaches such a degree that the production of commodities, their quantity is set by a legal norm, then legal regulation, if it is still a legal regulation, becomes an instrument to the same extent as an arm is an instrument of the human body.

The excessive size of the organization of public administration is an inevitable corollary of the development of the command economy, of the substitution of economic activities by public administration. Although it is not related only to this – as the 'rationalizations' of political content (ultimately always resulting in the growth of personnel), and the consequences of expertise pushed into the background also contributed to it – the number of employees in public administration grew by 200 per cent by 1954 if compared with 1946. An oversized apparatus of public administration – even if the growth of legal regulation requires the apparatus – is in itself a factor generating regulation.

The excessive weight of the bureaucratic coordination of society is an inevitable outcome of paternalistic economic (and also) political management. Bureaucratic coordination however – as analysed by János Kornai (Kornai 1984:1029) – may be present more tenaciously than the paternalistic system of relations itself. More exactly its gradual transformation (as began in Hungary from 1968 onwards) does not necessarily weaken bureaucratic coordination in keeping with the rhythm of transformation. (Naturally one reason for this is the contradictory, at times retractive, slow nature of transformation itself.) In this context János Kornai writes that the bureaucracy stretches a net of rules over the flow of any social micro-process. If the net is too permeable then all kinds of irregularities slip through it. The corresponding defensive measure is to make the net more dense. This may be called the 'inclination towards self-realization' of the bureaucracy, namely that it is inclined to complement general regulation by increasingly concrete and detailed rules. (*Ibid.* 1031.) This is how parallel to the transformation of the command economy the 'inclination of the bureaucracy towards self realization' was manifest in the form

of the growing mass of indirect regulators. (By way of example: in 1982 about 228 different kinds of regulating elements influenced changes in the profit of enterprises.) I think it is not difficult to find examples of such a kind of law-making which already embodies the internal logic of the bureaucratic organization. The logic which, to some extent makes the organization itself independent of the socio-economic environment and its changes. These legal norms in practice function without feedback, but there is feedback if the administrative organization is somehow informed about the ineffectiveness of the earlier regulation and launches further law-making.

The above description leads us on to the period of economic management which has as its aim the replacement of the command economy. This period has resulted in a decrease in the number of legal norms, but it undoubtedly also contains an element which continues to be effective in the direction of excessive legal regulation. But before studying the changes in the quantity of legal norms under the new situation, yet another phenomenon should be noted, particularly as this phenomenon apparently has not changed with the reform that has taken place in economic management during the last two decades and it is recognizable even in present days.

It is not a new discovery that law also functions as an instrument of the political management and 'shaping' of society. It is the source of much dispute as to how far law can be an instrument and how far it contains features that decrease or make impossible its instrumental utilization, what are the values and experiences accumulating during the autochthonous development of law which, as historically evolved phenomena (having their own rationality) transform it into an autonomous social phenomenon, which also means a pluralistic regulation by its systemic nature. (Kulcsár 1977a:422-448.) It is again a separate problem when efforts are made towards legal regulation divested of the historically evolved specificities of law as a consequence of a given social situation (intending to document this 'break away' and indicating 'revolutionariness' in the illusion of breaking away from the past), when law is used for 'momentary' objectives. Such a situation began to evolve in Hungary in the years after World War II and very markedly after 1948-1949. In such a situation law, freed from the historical bonds and age-old values, relieved of the historical 'dead weight', became lighter, easy to change, it could be utilized for anything in the short run, but as a 'momentary' means it became *weightless* as well.

The 'momentary' instrumental nature of law divested the legal norm rapidly made without any consideration, of a significant element, namely of its *stability*. Law could be as quickly and inconsiderately changed as it was made. One indication of this phenomenon is that more than one thousand legal norms were made between 1945 and 1949. This number can even be justified with the social changes. Another indicator, however, is more problematic, according to which, for instance, during the second quarter of 1948 *alone* 34 government decrees, and 45 others (issued by the highest authorities), issued in the same year, were repealed or modified. These legal norms could at best be in force with unchanged content for about three or four months. Also in the second quarter of 1948 60 government decrees and 101 orders of the highest authorities issued in 1947 were repealed or modified. But short-lived

legal norms did not disappear from the practice of law-making later either. I cite as an example the order No. 11/1952 (II. 15.)FM, which modified the original order No. 5/1952 (II. 1.)FM, regulating mechanized agricultural work necessary for the cooperatives, groups of cooperatives, and for peasants working individually, two weeks after the latter was issued. If we study the events of the period between 1970 and 1979 in this respect, again the continuous growth in the proportion of modifying legal norms (related to the 'basic' one) can be observed. (Rácz 1981:323-324.)

The great increase in the quantity of legal norms during the period immediately after World War II (between 1945 and 1951) is understandable, as new social, economic and political conditions developed. But the study of law-making (down to ministerial orders) shows that the new economic and political situations have resulted in the considerable increase of legal regulation, though not to the extent of the years 1945-1951, even without fundamental social changes. Such periods occurred between 1954 and 1957, 1967 and 1970, and an increase can be observed from 1980 onwards. (Kampis 1981:312.) Periods of political change, the creation of legal norms reflecting change, start with the correction of the legal regulation of earlier economic-political phases. The trend thus drawn shows a certain cyclical nature as regards the quantity of legal norms, but this cycle is the reflection of another kind of cycle, the socio-economic one. The survey studying the trend unfortunately did not cover the changes in the number of ministerial instructions. It is open to question whether these norms – which have grown in number due precisely to the central management of the economy and to the saturation of the economy with 'administrative' elements – modify the trend and the occurring cycles, or 'raise' the line in the coordinate by their number, while retaining more or less the same cycles. Logically the latter may be expected, but a remark by György Kampis, who conducted the survey, explaining the sudden decrease in law-making between 1951 and 1953, suggests something else as well: "It was during this period that the system of economic management was based on centrally ordered plans, and this system of management was extended over the management of the society in general, that is, direction was by ministerial instruction, circulars and ordinances instead of Acts (law decrees) and decrees. The apex of this trend was represented by the appeal of the Prime Minister to the members of the government to give up their right to issue orders in 1952. The plans and measures conceived at that time bore the imprint of war economy, which had become dominant between 1951 and 1953." (*Ibid.*) Therefore, it is quite possible that if the ministerial instructions, circulars, and so on are also counted, their sum would balance to some extent the marked decreases between the various cycles.

The data, however, which suggest the quantitative aspects of the 'diminishing weight' of the legal norms used as instruments for 'momentary' aims, do not tell much about the contents of these rules.

Such changes in content have occurred that *the overwhelming majority of the legal norms have become technical*, their character as behavioural norms has become dim and they keep very little in touch, or only very indirectly with the crystallized, lasting values of universal or Hungarian legal development. Thus, the 'weightlessness' of these legal norms derives from their 'looseness'. Naturally it is open to

question how far this 'looseness' and rapid changes can secure the effectiveness of law.

This question has become particularly significant given the winding up of the command economy, as central 'management' tried to create a '*normative situation*' with the so-called regulators (these are also rules in the form of legal norms mostly financial in nature, intended to influence the behaviour of the economic actors) (Kulcsár 1987:461-462, 520-521) which modify some elements of the real situation for the enterprises and for the economic actors in general. More precisely it means that the economic actors, when they formulate their behaviour, are forced to assess the given economic (market) and social conditions as modified by the regulators. "In Yugoslavia – writes Károly Attila Soós – the reform concepts of 1952 and 1956, but even more of 1961 and 1965 emphasized the *self-regulation of the market*. In Hungary the reform concept of 1968 rather emphasized *state regulation by indirect* (financial) means – the setting of a large number of prices by the state, a vigorous regulation of the market by a policy of credit, taxation and subsidies – as the fundamental coordinating (organizing) principle of economic activities." (Soós 1986:124.)

In this context the legal content and economic basis of the regulators is an issue to be studied separately. Of course the role of legal regulation can easily be overestimated, even in the sense it was put by Mitchell Polinsky in his critique of Posner's book, the *Economic Analysis of Law*, when he said that according to the author's fundamental thesis legal rules and institutions have to promote efficiency, they have to encourage the markets based on the competitive principle to strive for the greatest possible profit, and if such markets are missing, the institutions have to 'play' the role which would otherwise be performed by competitive markets. (Mitchell Polinsky 1984:339.) The meaning of efficiency, however, is already an economic presumption, or, more exactly an issue of the science of economics. Without its more exact identification one cannot assess rightly the 'market substituting role' of law either. It seems to be beyond doubt, however, that the supposed substitution of the competitive market by legal regulation (or, as is said in this part of the world: by simulation) is an obvious overestimation of the capabilities of legal regulation. Although more realistic, Gerschenkron's statement is still an overestimation according to which wherever the social agreement for, or confirmation of, enterprise has not evolved, historically there the state – with its law-making, lawcourts and police – has secured the entrepreneurs against the hostility of the environment. (Gerschenkron 1966:256.) In fact according to Mitchell Polinsky the role of law is different and greater than would follow from Posner's hypothesis, based as it is on the principle of the competitive market, and from the logical consequences of this hypothesis, as the hypothesis itself is wrong. (Mitchell Polinsky 1984:354.)

Be that as it may, the real opportunities for law in the management or influencing of the economy are basically determined by two conditions. Partly, how far the economic hypothesis law is supposed to serve, is adequate to the real possibilities of the economy, and second, how far can law – because of its own features – correctly serve economic presumptions. As a consequence of the failure of either of the conditions the effectiveness of law would decrease, and this decrease is specifically accompanied by an increase in legal regulation.

As regards competence it is difficult to analyse how far the economic management which is replacing the command system is based on real economic presumptions in the form of a system of regulators designed to build a normative situation. But in all probability the next paragraph of Attila Károly Soós's statement quoted above may be enlightening: "In comparison to it (the Yugoslav self-regulation of the market and the indirect Hungarian management – K. K.) the practice in both countries – already at the time of the implementation of reforms, but even more after recentralization following the reforms – is largely characterized by *the determination of the tasks of enterprises according to the hierarchical conditions.*" (Soós 1986:124.) This has a number of forms. The state and political control over the manager of the enterprise, the 'consultations', the diverse network of relationships, the frequent changes in financial regulations and their simultaneous formal rigidity which makes them impossible to observe, the retrospective legal assessment of entrepreneurial behaviour and even regulation affecting the past, etc. themselves weaken regulation by the 'normative situation', and offer opportunities for direct orders, bargains, for 'manual manipulation', particularly at a time of deteriorating economic conditions. But it can be stated that the original economic concept did not prove sufficiently successful partly because of its original shortcomings, partly because of uncertainties deriving from the various features of the political system, and partly because of the numerous factors affecting the practice of regulation. As far as overregulation is concerned, the problem can be traced back to two basic factors.

First, an interpretation of regulation which in practice constantly changes the system of regulators together with the changing economic conditions, and, one should add, in keeping with the phenomena of the state budget as well. This practice produces all the consequences of the use of law as a 'momentary' instrument, and keeps valid, modifies and reproduces rules which are almost impossible to observe, and which are consequently not properly elaborated, full of contradictions, and in the practice of Hungarian economic management have often been contrary to the political resolutions declared during the past few years.

"In 1983 the positive law in force could be summarized in about 18 thousand pages (without the legal norms issued by the councils) – this means a library of about 60 volumes, if one volume contains 300 pages. The positive law of the *Magyar Közlöny* (Hungarian Gazette) covers about one thousand pages a year. In addition, the normative orders and directives are published by the ministries (if they are published at all, and are circulated among those concerned in a copied form). It is also beyond doubt that positive law has been vigorously expanding recently. Between 1965 and 1980 the estimated quantity of valid legal material (without normative orders and directives!) grew by about 25 per cent. If we look at the index of growth during the past few years the number of legal norms issued grew by 2.3 per cent in 1979 if compared to 1978, 4.06 per cent in 1980 as against 1979, 5.56 per cent in 1981 as against 1980, 7.08 per cent in 1982 if compared to 1981, 4.25 per cent in 1983 as against 1982." (Sárközy 1986:309–310.)

It should also be noted that it is not only the large number of legal norms which is a problem, but also that the legal norms change too rapidly, therefore, the legal

material is *incomprehensible*, and suffers from a lot of internal contradictions. All this stresses the old statement of the legal discipline that overregulation is not a quantitative, but a *qualitative issue*. This is because if the learning of the legal material related to economics and consequently its observance is an impossibility of information theory, then the effectiveness of law (as a highly important means of social regulation, through which the entire set of economic regulators is supposed to function) can also be only very low, hence law is *inflated*, and its value is *devalued*. The new phenomenon called in the literature the 'bargain of regulation' is related to all this, referring to the fact that some managers of enterprises have an opportunity to influence even regulation because of the hierarchical organization of the institutions, the specificities of the political system, the great significance of personal relations and because of some ideological remnants. Tamás Sárközy also points out in his book cited above, that "when overregulation is often criticized from the side of economic policy, or from the enterprises and public opinion, a legal prohibition is demanded at the slightest negative phenomenon and abuse". (Sárközy 1986:311.) I may add that it is not without success.

The other phenomenon deserving attention is that overregulation has not evolved in the higher level legal sources, and particularly not in the form of statute or before 1989 in the form of law decree, but in the legal norms regulating implementation. As it was put by Tamás Sárközy, the large mass of legal regulation accumulated in the sphere of the so-called secondary law, such as in the spheres below ministerial orders. In such forms the nature of which as a legal norm can be questioned, as the others – like the so-called legal directives – are no more than "*instruments of the expediency of public administration*". However, they are also largely realized while imitating forced legal regulation, and public opinion also treats them as legal norms." (Sárközy 1986:308–309.) Therefore Act XI of 1987 on law-making satisfied a real social need when, in keeping with the earlier signals of the legal discipline (Kulcsár 1982:19–20, 81–84; Szabó 1985:3–13) it initiated the elimination of the contradictory practice which had overgrown law-making. This Act already differentiated between *legal norms* (statute, law decree, decree of the Council of Ministers, ministerial order, ruling by the secretary of state, order of a council), and the "other means of state direction". Even the latter were divided into two groups. Those in the first group (resolutions of the organs of the state authority and public administration, the 'state standards' defined by them, the prices set and the statistical announcements) are not legal norms, but they are obligatory, whereas the 'legal directives' belonging to the second group [the directives and resolutions of the National Assembly, the Presidium (before October 23 1989) and the Council of Ministers, the directive principles and information issued by a minister or head of an agency of national competency] differ from the other legal means of state management – as it is stated in the Act – in that "they are not obligatory in the legal sense of the term. Their primary objective is to render assistance to those who implement law, to promote the development of a uniform legal practice, and to give a legal form to the recommendations of the state organs." How far this distinction would affect the actual legal nature of the 'other legal means' of state management which are not legal norms in social practice, will be determined by the phenomena

of their evolving function. In fact the Act and the justification attached to it is uncertain in this respect as well as in a number of other respects. For instance, differentiation between a legal norm and the 'other legal means' is not clear beyond the statement that the latter are not legal norms. Therefore it would be too early to draw any conclusions about the impact of the Act on overregulation, as it can be maintained by the 'other legal means' as well, besides the legal norms. But it is quite probable that these 'other legal means' are less limiting in their creation and modification if compared to the legal norms. For instance, an order is obligatory for the subordinate organizations of a ministry or national authority, and such instruments can still make the normative situation in which the economic actors have to move, uncertain and contradictory, even if these orders cannot cover enterprises, co-operatives, etc. with the exception of the economic organizations that can be classified under this heading by law in force, and which are active in foreign trade and in the sphere of defence. The organizations of public administration, acting in keeping with the orders, influence the behaviour of economic organizations by their own activities anyhow.

Although it does not extend so far as in the economic field, the outlook, which evolved in the 'socialist' political system – particularly on the basis of the Soviet development of the 30s – according to which the starting point of regulation was the prohibitive or permissive behaviour of 'authority', is still a significant source of overregulation. The consequences of this legal political outlook could be characterized with a slight exaggeration as efforts towards the 'encirclement of the citizens'.

This outlook and the practice of law-making deriving from it goes hand in hand with the attempt to transform society, with its starting point Lenins' dictum: "no private interest whatsoever is known to us". This political system has very little regular feedback from its own social environment and is not independent of the historical limitations in Eastern Europe, 'socialist' society and its political objectives. Consequently, the social environment became the subject of political efforts so much that in those times even in the transformation of the society the latter remained only *an object to be transformed*. The consequences of political decisions, the different interest relations and the way the decisions affect them, the tensions and conflicts accompanying transformation were fed back only in a fragmentary manner, mostly transformed by organizational interests, into the mechanism of the political system. This allowed little opportunity for initiative for the consideration of participation and of spontaneous processes. Ultimately the conditions set in, which had been indicated by Marx earlier, namely that "for the bureaucrat the world is the mere object of his handling". (Marx and Engels 1957:251.) From this situation came legal regulation which aimed at shaping the social environment and almost every relationship of the individual, and in which even that old legal principle that whatever was not legally prohibited, was permitted, was pushed into the background.

Marx's reference to the relationship between the bureaucrat and his social environment is appropriate as although law continuously interfered into the most personal, intimate sphere of man (even into the world of family), and to an increasing

extent, the 'encirclement' of the individual primarily unfolded in the relationship between the *citizen and public administration*. This is also indicated by the fact that overregulation is primarily manifest in the field of law related to public administration. (Madarász 1987:16-17.) But it is also true that one may go wrong most in the field of law related to public administration if overregulation is only approached quantitatively and not "together with the legal content (together with the exercise of power in public administration) expressed by it". However, this "legal content is also an instrument of the exercise of public administrative function", hence "the assessment of a legal solution can begin only with weighing the social role, the *role played in the government of the society* by public administration." (Madarász 1987:18.)

