BOOK REVIEW

E.P. Thompson, *Customs in Common*. London: the Merlin Press (1991). (xii + 547 pp.)

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The relationship between the historical and the social-scientific approaches to the study of law is complex, not only for methodological and paradigmatic reasons but also because so many (sub)disciplines are involved: history, legal history, law, anthropology/sociology of law, anthropology/sociology. Hardly anyone will dispute that the two approaches need each other. The historian who attributes some development to a legal intervention, for example, is likely to make elementary mistakes if he or she knows nothing about the problems of assessing legal effects; and the legal historian who draws social inferences from data in ancient court files will cut a silly figure if he or she knows nothing about the systematic bias characteristic of such documents, resulting from the selection processes that 'litigation theory' addresses.

The social scientific study of law, on the other hand, is inevitably universal in its pretention: a theoretical generalization is either true for all societies in all historical periods, or it is not true at all. Nevertheless, while a comparative approach is fairly common, especially in anthropology, the use of historical methods and data remains rare. Part of Black's breathtaking singularity lies in the fact that his approach recognizes no boundaries of time or space (Black 1976).

Despite the fact that neither can do without the other, however, the two approaches have on the whole remained separated by a gulf of mutual ignorance and suspicion. Of course, there are exceptions. There are anthropologists who have studied legal phenomena in an historical perspective and there are historians who have studied legal phenomena and have been well-schooled in the relevant social-scientific literature. The cross-disciplinary bridge-builders remain rare, however, and on the whole those of us on the social-scientific side of the divide who are interested in historical data are (apart from the nineteenth-century evolutionists) dependent on (legal) historians who, as it were without knowing it, mine veins rich with material that affords general insight into legal phenomena.

The late E.P. Thompson is one of the most distinguished of those to whom one can turn for the analysis of historical examples of the phenomena with which modern legal anthropology is concerned. In *Whigs and Hunters* (1975) he deals with the social history of the Black Act of 1723, which introduced the death penalty for a range of seemingly trivial offences having to do with forests, placing it in the context of bitter social conflict over the privatization of forest ownership and the elimination of customary common rights in the forest and its products. And in *Customs in Common*, published shortly before his death, he deals with "customary consciousness and customary usages" in eighteenth-century England. The importance of both books for the study of legal pluralism hardly needs to be argued, and justifies a short review of the latter book in this Journal.

Although it is a collection of (more or less revised) essays most of which were published many years ago, Thompson describes *Customs in Common* as "intended as a single closely-related argument" (ix). This argument concerns "the theme of custom as it was expressed within the culture of working people in the eighteenth century and into the nineteenth" (1). Plebian culture is defensive, conservative and rebellious. It "resists, in the name of custom, those economic rationalizations and innovations (such as enclosure, work discipline, unregulated 'free' markets in grain) which rulers, dealers, or employers seek to impose." (9) "Many of the classic struggles at the entry to the industrial revolution turned as much on customs as upon wages or conditions of work." (5) Plebian culture afforded priority in certain areas to non-economic over monetary exchanges, so that "much eighteenth-century social history [can be seen] as a succession of confrontations between an innovative market economy and the customary moral economy of the plebs." (12) The industrial revolution eventually revolutionized 'needs' and thereby destroyed "the authority of customary expectations", a process that continues today in the non-industrialized world (14).

In "The patricians and the plebs" Thompson develops the thesis that eighteenth-century English culture was based on an "underlying polarity of power" (95) in that the fundamental political relationship was between 'the gentry' and 'the working poor'. The relationship was one of reciprocal equilibrium between the socio-political hegemony of the former and a distinct plebian culture - aware of the dependence of the gentry on its fundamental acquiescence - whose assertion of its customs and rights largely took the form of crowds and riots. The relationship was largely symbolic on both sides. In the course of the discussion, Thompson makes a characteristic observation on the importance of "theatrical" relationships in law and politics (he is speaking here of the gentry, but the same analysis applies to the plebs):

> [I]f we speak of it as theatre, it is not to diminish its importance. A great part of politics and law is always theatre; once a social system has become 'set', it does not need to be

> endorsed daily by exhibitions of power (although occasional punctuations of force will be made to define the limits of the system's tolerance); what matters more is a continuing theatrical style. What one remarks of the eighteenth century is the elaboration of this style and the self-consciousness with which it was deployed. (46)

The "studied paternalist style" of the gentry manifest itself in the "social lubricant of gestures" (charity, support for popular festivities) and, in particular, in the administration of justice: on the one hand, "the ritual of public execution [as] a necessary concomitant of a system of social discipline where a great deal depended on theatre" and on the other hand frequent merciful intervention to secure a reprieve (46-48).

