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Hywel Dda's Law-Books and the Welsh Legal Tradition¹

The mediaeval Welsh Laws present a particular fascination for the legal historian, whether as textual critic attempting to expose the chronological strata and historical depth of the surviving manuscripts, or as examiner of a changing mediaeval society and its pluralistic and customary fabric. However, Welsh mediaeval law is notoriously difficult to characterize: in one sense it is static and without direction, even anachronistic; and yet in another it is a developing and living law. The Welsh law texts were collections of material from different periods in Welsh legal history, and they provide valuable source material on basic legal principles and their directions of change but the texts themselves neither explain how the law was to be operated and administered, nor do they indicate how legal decisions were to be enforced. Even where there are clear rules of procedure, such as in relation to land disputes and suretyship,² the scholar must travel beyond the main texts for practical insights into the policy considerations governing social relations and the settlement of disputes in mediaeval Wales. In an intriguing and synoptic work, simply entitled "The Welsh Laws", T. M. Charles-Edwards seems to allay some of our concerns over the apparent dichotomy between the paper rules and their probable practical applications. It is after all the full picture that is ultimately important, and we must work our way towards a wider understanding through a combination of available legal, administrative and literary investigations.

From the late 13th century, English common law was incorporated into the legal system of Wales, although there was no concerted attempt to substitute English for Welsh law in general for two and a half centuries after the Statute of Rhuddlan of 1284.³ This act, which had effecti-

¹ Review-Article of T. M. CHARLES-EDWARDS, *The Welsh Laws*. Cardiff: University of Wales Press 1989. 93 pp. + Select Bibliography 8 pp. Paperback £3.50.

² On Celtic Suretyship, see Part 1 of: *Lawyers and Laymen*. Studies in the History of Law Presented to Professor Dafydd Jenkins, Cardiff 1986.

³ J. H. BAKER, *An Introduction to English Legal History*, 2nd edition, London 1979, pp. 29-30; and see D. JENKINS, *Law and Government in Wales before the Act of Union*, in: *Celtic Law Papers introductory to Welsh Medieval Law and Government*, (Studies presented to the International Commission for the History of Representative and Parliamentary Institutions), Brussels 1973, now available from the Centre for Advanced Welsh and Celtic Studies, University College of Wales, Aberystwyth.

vely annexed Wales to the English crown, attempted to codify some of the basic principles of English law for the use of Welsh royal officials, but it did not attempt to prohibit the Welsh from using their customary law. Even if the English had foreseen a new legal order for Wales, they did not design the complete eradication of Welsh Law nor, it appears, the realisation of such an end by a gradual process of common law transplantation. The Statute of 1284 had reserved to the newly-conquered Welsh much of their largely customary law in relation to Status, Land, Inheritance, Contract, Debt, Covenants, Sureties and Trespasses. It may have been contemplated that the English common law would eventually envelop the surviving Welsh laws, certain of which were associated by the English Church with the abominations of the devil, but the major changes instituted under the Edwardian Settlement of Wales were predominantly administrative in nature. While Welsh law was to prove resilient and renascent after 1284, the Settlement divided Wales into six counties on the English model, and equipped them with sheriffs, bailiffs, coroners and justices, notably those of Chester, Snowdon and South Wales. The remainder of Wales was to be governed by the Lords Marchers, who were by and large independent rulers. In these Marcher (or borderland) areas, there continued to emerge a mixture of Welsh custom and English law known as the Custom of the Marches. However, the positions of the Marcher Lords were anomalous and, as Holdsworth wrote in his "History of English Law",⁴ analogies with these potentates "must be sought, not in England, but in France, or, better still, in Germany, where the margraves held somewhat the same position against the Slavs as they did against the Welsh". In these borderlands between England and Wales, a customary law developed through a unique process of mediation of English and Welsh law in a jurisdictional area in which the king's writ did not freely run.