The expansion of the management of the society means the expansion of public administration even without any other factors involved in. (To be discussed in item 2.) Therefore it is a logical conclusion to say that the centralized nature of the 'socialist' political system and the penetration of politics into practically every sphere of activity has led to the proliferation of public administration and law related to it. The growing penetration of public administration into the conditions of life is naturally promoted by objective processes as well. The objective need for regulation evolves as a consequence of a number of different factors, including scientific research (for instance compulsory prevention in the field of public health - vaccinations, screenings - or other measures taken against epidemics), or because of the appearance of new sources of danger, such as the rapid and alarming appearance of environmental hazards, etc. (Madarász 1980.) However, the impact of any objective trend appears in legal regulation only after it has been consciously assessed, and the ideological, political aspects of conscious assessment can be very significant. (See Kulcsár 1982:87-122.) Simply the basic ideological stand which can be safely called the utopia of the 19th century, namely that the world, including society, can be rationally, scientifically shaped, is an irrational approach despite its apparent rationality, because it does not take into account the unknown processes, phenomena and interrelationships of the world and society, or, what is even worse, it supposes them to be *already* known at a certain level of scientific development. Such an ideology involves the voluntaristic shaping of the society (although it is apparently based on seemingly objective processes), one of the consequences of which can only be the proliferation of administration and legal regulation. In this context failure is a *factor enhancing regulation*, as in this mentality "A frequent response to the ineffective legal norms is to superimpose new, more drastic laws upon the old, unenforced ones (as it was impossible to enforce them - K. K.), as though a more severe piece of formalistic legislation could correct failures in a milder rule on the same subject." (Ocran 1978:187.)

The significance of ideology, of course, does not expire in the context and basic consequences of this 'basic position'. Often it appears in the most impossible forms in the relationship of man and public administration. We need only recall legal regulation concerning abortion, which involuntarily subjects the most intimate sphere of women to the decisions of selected committees without any justification.

The ideological stand of Lenin: "no private interest whatsoever is known to us" met great social resistance which shows its complete anti-human character. The dysfunctional nature of a policy with such a content and decision-making practice might grow to such an extent that it endangered or destroyed policy evolved with this theoretical approach and the organizations embodying policy. However, the protection of 'private interest', of the personality and personal rights against state interference is not a factor necessarily leading to a decrease in legal regulation. It is because the individual and his or her relations are 'soft' media in the face of the activities of the state regulated by law (at least in Eastern Europe, and with the illusion of 'softness', attractive to state activities), it is difficult to fend off 'encirclement' of the individual by the 'administrative state', without the aid of legally set limitations. Therefore, the legal protection of the individual requires legal regulation. "It is a paradox that the *need for regulation and defence against it intertwine*, regulation swallows everything to such an extent that at times it offers protection even against itself. 'Regulation' is not a cause, only a corollary (directing, legitimating, etc.) interference and the numerous kinds of dependence – only part of which originates from the state now – accompany the process of integration. On the other hand, situations affecting the individual most directly, multiply which, as soon as they become technically feasible, are immediately implemented (such as transplants, new methods of birth control, computerized registrations). They have to be incorporated into the order of the society and have to be regulated. Therefore today the protection of the individual uses the slogan of freedom from regulation, in the meantime this demand has become outdated. Actually the protection of individual rights lays *emphasis on the safeguards of regulation* . . . It should not be forgotten that 'sitting out law', *defence aiming at autonomy itself brings law into the intimate sphere up to the limit of possible regulation, up to the issue of life and death.*" (Sólyom 1983:315–316.)

The reason why this protection by legal norms is needed – besides and beyond the attempts of the state to interfere – is also related to the fact that "gradually the medium of non-legal protection comes to an end, the communities held together by a non-legal order dissolve, and the extra-legal normative systems themselves are weakened. On the other hand, and this is the graver reason: the 'forms' of attack against the personality also change. The place of insults against the personality is taken by *impersonal*, technical threats, which overthrow the balance of power by themselves and further, because they originate from an *extraordinarily superior force*, if compared to the individual, usually from an organization, hence the danger is impersonal in this sense as well." (Sólyom 1983:317.) The norms and even the methods of setting disputes, which do not only survive besides those of the state (even from 'traditional' sources), but appear to revive or even evolve as something new, even if they offer some protection are inadequate to the new dangers. The state, as the authority capable of asserting legal norms and safeguards (theoretically even against its own activities!) is becoming increasingly significant. "The fact, however, that self-protection is being replaced by the protection of the personality as a 'service rendered by the state' can be coordinated with the programme of independence, 'autonomy' from the state only in ideology." (Sólyom 1983:318.)

This problem, however, leads away from the *specific* factors of legal overregulation of the 'socialist' political system, as the facts outlined above manifest themselves in every society advanced in modernization.

2. A special consequence of the evolution of the 'socialist' model of society in Eastern Europe is the fact that it has functioned as a model for societies both near and far, but always at the periphery, which are looking for some kind of 'socialist' path, and it is difficult to separate the characteristics of the model of the 'socialist' society and of the "socialist" political system from the special circumstances of East European history. It is difficult to find out what traces of this political system are linked to some vision of socialism not linked to the region – if there is one – what are the regional historical specificities related to backwardness and the desire to escape from backwardness, and what are the consequences of the survival of these traits.

Now after the political transition, and rather later, after the successful transformation of the economy, the 'questionmark' would be set up more clearly: what phenomena were the consequences of the 'socialist' system, and it remains to be seen how can be overcome, if at all, the special traits of the East Central region of Europe. (It is a fact that even during of the government of transition of 1989–90 it was started a severe deregulation process – with results – but it is impossible to forecast the future results and prospects in legal regulation of the complete change in economics.)

The most important historical trait of the political system which evolved in Eastern and East Central Europe is its excessive weight, already referred to. It also means that political decisions appear in almost all the spheres of social activity, that *politics shapes the relationships of these spheres* along its own logic. Over-emphasizing the instrumental nature of legal regulation is a natural consequence of *the excessive weight of the political system*, hence quantitative growth and the great 'speed of rotation' of legal norms (Petrik 1985a:389), that is their extremely great changeability.

The growth in the number of legal norms and in the 'speed of rotation' is accompanied by an increasing shift of law-making to lower levels. Today, this process has gone so far in Hungary that forms of regulation have become predominant which cannot really be considered legal norms in the spirit of Act XI of 1987 on law-making, as they are only the "legal means of state direction". However, the real regulatory value of these forms – precisely because of the phenomenon of the inverted pyramid – is greater than that of any legal norm produced at the upper levels of the hierarchy of law-making.

I would like to mention one further consequence of the two 'pyramid phenomena' and their mutual influence, which, together with other phenomena, are alive in the legal systems of the developing countries. The more legal norms are made, the more *controversial* the *normative situation* becomes by this fact, on the one hand the more there is a growing opportunity and even 'pressure' for further regulation (together with the employment of penal norms as the 'ultima ratio'), and, on the other hand, organizational and individual behaviour aimed at *evading* legal regulation entirely,

increases all the more. As a consequence of overregulation and its contradictions the *spontaneous regulatory mechanism of social processes and phenomena* come to the foreground, naturally weakening the position of law as such in the society, making the carrying out of its functions more difficult and limiting its effectiveness in the process of modernization as well.

As the ambitious goals, tasks and expectations are mostly linked to premises of an ideological nature – which were and could be particularly attractive on the eastern periphery of Europe because they have been far from realized, – one cannot underestimate the influence of ideological elements upon overregulation. Often these elements have set requirements different from economic and legal rationality, hence legal regulation thus made acted as a ‘substitute’, legal norm related to the phenomenon of shortage, in other words it had to assert values not realized in the face of actual practice, hence the result could be nothing else but failure.

One aspect of this process was described in one of János Kornai’s recent papers. “Enormous forces are at work in the socialist economy for a return to the maximal state (the maximal state is the highest, still operating degree of bureaucratic authority interfering into everything) (Kornai 1988:6), which would divest the individual of the opportunity of free choice in a number of economic spheres. A lot of bureaucrats would like to regain their lost authority. Besides, the requirements of the internal consistency of administrative regulation also assert themselves. If a large number of, but not all the economic activities are regulated, then there are loop-holes. It is natural, that in this case the intention to close the loop-holes and leakages appears with the help of more central regulation, more laws and orders. Finally, the traditional ideology and ethics also have an important influence, because apparently they legitimize the trend of ‘re-statization’ or ‘the return of the state’. It calls for the termination of the various undesirable phenomena, including anarchy, selfish individualism, the drive for profit, undeserved incomes, based on ownership instead of labour, the immoral richness of a few lucky individuals, while the rest of the society has, no access to such material well-being.” (Kornai 1988:20.)

It is hardly could be stated, however, that this danger already has passed by the change of political system in the former ‘socialist’ countries.

It can be hardly disputed either that the differentiation of incomes and wealth necessarily grows as a consequence of the process of economic transformation, of the spread of the (real, not simulated) market mechanism. It is also beyond doubt that the basis of such a differentiation occasionally has been, and would be – in a spectacular manner – craftiness, the abuse of monopoly positions, and the uninhibited exploitation of the opportunity offered by the difference between demand and supply. Thus it is not always good work and achievement, or a socially useful enterprise. However, this can be hardly avoided because of the weakness of the market economy. Such behaviour can only be reduced with the strengthening of real market relations. These phenomena, however, offer an apparent reality to the ideological elements mentioned by János Kornai even to the extent that *every* differentiation of income and wealth may be traced back to such circumstances. This socially quite ideological element, has been more or less accepted and reflected in legal regulation, in some cases to the detriment of the economic and technical

development of the country. One need only remember the (now void) maximization of private imports at 25,000 forints in Hungary some years ago, for which the law-maker could find no other justification but the struggle against 'undeserved incomes'. It should be added that such a demand for regulation, deriving from 'national envy' is easily 'heard' by the bureaucratic organization, as the individual entrepreneur ultimately leaves its sphere of authority, or its power decreases in this respect. Hence it 'incentively' negatively assesses every phenomenon which broadens the circle of people independent of the 'bureau', not to mention the fact that mediocrity employed in bureaucracy almost naturally identifies differentiation in income and wealth with dishonesty, or – some years ago – with an ideological feature, such as the 'reproduction of capitalism' (which again became out of the 'fashionable ideology' now). The slogan of so-called 'equality of opportunity' after the retreat of the thesis of equal incomes has a similar function in many respects, the practical realization of which sometimes is not done by the demand for more opportunities for people with fewer chances but by a decrease in the opportunities of those who seem to have better chances. The idea of the equality of 'poverty' has not at all disappeared from the societies of Eastern Europe.

One feature of East European social development functions as the source of legal overregulation, as well as having other dysfunctional consequences. It has been known ever since the activities of Ferenc Erdei, that the 'expertise of dominance' has been superior to objective 'professional' expertise in Hungarian society, and in certain periods it was usually authority and politics which was dominant over expertise. (Erdei 1980:308–309.) The same phenomenon occurred in the societies east and south of Hungary and in the countries of the 'Third World', but there was an even greater emphasis on authority. Yet the components of the expertise of dominance in the historical Hungary – in the 'land of lawyers' – had some special content, namely legal expertise, which meant the expertise of lawyers, some surplus to the benefit of 'expertise' if compared to the other societies of the region. However, the dominance of legal expertise started to weaken in the wake of World War I in the face of another, 'objective' expertise, and it increasingly waned after 1945. It is commonly known that with the beginning of 'big' law-making, of the proliferation of legal regulation the legal profession as such was increasingly pushed into the background, its expert knowledge as well as social esteem was artificially reduced. (Kulcsár 1985a:320–332; Kulcsár 1987c.) The element of expertise 'fell off' from its position of authority – the dominance of which had been strengthened to an unprecedented extent in the face of expertise and even today it weakens but slowly – to the detriment of legal expertise as well as the content of the *expertise* of politics as a profession. Thus the use of law as a substitute instrument could be done practically without professional limitations, in a voluntary manner, and the quality of the legal norms made significantly dropped. A major decrease in administrative expertise also took place at that time, and the spread of bureaucratic law-making, resulting in over-regulation anyhow, was pushed towards the proliferation of rules by the lack, or low standard of expertise.

A special situation evolved. When the term 'legal profession' became a pejorative one, mostly because it was concerned with legal expertise, respect for legal values

and the observance of the specificities of law, together with certain limitations, legal regulation – disregarding this legal rationality – became a constantly and incompetently used instrument for the solution of all kinds of social problems. This is how the direct action of authority, not restrained by law – which has been characteristic in this region not primarily in Hungary – acquired a new form at the eastern periphery of Europe regulation in ‘legal’ form but not restricted by legal rationality, the voluntary nature of which did not differ much from autocracy dressed in the formal garb of a legal framework.

but not restricted by legal rationality, the voluntary nature of which did not differ much from autocracy dressed in the formal garb of a legal framework.

3. Legal overregulation, however, is not only a specific feature of the Hungarian, or East European, and not only of the ‘socialist’ (or developing) societies. One may read in Western sociology about the flood of laws and lawsuits, about the explosion of law, about ‘bushes of law’, the Cassandran outcry complaining against the ‘legalization’ of every social, economic and political relationship that has been constantly growing during the past seventy years. (Raiser 1987:167.) References are made to ‘legal contamination’, to the crisis of regulation, and a possible protection against it is seen in de-legalization and in the withdrawal of law. (Galanter 1980; Sajó 1988:174–192.)

The question is that if those phenomena also occur in the advanced countries which have been assessed in relation to the role of law as problems of modernization in the backward countries, such as overregulation, the growth of symbolic legal norms, the evasion of law, etc., then how far can they be considered as phenomena of the process of modernization?

In reality the quantitative growth of legal regulation is related to basic processes in the advanced western societies as well. Habermas interprets ‘legalization’ as part of the secular process of civilization, the first wave of which was the establishment of the bourgeois democratic state, and the second wave was brought about by law-making as a corollary of the evolution of the social state. In this state, too, law increasingly functions as the instrument of management and transformation in the field of the economy as well as of the society. This is called by Habermas somewhat inaccurately the ‘colonization’ of life by ‘law’. Undoubtedly greater social security, and even the protection of the rights and personality of the individual have resulted in the growth of legal regulation, as is indicated by German data, where there was a similar and even more outstanding growth. (Rotthleuthner 1985:206 et seq.; Raiser 1987:169.)

The overregulation of the activities of the organizations of public administration is also a general phenomenon. One form of it was already described by Roscoe Pound when he noticed that public administration was regulated to such detail and so restrictively in 19th century America, that the discretion necessary for efficient operation was missing. (Pound 1914:12–13.) Such an excessive emphasis on the restrictive nature of law can really be considered as one of its dysfunctional phenomena (Vágó 1981:20), but today the growth of law-making by administrative organizations has become a more significant factor in overregulation. In the United States, for instance, in 1950 such legal norms covered 9500 pages of the official

journal, the *Federal Register*, and this quantity grew to 77,000 pages by 1979. (Vágó 1981:125.) The more extensive state activity becomes, and consequently the more the number and competency of the administrative organizations grow, the more their law-making activity increases, by which they make their tasks concrete and set their procedures – even if it is done within the framework of valid, but too broadly or programmatically worded legal norms. This type of law-making – called bureaucratic above – is present even if the phenomenon of shortage described in Part One is not behind it. (Which – if it is present – naturally further increases regulation.)

Thus the unfolding of the modern conditions of life, the new scientific discoveries and their introduction to technology, to the economy and society leads directly to increased legal activity, and partly indirectly through the law-making of the bureaucratic organizations established for the handling of new phenomena and situations. But the treatment of the new phenomena and situations by the implementation of law and the settlement of the ensuing disputes also leads to the growth of regulations even if, or just when dispute settlement is taken away from the traditional juridical organization in the interests of expertise, the promotion of the interests of the parties concerned, of saving them from lengthy procedures, etc. For instance, in Britain, such judicial bodies were set up in the fields of education, mental health, social security, health service, national insurance, pensions, etc., on the basis of an Act of 1958 (Tribunals and Inquiries Act). These tribunals function at least as much as part of the welfare state as they do as juridical organizations and the network has been expanding ever since 1958. (Bell: 1969.)

Therefore, the statement that the welfare state serves the cause of freedom just as much as it is endangered by it (Bell 1969:1), is reflected also in the changes of legal regulation.

However, the legal system has a 'self-developing' feature as well. This means that the existing legal system is inevitably in permanent movement because of its inherent needs. The sources of this movement are the following:

- efforts towards the dissolution of the existing and constantly reproduced contradictions within the legal systems, the instrument of which is usually new regulation;
- the consequences of the changes that take place in the various branches of law upon the other branches;
- the demand for changes in material law upon changes in the procedural rules, etc.

However, these phenomena of apparently global overregulation have been influenced in the direction of further overregulation by factors associated with 'socialist' society and the historical specificities of the Eastern periphery of Europe or the 'Third World'.

De-legalization, the movement intentionally aiming at the reduction of legal overregulation is also an almost general reaction, but it again has marked features at the Eastern periphery of Europe and in the 'Third World'.

De-legalization essentially means the retreat of legal regulation, not only in the sense of general 'holding back', but also a retreat from the already regulated fields.

Complete retreat is apparently rare and occurs mainly in fields where legal regulation was unjustified and contrasted with the rationality of law itself. Partial de-legalization, however, is a phenomenon touching upon daily life and in this case retreat means the depth and detail (perhaps differently in the various forms of legal sources) of regulation.

Today de-legalization is just as much a slogan globally sounded (and in some cases it is even a demand), as the phenomenon of overregulation is. Its forms, together with the possibility of regulation taking the place of retreating law and, finally, the ideological context of retreat, manifest themselves in a number of ways. The main trends outline three broad types.

The first type appears in the advanced capitalist countries. Here too, the phenomenon of overregulation has provoked a quest for means which may reduce it. The following quotation refers to the socio-ideological context of de-legalization in this case: "The evolution of the welfare state as a developing civilizing process seems to be irresistible, consequently the growing predominance of law cannot be halted or turned back either. The task can only be to sketch its limitations and to mitigate its negative consequences. Sociology has provided a movement with this purpose in mind, calling for *de-legalization*." (Raiser 1987:174.) The basis of this movement – continues Raiser – is that the complex directing programmes of the state have not only remained unrealized, but have been accompanied by innumerable unforeseen and undesirable side effects. In addition, law as a kind of political means of managing society carries in itself its own limitations, as it can modify society only to the extent allowed by society's inherent laws. Thus society has a certain immunity from legal interference. (Teubner 1984:334.) One symptom of this immunity is the growth of the 'self-regulation' of the social processes, phenomena and organizations mentioned above, together with signs of the 'evasion' of law.

Besides the sociological literature emphasizing the 'modesty' of the state as a solution (Crozier 1987), the idea and practice of "Regelung durch 'Markt' statt durch Recht", "market regulation instead of legal" is becoming increasingly significant. (Blankenburg 1983:45.) Blankenburg, when analysing the reasons why the legal rules related to schools have become so confused, reached the conclusion that the 'density' of legal regulation does not only grow in the Federal Republic of Germany, but that these legal norms are unavoidable as well, whereas in the United States, where the state and the law also interfere into these relations, the individual still has some choice, even if it is very expensive. It means, the author continues, that '*participating subjects*' live in the Federal Republic, though they participate only through the 'detour' of Parliament and under the supervision of administration, whereas the parents and pupils are *consumers* in this respect in the United States, where their behaviour is regulated by the 'market'. The only medicine against increasingly legalized relations are *laws* regulating basic relations instead of the wide variety of legal norms which go into detail. (Blankenburg 1983:46.)