"Custom, law and common right" deals with the gradual loss of common rights and the enclosure of the commons, a process in which the "law was employed as an instrument of agrarian capitalism" (175) and the "notion of absolute property in land" ultimately triumphed over local customary relationships (167). The discussion is subtle and detailed. Two points of special relevance for the study of legal pluralism deserve note.

(1) At enclosure holders of lesser customary rights (occupiers of 'common right cottages' and those who enjoyed 'minor rights of common' such as grazing for pigs, geese or even cows) were generally not compensated, since they were not legal 'owners' of these rights (128). One thinks at once of the problem of customary agricultural use-rights of women in Africa, which are generally ignored when community land is divided up into private ownership or when compensation is given for public taking.

(2) The dispossession of commoners in England and the common law's insistence on absolute, individual ownership were the "templates" of nineteenth-century British colonial practice. Only in this century, especially in Africa, has "colonialism learned how to co-exist with tribal land usages and with customary law, indeed to invent customary law or to codify and institutionalise it in such ways as to create a new and more formal structure of rule" (174). Reading this in the light of subsequent African legal history one wonders, however, whether the policy of Indirect Rule was a reversal of colonial legal policy or really only a temporary tactical accommodation. Enclosure in England, after all, was a process that took several hundred years.

In two chapters, "The moral economy of the English crowd in the eighteenth century" (reprinted as first published in 1971) and "The moral economy revisited" (that deals with various reactions to the earlier essay), Thompson deals with the explanation of eighteenth-century food riots. Hunger in times of dearth is

insufficient as an explanation. "Of course hunger rioters were hungry, but hunger does not dictate that they must riot nor does it determine riot's forms." (266) Riot, where it occurs, is "usually a rational response" that takes place "not among helpless or hopeless people, but among those groups who sense that they have a little power to help themselves" (265). It is often quite disciplined (and relatively non-violent) and directed toward inhibiting exports of food from a district, regulating markets, forcing farmers to send supplies to market, and pressuring the authorities into organizing local measures of relief.

Eighteenth-century food riots took place against the background of the decline of Tudor policies of market regulation, including emergency institutions for times of dearth, under the influence of the new political economy of the free market in grain, associated in particular with Adam Smith's *The Wealth of Nations*. In time of dearth and high prices, riots could enforce protective market-control, claiming legitimacy derived from the earlier, paternalistic 'moral' economy. Food riots were part of the 'field-of-force' characterizing the century's polarized power relationships.

Thompson's treatment is made particularly interesting by its emphatically comparative character and the way in which it refers to the Irish and Indian experiences with food riots, and the literature on the 'moral economy' of peasant cultures. It is weakened, perhaps, or at least made a bit tedious, by a polemical undertone whose object is Adam Smith and which is unpersuasive in two respects. In the first place, the influence Thompson ascribes to Smith seems exaggerated: there were others, before him, who had had the idea that interference in the grain market might tend to increase rather than to relieve dearth; there seems little reason to suppose that, had Smith never existed, government economic policies would have been much different. In any case, Thompson does not argue the point. In the second place, the economic 'errors' of Smith, if errors they be, require a far more precise argument and far more careful distinctions than they receive at Thompson's hands. Anyone even vaguely aware of the damage wrought to local economies in the Third World by thoughtless, populistic interventions in local market relationships (price control; attacks on 'middlemen' and 'hoarders') or with the devastating effects on local agricultural production of supposedly beneficent food aid, will feel uncomfortable with Thompson's polemic against Smith. It is not enough to respond to this sort of problem, which is precisely what Smith and others had in mind, with nothing more than a crude distinction between long-term and short-term policies.

A chapter entitled "Time, work-discipline and industrial capitalism" considers the relationship between changes in "the inward notation of time" and the "severe restructuring of working habits" required by the transition to "mature industrial society" (354). Apart from occasional suggestions that both the resistance of industrial employees to the imposition of time-discipline and, later, their

incorporation of the new sense of time in struggles to limit the length of the working day, were influenced not only by economic but also by customary, normative considerations (so that the historic change was one of social rules as well as of conflict of interest and values), there is not much in the chapter of specific interest to readers of *JLP*. The extent to which practice was based on customary rules and, if so, how these emerged, changed and were maintained, is not discussed.

By contrast, two chapters on the internal social control of plebian culture will be of special interest to readers of *JLP*: "The sale of wives" and "Rough music".

