We are now well furnished with general works on comparative law written by Western authors and appearing in English. The obvious examples range from Lawson’s slender but seminal Cooley lectures through the French approach of David and the German of Zweigert & Kötz to the American “casebook” packages of Schlesinger and Von Mehren. An East European counterpart is now provided by the translation of Professor Gyula Eörsi’s major study. It is the first such treatise to appear in English and, being the work of a mature scholar and distinguished author of a socialist country, is profoundly different from the chic offerings of our home-grown Marxists.

An initial regret must be expressed. The translation does not seem to have been read by a lawyer – or indeed anyone – whose native language is English. Often it is possible to divine the meaning: one can make sense of the “strings and arrows of our ageous societies” (p.50), assume that “third-rate” means “tertiary” (p.54), and read “subjective law” as “right” (p.360). There are, however, several passages of which, with the best will in the world, an English reader can make nothing at all whether because of the syntax or the vocabulary (innervative, contentual, volitive). It is quite likely, therefore, that some of the criticisms which follow stem from the translation rather than the author’s analysis.

The task which Eörsi sets himself is to present a Marxist analysis of the major figures of private law, especially ownership, obligations, and the abuse of right and, in so doing, to compare socialist and capitalist legal systems. His work displays immense learning, profound insight, and scrupulous intellectual prudence. He observes that Western comparatists base their approach on abstract notions (saying of Zweigert & Kötz, for instance, that “all their elements belong to the sphere of ideas and institutions” (p.44)) and emphasizes that such a method fails to attribute proper weight to property relationships; this neglect he ascribes to “the present defensive stage of capitalism” (p.46). By contrast, Eörsi’s basic postulate is that “each mode of production, each socio-economic structure has its corresponding law-type” though he warns against mechanical derivation of one from the other (p.48).
Curiously enough — although he does not cite them — one may find support for his views in the far-from-Marxist “Chicago school” of lawyer-economists. Their — purely descriptive — hypothesis is that the one and only goal of the common law is to promote the efficient allocation of resources and they conclude that it may be possible to deduce the basic formal characteristics of law itself from economic theory. But of course the theory, whether of Pareto-superiority (someone gains, no one loses) or Kaldor-superiority (gainers gain more than losers lose), is designed to operate only by taking as given the present distribution of resources.

1. Capitalism

Eörsi’s fundamental distinction between socialist and capitalist law-types is that the first is based on social ownership of the means of production, the second on private property. In this system the owner of the means of production meets the owner of labor and they deal: the former buys labor for money. From that basic economic relation, the author deduces four principles of private law: unlimited ownership; freedom of contract; formal equality; and the underlying safety-net of subjectives Recht according to which everything is permitted which is not formally prohibited (p.68). For a Western lawyer, in many ways the most stimulating section of the book is its lengthy comparison of bourgeois law groups, of which the author distinguishes four.

1.1. The “Early” Capitalist Revolution

The private law of England and Scandinavia is treated as the product of an early bourgeois revolution. The essence of the common-law system is to be found in the fact that the landed interest and the mercantile class reached a compromise, with the previous centuries of conflict culminating in the settlement of 1689. Following Engels, the author sees this as an adjustment whereby the political spoils would be left to the great families, provided that the economic needs of the rising middle-class were met. It is this class-compromise which made possible a largely uninterrupted course of legal development from Glanvil in the twelfth century to Lord Denning today; rendered unnecessary the reception of that part of Roman law dealing with the relations of commodity production; prevented a split between public and private law and codification of the latter; generalized the law of contract and permitted the lex mercatoria to infuse the whole legal system without being confined to a separate code or courts; developed early a notion of full vicarious liability of the employer; and left the rest of the law of tort in fragments.

By way of prologue the author takes a 1963 case in which the Court of Appeal, faced with a suit arising from a road accident caused by a dog in a London street, had to decide the outcome by dealing with the medieval law on liability for cattle; and he concludes that the feudal basis for this rule — still operating in the 1960s — was the favor shown to landowners (pp.111 ff.).