The dysfunctional consequences of the quantitative growth of legal regulation have led to a regulatory crisis even in the social-legal or welfare state. The trend of change is by no means unambiguous; the exit of the state or law from the regulation

of relations. The slogan of the 'modest state – modern state' is rather the search for a solution which emphasizes the activity and participation of the citizenship, for such a state where citizen participation can take place within a framework of the most important and indispensable regulation, but where those responsible for regulation also take into account the participation of the citizens (even if indirectly) in the elaboration of the regulation. Essentially the growing emphasis on local self-government illustrates a similar development.

Another phenomenon of 'de-legalization', related to this tendency is the appearance and spread of those forums which – at times established by law – directly involve the population or part of it in the management of certain affairs or in the settlement of disputes. Such are the consumers' organization which have developed mainly in the Scandinavian countries: the councils and arbitration committees. But it is a question as to how far the appearance of these forums, based on lay participation, can be considered manifestations of the process of 'de-legalization' despite the dominance of the lay element. They are not only established by legal norms but their operation is also based on legal regulation from the point of 'material and procedural law'.

This type of 'retreat' of law has acquired a special emphasis in the former 'socialist' societies of the Eastern periphery of Europe because of ideological reasons. I have already mentioned that an anti-legal attitude had appeared practically everywhere in the 'socialistic' tendencies because of the theory of the 'withering away of law', which was later on replaced by the excessive utilization of law as an instrument, yet the demand for escape from law has been revived by the various phases of the changes in policy. At times the ideological approach is strengthened which is linked to the perspective of the disappearance of state and law, to the 'management of things' instead of persons, to 'self-management'. It is commonly known that N. S. Khrushchev, assessing the dysfunctional consequences of the political system which had evolved in the Soviet Union of the thirties, announced the growing significance of social organizations, the transfer of state functions, or, perhaps more modestly of state tasks to these organizations, regarding it as a means which would guarantee the participation of the 'workers' in public affairs, which would reduce the excessive weight of the state, and would allow for restraining legal regulation. It is also known that – at least in Hungary, as I do not know sufficiently the practice of other former 'socialist' countries – this objective remained largely a formal one. This was partly because tasks were transferred to 'social organizations' which were themselves bureaucratic (social insurance was taken over by the Central Council of Trade Unions), and partly because it led to the setting up of practically inoperative organizations (like the social courts). In 1972 a survey conducted by the Central Committee of People's Control proved that, for instance, the so-called handling and management of social insurance by the trade unions had resulted in an even more intricate bureaucracy (exclusively in the pejorative sense of the term) than the state one had been, together with such an output of rules which – as they had to be implemented by the law courts – ultimately did not differ in any way from the legal norms, but only made positive law even more confused.

The third type of 'de-legalization' growing primarily in the 'Third World' (though it has appeared in the advanced countries as well) is the spread of the so-called 'grassroots' movements. These movements were launched with the slogan of shaping the conditions of life from 'below', of coexistence without formal regulation and a set of institutions, in contrast to the over-regulation of modern societies which could not be controlled by the population anymore. The movement has been accompanied by an effort to sustain the traditional customs and institutions in almost all the developing countries. These efforts have often been supported by the idea of maintaining a special identity, by a demand for strengthening 'differentness' and the 'special', in some cases, to the extent of a fundamentalist ideology in the face of an increasingly uniform world requiring adaptation.

These objectives are particularly strong in places where there are other ideological contexts besides Marxism (like Gandhism in India, Singh 1978:59-60), in such cases the specificities of the communities permeated by traditional culture act by nature against modern legal approaches. (Singh 1978:164-165.) In India, for instance, after Gandhi's experiment, particularly in the second part of the thirties (Brown 1990:296-313), Rajni Kothari thinks along these lines in political science stance, after Gandhi's experiment, particularly in the second part of the thirties (Brown 1990:296-313), Rajni Kothari thinks along these lines in political science and Upendra Baxi in the law, laying special emphasis upon the significance of the non-state legal system. (Baxi 1982:328-347.) The so-called religious basic communities in Latin America play a similar role in many respects. (Marton and Vágási 1989:444-447.) In some countries efforts were deliberately made to establish such grassroots communities, which could be commissioned to do the job of public administration and even of adjudication. Examples are the kebele-system in Ethiopia, or the revolutionary committees of Cuba based on neighbourhood relations (earlier such 'primary' associations appeared in Peru as well).

However, this is hardly a negotiable road. From the point of regulation it is not feasible because no matter what organization makes it, a rule, if it is ultimately enforced by the state has a legal nature, no matter what it is called, and such a possibility is always there whenever an organization is granted the power of regulation going beyond its own members (even if indirectly) by the state. Its functioning in the society is not determined by the name but by the actual functions.

A way out is offered by an increased acceptance of 'regulation by the market' - the concept of the market is understood broadly, including the reality of the regulation of spontaneous processes. But this is accompanied by changes in the 'technology of law-making' as well. In other words, more comprehensive and lasting forms of legal norms are needed which would also allow greater space for spontaneous changes, instead of transient, hence more weightless forms of detailed regulation. Its precondition is to get rid of the illusion of influencing in detail the real processes in politics, in economic policy, in cultural policy, etc., as well as in legal policy. László Antal introduced a 'fitting expression' (Antal 1980): he described the *regulatory illusion of the managers* of the economic mechanism. Those who wish to regulate believe that they can achieve what they want with their interference. Our theoretical logic and practical experience of the redistribution of

profit prove that over-regulation ultimately makes regulation an illusion. If only a single marked diversion were employed from the original profit, maybe it could be effective. But the ensemble of a myriad of considerations proves to be ineffective. Perhaps the joint effort of social psychologists and economists could find out by observation or by experimentation where the *stimulus threshold* of redistributions was. If altogether only a few redistributions took place, then each of them could cross that threshold and could be effective. But the change brought about by a fragment of all the redistributions, would certainly remain below the stimulus threshold.

In addition, constant changes further enhance insensitivity. It is insufficient to sense the consequences of one or other redistribution, but reactions upon them are also expected. Moreover, the reactions are supposed to be incorporated into the permanent behaviour of the enterprise. But by the time all this had taken place, new kinds of redistributions would enter into force.

The total effect of the wide variety of constantly changing redistributions is that the ultimate profit cannot be predicted, as it depends upon good luck or the whim of regulators. And if this is so, then it is better to strive to influence the regulators by 'lobbying', bargaining, with the help of contacts, pressure and similar methods. (Kornai and Matits 1987:707I.) The description does not only hold true for the regulation of profit, but for all regulation which goes beyond a 'critical mass' of possibilities available in real processes and phenomena. The second precondition deriving from the effort to get rid of the illusion of 'wishing to regulate everything' is the outlook and attitude of the law-makers and those who implement law that 'everything is allowed that is not forbidden', 'whatever is not regulated', which permits the changes of spontaneous behaviour, which should become general.

The chances of avoiding the 'temptation to regulate' are not great even in societies of an advanced legal culture, and in this respect the societies on the path of modernization are in an even more problematic situation with their specific legal culture. The efforts of the elite to regulate and the traditional relations, the traditional norms deriving from them often produce contradictions that cannot be dissolved.

III

'Modern' Law and 'Traditional' Legal Customs

One of the most complicated phenomena that has evolved in relation to law and the process of modernization – primarily in the so-called developing countries, and there particularly in the societies preserving the traditional tribal and clan relations – is the mutual influence of traditional law or legal custom and modern law (whether colonial or made after independence), their place and possibilities in the modernizing society. The question has already been raised in connection with the plurality of the legal system in some of its theoretical aspects, and there I mentioned that in certain respects this problem was not unknown in the modernizing process of the European peripheries either. The relationship of modern law and traditional legal customs was studied in Hungary (and in Romania too), the latter were collected, and they were even assessed by the so-called movement for research into 'folk law' in the 1930s and 1940s, with a certain ideological approach constituting one of the significant factors in laying the foundations of law-making. (It should be noted here, that the collection and analysis of 'legal folklore' was not accompanied by such a consideration in the European centre.)

Thus the question is not entirely alien to the modernizing process of the European peripheries either, yet it has become topical nowadays (and more markedly in the recent past) in the newly independent states. So much so, that the possibilities of traditional customary law (in the following I shall use this technical term), and its place in the building of the legal systems of independent countries have been discussed by several scholarly conferences.⁸ The attitude towards traditional law and the legal past of the country has been different in these countries and has been changed by the passage of time. Therefore Alliot could justly speak about a large-scale offensive against the survival of traditional law, which resulted in major law-making in the new states: but also about the fact some of these new codes left part of the traditional institutions unchanged, even if their essence was altered in a number of respects, for instance, in that the compulsory force of the rules and institutions was not linked to the village communities but to the state. Elsewhere – like for instance in the new states: but also about the fact that some of these new codes left part of the traditional institutions unchanged, even if their essence was altered in a number of Ivory Coast, the law-makers wanted to safeguard economic and social development by the total break-up of the traditional structure and followed contemporary French law (see the Act promulgated on October 7, 1964). (Alliot 1980a: 172.)

Apparently the consequences of the strength of pre-independence indirect rule are not indifferent towards the changes of later attitudes to traditional law. The place of customary law within the legal system depended upon the nature of indirect rule during the colonial period. And the strength of indirect rule reflected in many respects the social, economic and cultural advancement of the society and the changes that had taken place in its structure. However, the surviving and functioning traditional customary law was to some extent modified by the legal system coming from 'outside' to an extent depending upon the actual transformation of the society.⁹ In the British colonies, for instance, the impact of the principles of British law – primarily on the changes in criminal law and procedures – proved to be significant, even though a complete transformation did not take place in this field. The effect of colonization was also significant in at least some measure, on the 'unification' of the customs of different communities. Finally, the socio-economic changes also modified customary laws – particularly with the growth of individualism – in some significant spheres, like for instance family relationships, land tenure, inheritance, and so on. (Morris and Read 1972:211.)

A special situation evolved after the former colonies had become independent. The requirement of legal security, the legal knowledge and general education of the local jurists and judges, also the changes that had *already* taken place primarily in the urbanized areas, and finally certain requirements of modernization (the place occupied in international relations is not a negligible point either), and even the pressing demand to get rid of the 'primitive' components of the immediate past, required the maintenance of the *law of the earlier colonial power and its further development based on its fundamental principles*. On the other hand the living conditions of the non-urbanized majority, the identification of traditions with the products of the 'Volkgeist' of the given people, the linking of identity to the traditional legal system, a different demand to get rid of the past (of the colonial rule), and finally, special ideological factors (the local interpretation of socialism) *demanding the strengthening of the traditional legal system*. The resolution of the contradiction was attempted in different ways. But it would appear that the judicial organization – though it is true that there are complaints against its conservatism¹⁰ – has tried to create and maintain a realistic balance right from the outset.

The legislative experiment to 'reconcile' traditional law – in this case sacral and tribal law together – and modern law was first made in the Indian constitution.

A number of the articles of the constitution – particularly the so-called 'directive principles', (that is the chapter containing the principles guiding governmental work, Articles 40, 43, 44) and the Schedule dealing with the tribes – touch upon the future of customs directly or indirectly. The constitution, for instance, calls the attention of the government to the promotion of village traditions, traditional institutions and economy (panchayats, local industries). But at the same time it calls for the creation of a uniform civil code as well. It protects the tribes and backward castes from social injustice, and strives to eliminate their disadvantageous position. Thus, the Indian constitution calls for 'positive discrimination' in favour of the 'untouchables' and tribes listed in the Schedules which would structurally eliminate these traditional societies. The attempted law-making and the efforts made towards

the enforcement of the relevant laws led to harsh political and even physical conflict and success has been relative. (Galanter 1984a.) But the very same constitution was effective in maintaining the existing structure and situation as well, as it allowed the suspension of some legal norms in the tribal areas. (Basu 1959:160 et seq., and 588–589.) The tasks of law and jurists grow in this respect, and a significant role is to be performed by public administration most intimately connected with the problem. "... even though the administrator may not be put in the category of a judge, a lawyer or a teacher" – writes an Indian legal scholar – "he is in a developing society called upon to perform a function in which the techniques of the law are closely involved; when this growing role of legal technique is viewed in the light of the fast-moving influence of social reform movements, caste, religious and other pressure groups as *instruments of social change* we get an idea of the responsibility of the legal profession in our society." The process of using law for social transformation and change "is evidenced not only by the provisions of the constitution but also by a great deal of continuous legislation." (Sharma 1976:31–32.)

Such a complex function of law, the promotion of socio-cultural changes on the one hand, and a certain protection and obviously also transformation of traditional customs and customary law on the other sets a delicate task for the legal system. In India two important aspects of this task can be observed: one is the selection of customs and as a means of it the collection, ordering and even codification of customs (Sinha 1976:83–87), and the other is the judges' activity, in which the collision of the rules of the two spheres demands an authentic answer, as in a case. In this connection I quote only two such cases from the Indian High Courts where a clear view of theoretical significance has been given to this 'challenge'. In *Erumagha v. Narayana* (1958) the court ruled that if the custom was not rational and did not meet modern requirements, it should be *rejected*; whereas the decision in *Dasaratha Rama Rao v. State of Andhra Pradesh* (1961) went further and stated that even a custom which was once recognized by law had to give way to basic legal principles.

But in Indian jurisprudence, too, an opinion starting from the opposite theoretical basis can be found. I quote its most characteristic manifestation: "There is no intention to belittle the contribution made by common law jurisprudence to our legal system nor it is possible to overlook the fact that the social structure of present day Hindu society has undergone a change making it impossible to apply the Hindu legal concepts in their entirety. It is, however, submitted that even today our society has not succeeded in adapting to the present legal system, based as it is on common law, without reservations, because it finds that the system is not in consonance with its cultural mores. There is no call for the wholesale adoption of Hindu juridical ideas, but of the underlying concepts, values, and ideals which give it its vitality and longevity, and which are basically secular in character and sound in principle." (Zaveri 1979:41.)

The practical solution of the conflict between 'modern' life and modern law and legal customs and customary law representing not only tradition, but a particular culture and identity in the eyes of many takes place under the conditions of everyday life, in keeping with the nature of living conditions, with neglect, disregard, or

're-interpretation', depending upon the nature and way of life of the different parts of the society. In legal practice the ruling of the law courts is decisive, though naturally public administration also plays a significant role even if it is less spectacular or known. Therefore, the role of the lawcourts is highly important from the angle of the successful use of law in the service of modernization.

In India the complicated system of British law, modern Indian law (the difference is frequently blurred, and it is not rare that particularly the legal norms promoting programmes of social transformation and the traditional liberal British legal principles contradict each other), the Hindu and Muslim sacral laws and the rural tribal customs make the situation of the lawcourts a particularly problematic one. But the same dilemma is perhaps even more sharply manifest in Africa. In the African countries French law and the traditional legal customs, or British law (in the form introduced in India too), occasionally Muslim law and the traditional tribal customary law are frequently in insoluble conflict precisely because of the more backward conditions. Although, as is indicated by the quotation above, in India, too, the demand for the assertion of Hindu legal principles occurs as an *ideological question*. The legislators did in fact encounter many difficulties, particularly when the new legal norms related to the family and to blood relations were made, because of the more general spread of the British legal culture, the extensive judicial system and public administration, and the large number of legal experts (according to an estimate from the early 80s there are about 228,000 jurists in India, about 336 per one million inhabitants, placing India third in the world in this respect; Galanter 1983a:7) and also because of the special features of the political culture, the problem is not so sharply manifest there as in Africa, where the situation is thus further aggravated. Yet the 'modernizing' Indian elite, part of which has been less attached to tradition (for instance Nehru and his circle) and has striven to hasten modernization in the field of law as well, has recognized the significance of customary law and even utilized it in the interests of modernization. (Ishwaran 1977:112.) However, interesting contradictions derive from the two different legal cultures. For instance, the traditional Indian sacral law does not know the concept of precedent – the legitimation of judgement derives from the *fact* of government during the course of the implementation of law (Derrett 1980:511) – whereas the precedent, that is the 'ratio decidendi' of an earlier ruling is a legitimizing factor in the British legal culture. In the modernized juridical practice the system of precedents has been adopted (a consequence of two hundred years of the implementation of law by the British) and in this respect the Indian implementation of law has fitted into the world of common law. However, the same did not take place in the case of the state based on law. Western concepts of the state based on law, the rule of law which did not appear in the traditional legal approaches, could not find a place in this poor society because – although such concepts have taken root in Indian socialistic and modernistic ideas – their implementation has proved to be too expensive. (Derrett 1980:523, 531–532.) Therefore this modern concept has a rather manipulative significance.

Indirect rule was effective to some extent in India too from the angle of the implementation of the legal system, and not only in the so-called princely states, yet

it never had the nature it did in Africa. In Africa the contradictions between the modern and the traditional legal norms were sharper. Realizing this, commissions with the task of transforming the legal system and adjudication were already functioning in the 30s, and the problem became even more topical in the 40s and after World War II. Consequently, two conferences were held in London during the colonial period to co-ordinate the different legal systems, and in 1959–1960 talks were held on the ‘future of African law’, again in London. According to the general conclusion of the conference uniform law was theoretically desirable, as it would facilitate the administration of law, yet this could only be achieved in the field of commercial law. Apart from this, only the reduction of differences could be regarded as realistic. It should be done by the collection of legal customs prevalent in given geographical regions (the summary of the legal customs of Punjab was evaluated as a valuable experience) and by their selection on the basis of uniform principles. Customs which were not only local could be included in the collection so that the lawcourts could also apply them in general. It was the task of lawcourts to adapt the rules and general principles of customary law to the changing conditions.

It was generally held that the ‘collection’ – in the compilation of which sociologists, legal experts and public administrators should participate – *could not be regarded as law*, but rather as a guideline which would allow flexible application. Consequently the ‘collection’ would have to be reviewed as frequently as changing conditions demanded. The role of modern – that is British – law should keep pace with the tasks that became necessary in the development of the individual countries, and particularly in economic development. Therefore, British law could not replace the traditional customary law related to the individual, to marriage, to the family, religion and inheritance. But obviously outdated customs should be excluded from legal practice by legislation, and of course from life too, as far as possible. The conference also accepted more detailed recommendations in the various spheres of law, which were made more concrete by another conference on local courts and on African customary law held in Dar-es-Salaam in 1963. For instance, it was stated that written, codified rules were needed in the field of criminal law, alongside which the traditional punitive norms might still exist, although less enforced. *Land ownership* represented a separate problem, with the exception of Tanganyika (Tanzania), where the ujamaa system considered the question differently. All the countries were ready to accept the fact that the enhanced utilization of the land was of primary importance for the development of the economy, which was hindered by the traditional African system of land ownership. Finally, the conference also dealt with the problem of the conflict of legal norms, suggesting that a choice among the various norms should be made possible everywhere by detailed legislation.