Between the Statute of Rhuddlan and the Henrican Act of Union in 1536 much of the customary law in force was collectively known in Wales as 'Cyfraith Hywel', or the Laws of Hywel Dda. Whereas Hywel the Good had died around 950, laws attributed to him began to be codified two centuries later. The earliest surviving Welsh law-books seem to imply an early model, or set of models, dating back to (the story of) Hywel's assembly at Whitland (or the White House) in 942, when this King of most of Wales initiated a recension of the existing laws with the consent

⁴ Volume 1, p. 118 (paperback edition London 1969); see also R. R. DAVIES, *The Law of the March*, in: *Welsh History Review* 5 (1970), pp. 1-30.

of his witan in the presence of men of 'authority and science'. Two of the earliest manuscripts (Peniarth 28 and 29) refer to Hywel's work in codifying the laws and customs. The former states that "King Hywel, who was surnamed Good, that is dda, put together the laws of Britannia moderately and temperately with the unanimous consent and after the careful consideration of the wise men of his kingdom, namely, the men of Gwynedd, Powys, and Deheubarth, who had assembled together in one place before his tribunal." The latter refers to "Hywel the Good, the son of Cadell, prince of all Cymru, [who] perceived the Cymry abusing the laws, and summoned to him six men from every cymwd in his principality, four of them of the laity and two of the clergy ... and they imposed their curse on the judge who should not take a vow to administer justice, and on the lord who should grant him authority without that judge knowing the Three Columns of Law, and the worth of Wild and Tame, and everything necessary for the use of man".⁵ Although the complete manuscripts contain similar prologues or preambles ascribing the law they contain to Hywel Dda, none can definitely be attributed directly to Hywel Dda. Furthermore, the considerable differences between the law-books indicate that their authors, unlike the Irish, were not unduly concerned to preserve intact a standard text handed down from the past. The law-books were dynamic as well as being traditional. No inhibitions prevented the redactor from updating. As Charles Edwards is keen to maintain, ancient material was not preserved merely as a matter of set policy.

To the intelligent Welsh layman the Laws of Hywel, albeit in a sense fictitious in origin, came to be seen as a badge of nationhood, and it was asserted that Hywel had undertaken a pilgrimage to Rome and had there gained papal approval for the promulgation of his laws. Even though the Welsh princes were vassals of the English crown, they continued to see themselves as governors of a people separate in language, law and custom from the English conquerors. But did Hywel sponsor some kind of written text of the laws? It is of course a possibility but, as Charles-Edwards admits (p. 22), his text(s) cannot be convincingly reconstructed, notwithstanding that there may be persuasive evidence in the Welsh mediaeval texts pointing towards a single law-book lying behind the recensions. It has to be admitted, however, that there was no special propaganda advantage in accrediting laws to Hywel Dda several

⁵ Translations taken from ARTHUR WADE-EVANS, *Welsh Medieval Law*, Aalen 1979 (being a reprint of the Oxford edition, 1909), pp. li-liii.

centuries later. "The prograssanda value of Hywel appears to be an accretion to the original tradition; the propaganda value of Edward the Confessor, David I and St. Patrick was there from the beginning." (p. 85). Nevertheless, the legend of the Whitland assembly and its enticingly romantic element apart, the mediaeval Welsh laws derived their status not so much from Hywel's claim to legislate but rather from a consensual 'legislative tradition' and from the undeniably popular and indigenious appeal of Welsh law. What is certain is that the designated 'Laws of Hywel Dda' were neither a set of rules enacted by a single ruler nor an agglomeration of materials emanating from a single dynasty of Welsh princes.