The former deals with a custom current from the mid-eighteenth to the mid-nineteenth century, in which a husband could transfer his (rights in his) wife to another man (occasionally a woman or even to the wife herself) according to a ritual whose elements were regarded as essential to the 'legality' of the sale. These included publicity (the transfer was publicly announced or advertised and generally was cast in the form of an auction held at a marketplace on a market-day; more private ceremonies, before witnesses in a pub or similar location, also occurred), payment (a generally rather nominal amount); and formal 'delivery' (generally symbolized by having the wife wear a 'halter' of rope - or ribbon, etc. - around her middle, the free end of which was handed over to the new husband). The transaction was sometimes ratified in writing.

Thompson collected more than 200 cases of such 'sales' from journalistic and similar sources. Despite the ritual form of an auction, the 'purchaser' was in many cases a man with whom the woman was already living; and in any event, the identity of the 'purchaser' was generally arranged in advance. The consent of the wife was essential to the validity of the 'sale'.[1] Thompson concludes that the 'sale' of wives must be regarded as essentially an institution of divorce and remarriage, which at least in its ritual form was an 'invented custom' dating from about the end of the seventeenth century. The custom grew up in an era of widespread marriage-breakdown, the absence of legal divorce, and the need for a formal ritual surrounding changes of marital status in tight-knit communities in which the marriage bond played an important social role. As usual in such matters, 'the law' was ambivalent: there were a few prosecutions for bigamy (if

1 I cannot withhold a Thompsonian *bon mot* from the reader. Having presented two quantitative summaries of his data concerning the consent of the wife, he observes:

> I regard these quantities as literary and impressionistic evidence, as contrasted with the `hard' evidence in this chapter, which is the close interrogation of texts and contexts. (430-431)

the participants were so foolish as formally to remarry) and for the 'crime' of the 'sale' itself; but on the other hand the custom seems to have been treated as more or less legitimate by at least some local authorities and could become highly entangled with the administration of the Poor Laws.

The final chapter deals with a topic familiar to readers of *JLP* (see e.g. Griffiths 1984), variously referred to as popular justice, *charivari*, etc. In Great Britain the element of raucous noise seems to be central, hence the term 'rough music'. Thompson defines it as "a rude cacophony, with or without more elaborate ritual, which usually directed mockery or hostility against individuals who offended against certain community norms." (467) The chapter affords a wealth of ethnographic data from England, Scotland and Wales, but the approach is broadly comparative, Thompson taking 'rough music' as part of a "family of ritual forms, which is European-wide and of great antiquity" (467) and which spread from Great Britain to North America. Marital infidelity, inappropriate marriages, and violations of the norms of patriarchal society (wife-beating, female insubordination, scolding, nagging) seem, in Great Britain as elsewhere, to have been the most important occasions, although customary forms could be put to use for other purposes as well. Thus the rituals of rough music were used in connection with industrial conflict (in particular, against strike-breakers and the like), resistance to invasions of common rights, etc.; the "vocabulary of rough music" also made its way into eighteenth-century urban politics and the behavior of 'mobs'.

The chapter on 'rough music' emphasizes, like the rest of the book, varieties and continuities in symbolic form. It is no accident that Thompson uses the metaphor of language and specifically associates 'rough music' with dialect. It is an interesting, colorful approach. But when, at the end, he writes that "rough music belongs to a mode of life in which some part of the law belongs still to the community" (530) he calls attention, I think, to the central weakness of his approach. For it is precisely the law-like aspects of the phenomenon - the elements of institutionalization, of process, of authority, of public responsibility - that receive little attention. He mentions "suggestions in some accounts that rough music was performed in the execution of some actual deliberative judgment" (489), observes in passing that the "institutional or quasi-institutional role of young unmarried men ... has not yet been proved to have been found in England" (496), and states that "there is nothing automatic about the process; much depends on the balance of forces within a community, the family networks, personal histories, the wit or stupidity of natural leaders" (515). But he does not go further than this in exploring the extent to which 'rough music' exhibits law-like characteristics, nor does he systematically use such characteristics to set 'rough music' off from non-institutionalized forms of disapprobation or protest.

Customs in Common is, in short, full of fascinating examples of law-like behavior and institutions. On the whole, the treatment remains at the symbolic level (with

occasional suggestions as to the social functionality of particular forms of symbolic behavior). Where the book disappoints, at least from the perspective of legal anthropology, is in failing to locate the phenomena discussed in the context of a systematic, theoretical analysis of the legal aspect.

References

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