In Dar-es-Salaam, however, the countries of ‘civil law’ were not represented (the countries belonging to the French legal system held a separate conference in 1962); therefore a new meeting was called in Venice in 1963 under the title ‘From Traditional to Modern Law in Africa’. (Allott 1971a: 4–17.)

Perhaps the most interesting material is offered by the conference held at Ibadan in August 1964 on the topic of the integration of customs, where the most prominent authorities on the problem from both English and French law participated.

The main topic of the conference was the 'restatement' of African law along a pattern similar to the 'restatement' of American law, though it was done in an essentially different context. The objective itself becomes clear from a quotation indicating the American view: "The purpose was to state rules representing the soundest and most consistent legal thinking, backed by the weight of judicial authority." (Allott and Cotran 1971:40.)

The goals set by the series of conferences have not been achieved so far. Though in Tanzania and elsewhere a 'code', a collection of customs has been made, its application, if possible at all, will be a longer process. (In Tanzania, for instance, the Minister of Justice himself told me – in the middle of the eighties – that the code was not really alive, people rather refrained from going to court in order to avoid the application of the principles of the code in place of the local customs to settle their disputes.)

The reasons why the problem of the relationship between customary and modern law has not been solved either in theory or in practice in the majority of the developing countries are complex and here I can only refer to them in broad outline.

To begin with, the basic ramifications of the problem go beyond the field of law. Referring again to the question of the rationality of law I can only repeat that the realization of the internal rationality of law depends on the 'rationality' of factors beyond law. The hierarchical coexistence of the plurality of modern and traditional (in itself perhaps multi-layered) law (incidentally the two do not exclude each other) may be guaranteed by keeping the traditional and modern living conditions in balance, that means: by a well-considered policy and social practice of modernization. Although the role of the sets of political ideas constituting the ideology may in theory be positive in this balance, the experience gained so far rather indicates its disturbing influence.

Therefore the basic question is whether the society and its political system has found the way to modernization corresponding to the possibilities and conditions of the given society, how far the political and power relations and the external environment of the society allow the corresponding practice.

The dynamic balance of traditional and modern law depends on this and not on desires, no matter to what ideology they are related. The existing traditional law is not a guarantee of the specific and timeless 'Africaness' of the given law, just as the popular legal customs of Hungary and Romania did not reflect any kind of specific and timeless Hungarian and Romanian legal mind in the 30s and 40s. "Customary principles and ideas must be seen as a superstructure of traditional African social and economic organizations, and as norms so immanently African that one ceases to be a true African the moment one abandons some or all of them." (Ocran 1978:37.) But while the Hungarian or Romanian efforts to base the legal systems on these legal customs had only ideological foundations (the traditional conditions producing or keeping alive these norms had already been undergoing considerable change in Romania and somewhat more in Hungary), this problem is a question of daily routine in most of the developing countries.

The fact that certain fields of life have remained traditional to such an extent that a conscious intervention is impossible or may even be dysfunctional, and therefore

the traditional norms are dominant – even in the face of modern legal norms in force that may exist – in itself does not prove the durable value of these traditional norms, but indicates the greater resistance of certain fields of life to change, or indicates that the conditions of the desired change do not exist. It should be added, however, that this issue is not only the problem of the ‘traditional’ and the ‘modern’ as it appears today, but also the general dilemma of the conditions of life and conscious law-making related to the personality, the family and relatives. In China the Ch’in dynasty, which was against tradition and which established the uniform empire, and also the other early imperial law-making in the spirit of Confucianism were forced to make concessions to popular legal customs, for instance in the field of the family, relatives, etc., moreover, the living popular legal customs were in some cases adapted as positive law. (Bünger 1980:451–456.) But it is beyond doubt that it is precisely customary law far beyond the possibilities of governmental control (Brietzke 1982:78) which most tempts the ideologically motivated dominant policy to change, and failures suffered here frequently produce merciless reprisals. A natural consequence of which is that insisting upon these traditional legal principles and norms easily leads to the basis or symbol of a broader resistance even to an irrational extent. The Eastern periphery of Europe, including Hungary has produced such examples (for instance in the second part of the 18th century). Sobriety is rather rare, particularly in an ideologically motivated policy ‘shaping the society’. In this respect the attitude of the Pakistani ulama, Mawlana Mawudi is remarkable, who linked the possibility of the return to Islamic tradition to the changing living conditions. At first it should be guaranteed – he wrote – that the entire social structure of Pakistan be transformed, in conformity with Islamic principles. Modern capitalist society, for instance, encourages men as well as women to be dishonest and to seek illicit sexual relations, whereas if the state becomes an Islamic one, all this changes and those who commit such crimes are punished in accordance with Islamic law. But in order to achieve this the entire educational system has to be transformed and not only the pupils but also the teachers need to be educated; and so on. (Anderson 1976:189–191.)

The problem is alive nowadays, too. In one sense it appears to be even graver. *Reafricanization* (or ‘reislamization’) as an ideologically-founded aspiration has become more marked in the field of law. It should be remembered that the desire for ‘reislamization’ has a different content in different countries and periods of time. For example, the 1956 constitution of Pakistan calls the country a democratic state based on the Islamic principles of social justice. The extension to the constitution passed in 1962 states that all legal norms contrary to the Koran and the Sunnah, and the Riba¹¹ should be abolished. In Somalia the leader of the revolutionary regime of initially Marxist hue, when he spoke about the utilization of ‘scientific socialism’ in ideology and in the building of the state, saw the ‘scientific quality’ of these ideas in that they adjusted themselves to the local conditions, to Islam in the case of Somalia. (Anderson 1976:191.) Incidentally it is not only in the Islamic states but in the process of ‘reafricanization’ in general that most of the African countries have striven to create some kind of a ‘socialistic’ societal set-up (and continue to do so at least in words), an objective which has been expressed in legislation as well, thus

increasing the difference between reality and legal regulation. A good example of this is the frequently quoted ujamaa system in Tanzania. This policy brought together the scattered population of the country, in keeping with its conditions, and focussed on cultivating the land in traditional ways, in villages, by utilizing the collective form of land ownership, in accordance with the African variant of rural, or co-operative 'socialism'. Although it was undoubtedly easier to organize medical care, schooling, administration and even political organizations in the newly created villages, the conditions were not suited to this settlement policy, consequently the earlier links were destroyed (in Africa land means much more than a possession), agricultural production declined, despite or because of the rules directly regulating production, the earlier communities disintegrated, the artificially created villages could not replace them, and as a result the disintegration of the society increased.

Thus it was with justification that the well-known legal experts who participated in the Ibadan conference (most of them from Europe and Africa) spoke much about the importance of *transition*. Starting from the position that law-making is not a goal in itself and law is useful for any purpose only if it is known and only in so far as it is implemented. René David, for instance, stressed that the law-maker has to respect the local autonomies existing in his region in such a way that on the one hand the development of the communities is influenced, but on the other, control able to curtail the most glaring abuses, is exercised over them. Beyond this the *conditions* of the spread and administration of legal norms should be improved mainly with the promotion of legal education. (David 1971:56.) René David was able to write these sober lines on the basis of experience of the 'functioning' of the Ethiopian civil code he created, which was echoed by other participants at the conference too. J. Keuning, for instance, who opposed David's view challenging the legal nature of local customs, held the view that it was no longer possible in rural areas to leave the upholding of 'law and order' to the traditional institutions of tribes, village communities, and so on, as these communities had already been integrated into larger political units and even traditional life was not static. "The State cannot avoid interfering in and taking responsibility for the course of justice at the village level in rural areas; and even less can it let the law take its own course in urban areas." (Keuning 1971:62.) Indigenous African law should, wherever possible, be recognized formally too as "it is the legal expression of African socio-cultural organizations. But we must be bold enough to see the law as a flexible system which can give expression to the dynamics of the present day. . . . This implies a judicial organization which has the confidence of all layers of the population, which is easily accessible, and whose actions are understood and accepted. . . . In their interpretation of the law the judges dealing with the present must look back to the past and at the same time glance into the future. The judges must re-interpret the traditional law for their own times, extend it, and, where necessary, supplement it in new situations. But in doing so they will have to use extreme care that their interpretation and their 'legal creation' remain in harmony with the framework of the customary law." Customary law is the dominant one and "written laws (should) be enacted only for the regulation and stimulation of modern projects for the development of industry, commerce, agriculture and general welfare services." (Keuning 1971:66.)

The re-interpretation of customary law is also important, he continues, and collections should be compiled, these may be useful, but on each page of each book the warning, printed on the pages of the 'code' of Javan customary law prior to World War I, should be repeated: *'This book is a description and not a code!'*

David has also mentioned (David 1971:56), but Allott expounded in greater detail that the 'africanization' of African law is not necessarily a hindrance to modernization, if African law is not identified with traditional customary law. In this sense African law would mean much more a *unification of law*, if the African states jointly attempted law-making suited to their own conditions. (Allott 1965:227 et seq.) As the principles of British law also contain something from the past – Allott continues – the same may happen to the new African law while it is being developed, and even the universal inspiration of African law cannot be excluded; along the pattern of African sculpture and music inspiring modern art. (Allott 1965:240.) An emphasis on the procedural characteristics is in keeping with this view. While great attention is devoted to the unification of customary law of a substantive nature and its integration into the national legal systems, much less thought is given to this possibility in connection with traditional African legal technique and values in handling disputes. The 'African personality' has at least as real significance in connection with these as with substantive law. (Twining 1964:52–53.)

Such an interpretation of africanization – the possibility of honouring the special characteristics of that continent by uniform principles in all the legal systems – seems to be far better founded, though the danger of africanizing law – primarily in the Black African countries – along the pattern of africanization in the other spheres of intellectual life, and particularly in philosophy and literature cannot be disregarded. In this respect Allott's analogy is 'double-edged', because the utilization of the 'traditional' in legal regulation is not analogous to the same problem in art. The process of the unification of African law, as one possible way of 'reaffricanization', may be based primarily on the identity of the economic and political conditions and on the similarity of their development naturally not excluding the utilization of the values, solutions and concepts created by African legal development.

Notes

1. In Hungary the rejection of law was manifest in the 'rejection' of the legal profession which went beyond attempts at getting rid of old law after World War II. (For this, see Kulcsár 1985a:320–332.) Elsewhere the same outlook appeared even more radically. In China, for instance, in 1949 twenty per cent of university undergraduates were law students. Numbers decreased by the same proportion after the political change and in 1957 the training of lawyers was wound up. In 1965 only one per cent of students were reading law, but as it turned out that ideology could not replace law and legality was becoming increasingly important with the transformation of the society, so legal education also acquired greater emphasis, particularly after 1984. According to the Minister of Education, annually, about 35 thousand law students should complete their studies. (Ts'ao 1984:182–183.) This problem has been more deeply analysed (after finishing the manuscript of this book) by Shen 1991:135–144; Erh-Soon Tay 1991:145–154; and Weidong 1991:155–176).

2. The ambivalent handling of legal regulation has been particularly clear in the post-colonial period of Mozambique. A lecturer at Maputo University expressed this characteristic in the following: "... when things are going well in Mozambique as far as the legal system is concerned, we speak about 'popular justice', and when we have problems, we speak about 'socialist legality', particularly... when it's been found necessary to 'reinforce socialist legality'." (Sachs 1985:133.) Legality had become inconvenient in the period after the revolution when – in the same way as in Hungary between 1945 and 1947 in the case of the so-called lawsuits about horses – lawcourts sticking to legal norms and legal education were blamed, and subsequently the demand for reinforcing legality was related to the failure of legal regulation detached from reality. The practical failure of legal regulation was then coupled with a curious arrogance: "If our society doesn't correspond to our legal ideas and our notions, so much the worse for our society, it's underdeveloped, and backward". (*Ibid.* 140–141.)

3. In the European 'socialist' countries, too. On the example of Hungary, see Kulcsár 1985a:293–294 and 349.

4. These differences derive from different historical developments, for instance, from the fact that Western structures had a not negligible influence in the East Central European societies, whereas in Eastern Europe Byzantine ideas and Asian imperial rule left their traces. I have already referred to the differences manifest in law, regarding the relationships to Roman law. (See in particular Kulcsár 1983, 1983a.)

5. Of the many possible examples I would quote only one. In 1973 in one of the Indian states, Kerala, a bill was prepared (and even passed in 1975), on the abolition of the Hindu joint family (*Kerala Joint Hindu Family System, Kerala Act 30 of 1976*). The Act essentially wanted to abolish the Hindu joint family for reasons of population policy, as the joint family is a highly attractive one from economic and financial respects (Derrett 1977:381), thus its winding up would weaken this material 'security', which may be one of the factors of high fertility. But the present assessment of the Act points out that the act did not provide adequate psychological conditions for a 'dramatic change' and did not take into account the inertia which is characteristic of Indian, and particularly of an agricultural society. In addition the Act was only aimed against the Hindu joint family, but not against the similar Muslim or Christian formations or factors related to the joint family. (Derrett 1977:392–393) It is appropriate to point out here that one of the important factors in the effectiveness of legal regulation aiming at the reduction of fertility in the developing countries – besides securing the necessary technical, medical and other conditions – is consideration of the specific characteristics of the socio-cultural environment. This is indicated by the lectures held at Nairobi in 1974 (see Uche 1976) which were largely based on the analysis of practical experience.

6. Robert Seidman describes a very interesting case in connection with the preparation of the *Tanzania Range Management and Development Act* (1963), when the administrative decisions concerning the details of legislation affected even the essence of policy. The Act contained a programme aiming at the transformation of the way of life of a nomadic Masai tribe. As is commonly known the Masai are a cattle-breeding, migrating tribe whose life is determined by animal husbandry and the family as a social unit. The intention of the Act was to orient animal husbandry towards the market, to replace nomadism by settled village life. The Act was not initiated by the Cabinet but by a memorandum (1963) of the Ministry of Agriculture, according to which the region concerned would be divided into zones, but keeping in mind the traditional Masai conditions as far as possible. The maximum livestock permissible in a zone would be determined, all cattle would be branded with the sign of the zone, and cattle-breeding above the permitted quantity and outside the zones would be forbidden. The memorandum proposed the setting up of a separate office, together with declaring the zones to be special regions of development, where adequate systems of land ownership, water supply, settlements and road network would be evolved. The plan was considered by an inter-ministerial committee which recommended that the law officer in charge of preparing the bill ensure that the plan corresponded to general government policy, and see if it could be implemented administratively, without new legislation and the modification of general policy. But the law officer, when deciding upon these questions actually interpreted government policy by himself, after all to decide whether a programme corresponds to the general policy or not, is in itself the shaping of that policy. (In this case partly the guarantee of adequate food supply, and partly preventing a class-like social stratification were questions of the general policy.) Finally, the proposal was brought to the legislative committee of the Cabinet which demanded a clarification of the policy the bill

was intended to implement. Meanwhile the US Agency for International Development offered technical assistance, methods for counting the animals, and it even proposed to bring the Masai concerned together in the form of a Ranching Association Ltd., which could then negotiate with the government, be given land, and so on. Another proposal suggested association in the form of co-operatives based on the Masai extended (or joint) family. The Cabinet proposal published a year later did not say anything about the form and size of association or the size of herds, but only mentioned in general that in the association every head of a family had to accept a certain reduction in the herd, in appropriate proportion to the capacity of the pasture, and so on. Finally the form of the Ranching Association was defined in broad outline by the Act and the reduction of the number of animals was determined, but the Minister was authorized to elaborate the details, and ultimately the regulation of the decisive questions went into the hands of the public administration. As a consequence of the implementation of the Act the stratification already begun among the Masai has continued, individual property has strengthened and so on. Ultimately administrators have made decisions in political questions, the implementation of which would essentially and irrevocably change the Masai society, and in exactly the opposite direction to that required by the 'socialist' and egalitarian orientation of Tanzania. (Seidman 1978:19-22.)

7. "The more the economic role of the state grows, and efforts to redistribute the income of households come to the fore in state economic policy, the more emphasis is placed on the R^{adm} scheme of distribution, or its combination with other schemes." (Kornai 1980:453.) R^{adm} is the abbreviation of 'administrative' and 'remittance' of the issuer in distribution.

8. In the colonial African countries – primarily in those under British rule – early efforts were made to reach a uniform settlement of questions related to the integration of customary law and the 'native' courts. In the 1930s the systematic collection of customary law really began although some attempts had already been made to obtain certain information around the turn of the century. Objections could be raised to all recording, as indicated by the report of 1945, that the natural development of customary law would be broken and it would petrify. (Morris and Read 1972:191-199.) Nevertheless, between 1953 and 1956 conferences were held with the participation of colonial legal advisers to discuss questions of customary law and the reports of the conferences were published as a supplement of the *Journal of African Administration*. Traditional tribal law is utilized under modern legal conditions outside Africa as well, for instance in Canada. (Native People 1982.)

9. The shaping of customary law was not done by direct judicial modification. The Privy Council, the highest court of appeal for the dominions and colonies, for instance, either accepted or rejected custom, but did not modify it. On this see *Eshughayi Eleko v. Officer Administering Government of Nigeria* (1931, AC, 602, p. 673) or *Denmole v. Dawodu* (1, W. L. R. 1053, 1962). Lord Atkins said in the *Eshughayi Eleko* case that "it is the assent of the native community that gives a custom its validity." Thus in the opinion of the Privy Council, still accepted by the lawcourts of English-speaking Africa, a rule of customary law is enforced by the courts because it is an authoritative rule with a binding force. There are some courts which make an effort to adapt customary law to changing conditions, for instance, to the general principles of the changing conditions, but this is not a norm based on customary law, rather case law based on the authority of the court. "A court of law cannot in itself create *customary law*." (Ogwurike 1979:29-31.) Yet it is an interesting phenomenon that the lawcourts, though they had different opinions on the case of what morals the so-called 'repugnancy-clause' should be applied to (customary law can be applied if it is not contrary to justice and morality), as there were some who expressly referred to British morals, relatively rarely resorted to this institution. The true reason was probably the fact that rules of customary law were changing so quickly that they relatively soon came sufficiently in line with British law to make the repugnancy-clause superfluous. (Morris and Read 1972:180.)