There were of course a number of important innovations introduced into Wales from English law after the Statute of Rhuddlan. In particular, the concept of felony (whereby certain offences were henceforth deemed to be against the sovereign lord, the king) appeared in the dominion; while the jury system on the English model was introduced, along with English writ system procedures. However, Charles-Edwards maintains that the assimilation of elements from other systems was nothing new to the Welsh. Prior to Rhuddlan, they had been able to assimilate elements from other traditions, such as the 'exceptio' of Roman Law, which lay behind the custom of *ardelw* (avouchment) of the Book of *Cynghawsedd* (Pleading), which is regarded by Charles-Edwards as one of the most mature pieces of legal writing in mediaeval Wales (p. 68). Yet despite such innovations, the Welsh Laws maintained a sense of national identity despite the fact that Wales itself had never been a political unity, even before the Edwardian conquest. It is arguable that it was the English overlords and their administrators who were indirectly responsible for uniting the province and turning it into a single principality.

Mediaeval Welsh Law was not a system designed to provide rules, principles and sanctions in an organic whole. Instead it was designed to bring disputing or recalcitrant parties to a settlement. The written laws might not accurately reflect this underlying purpose and, in a strong unofficial sense, the existence of written law was often only the trump card in bringing parties to a consensual arrangement. The written rules were merely one element in the whole. As Charles-Edwards observes: "The distinction between rules, written law and the whole process of which they form a part creates a difficulty for anyone who would understand mediaeval law. What we have is one element in the whole – written texts – and from them the social process to which they belong must be

reconstructed" (p. 6). In spite of the constraints of compactness, which prevent this economical little book from travelling far in the direction of a more historically embracing reconstruction of the social process to which he refers, it is a treatment nonetheless full of insights for those who might wish to respond to the stimulation inevitably received from "The Welsh Laws".

Between the late 13th and mid-16th centuries, special problems of law and order in Wales and the Marcher regions produced a form of royal justice largely untypical of that found in much of the South of England. The direct application of legal rules and principles through the mechanism of formal trial was frequently overshadowed by the use of various forms of 'alternative dispute resolution'. In his masterly work on "Kingship, Law and Society: Criminal Justice in the Reign of Henry V",⁶ Edward Powell has recently emphasised that even the formal English legal sources would have played a secondary role in the courtrooms of the more disorderly or otherwise ungovernable parts of the realm. Similarly, Charles-Edwards notes that the Welsh judges, particularly those of Gwynedd, gave a prominence to arbitration over curial judgment despite their schooling in the Welsh and English written texts. Yet arbitration and formal decision making are not mutually exclusive in mediaeval society. The researcher has to overcome complex terminological problems in dealing with the realities of mediaeval justice; and there is correspondingly a fundamental difficulty in distinguishing between a 'court of justice' and other kinds of tribunal or institutional gathering. In mediaeval England and Wales, such a distinction is not altogether clear. As R.R. Davies observed in his valuable essay, "Administration of the Law in Mediaeval Wales"⁷: "Law courts only emerge as specialised assemblies when their status and functions are delimited, their meetings regularised and their proceedings formalised". Even into the 15th century, royal justice was still a multi-faceted process in which the endorsement of alternative dispute resolution was not automatically interpreted as a plainly prudent or expedient recourse en dernier ressort. Negotiation, arbitration and mediation were the necessary adjuncts to the adjudicating function of superior judging, particularly

⁶ Oxford 1989, pp. 86–114, 271–275; see also R. R. DAVIES, *The Administration of Law in Medieval Wales: The Role of Ynad Cwmwd (Judex Patriae)*, in: *Lawyers and Laymen* (note 1, above), pp. 258–273.

⁷ *Lawyers and Laymen* (note 1, above), p. 260; also by the same author is: *The Twilight of Welsh Law, 1284–1536*, in: *History* 51 (1966), pp. 143–164.

where the interests of public order and social control demanded a sensitive political awareness in the unquiet parts and remoter corners of the realm.