10. The most characteristic example of this is the following quotation: "Local legislation is potentially powerful to revolutionize the law and to make it a superstructure on the economic base. It could be a formidable tool in the hands of African legislators to usher in a new political ideology and a reshaping of the people's economic life. But in English-speaking Africa it has not been fully utilized in a positive sense. The main contributory factors are the conservatism of the bench and the bar, due to their English legal training and background. Also, on the economic front, the dualism of the economic base and the existing plurality of law seem to encourage complacency." "There is, however, one factor which militates against efforts by African radical governments towards social transformation through law. It is the

doctrine of binding precedent. As with the governments of the less progressive and very conservative tendency the doctrine of binding precedent remains, together with English background history, legal purpose, and methods as with all governments in English-speaking Africa, because of the court system. Support for the notion that judges are merely there to discover and declare the law is a clog in the wheels of legal development in Africa. It offers little scope for more dynamic and progressive development of the law, even with the most radical government." (Ogwurike 1979:192-193.) The Hungarian system of law courts was also criticized in this manner after World War II. At that time too, the so-called 'jurisprudence' was regarded as a clog in the wheel of progress. Nevertheless, although this judicial system hardly had the Anglo-Saxon tradition yet apparently such a 'moderating' judicial activity has not been without function either, in respect of balanced legal, or social development.

11. The Sunnah is the sum total of tradition narrating the deeds of the Prophet, the second most significant source of Islamic law after the Koran. Riba is essentially the prohibition of usury. I want to call attention to the fact, that these are some modern reforms in the most conservative Islamic countries, e.g. Saudi Arabia – where theoretically there is no temporal legislative 'authority', because 'such' an authority is contrary to the conception of a theocracy in which the law is given by revelation as interpreted and identified by the competent 'Jugahā'... In actual fact, there are instances of temporal legislation in Saudi Arabia. There is, for example, a Civil Advisory Council, and from 1976, ministerial office, etc. But this reformist legislation is characterized by a pragmatic approach. Utilitarianism (*maslaha*) has almost become a source of law in its own right. But even here there is no orderly, systematic effort to develop a legal methodology. (Layish 1987:279-282.)

Chapter Four

The Role of Law in the Process of Modernization – Some Lessons

Lessons, Possibilities and Limitations of Law in the Process of Modernization

When the role of law in the process of modernization is studied historically, regionally, the political and legal systems, and the political and legal culture are also considered, we find similar problems within different contexts. All these different interrelationships which have extremely deep roots and widely different historical backgrounds shape the phenomena as well, therefore it is a question of how far general inferences can be drawn from the analyses hitherto presented. Finally – even taking the risk of repetition and with references to ideas already expressed, but availing myself of the opportunity of moving ahead as well – I will try to summarize some inferences as examples.

There have been illusions about a total break from the past including law rooted in the past, but they have been dispersed just as much as the illusion of 'getting rid' of law as such, in other words: efforts towards transformation without law have failed in the long run as has 'faith' in law treated freely and without limitations.

Changes by revolution and by reform both have a role in the process of modernization. Where and which type of change comes to the fore and how it alternates again depends on a series of factors. For instance, on how far the given society and its political system makes reform possible, and what changes are brought about by the attempted reforms; whether a situation evolves where reform is impossible, and which therefore leads to an explosion; and, finally, how the 'society' is 'ready' for a transformation which represents a change of socio-economic system.

The view that revolution does not take place either in a society at a high level of development or at a high level of traditionalism, where the degree of social and economic complexity is rather low, and that it can be expected rather in a society which has already reached a certain level of socio-economic advancement but its political modernization, political development lags behind economic and social progress (Huntington 1968: 454), is an attractive one, but it does not always correspond to reality. During the period after World War II it was the traditional societies of the developing world at very low levels of development which produced revolutions. Thus Huntington's thesis can at least be supplemented with the external factors which played a significant role in the elimination of the colonial situation and since then in the process of modernization, including the road to revolution. That a revolution has little chance at a low level of development without some participation by the peasantry is not only confirmed by the Chinese, Vietnamese

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Lessons: Possibilities and Limitations of Law in the Process of Modernization

The possibilities and limitations of law in modernization are mainly determined by extra-legal factors and processes. The level of development of the society as a whole, its economic, political and cultural conditions and the political system which elaborates and implements the decisions concerning the way of modernization, its degrees, the way of changes, and so on, give law a frame which may be filled in differently, yet, ultimately it is a *frame*, which can be barely changed by legal regulation.

The 'frame' often and unexpectedly proves to be very hard and difficult to break through by law desiring change. There have been illusions about a total break from the past (including law rooted in the past), but they have been dispersed just as much as the illusion of 'getting rid' of law as such, in other words efforts towards transformation without law have failed in the long run as has 'faith' in law treated freely and without limitation.

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and other events of recent decades, but essentially by the Russian October Revolution too, particularly during the seizure of power. It is also true, however, that – although in a different manner and by different means – the revolutionary elite usually succeeded in activating the peasant masses. But after power is acquired, the role of the peasantry, as a receiving medium is ‘transformed’, or at least it is *seen* transformed by the elite almost without exception, though its social significance does not diminish. The ‘revolution’ directed from the top downwards, or reforms introduced even gradually but accompanied by radical change manifest themselves in a series of political, economic and other decisions which – usually did not take into consideration the socio-cultural character of the peasantry – may provoke a counter-movement or extensive passive resistance. These movements and the provoked resistance may nullify all the achievements of the ‘revolution’ coming from the top or of reform, or may have dysfunctional consequences impossible to cope with, particularly if dominant politics disregard the cementing force of the existing conditions, and do not achieve a consensus with the vast majority of the population, which is mostly the peasantry at a low level of development. During the course of revolutionary – therefore mostly imposed by force – transformations the disintegration of the peasantry, a catastrophic decline in agricultural production took place in many countries. As a consequence of imposed forms of ownership and organization even production (China, Vietnam, Ethiopia, Tanzania, etc.), the reforms led and ultimately lead to dangerous decrease of agricultural production, even to famine and finally to a return to the traditional production structures (family, extended family), to change the political system. In fact ‘neo-traditional peasant classes’ and their differentiation (Agh 1989: 126) are becoming characteristic in the backward countries of the ‘Third World’, following a ‘socialistic’ path, in the course of adjusting to the uniform world economic system.

It may be generally stated that the failures of the post-revolutionary society have ultimately resulted in the introduction of various reforms, and the policy of reform is becoming the general one, after the forcing of external patterns, or those evolved internally because of ideological considerations. Apparently the building of a new society as well as the process of modernization are endangered if these reforms are not introduced, and as it turned out for to-day, these – mostly ‘partly’ – reforms are not enough to maintain the ruling political systems and to promote the modernization. It turned out too, that the patterns forced upon the society as a ‘new tradition’ result in immobility. In most cases the ‘new traditional elements’ are effectively linked to the specificities of the ‘old tradition’.

1. Some simplification the types of experimental solution have evolved in the process of modernization until yet as follows.

In the *East European and East Central European region* the socio-political systems, retaining the conditions which emerged during a specific course of development in different periods of time and at different levels of advancement, made possible the ‘take off’ stage of modernization, but later – mostly after World War I, they slowed down or even restricted most of the processes of modernization. After World War II, in the new political situation there was tried to start again the ‘take off’ in a

changed social structure and by a forced introduction of the new social order. But the institutional system created during the 'revolutionary' changes and afterwards – translating the new interest relations into rigid obligations and retaining some traditional elements of the past – partly filled further development with specific elements, and partly hindered it, so that the elaboration and implementation of the necessary reforms has become the greatest problem of these countries. However, the reforms are the consequences of a deeper socio-economic transformation, and are related to the necessity and the difficulties of transition from the first into the second phase of modernization. The reform efforts appeared in the process of the dismantling or the authoritarian-bureaucratic system which was the product of the first phase, but has already been divested of the majority of its totalitarian traits. However, the realization of reforms was impeded by some features (even if compared to societies which can be characterized by similar traits). For instance, the development of a market economy is also included in the transformation of ownership relations at the Eastern periphery of Europe, and the political system was based on one-party rule which permeated the state as well as the economy, culture, etc., and where the 'bureaucratic' component (as will be seen later) of the authoritarian-bureaucratic system was itself special. (Kulcsár 1990.)

The necessity for reform was convincingly indicated by the falling efficiency of the economy, the spectacular falling behind of per capita income not only compared with Western countries, but in some cases even behind countries which had been on the same level in the 30s but did not follow the East European model of 'socialist' society, and finally by the widening 'gap' in technical achievement if compared to the societies of the European centre. Naturally, all this was accompanied by negative social phenomena (growing deviancy, falling cultural standards, deteriorating health of the population, etc.), by increasing political instability, and by an express demand for a change in the political system.

The role of law in this variant of modernization – also due to the historical traditions – has been increasingly exaggerated (excessive faith in law is one of the signs of backwardness). The use of law as a substitute had become general. As the conflict between the excessive ambitions and the realities of the economy of shortage further increased demands for regulation, the legal system became increasingly confused. Law became the instrument of short term 'technical' regulation, where the regulation of behaviour in the 'classical sense of the term' was pushed into the background. In the late eighties, however, has appeared a strong demand for stable and predictable legal regulation and movement towards a state based on law, or towards the constitutionally acceptance and realization of the principle of 'Rule of Law'.

In the same period it turned out too – partly due to the failure of reform, partly even due to its success – that it was impossible to maintain the so-called socio-political order which existed mainly as a result of a specific international situation, the bipolar power relations shaped by World War II. These socio-political systems proved unable to solve the problems of transition to the second phase of modernization. In the last year of the 80s and in the first years of 90s most of the systems in Eastern Europe have begun to change. They have left the 'socialist' model and are

trying to build free-market economies and European type constitutional democracies. Some of them, particularly the Soviet Union, on the other hand have been trying to reconcile some 'socialist' elements with democratic ones, still maintaining the most important power relations according to the remnants of the old patterns. The recent events in the Soviet Union (in the summer of 1991), however, show that the socialist experiment for promoting the modernization looks like meeting its end. (As we have been witnessing in the late 1991 and in 1992 the Soviet Union as an Empire and even as a state-unit collapsed.) In the transition of East Central European, former 'socialist' countries, however, – particularly Hungary where the transition has been peaceful (at least until now) – the law, primarily constitutional law has indeed played an important role. Nevertheless, there are some question-marks in these cases, too. It has been quite natural, that the introduction of the changes in economics, political system, public administration, etc. need again the increase of law-making; the deregulation and the appearance of new legal rules should be the characteristics of the same process. The legal norms, however, are efficient only in such socio-economic and political processes which became organic ones in society. In these countries the future and the kind of modernization would be the result of the 'struggle' of the long-term historic process, the effects and lessons of the past, the political and economic forces (included the attitudes of the developed countries). This 'struggle' could be influence the legal rules, even if in the creation of a new political system the law had an exceptional determining role.

In the different paths to *modernization of the countries in the so-called Third World*, too, a number of factors have been active. Certain differences evolved during the elimination of colonial rule depending upon the forces involved, upon the changes in power relations, upon the economic potential of the given country, and upon the influence of external powers during the course of later development. Bearing in mind these factors the following types can be distinguished.

a) *The revolutionary path of a Marxist type.* Under the relatively strong impact of the socio-political and economic model of the societies at the Eastern periphery of Europe, some countries followed a 'socialist' pattern, though the imitation was not exclusive and several variations were possible (China, Vietnam and her neighbours; Cuba, Angola, Mozambique, Ethiopia, and Somalia at an earlier phase). These societies have evolved the ideology of some kind of peasant socialism – mainly on the basis of Chinese theorists and politicians – and have attempted, during the past decades to solve the problems of peasantry by the introduction of a rigid system of co-operatives disregarding incentives. Generally speaking they followed the East European pattern in the field of industrialization as well, with failure as its result. They could hardly progress in economic development while they had to wrestle with political as well as military issues, but the rigid political system, itself hindering movement by its bureaucratic organization, evolved everywhere. Changes have started in the majority of these countries – primarily in China though not without interruptions – and spectacular results have been achieved primarily in agriculture. The reforms, however – with the exception of China – are also related to global, or at least regional issues, therefore their progress also depends on external factors to

a considerable extent. (Accordingly, due to inner and outer factors, these experiments, particularly in Africa, already met their end.)

Some of the countries belonging to this 'type' are in a special situation. Those countries which have evolved an essentially unchanging traditional culture mainly because of long and at times total seclusion (such as Ethiopia and Tibet), have been confronted with the East European pattern of modernization based on Marxist ideology with 'revolutionary' violence as the background, therefore these societies became practically 'defenceless' in the face of the transforming impact of the external patterns forced upon them. The difference was too great to allow the process of modernization to develop forms that could grow locally as organic ones and to offer foundations to movements based on the internal conditions. Hence traditional living conditions and traditional culture are still sharply separated from the modern efforts.

In the modernizing process of these societies law was hardly played a role. Moreover, when resolute efforts were made to eliminate the earlier legal system, the new legal regulation – if it was created at all – appeared in a rather punitive guise, in the form of central administrative measures, and the role of law has only been recognized in the last decade. New legal regulation mostly followed modern patterns (in some cases even the earlier colonial forms re-emerged), and tried to settle legally the introduction of foreign capital, conditions of foreign trade and monetary relations, etc. even in China during the first phase. The idea of direct participation became part of the dominant political ideology and the political leadership itself tried to institutionalize it (primarily in the form of various neighbourhood organizations). As new legal regulation was not available, the traditional legal principles have survived in the social behaviour of these countries.

b) Some kind of 'socialistic' ideology appeared even in a number of countries which chose the *capitalist path*, at the time of independence. This was usually expressed constitutionally, too. But the practical consequences of this ideology have not gone beyond the nationalization of certain branches of industry or of the banking system. These societies have been characterized by the gradual weakening of the 'socialist' visions that might have existed during the first phase of independence and in certain cases spectacular changes have taken place. (In Asia examples are India, Indonesia, Pakistan, the Philippines, Malaysia, and so on, and in Africa Kenya, Nigeria, Zaire, Senegal, Morocco, Tunisia and to some extent and in a certain period Egypt.) The social changes, if any, were gradual and had less influence on equilibrium. In these countries the political elite – practically synonymous with economic power – was less ready to change the status quo structurally, therefore the occasionally dramatic political changes have modified the social structure less. There are some countries, in which it seems that the transition to the second part of modernization has been successful. The best examples are South Korea, Singapore and Taiwan. These countries show the result of combining some traditional elements, with education forcing capital to reach a level at which the automatism of inner factors becomes able to sustain economic growth and the basis of a welfare system.

In these countries the legal system – with certain changes that have proved to be transitory – has essentially followed and developed law evolved during the colonial

period. Consequently, legislation has also been hierarchical, authoritative and bureaucratic, and the problem of maintaining social control over those in government has remained unsolved. Even India is not an exception, but it is particularly so in the African countries.¹ Law has done relatively little in the interest of modernization – naturally there are differences among the various countries – yet these societies are not free either from excessive faith in law and its consequences.

c) In the countries following a *specific 'socialistic' course* (Burma, Iraq, Syria in Asia, Algeria, Tanzania, Zambia, Ghana, Guinea, Mali in Africa, and so on) the political ideology related to liberation from colonial rule survived the change of power to some extent, and it became a principle of social organization at least in some respects. Here the experiments in social transformation tried to assert some specific identity (see, for instance, the variant of African socialism in Tanzania)², but the result has been disillusionment everywhere; the economies are in ruins, there is a shortage of food, an increasing marginalization of the masses, and instability in the political systems. Neo-traditional peasant relations are appearing in these countries and fundamentalism as well. (Ágh 1989: 132–148.) In these countries, too, the solution is offered by the adjustment to the main processes of the world economy, and by the introduction of reforms. Post-independence legislation partly utilized traditional law, or at least referred to it, and partly tried to put the political decisions into effect by new legislation resembling the East European pattern.

It can be stated in general that a double attitude has evolved in relation to law, along with the pluralist understanding of law which can be felt in almost all the developing countries. On the one hand there was the 'lack of a legal frame' for the new forms of participation, and on the other, there was the already mentioned extensive faith in the power of law to transform society, the utilization of law as a momentary instrument, and its consequences. But a certain balanced attitude towards law has also appeared – though with varying intensity in the different countries –, and even a recognition of the legal consequences of adjustment to the world economy.

It hardly needs to be emphasized that the variants, just as much as the different manifestations of social attitude towards law are *types*, which, in addition have been realized in the individual societies with different intensity depending upon the period. Nevertheless they offer some opportunity for analysing the social role of law.

"The idea of legal engineering, of achieving social and economic change through government law, still ranks, foremost in the arsenal of development techniques. Law as a desired situation projected into the future is used as a magic charm. The law-maker seeks to capture desired economic as social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law-enforcement, or expressed more generally, to the implementation of policy." (Benda-Bechmann 1989: 129–130.) This statement could provide the basis for further ideas, namely, if the development projects failed then this could be supposed to be due to the living traditional law, which would be really a 'scape-goat', because success of these projects obviously demanded a change in the behaviour of people regulated by the traditional law. Since the "models are normative ... in other

words, development projects have the form of law ... they ask people to change their behaviour, in the hope that the changed behaviour will lead to desired social, economic or political consequences." (Benda-Beckmann 1989: 133-134.) The error involved in this supposition is two-fold: first, to realize a development project it is not enough to regulate human behaviour; second, human behaviour is far from being regulated *only* by law.

2. Whether law may be used as a real instrument in the process of transforming society – depending upon the political intention and authority allowing realization – the problem appears in the *relationship of legal regulation and reality*. Reality is complex, and the 'readiness' of the society to receive legal regulation which promotes change is influenced by a number of factors. It is shaped by all those factors, the economic, political and administrative conditions, the way of life, the strength of traditional culture, the nature of the political and legal culture, and so on, which influence the effectiveness of law in general. (Kulcsár 1982: 141-171.)

However, the problems influencing the effectiveness of law only multiply if the question is studied concretely, in the context of the legal system of a modernizing society. These problems can be given as examples for the time being, without reference to their solution:

- How far can law interfere in a well-functioning system in the interest of developing it further? How far will it become destructive (in R. David's opinion it can only be destructive)³, and how far is it capable of fitting new and progressive elements 'functionally' into a system that is operating well? This gives rise to the following problem:

- How far can a system or even the process of some of its partial phenomena be regulated with careful consideration? Law interferes in a functioning system at one or two points at the most so that the coherence of regulation may be challenged – and this in itself is a factor limiting efficiency – whereas a comprehensive, coherent regulation is almost impossible.

The analysis of all these – and similar – problems is essential to give an answer to the basic question. But the most delicate problem derives from the most important component of the concept of modernization accepted by us.

The generally accepted criterion of the progress of modernization is how far it is capable of generating changes by itself, how far the developed institutional system is suited to maintaining the necessary movement and growth. In other words: how far the institutional system is capable of 'absorbing', processing and stabilizing social change in a manner so as not only not to hinder further changes important for the survival and adaptation of the system, but to induce such changes. Of course change in itself is not a value, therefore the institutional system is forced to select: it has to secure the necessary stability for the process of modernization.

Therefore the basic question is *how far law can participate in this mechanism*. The role of law in the process of modernization may seem to be little different from the role of law *in general*. As it was defined by Roscoe Pound in the first decades of this century: it is in the joint service of stability and change. Basically this is so, but there

is a further significant element. The process of modernization is the continuous maintenance of change, but this process, with the exception of the special case of the phase of 'take off', cannot mean the overthrow of the stability of the entire system. During the period of revolutionary transformation which shapes the new social conditions, creating a new system of classes, strata and institutions, a new power structure which it intends to *stabilize in the face of the elements of the 'old' one*, change acquires a special emphasis and leads to curious interrelationships. In such a case the interest of stability is *temporarily* pushed into the background, or, rather it is *concentrated on whatever is newly created*, while change claims a total break with the existing conditions and with the past. But consequently stability may become excessively emphatic precisely in the protection of the new system, it may appear as primary need, or at least it is expressed as such. All this, if expressed by law, may create a situation in which initially *change in itself may appear to be a value as contrasted*, in a sense, to the generally accepted *basic principles of law*, and later on the *newly created elements may become almost traditional, and even 'sacral' values*.

In this manner law can easily – almost inevitably, though perhaps temporarily, as historical evidence shows – turn against some of the elements which it considered earlier to be valuable. A strong desire to get rid of the law of the past was not only general in post-revolutionary Russian society, or in the East and East Central European societies after World War II, or in the so-called developing societies, but such phenomena were manifest in French legal development after the revolution, and even during the period after the American War of Independence. As in the modernizing societies, so in these countries a significant continuity remained not only in legal development but in other spheres of the society as well.

Efforts towards change may make legal norms particularly changeable, or rather short-lived in the service of modernization. The consequences of short-lived situations are not limited to norms directly regulating economy, but may even force the law-maker to make quick changes in some of the codes, based on more general principles. In Hungary, for instance, the specific and characteristically interpreted conditions of the period between 1956 and 1960 were expressed in the penal code promulgated in 1961, and which, in certain cases, turned to solutions earlier considered obsolete.⁴ Even if I cannot write about the annual or even more frequent changes of the so-called economic regulators, directing economic life – which has been a constant practice for instance in Hungary – and I am not in a position to assess its justification now by changes in the economic situations or the consequences of the frequent changes upon the security of economic activity and the possibilities of its planning, it is certain that *the element of change has acquired a greater importance in law in the modernizing process than stability*. This was also manifest in the considerable decrease in the number of Acts and even of law decrees in Hungary, intended to express elements of stability, whereas the quantity of other kinds of law-making, expressing mobile elements though in various shapes and even creating new ones, increased.

I have already referred to the phenomenon that legal regulation expressing the newly created legal principles may result in, and may reflect a *rigid stability* as well. This phenomenon – which characterizes all legislation produced in the modernizing

process, but it is present even more regularly in all legal regulation in the wake of 'revolutionary transformation' – has a dual source.

As far as modernization is concerned, S. N. Eisenstadt, when writing about post-traditional societies, defines the characteristic of traditional societies as the following: "In the cultural sphere all 'traditional' societies, however great the differences between them, tend to accept some past event, order, or figure (whether real or symbolic) as the major focus of their collective identity. This given sets the scope and nature of their social and cultural order, becoming the ultimate legitimizer of change and the delineator of the limits of innovation. Thus, official, normative limitations are placed on change and innovation in terms of reference to this past given. Access to positions of power is restricted, incumbents being recognized as the legitimate interpreters of traditions as well as the forgers of the legitimate contents and symbols of the social and cultural orders." (Eisenstadt 1972:5.) In the traditional regimes – continues Eisenstadt – legitimation of the rulers has been couched in basically traditional religious terms.

In the post-revolutionary decades of the societies building themselves on the basis of the 'socialist vision' some phenomena show a certain resemblance to the traditional and post-traditional societies. The most important of these is the change in the nature of ideology, or at least of some of its components, which has served as the theoretical basis of social transformation and of modernization. This ideology, or some of its elements has acquired a 'religious' nature, therefore it has the same function against innovation, against socio-political change as the 'traditional religious terms' have in the traditional societies. As I have mentioned already, in the post-traditional societies – including the 'socialist' societies – 'new traditions' have evolved (some of them in continuity with the old ones). The function of these 'new traditional' elements is to secure stability, and, naturally, to defend those interests which are linked to these traditional elements, or, more accurately, which are expressed by these elements. Such 'new traditional' elements may be found in the legal system too, so that certain ideological components of the legal system also act against change even if these changes have been prepared by the socio-economic processes.

But all this in itself indicates 'at the most' the specifically changing proportion and relationship of the elements of stability and mobility on the level of legal regulation, and less – though not independently from them – in conditions of the modernizing societies. If we study the last four decades of Hungarian society, until the transformation in 1989–90, we find that – despite all legal changes, or together with them – a period of stability evolved, which can be dated to the late sixties with the cooling down of emotions after the large-scale reorganization of agriculture and with the development of balanced political conditions. This stability, however, only concealed the growing backwardness of the entire economy, the growth of unmarketable stocks, the slowness of technical development, and the failure of economic management and economic policy only indicated by certain signs, but recognizable more or less. But it was precisely this stability which subsequently allowed the political and legal institutional systems, which sensed the necessity for social change, to launch change, which – as it started in the economic sphere and

because it was in a way largely frustrated only in this sphere (at least for a while) – gave a new impetus to the progress of modernization and has obviously influenced other spheres of society as well. As a consequence of change, despite the uncertainties and stagnation, even this increasingly wavering economic reform was able to influence other spheres of the society and – has turned out to be one of the main factors in starting the transformation process in Hungary. Legal regulation (in general and in a broader sense), in so far as it has been able to serve change – and this is not at all free of problems as the elements of the earlier economic management constantly recur in the detailed regulatory system of the economy – also has its influence in the long-term stability of the society. It is obvious that the lasting stability of the society can only be founded on an economic system which functions well, recognizing its own needs and capable of adjusting itself to these needs.

But it depends on the entire society, and in the peripheral regions particularly on the *political system*, which transforms the 'whole' into policy, how far it is capable of allowing and promoting by its entire institutional system that self-motion of the economy which is the basic condition of adaptation to the changing circumstances. The stability of the political system itself is determined to a large extent by its own *capacity for adaptation*, its ability to change its internal structure and elements. Naturally, the conditions of such a change are complex, moulded by complicated mechanisms, which cannot be analysed here.

The role of law in this mechanism, serving the stability of the society by continuous change, is obviously not an autonomous one, but it should not be underestimated either. Legal regulation and its realization may considerably influence the functioning of the mechanism of adaptation evolving in the various spheres, big systems and even organizations of the society during the course of 'forcing' political decisions into legal norms and the implementation of law. The role of law and even its technical level is particularly significant in legal regulation which wants to *assert jointly the 'immediate' and the long-term requirements*. In the regulatory process of some change that has become necessary the legal norm may concentrate, for instance, only on the requirements of change considered to be necessary by the situation of the moment, caring little for continuity in the future, for fitting the given regulation into the system, for the differentiated treatment of its possible consequences, that is to say: for a regulation which would satisfy even the requirements of continuous adaptation. In this case law, which becomes rigid at the moment of its birth, impedes the assertion of the requirements of adaptation. (This can be only a 'technical' mistake, but it is not rare for legal regulation to assess momentary needs and conditions as long-term or even 'unchangeable'.) As a consequence of the rationality and techniques of law the level of the legal source where such a legal norm appears has a great significance in the legal expression of the demands of the present and the future. Earlier, reference was made to the growing number of primarily lower level legal norms in connection with legal over-regulation, particularly at the Eastern periphery of Europe, and in every backward country which has embarked upon a conscious 'building of society', but the phenomenon is present in the advanced countries as well. Governmental, or rather ministerial law-making suits the presumed or real, but certainly short-run govern-

ment objectives and interests deriving from the situation. Perspective and thus the security of the desirable processes is served by Acts – because of the procedural aspects of law-making itself – as they are better suited for more considered regulation, for legislation based on principles which can be defined. It is not by chance that the state based on law (a real constitutional state) is also based on Acts which take into account the nature of human and organizational behaviour.

This is why – as I outlined in the first chapter of this book – constitutional law-making had such a great role in the peaceful transformation from an authoritarian regime to a democratic political system in Hungary in 1988–90.

Earlier I analysed the consequences of the fact that the legal system consists not only of legal norms but also of bodies concerned with making and implementing law. The incongruity of legal norms and bodies concerned with the implementation of law (including that of public administration) may in practice even nullify the effectiveness of legal regulation. This is particularly so where and when legal regulation strives to promote social change. Therefore conditions of change and particularly conditions which promote the ability of a socio-economic system to change have to be guaranteed not only in legal regulation as such but also on the level of organizations operating those regulations. If the organization is unwilling to or incapable of implementing legal regulation then the normative regulation promoting change is worthless even if it is meant to attain realistic objectives. In Ethiopia, for instance, in the final phase of imperial rule ‘basically sensible’ plans were made “given the fact that structural transformation was impossible under Haile Selassie’s regime. Many problems relating to plan preparation could have been dealt with effectively through law, although this was never done. The major problem was, however, that the plans were virtually forgotten by the bureaucracy as soon as they were published.” (Brietzke 1982: 78–79.) Naturally the harmony of the normative part and organizational components of the legal system is not a guarantee *in itself* for the success of the desired changes, but the lack of congruence is certainly a problem. “The most wonderful law will not work if the administrative machinery for its implementation is not there and operative” – writes Allott as one of the most important conclusions of his surveys. (Allott 1980: 212.) Further problems arise when the organization meant to implement legal regulation, for instance, an administrative unit is set up, but despite this it is unable to put into practice all that is outlined by the legal norm, because of lack of financial means.

In the recent, almost five decades development of Hungarian society specific phenomena related to incongruity, and which offer broader lessons as well, have become manifest.

In the years immediately after the war when the tasks of reconstruction were a major concern, the central management of the economy and society on the level of legal norms as well as organizations became increasingly vigorous, utilizing even the organizations established during the war and the legal norms also introduced at that time. Here two contradictory tendencies occurred in a very interesting way: on the one hand, there was the political effort to reduce the administrative personnel by redundancy lists, by screenings, and so on, intended to limit numbers, though its impact was widely counterbalanced by the struggles for coalition positions resem-

bling the 'spoils system', and on the other, there were the consequences of growing centralization. (The latter appeared all the more effective as the reduction of the number of personnel in public administration was not accompanied by a scaling down of the structure.) The attempt to reduce the number of employees in the state organization remained more or less a political slogan only, behind which the replacement and even hiring of new personnel on the basis of political considerations continued. As the second tendency was the product of preparations for a change in the political and economic system, it is not surprising that the latter tendency gained strength. But during this period, and practically until the second half of the 1960s a special congruence evolved between the development of legal regulation and of the organizations. The congruence was a special one, because the change in the content of legal regulation and its growth and organizational 'development' occurred in a mutually reinforcing manner. The excessive emphasis on central management naturally increased the number and technical nature of legal norms, and their implementation and control demanded increasingly specialized organizational growth. And the organizations – particularly in public administration from the ministerial level downwards – 'contributed' to the quantitative growth of legal norms or 'quasi legal norms' with new law-making. But this law-making became increasingly 'bureaucratic', in so far as it *derived from organizational activity, or was intended to promote formal efficiency rather than to regulate social phenomena and processes*. (Thus the instrumental nature of law was further narrowed in these legal rules and it was moulded into an *organizational instrument*.)

The development of the organizational system, the bureaucratization of a considerable part of legal regulation naturally increased the role of the organizations in preparing and implementing further social change (obviously with the 'shaping' interference of organizational interests). With a slight simplification one could even say that in the period from the end of the 1960s *incongruity developed between the normative material and the organizational components of the legal system*, and this incongruity developed to a large extent as a result of organizational interests, and of a certain resistance on the part of the organizations to change.

It is commonly known now that the birth of legal norms (themselves not free of contradictions and brakes, and even containing safeguards against 'excessive' organizational changes, Sajó 1982:3481) expressing changes in economic management, was not followed by organizational change either in public organizations or in the system of economic organizations. The absence of organizational change played a considerable role in restricting the progress of the economic reform launched in 1968. The unchanging organizational framework facilitated the assertion of the political line which temporarily gained sufficient force to restrain the reforms. Although I am not able to analyse this phenomenon here, it must at least be indicated that the later deformity of the legal norms expressing the new economic management was largely the result of the legal rules made at lower levels, when the incongruity between the organizational systems concerned and legal regulation was resolved by just such a backward step.

With the new impetus to the reform process congruence seems to be more complete, or the incongruities have been resolved at least to some extent by changes which have also taken place within the organizational system.

However, incongruities have appeared between legal regulation and the organizational systems even during recent years. Moreover, new features can be seen if compared to the former ones. Perhaps the most significant new feature is the incongruity between the basic legal regulation (and the values behind this regulation) ensuring the freedom of organization and action of the economic organizations during the development of the new economic management, and belated organizational transformation and the system of regulations deriving from the economic policy assessment of the short-term economic situations. The opportunities for interference by public administration are still excessive if compared to the original concept. A further component of this situation is the incongruity between economic and political management which can be observed on the level of legal norms as well as in organizations. Since 1988 in Hungary, legal regulation – starting from the need for a change in the political system and from the realization of the importance of predictable legal norms on the basis of the concept of the state based on law – has produced a number of Acts which are designed to end the incongruity manifest in the functioning of the two systems, the management of politics and of the economy. I would only refer to statute VI of 1988 on Economic Companies, and to statutes II and III of 1989 on the regulation of the Rights of Assembly and Association. A situation was created by the October Amendment to the Constitution and the related Acts in 1989, which promotes the necessary adaptation of the political system by its transformation.

The 'desirable' changes in the process of modernization are less enduring if they appear or unfold in *only some spheres* of social life. The big systems of the society – which I spoke about in Chapter One – although they have a relative autonomy and all of them have their own specific laws, specific aspects of the rationality of action develop in each of them – yet they constitute the *environment* of, and react upon one another. The historically evolved *totality* of the society with its elements is the environment of all of them. These big systems (political system, economic system, etc.) function influencing and conditioning one another, thus apart from certain limited possibilities and short-term changes, *none of the big systems can change adequately and effectively if the others remain unchanged*.

The incongruity which thus develops is particularly problematic for legal regulation as a system, because *it is present in the other big systems, in all the spheres of life in the society with its regulations*. The legal system tolerates some inconsistency or incongruity both 'horizontally', that is in its rules related to certain spheres of social life, as well as 'vertically', regarding the time dimension of regulation, as the legal system operates with more or fewer contradictions in the case of the incongruity between the normative material and the organizational element, but the *totality of the system strives to resolve inconsistency and incongruity*. There is a considerable danger that this solution will occur, though historically only temporarily, counter to necessary change partly because of the internal, inbuilt factors of the legal system promoting stability, and partly because of the external, political factors. All this has to be stated even if we know that the legal system, like all other systems, changes precisely through the emergence and resolution of inconsistencies, incongruities, and even contradictions.

The incongruity between the legal norms and the organizations designed to implement them – an important aspect of which, namely the existence or lack of the organization was mentioned earlier – is particularly problematic in the phenomena of the relationship of legal norms directing organizational activity. In this respect specific differences can be observed between the modernizing process of East or East Central Europe and of the so-called developing countries. The differences, however, outline two specific kinds of deviancy, two differences from the ideal-type of bureaucratic organization as defined by Max Weber.

II

Lessons: 'Deviant Bureaucracies' (Public Administration in Eastern Europe and in the Developing Countries)

Max Weber developed the ideal type of bureaucratic organization on the basis of the economic and political processes of the European core and of the continuous rationalization apparently developing within them. He put the ideal type of bureaucratic organization within the category of formal rationality, linked to the formal-legal type of dominance thus it has acquired a historical philosophical content as one of the products and also a means of rationalization manifest in history. But just as formal rationality may be separated, or may even contradict material rationality (as it serves imperfectly, or does not at all serve material rationality in the given case, which, incidentally may be different and even contradictory in the different spheres of social activity, such as the economy, politics, law, etc.), so the bureaucratic organization may also become dysfunctional in that activity for which it was created, or within its social environment. This dysfunctionality may be manifest in the decrease of the efficiency of the organization, which may go even to extremes, as was suggested by Weber, when he studied what effect the bureaucratic organization would have upon the 'technical' productive capacity of the society. Further, it may be manifest in the 'production' of bureaucratic phenomena in the pejorative sense of the term, the inherent nature of which is indisputable within the bureaucratic organization as shown by the results of modern sociological research. (Kulcsár 1987a:239-257.)

Among the broadly known characteristic features of the Weberian ideal type there is the impersonal official, who performs his task *sine ira et studio*, on the basis of his technical training, and whose authority is limited by formal legal norms. According to Weber, formalism is capable of hindering autocracy with the least effort, just as the content of material utility of the administrative tasks performed in the service of the 'subjects' also requires formally treated *rules*. (Weber 1987:232.) These 'rules', however, originate from an external source, after all a considerable, or even overwhelming part of the calculable rules determining the work of the bureaucratic office organization comes in principle from an organization occupying a dominant position above the bureaucratic one, from parliament on a national level, and from self-governing bodies on a regional and local level. One of the even theoretically important components of the political system, which has evolved in the European core is the *subordination of public administration to legal norms deriving from decisions made by elected bodies*. However, this situation has

become more complicated in reality. Weber indicated the possibility, and the tendency is now clear that public administration influences, in certain cases situates, and in extreme occasions may even direct the decisions of elected organizations, in other words, it may become dominant even in the face of elected organizations meant to direct it, despite the constitutional regulations. The growing law-making of bureaucratically organized public administration is related to this phenomenon. This law-making has gradually pushed legislation by elected bodies into the background during the past one hundred years, resulting, for instance, in some legal norms, such as Acts, passed by the latter simply setting broad objectives, or becoming symbolic, the normative content of which being ultimately granted by regulations elaborated in the organizations of public administration.