Given the heterogeneous nature of mediaeval justice, it is tempting to search for characteristic resemblances between the Welsh laws and other early mediaeval codes. There are meagre parallels with the Anglo-Saxon codes in the context of the provision of compensation as a major discouragement to feuding but the Welsh laws, in sharp contrast, stress the ties of kinship, families, tribes and chieftains instead of the conceptions of counties, hundreds, community, lordship and feudal homage found in the later Anglo-Saxon laws. One of the most uncertain areas in our understanding of Welsh law is the relationship between the law-books and political authority. No Welsh law-book, even that of Gwynedd, is explicitly associated with a particular ruler – as “Glanvill” is with Henry II or “Liber Augustalis” with Frederick II. (p. 38). It is possible that the legend of Hywel Dda was sufficiently alluring to cast a veil over the legal associations of other and later rulers. Yet it should be stressed that the Welsh law-books do not in any meaningful sense constitute royal legislation, although the contingency of some form of sponsorship cannot be excluded. According to Charles-Edwards, their descriptive, discursive and systematic character seems to rule out strong ruler association (p. 40), but this observation should not be taken to mean that the texts existed in a political vacuum. Such a notion is untenable against the background of 12th and 13th century Welsh history, and the deep traditional rivalry between North and South Wales.

In a loose sense the Welsh Laws are the nearest contemporaneous equivalent to the English treatise known as “Bracton” (probably written between 1240 and 1260), which equally underwent considerable notation and elaboration, and which would have existed alongside the Welsh laws until 1536. Some forty Welsh manuscripts (some complete and others fragmentary) were written between the early 13th century and the early 16th, yet very few can be readily assigned to the second half of the 10th century, when the first recension may have been made. It becomes clear that these written texts are not all of one kind, and it is possible that there was a large number of different law-books available even in the 13th century. Mediaeval Welsh literature (such as the Four Branches of the Mabinogi) is full of examples of how the law-books worked in practice, and after the 1280s administrative documents survive, especially for the hybrid Law of the Marches. Linguistically, the laws are not unlike many Middle Welsh prose tales, but in many respects

the legal texts of 'Hywel Dda' defy straightforward analogy with other contemporary or earlier legal texts produced outside Wales. An Anglo-Saxon model seems unlikely, in spite of well known links between Hywel Dda and the West Saxon court. The form of the Welsh laws is generally dissimilar to those of King Alfred, or indeed to any Anglo-Saxon royal legislation. Instead the nearest convincing parallel in terms of form is likely to have been the Irish "Senchas Mar", since the original "Annales Cambriae" (although not law books), put together in Deheubarth during the reign of Hywel's son, contained a set of Irish annals as one of their main sources. Charles-Edwards argues that the Irish parallel remains only an attractive possibility because many of the texts can be seen as individual entities, even though they can be allocated into groupings because of similar content. Scholars have therefore been much involved in the variations between manuscripts on the one hand, and the links between them on the other. Among the closer groups are the Versions of Gwynedd and Dyfed (or perhaps Deheubarth), while the two looser groups include the Version of Gwent and the Latin *Leges Wallicae* (p. 18).

Since Aneurin Owen's classic edition of the "Ancient Laws and Institutes of Wales",⁸ many of the Welsh law-books have acquired different names, presumably after the lawyers who were chiefly responsible for producing the recensions. Thus the 'Version of Gwent' has become known as the "Book of Cyfnerth" (Llyfr Cyfnerth). However, Charles-Edwards suggests that the only law book which correctly reflects the author's name is Llyfr Iorwerth, the "Book of Iorwerth" (p. 19). This was probably created by Iorwerth ap Madog in the early 13th century as an adaption of an already traditional pattern, based on Versions of the 'Laws of Hywel' that had been written in 12th century Gwynedd. Fortunately, "The Welsh Laws" usefully provides information about abbreviations and full titles of the law-books (between pp. 19-21), and seven main law-books of mediaeval Wales are identified: the complete ones being Llyfr Cyfnerth, Llyfr Iorwerth, (Four) Surviving Latin Law-books, and Llyfr Blegywryd; whereas Llyfr Colan, Latin Book C (which appears to have derived from Gwynedd), and Llyfr Cynog, which is closely related to Llyfr Iorwerth, are incomplete or fragmentary. While the English juristic attitude to the native Welsh law-books and manuscripts was not surprisingly highly ambivalent (many writers regarding them as

⁸ Published for the Record Commission, London, 1841.

irrational, ultimately discordant and roundly incomprehensible), these Welsh texts were nevertheless written almost certainly by lawyers for lawyers. They point to the development of the roles of lawyers and legislators alongside each other and although the 'Laws of Hywel' meant different things to different people, they were regarded by the Welsh lawyers (particularly of Gwynedd) as the authentic works of native law, expressed in popular forms, such the triadic, and full of procedural indicators of potential value in those circumstances in which the transplanted English procedural norms might be overlooked or held to be silent on matters of presentation. Despite any reservations, it cannot be doubted that the English royal officers and their administrators had much to gain from the survival of certain Welsh laws. The provision of inheritance by a son from a father recognising the issue, irrespective of whether the son's mother was married to the father or not, was unequivocally interpreted by the English clergy as a custom repugnant to the sanctity of true marriage; whereas, on the other hand, the absence of rules or customs of primogeniture meant that all the sons (whether legitimate or not) might share the patrimony. The English kings were undoubtedly aware of the advantage of encouraging partible inheritance if applied to the major principalities. By applying this customary law, significant territorial blocks could be broken up and princely or baronial dynasties could be reduced to impotence.

Despite the changes inherent in the Edwardian Settlement of Wales, one distinction remained crucial; the difference of nationality. Even though the Welsh were frequently reminded of their subordinate status before the Union of 1536, and the colonists moved into the land of Gwynedd and elsewhere, national divisions, although not absolute, were maintained. Charles Edwards seems to suggest that the English may have been content to encourage the belief in nationhood and distinctness for their own 'conspiratorial' reasons. Admittedly he does not enlarge upon this not insignificant thesis, but there appears to be an implicit contention that Welsh law was allowed to survive the Edwardian Settlement of Wales because it was an integral element in the structure of English supremacy. The law-books may have therefore appeared as a response to the need for experts in the dominion in Welsh as well as in English law. The Welsh law-books and manuscripts were certainly largely written after 1284 for Welsh gentry with official positions, many of whom proved to be supportive of the English overlords in periods of unrest and rebellion. The English may have encouraged the writing of the Welsh law-books which would fulfil the exigent function

of at least defining the boundaries of Welsh law and pin-pointing the ambit of tolerable co-existence with the English common and statute laws in related and non-exclusive matters. After all, a written law is far less dangerous to a coloniser than a dynamic set of local customs which can be freely adapted to changing political and social circumstances without inhibition. The mediaeval Welsh laws would have appeared anachronistic to the English lawyers, and hardly threatening to the administration of geographical areas somewhat divorced from the mainstream of English legal and political life. It may have been believed (until the 16th century) that if the Welsh subjects could be permitted the myth of nationhood and its correlative attributes, the dominion would prove ultimately more governable and habitually compliant to the English administrative will. Divisions in 13th century Wales had encouraged the establishment of social and political ties between English families and their Welsh neighbours. These persisted after 1284; and indeed the Welsh officials of Edward II remained loyal to this relatively weak English king even against the English (and some Welsh) magnates. In the following centuries before the Act of Union their successors in office continued to serve the Crown, sometimes in opposition to large numbers of fellow countrymen.⁹

Full absorption into the English legal system took place after Henry VIII's Act of Union in 1536,¹⁰ by which Welsh subjects of the English crown were granted the same laws and liberties as their English counterparts. English land tenure was introduced to replace the Welsh land law, although 'reasonable local customs' were not necessarily abolished at a stroke. The Great Sessions of Wales was introduced, and Wales was administratively re-organised. Commissions of the peace had been introduced by an earlier act¹¹ of the same year, and justices of the peace and other legal officials were henceforth to hold their courts in the English language. The whole of Wales and the Marches was divided into shire-ground on the English model; and was to be further divided into hundreds. Welsh counties and boroughs were to be represented in Parliament. The Union appears to have been generally welcomed in Wales and the dominion's peaceable assimilation into English administrative