A certain change can be sensed even in the public administration of the Western centre, in its relationship to the elected bodies, though the influence of public administration starting from 'inside' and aiming at political management typically does not reach the weight of the political objectives received from outside and of the related legal regulation. One may object that the political influence of public administration has been a problem even in Great Britain, where the public administration holds a privileged position. Moreover, according to Dicey even the existence of administrative law has been doubted. "The difficulty with applying the traditional politics/administration distinction to the work of the British higher civil service lies in the fact that senior civil servants are just as much involved in the political control of their departments, and often, too, in the actual legislative process, as machinery designed to carry out political instructions." (Hill 1972:199.) As indicated by the quotation, the participation of the senior civil servant in the legislative process has been effective, moreover "intervening between the bare bones of Act of Parliament and the decision-making of individual civil servants there is a framework of rules which are described as 'delegated legislation'. In other words, administrative bodies have powers which enable them to legislate" (Hill 1972:61), but their management by legal norms is not challenged and the weight of their personality does not become dominant either in the administrative activity itself.

The bureaucratic organization as an ideal type, as a perfectly working machine in Weber's words, differs from the ideal type in its real operation because of various factors. The *basic principles* upon which the bureaucratic organization is built, have never been realized in their totality. Actually the organizational activity is realized through human behaviour, and the sociological phenomena deriving from this fact shape the process of the realization of rules based on the above-mentioned principles. The individual, for instance, working in the organization would accept the objectives of the latter in general, and even the influence deriving from the functioning of the entire structure of the organization upon his own behaviour, yet he would also follow his own objectives besides those of the organization, and while accepting the influence of the organization he himself would try to shape organized activity. The complete rational functioning of the bureaucratic organization is restricted by these factors, not to speak of the limitations involved in expertise (which can never be complete), in foresight (which is frequently wrong, particularly concerning the consequences of decisions), in the capabilities and characteristics of man perform-

ing organizational activities, about those objectives that derive also from the conditions of the organization and from the external *environmental* determination of man working there.

As the bureaucratic organization also lives in a historically developed social environment, so its functioning is considerably influenced by the *social content* of the organization itself.

The phenomena constituting the social content of the organization partly derive from the already mentioned fact that organizational activity is realized through human behaviour, and partly from the system of relationships between the organization and its social environment and from the changes in these relationships. The social environment has its effect on the place, significance and functioning of the organization, depending upon its historical, economic and cultural characteristics, and also on its political role, and finally on its efficiency within the society.

Weber had also referred to the importance of the environment of bureaucratic administration when he said that such an organization had significant *technical* conditions – he mentioned the technical conditions of contacts, transport and communications (Weber 1987: 231) – but it has become clear through research done since his time (only to mention Selznick or Crozier: Selznick 1957: 5; Crozier 1963), that the effect of the environment is asserted in a broader sense. "Individuals within an administrative organization bring with them certain social commitments and attachments." (Hill 1972: 28.) I may add culture, values, norms, etc. alive in the environment. Needless to say, the socio-political environment, which is different to-day even in the developed countries from that of the time of Weber, in itself means different conditions for the activity of the bureaucratic organizations. In the discussions at a Seminar (in Oslo, August 23–27, 1990)⁵ attention was drawn to e.g. the changed factor of the democracy of developed countries, such as the importance of interest-groups, the dominance of bargaining processes, the growing significance of local or regional interests, or the risk-reducing activities of the state bureaucracy, etc. The question was even raised as to whether present bureaucratic organizations are a form of deviance from the original Weberian model?

I think, these changes are realities, the conditions different, but the modifications of the Weberian model in the developed countries basically did not question the most important factors of the model, but the situation was different in the so-called developing countries or in the former 'socialist' societies.

The often problematic functioning of the organizations of public administration built upon the Western pattern in the developing countries indicates by what modifications can the bureaucratic organization, approaching the Weberian ideal type, be built, if at all (not to speak of its functioning). Leaving aside for now the level of training, one of the major problems of the public administration of developing societies is the *rationality of the task (objective) in comparison to the environmental conditions*. The rationality of the activities of public administration, as a bureaucratic organization functioning rationally, if it is forced to perform in an 'economy of shortage', in other words, if *cannot realize the tasks because of lack of means*, it is inevitably impaired. This 'economy of shortage' may be manifest in a relative sense too, that is, if compared to the set objectives. In this case the organization can only

inadequately serve the objectives not taking into account the true conditions, even though the goals may be set by a legal norm.

Rational administration, and *rational administrative activity* above all, is particularly problematic under such social conditions which have historically evolved a different type of administration and administrative activity, whereas in the present medium a modern type of bureaucratic administration is needed, which implements legal norms (embodying political ideas) for the solution of tasks. This bureaucratic administration is one possible variant of the administrative organization which is called 'formal' administration by F. W. Riggs after Károly Polányi's 'formal' economic concept presuming a price-forming market. (Polányi 1976:232 et seq.) Just as 'essential' administration does not require bureaucratic organization working on the basis of legal rules, so the essential economy does not need the market, as is pointed out by Riggs. (Riggs 1964:7.)

Nowadays the contradiction is that the underdeveloped countries aim at the preservation of certain traditional values besides modernization, but they cannot rely upon traditional administration anymore than upon a traditional economy, whereas the bureaucratic type of administration built on the Western pattern is not efficient either, no matter how the latter is formally developed. (It is particularly not efficient when and where public administration has to perform novel tasks if compared to its Western equivalent. A commonly known example of this is the problematic nature of Indian public administration in the management of state enterprises which are treated as hierarchically subordinated bureaucratic organizations, and their economic operation is made almost impossible by 'administration'.) The 'Western' model necessarily leads to dysfunctional results because it does not suit these transitory societies, where the promulgated legal norms frequently hardly mean more than pious wishes, where decision-making is not delegated because of a multitude of centralized decisions, and where the local authorities are weak, etc. The reason is the too far-fetched nature of the objectives which are supposed to be served by the legal norms and by administration, the lack of the conditions for realization, the resistance of the social 'medium', and finally, it is not independent of the 'attitude' of the organizations supposed to realize them. (Riggs 1964:381 et seq.)

Essentially that feature of the bureaucratic organization which generally challenges the character of a 'perfectly functioning machine' also manifests itself in the relationship between the organization and the environment. This 'feature' is the clumsiness (occasionally impossibility) of *adaptation to the environment, an inclination to turn away from reality*. Its consequence is that the bureaucratic organization changes when its activity is obviously of dysfunctional effect within the environment. (Crozier 1963:258.)

Thus the bureaucratic organization as a formalized one does not at all function with the precision of a machine (even in its original Western European environment), the rationality of its expert activities can be influenced by a number of factors, yet the statement holds true, that no better one has evolved so far.

Therefore if an effectively functioning public administration based on bureaucratic organizations could be interpreted as 'deviant' right from the outset if com-

pared to the ideal type, could we find an administration truly corresponding to the ideal type anywhere in reality? (Which of course would be a conceptual contradiction as it is the conceptual characteristic of the ideal type that it does not manifest itself in each context and detail empirically.) We can accept the fact that the public administration of the societies of the Western core constituting the advanced part of the world, growing out from its original European base, which was originally built upon the Weberian ideal type, presents itself as a *pattern* for the modernizing societies together with its dysfunctional phenomena, and occupies a changing position in a changing political system; but the deviant forms of bureaucratic administration can be found in the developing countries and in the former East European and East Central European 'socialist' countries, in comparison to this pattern in the two respects which I referred to in the introduction to the present analysis. In other words, if compared to the impersonal nature and primarily external regulation of public administration (which, I repeat, does not totally exclude its regulation from inside). I would say in brief, that the deviance of the bureaucratically organized public administration in the underdeveloped countries – primarily in the Asian and African societies – manifests itself in the *dominance of the role and significance of the official, the administrator* as against regulated administration, though phenomena of over-regulation can also be noted, while deviance primarily appears in the *unprecedented growth of the legislative activity of public administration* in the 'socialist' societies which have evolved in the Eastern periphery of Europe, even though the significance of the personality of the official and the set of his contacts is also much greater than it is in the core societies. However, the social content of deviance does not derive primarily from the mere divergence from the ideal type, from the 'pattern', thus it cannot be covered by ethnocentrism, or by its phenomena, but from the fact, that the divergence multiplies the dysfunctional consequences of public administration, while its social effectiveness decreases.

1. When writing about the public administration of developing countries, F. W. Riggs noted that although formal organizations of administration similar to the European one have appeared in Asia, Africa and Latin America, "yet, somehow, closer inspection of these institutions convinces us that they do not work in the same way, or that they perform unusual social and political functions. Perhaps the explanation may be found if we note that the new market and administrative systems have displaced but not replaced the traditional systems. In other words, even though the market has invaded the village, it may not have fully eliminated the old redistributive system." (Riggs 1964: 12.) In these countries one of the characteristics of modernization is the existence of overlapping institutions and effects, which means that "the new formal apparatus, like the administrative bureau, gives an illusory impression of autonomy, whereas in fact it is deeply enmeshed in, and cross-influenced by, remnants of older traditional social, economic, religious, and political systems." (Riggs 1964: 15.)

A source of the 'deviant' bureaucratic type of public administration which has evolved in the developing countries, is the traditional economy, besides the market,

the existence or remains of the 'substantive' economy (Polányi), which by themselves limit the effectiveness of formal administration linked to the market, of the policy-implementing bureau. Besides, the traditional values and modes of activity also restrict the realization of the legal norms made in a formally legal way. (Kulcsár 1987a: 109–121.)

Whereas according to Riggs one of the characteristics of substantive administration is that the administrative organization does not implement a policy deriving from 'outside', from the environment of the organization, from the activities of some political body, which is received in the shape of legal norms (as would derive from the Weberian ideal type), either such a set of political objectives and regulation is missing, or even if lately it has existed formally, "the incumbents may become powerful enough to influence policy formation as much as the politicians to whom they are nominally responsible." (Riggs 1964: 14.)

The most important element of the deviant bureaucracy of the developing countries is just this personal dominance which directly derives from the functioning of substantive administration. This personal dominance appears in selection, where personal contacts, often patron–client relations, or even family ties are dominant in the functioning of public administration, where calculable legality is pushed behind the discretion of the official who can be influenced, and even in the organizational hierarchy itself, which means an unnecessarily multiplied grading, decreasing effectiveness, and finally, where not objective expertise but authority and personality distribute power and shape the forms of behaviour.

However, yet another factor should be mentioned among those maintaining the features of substantive administration even within that bureaucratic organization which is apparently a modern one by formal considerations. It is already commonly known that colonial power had quite a significant role in the survival of traditional political culture, and could strengthen its own autocratic rule with the elements and instruments of traditional political culture (Pye 1985.) An essentially similar phenomenon took place in colonial administration too, because of its dependence upon the traditional political culture. In analysing the British Indian administration, C. P. Bhambhri has stated, that it had two special components: elitism and loyalty to the masters. (Bhambhri 1972: 4.) These two components are expressly the characteristics of substantive administration. I could quote a series of such statements – as in fact I did earlier – which emphasize the role of the official as an individual in the British colonial administration. If British administration was built much more upon suitable people than on legal norms, then it actually gave a new lease of life to the traditions of 'substantive' administration, just as it strengthened the significance of traditional legal norms and the organization implementing law with the help of indirect rule. In fact the penetration of the division of labour of the modern economy into the traditional society of the colonies did not necessarily mean the disappearance of the traditional legal order. Empirical surveys prove that "the subsumption of formerly pre-capitalist producers within capitalist relations of production does not necessarily imply a complete transformation of pre-capitalist legal norms envisaged as mere simple concepts; but it entails a profound transformation of these norms as concrete concepts to the extent that subsumption con-

stitutes change in the mode of production." (Snyder 1981:296.) Similarly the elements of traditional administration did not disappear either.

Some components of the traditional legal system, however, have survived *after independence* just as much as discretionary public administration relatively less concerned with rules. Although it is true that the principle of judicial review generally survived in the face of its decisions, at least in the earlier British colonies, this frequently functioned just as discretionally as public administration. (Spectacular examples of this are quoted by Seidman 1978:236-238.)

This is how the special situation evolves, when public administration becomes bureaucratic, in so far as its structure becomes *formally* such, with a particularly large number of hierarchical grades, but its bureaucratic phenomena also multiply in the pejorative sense of the word, partly because of its growing independence from law, and partly because of the lack of necessary expertise. The later is particularly important because if the personal element becomes dominant in public administration (or retains its original dominance) then the components of the principle of 'only good men make good government', that is the significance of qualifications, suitability, impartiality, etc. would be revalued. Thus the growing independence from law and the inadequate quality of staff in public administration do not only produce a deviant bureaucracy, but ultimately public administration can only decrease in efficiency, too. To show that this is not only relevant in former British colonies, it is sufficient to quote the example of Ethiopia. "The fact that law does not tell each Ethiopian administrator what precisely he is expected to do creates a certain amount of insecurity among bureaucrats, but this insecurity is more than counterbalanced by the traditional attitude that administration is an exercise of privilege rather than a matter of skill, ability and training." (Brietzke 1982:210.)

The dominance of the public administrator as an individual against the legal norms is not only created or enhanced by the lack of such norms, but by the opposite as well, namely by *relative over-regulation*. This relative over-regulation ultimately results in the individual failure of the administrator in a public administration characterized by the dominance of individuals. The legal norms which cannot be implemented at all, or only to a minor degree, result in discretion independent of the legal norms, and, on the other hand, the difference between the objectives and principles set in the legal norms and reality, which cannot be bridged by public administration, manifests itself as the failure of public administration and its employees. Therefore, the more dominant the personal element of public administration is, the more responsibility it takes upon itself for the lack of realization of legal norms that cannot be implemented, and this strengthens further the dominance of the personal element in public administration.

Regulation, however, has been necessarily growing in the former colonial societies during the past decades, no matter how much the discretionary nature of colonial administration has been preserved. In fact the majority of these countries have launched some kind of conscious development policy in the decades since independence. Though the ideological foundations of such a development policy have greatly differed – extending from 'socialistic' trends to those expressing various fundamentalist objectives – yet law-making has had a prominent role in each (at

least after some time and when certain illusions – the illusion of society without law – had been dispersed). Such an altered position of public administration was expressed by Bhambhri in the following: "... from limited government we have moved to the era of 'Big Government'" – and he adds: "Although 'Big Government' is a universal phenomenon, in the developing countries it assumes special significance. The backwardness of centuries has to be combated by the efforts of the government. It is impossible for anyone to delineate clearly what a government should do or not do in the sphere of nation-building in an underdeveloped country. Development is a total activity, and ignoring any sector creates imbalances. In addition, this total developmental activity cannot be undertaken by anyone else except public authorities. ... 'Big Government' assumes 'Big Bureaucracy'. It is a truism to say that the greater the area of public policy, the greater is the role of implementation and service agencies." (Bhambhri 1972:8–9.)

Either it is the more modest objectives of developmental policy, or – and this is more frequent – legal regulation serving the building of a planned economy and society upon some ideological foundation, *regulation bears the signs of modernization, whereas the behaviour of public administration* – particularly regarding the dominance of the administrator – *is traditional in nature*. Thus the contradictions inevitably come to the surface. In the *present* condition of Indian public administration, originally organized by the British, for instance congruence between the norms and actual behaviour is missing, and the orientation of the lower level officials in particular towards those administrative norms which contain the office rules, the maintenance of authority based on hierarchy, and the guarantee of impersonality is of a low standard. I have already referred to a low level of orientation towards norms safeguarding a rational administration even among senior officials, for instance in India, consequently leading to a more developed 'bureaucratic' structure, in other words the relevant norms are more elaborate than their appearance in actual behaviour. (Panadiker and Kshiragar 1971.)

Although according to some data such a contradiction does not only occur in the public administration of developing countries – an American survey indicated, for instance, that a considerable number of public employees have authoritarian inclinations in contrast to democratic principles (Wynia 1974) – this contradiction as a *characteristic feature* is primarily present in the public administration of developing countries. The situation already referred to, namely that the organization of public administration is incapable of implementing over-ambitious legislation, keeps alive and even strengthens another traditional feature. This trait is linked to one of the characteristics of traditional legal systems, to the *punitive outlook* (Kulcsár 1988), but it has also been present in the public administration of developing countries because of the same cultural linkages, the features of political and legal culture. According to Seidman this "bureaucratic punishment-orientation results from ideology and structure. Administrators see punishment as the only available conformity-inducing measure. Administrators usually deal only with rules that they believe express custom. That suggests punitive sanctions." (Seidman 1978:242.) In Seidman's interpretation the social effect of punitive sanction is limited, and is particularly so in the developmental process, since punishment may strengthen the

existing systems, but may not lead to change, particularly not to the change of behaviour, which derives from the social environment in a way required by the government. (Actually this phenomenon became quite clear for me when I analysed the failure of the changes 'forced' by penal law under the Stalinist political system in 'socialist' society. (Kulcsár 1961:273 et seq.)

Thus such a form of deviant bureaucracy has evolved under special social circumstances and specific legal and administrative traditions. Public administration, designed to follow the modern bureaucratic pattern, is supposed to solve the tasks of modernization, but these tasks cannot be solved on the basis of the legal norms, which set the ambitious objectives. The objectives set for public administration, are usually so far from reality that they cannot be accomplished by a public administration which although formally based on rational expertise and calculable legal norms, in reality contains within itself the basic characteristics of a traditional, substantive administration. It retains in particular the dominance of the administrator as a personality and his right to discretionary decision-making.

Therefore, this form of deviant bureaucracy maintains continuity based on the continuity of the political culture. H. K. Asmeron, analysing the patrimonial nature of Ethiopian public administration, reached the conclusion that the patrimonialism of the imperial regime and the neo-patrimonialism of (the now already former president) Mengistu's Marxist regime essentially mean the same, namely: it is a means to serve a highly centralized, authoritarian rule, hence it could offer a relatively easy transition from the old political system to the 'socialist' government of today, even if the ideology of the bureaucratic organization changed to Marxism-Leninism. It is a corollary as well as a consequence of 'abolishing while retaining' that a number of traditional values and norms, cultural imperatives which had been the most important features of the patrimonial and personal imperial rule, have surfaced as typical characteristics of President Mengistu Haile Mariam's neo-patrimonial and personal rule, despite the radical changes accompanying government based on Marxism-Leninism. (Asmeron 1988:1-2). It can also be proved that the same continuity, linked to personal rule, has appeared in other countries of the Third World as well, despite the differences in regime. The same traits - the existing forms of super- and subordination, the consequences of the patron-client relationship, etc. - are alive in the political culture of these countries. (Asmeron 1988:25-27.)

2. Another form of *deviant bureaucracy* evolved at the Eastern periphery of Europe, under the so-called Stalinist political system. The model, created in the thirties in the Soviet Union, was based upon centralized planning and a desire to eliminate the market. This type of bureaucracy was adopted by the European countries which followed the Soviet model after World War II. By the end of World War II the public administration of these countries was much closer to that of the Western centre and their administrative traditions were also largely different from those of the underdeveloped countries, as parallel with the development of market economy the Weberian model had already taken the place of the so-called substantive administration. There were also other differences from Russian tradition. Yet

some elements of 'substantive' administration had been maintained by special social factors, though to a different extent in each country. In Hungary and Poland, for example, where the gentry and the traditions of administrative autonomy had long survived, expertise, objective knowledge was pushed into the background in favour of the knowledge of dominance, or more generally, in favour of the dominant, political position almost until World War II.

Following World War II, however, it was not the surviving elements of the substantive economy which grew into a market economy, but *attempts were made to eliminate the market economy and the values and forms of behaviour linked to the market, to enterprise, and even to the economy*. Deliberate measures were taken for ideological reasons. As I have mentioned, the effort to eliminate the market economy was accompanied by an experiment to create a new society based on special ideological premisses. The measures aiming at the creation of the new society were based on an ideologically shaped, ambitious set of objectives set in legal norms. As most of the East European and East Central European societies were still in the first phase of modernization, and these countries lagged behind those of the European core in respect of their economic and cultural advancement efforts towards the creation of a new society, had to be launched on the *soil of poverty*, and that also in a way so that these societies would reach a level of development through the renewed take-off of modernization, which would mean the second phase of modernization and an advanced social set-up, different from the main Western centre. It should be added that traits of the economy of shortage were present in these societies because of their historical backwardness, and they had also suffered economic breakdown as a result of the war. Thus, when the majority of these societies started to follow an unsuitable model and set ambitious objectives for themselves, they were already characterized by the economy of shortage. Moreover, shortage had grown even relative to the objectives and reality and in respect of the distance between them.

All these circumstances produced the *second form of deviant bureaucracy* in public administration (just as in the economy), namely a *rule-creating bureaucracy instead of a rule observing one*. A situation was created in which the legislative nature of public administration was strengthened along with its law-implementing character, and even, in the implementation of law the rules made by public administration itself were dominant.

The exclusion of the market, or its restriction to a very small sphere, the introduction of the system of centrally issued plans by the nationalization or collectivization of the productive and distributory organizations turned *economic activity also into public administration*. If the commodity and monetary relations do not assert themselves in keeping with the order of market values, or do not assert themselves at all, then the organization of production, the shaping of the price of individual products – and voluntarily at that, regardless of costs – distribution, etc. all become administrative activities. Moreover, the organizations effectively producing and distributing become articulated within the system of organizations in the society as units directly managed by administration, themselves behaving in many cases as administrative organizations and occasionally even as authorities. It is only one sign

of this economy turned administration that in these countries disputes between economic organizations were not (and in some countries are still not being) decided by lawcourts, but by arbitration committees of an *administrative nature* specifically created for the purpose and directly serving the interests of economic management. This in itself has led to the organizational growth of public administration accompanied by the enhancement of bureaucratic law-making.

May I add that the 'socialist' societies which evolved at the Eastern periphery of Europe, created a special paternalism by the centrally ordered economic plans, and strengthened the paternalistic elements which were already characteristic of the political structure of this region. (Kulcsár 1987a: 339-343.)

However, in the case of paternalistic economic and political management the *dominance of the bureaucratic co-ordination of the society is an inevitable outcome*. Moreover, bureaucratic co-ordination – analysed by János Kornai (Kornai 1984: 16) – may survive central management, it may endure longer than the system of paternalist relationships. More precisely, the gradual dismantling of central management (which took place in Hungary from 1968 onwards) does not necessarily weaken bureaucratic co-ordination at a tempo that suits transformation. (One reason, of course, is the contradictory, occasionally retrograde, slow nature of transformation itself.) I quote again what János Kornai writes in connection with this issue: "Bureaucracy stretches a net of rules against the stream of social micro-processes. If the net is too coarse, then all sorts of irregularities can slip through it. Counter-measure: the net should be woven more fine. This can be called the *inclination of the bureaucracy towards 'self-fulfilment'*: it is inclined to complement general regulation anew by increasingly concrete and more detailed rules." (Ibid.: 20.) This is how it came about that "the inclination of the bureaucracy towards self-fulfilment" manifested itself in the massive growth of a multitude of indirect regulators simultaneously with the introduction of economic reform, intended to transform the system of centrally ordered plans. (Earlier I quoted an example: 228 different regulatory elements influenced the profit of enterprises in 1982.) It is not difficult to find examples of law-making which already embodies the internal logic of the bureaucratic organization. A logic which, to some extent, makes itself independent of the socio-economic environment and changes in that environment. In fact such legal norms function practically without any feedback, more exactly the feedback – if the ineffectiveness of the earlier regulation reaches the administrative organization somehow – would set off new law-making.

Bureaucratic law-making is also a manifestation of those legal norms which do not intend to regulate the activities of citizens or people, but primarily organizational activity. Frequently they lay down the *procedural* aspects of their own activities when they are issued by the different organizations. Incidentally such bureaucratic law-making is the inevitable consequence of the economy of shortage; because shortage is accompanied by the distribution of 'shortage goods', this regulation creates the organizations of distribution on the one hand, and regulates the distribution and the behaviour demanded from those 'queueing' on the other. (For example, in Eastern Europe the motorcar was not a commodity but a centrally distributed article of shortage the price of which was independent of its real use value. One had

to queue, cars were allocated through an organization specially created for the purpose, and even the sale of second hand cars was regulated; a period of time had to elapse before a car could be sold. It is true that these regulations were violated with the result that the network of regulation had to be 'woven more fine'. The more marked shortage is, the more regulation increases, after all if an organization created to perform a given task cannot essentially do it, or only with reduced social effectiveness, then its activities will inevitably be distorted and become dysfunctional and instead of solving the task the 'how' appears, the self-regulation of activity as a substituent.

The impossibility of realizing ambitious objectives mostly worded on the level of Acts artificially enhances shortage, as *instead of* the realization of the usually ideologically based objectives and the solution of tasks – since it is impossible to realize them – organizations for their realization appear. Subsequently these organizations *narrow down* the theoretically set objectives and tasks through regulating activity. This allows some realization of the objectives. This phenomenon can be seen in the former 'socialist' societies on the Eastern periphery of Europe (although the context and the extent may vary), in the fields of free medical care, low rent flats built and allocated by the state, schooling, etc.

A further characteristic is that the *weight of the administrator* also appears in this form of deviant bureaucracy, as the significance of personal contacts survives behind over-regulation precisely because regulation is excessive. Actually, regulation generally allows for discretion, which, although it is only to be used in certain cases, formally legalizes the administrator's diverting from the rule. (In Hungary, for instance, the regulations concerned with the allocation of flats minutely qualify legitimate claims, including the administrative procedures and the involvement of the public. Yet, with reference to central interests, etc. administrative disposition over some of the flats remained practically, uncontrollable.) Essentially a similar discretion is the result of over-regulation. The observance of such a mass of contradictory legal regulation makes profitable economic activity impossible. If only ministerial orders and higher level legal norms are considered, then it turns out that 59.7 per cent of the legal norms promulgated in Hungary between 1945 and 1987 were made at ministerial level; and if the ministerial directives and instructions, which are formally not legal rules, yet are of a normative nature, circulars, etc. are also considered, then administrative law-making is even greater. Consequently, it is the spontaneous processes of the economy which create the 'rules' through which organizations and individuals effectively conduct themselves, rules which differ from, and occasionally oppose the relevant legal norms. As the violation of legal norms also becomes practically general the administrator has the opportunity to identify the violation of law discretionally, more precisely in order to call the 'chosen' violator to account, usually not because of a concrete violation of law, but by reference to it.

Ultimately the second form of deviant bureaucracy produces phenomena in the activities of administration similar to the first, as the most important 'result' of both is the *weakening of the performance and social effectiveness of public administration* – and consequently of law – as well in many respects.

Finally: the political culture which historically evolved at the Eastern periphery of Europe – despite the differences among the countries – has maintained, though to a decreasing extent, some norms and consequences of sub- and superordination, of the patron–client relationship. They were manifest in an almost extreme form in the phenomena of the personality cult, retaining and handing down certain traits of Asian political culture. (Kulcsár 1987a:258–259, 342.) Thus the emphasis on the personal element has been mixed with the second form of deviant bureaucracy as well.

Conclusions

III

Conclusions

It follows from the fact that modernization is a process of high complexity, encompassing all spheres of social activity from the economy through politics to culture, that law, as a promoter of this process, can perform its role successfully only if it is capable of changing (modernizing) in itself, and if it can participate successfully in the unfolding of the phenomena, which born from the same process, which means the modernization itself.

Consequently the role of law – though it is creative in nature – is not only secondary in this process, but its impact is mostly indirect. In other words it can be successful not only, and not primarily in its direct normativity, in shaping human behaviour through the impact of norms, but by participating in the regulation of processes, by shaping the network of roles present in the society, by the creation and moulding of institutions and organizations, etc. As a consequence of this situation it is rather difficult to isolate the role of law from other norms, or from other factors of modernization. It is particularly difficult if it is kept in mind that law is effective and functions within the context of political and legal culture in each case, beyond the interrelationships already referred to, and this medium may modify even the effect of the most rationally made legal norm. The effect is even more doubtful when the legal norm was not rational in its original 'intentions', in its dual linkage to the political elements of the shaping of society and to the actual condition of the society. Consequently, its own internal rationality is also impeded.

In Chapter One of the present work I briefly referred to the different sources of resistance, the resulting phenomena of which make the realization of reforms expressing modernization more difficult. Though it is true that I have mentioned these sources only at the Eastern periphery of Europe and mainly as they manifest themselves in Hungarian society, I believe that the signs of resistance thus defined can be generalized. The consequences deriving from these sources of resistance are manifest in two forms in law. Partly these consequences try to take a legal form. For instance, the restrictive regulators appear in legal norms, the organizational structure becomes more detailed in legal rules, the 'bureaucratic' law-making of the organization is strengthened, and the different forms of historical resistance are not only expressed legally, but become part of the legal ideology as well. On the other hand, law often uses its own means against the phenomena of resistance, imagining that it is capable of shaping behaviour directly, by determining new forms, drawing

up the framework of new opportunities, and at times even by means of the criminal law. Consequently, it happens that the struggle of the new and the old is projected to the plane of legal norms, to the normative sphere, to the level of legal ideology in the better case, thus everything which is only a consequence and manifestation, obtains primary importance. This can be observed in the present transformation of Hungarian society, for instance in the case of the legal norms following Act VI of 1988 on Economic Companies, an Act intended to promote real market conditions in the economic sphere. It can also be seen in the political field: in drawing up the 'rules of the game' for the political system, and even in the process of making the Constitution.

This phenomenon helps the development of the notion that law can participate in the process of modernization as a primary instrument by solving political problems, not to speak of economic ones, and about the deeper spheres of culture and customs, etc. However, I think that the earlier analyses show convincingly that the effect of law in the interest of modernization is conditioned by other factors even when it is intended that the legal system be changed, and, as is indicated by the present Hungarian experiences, the removal and alteration of forms and frames which have not been traditionally rooted, may meet difficulties despite the purest intentions of the legislator.

Law in the service of modernization may have to face the 'whole world' within the given society.⁶ In such a situation the intertwining of longer term processes and almost daily interests may hinder its development and impact. In Hungary today there is for instance Act VI of 1988 on the Economic Companies, which is a piece of legislation of outstanding significance in the development of a modern market economy and the free movement of capital, but it came into conflict with organizational and economic interest, and with the impact of 'traditional' ideological considerations even during its preparation. (Sárközi 1989.) Ever since it was passed the legislation has faced the united opposition of large enterprises which had a privileged position in the 'old' economy, and the ideological and political consequences which derive from the outdated model of 'socialist' society which brought so much trouble for the society. In addition the radical thinking intellectuals, those squeezed to the periphery of the economy but protected by the ideology of equality, or that of the populism and related political interests are also against it. Such mixtures of interest and ideology, though they may originate from diametrically opposite processes, naturally appear in every other field of a legal system which wishes to promote modernization. Often phenomena of processes going back to the traditional society are similarly intertwined with new and radical ideologies.

It is an obvious illusion to regard the role of law as so extensive that it is capable of changing such a social medium by itself, or together with its political background. However, such an illusion, if it penetrates reality, may have consequences which further distort law. Reference was made to it in the earlier analyses, here I wish to make only one remark. Undoubtedly there is a great temptation to make new legal norms when legal regulation has failed, instead of identifying the causes of failure, and ultimately to use the penal code, as an instrument of bringing success, the result of which would be a tough 'policy of penalties', the limitation of law to penalty only.

Such prominence for criminal law has always resulted in consequences seriously damaging to modernization, in the slowdown of the process, and even in temporary halts. It is not surprising that, where law is narrowed down to its 'most traditional' element, it becomes 'danda', and its 'responsiveness' is distorted into offended retorts.

Naturally, criminal law has its role in the introduction of social change (and in its restriction), similarly it also has a role in the process of modernization even in eliminating factors opposing change. But merciless criminal legislation by itself indicates the unreality of the desired social change – or to put it in a more general form – of social behaviour. And if we could assess excessive faith in legal regulation as a sign of backwardness in the process of state, political and legal development, then the excessive and even primary use of criminal law is the sign of the chiliastic faith of the 'law-maker' – using the term in a broad sense – who, because of the prejudice of his faith is incapable of understanding tendencies, and conditions of reality, and consequently of shaping it. Whereas as was stated by an author often quoted in this work (Seidman 1978:471): "development must begin with reality, not dreams". This is true even if we know from the example of not a single society that the public thinking accompanying emergence from backwardness is full of dreams.

Notes

1. Robert Seidman, who gave a comprehensive analysis of the possibilities of law in the development of African countries, has reached a strongly pessimistic assessment. The promises of African independence 'cast in gold' have proved to be false, and this can be primarily traced back to the fact that though the existing legal system (inherited from the colonial period) has strengthened the conditions of poverty and the conditions of oppression, the elite in league with the economic ruling class, perhaps with the exception of Tanzania, has done nothing to evolve a legal system which would have served development after independence rather than the interests of the political elite and of foreign enterprises. According to him the main cause of this situation is that the control of law by the governments is not adequately provided for. The doctrine of the Western 'rule of law' does not function despite the (British) traditions to be found in places, the African courts have not been able to guarantee human rights, and the authoritarian structure of the legal system restricts its own effectiveness in the introduction of changes. According to his hypothesis 'soft' development inevitably derives from the conflict between the authoritarian legal system and the commanding necessity of development. He sees the solution in the increase of participation, in involving people in the decision-making processes, which would sooner or later bring about institutional changes as well as changes in content. (Seidman 1978:464–472.)

2. Reference to African traditions has appeared in the most diverse forms. For instance, Julius Nyerere justified the introduction of the 'one-party' system by saying that the traditional African attitude and community routine have been generally based on consensus. Then he added that the 'multiparty' system was an artificial luxury which carries the state into an evil competition, whereas the new states require a combined effort to build the new society and to guarantee economic and social development. He simultaneously rejected the state organization of the 'socialist' states too, saying that there the individual is only secondary compared to something which is called state, whereas the ideal of 'African socialism' is community and egalitarian by nature. In practice, however, the dualism and the separation of the political elite and the 'motionless' rural masses expected to tolerate reform, have continued to exist. There are many complaints against the behaviour of the TANU and its functionaries, also against the changes introduced into the traditional system of customary law and judicial organization, and against

the frequent interference of TANU functionaries in the procedure of these courts. At elections people cannot express their will freely, the candidates are selected by the TANU leaders. (Maguire 1969:361-368.)

3. "The law becomes arbitrary and destructive of established order as soon as it attempts to regulate relationships between individuals who feel that they have worked out a fairly successful *modus vivendi* for themselves. The legislator begins to err as soon as he attempts to legislate relationships between husband and wife, between parents and children, between a village community or tribe which has as its major preoccupation not the affirmation of individual rights for the benefit of individual members but, on the contrary, has the idea of maintaining the cohesion of the group which it forms and the solidarity of its members." (David 1971:47.)

4. According to András Sajó this is almost a general reaction: "to a social conflict the victorious power has reacted by legislating and strictly laying down the existing, but challenged conditions, or may even have ordered grave sanctions to consolidate the existing reality." (Sajó 1983:193.)

5. The discussions of a seminar in Oslo were centered around the role of law in the development process and influence of political culture. The reality of the Weberian model even in its own time was questioned by Prof. Erickson from Helsinki.

6. This is why the Muslim religion - in some aspects - has been not only against, but for reforms in modernization. (Lapidus 1991:888-889.)

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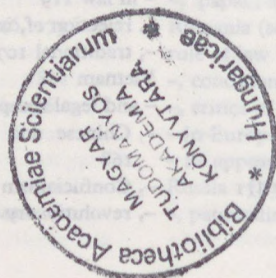
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1960.

This book poses the question whether the phenomenon of modernization has existed at different times and in different cultures with the same content, and as the answer is yes, it tries to provide a definition of this world phenomenon, free from ideological bias.

The real question is, however, whether law can be used to promote successful modernization; if so, under which conditions, and if not, for what reasons. The author investigates the modernization process in Eastern Europe from this point of view, particularly with regard to the recent decades of the so-called "socialist" societies, in comparison with those societies which originally had a traditional, sacral legal system, such as India, and traditional tribal systems, such as the former British colonies in East Africa. Finally, the author considers Ethiopia which had both sacral and tribal elements in its traditional legal system. Having analysed the effects of modern law during the colonial period and after independence, and the use of law in "socialist" political systems, the author draws some conclusions about the problems of legal pluralism, and the effect of successful or frustrated law-making, which have appeared in these societies and their legal systems. The book ends with some theoretical conclusions.

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MODERNIZÁCIÓ ÉS
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