⁹ J. A. F. THOMSON, *The Transformation of Medieval England, 1320-1529*, London and New York 1983, pp. 83-86; and consider J. BEVERLEY SMITH, *The Legal Position of Wales in the Middle Ages*, in: *Law-making and Law-makers*, ed. by ALAN HARDING, (Proceedings of the 3rd British Legal History Conference, Edinburgh 1977), London 1980, pp. 21-53.

¹⁰ 27 Henry VIII c. 26.

¹¹ 27 Henry VIII c. 5.

structures and processes represents one of the more notable achievements of Henry VIII's principal adviser, Thomas Cromwell. After his death, an Act of 1543¹² confirmed, consolidated and further elaborated upon the provisions of the Act of Union. By the accession of Edward VI in 1547, English law had fully devoured the legal system of Wales, and this process had been principally achieved by legislative momentum. Wales had therefore not been incorporated into the common law system by a gradual process of infiltration, imposition and reception. The Statute of 1536, passed in response to complex problems of government and public order in the Welsh Marches in particular, claimed to extend the provisions of the Statute of 1284; instead it extended the English common law to the whole dominion. It removed the distinction between the principality of Wales and the Marches; and similarly the distinction between Welsh customary law and English law by asserting the predominance of the latter. The Edwardian Settlement had been altered beyond recognition, and by the early 1540s the knights and burgesses of the Welsh shires and boroughs were sitting at Westminster as testimony to the integration of Wales into the 'body of the whole realm'. By the 1540s the laws and customs of 'Hywel Dda' had ceased to have validity, efficacy and persuasive effect. The Act of 1536 had brought about the determination of Welsh law.¹³ Accordingly, T. M. Charles-Edwards ends with the last instance of Welsh law as a living law. In the record of a case heard in Carmarthenshire in 1540 (four years after the official demise of Welsh law in 1536), two Welsh judges appear to have been appointed by the disputing parties as arbitrators, engaged to apply Welsh law at a time when the courts in Wales were using only English law. "The Welsh Laws" thus concludes as it opened – with an instance of alternative dispute resolution; a necessary final emphasis since long before 1536 Welsh law had only survived within the "interstices of an English political order" (p. 93).

¹² 34 & 35 Henry VIII c. 26 (a relatively lengthy statute of some sixty-six sections). On the post-Henrican transformation of Wales see P. R. ROBERTS, *Wales and England after the Tudor Union*, in: *Law and Government under the Tudors: Essays presented to Sir Geoffrey Elton*, ed. by CLAIRE CROSS et al., Cambridge 1988, pp. 111–138.

¹³ A. G. R. SMITH, *The Emergence of a Nation State, 1529–1660*, London and New York 1984, pp. 37, 389–390; G. R. ELTON, *Reform and Reformation. England 1509–1558*, London, 1977, pp. 203–205; and P. R. ROBERTS, 'The "Henry VIII Clause": Delegated Legislation and the Tudor Principality of Wales', in: *Legal Record and Historical Reality*, ed. by THOMAS G. WATKIN, (Proceedings of the 8th British Legal History Conference, Cardiff, 1987), London and Ronceverte 1989, pp. 37–49.

Although this work is a valuable guide and companion for the student of Welsh Law, it cannot in truth be described as a beginner's book. It is neither of a purely introductory nature, nor is it an attempt to establish the mediaeval Welsh laws firmly in their social and political contexts. A manifestly introductory work might require more comparative information on the anomalous Marcher laws and customs, and their curious relationship with both English and Welsh law. Equally, clearer chronology could have been presented, especially as the book lacks footnotes or references to accompany the useful bibliographical information at the end (between pp. 95–102); and, even though this is a relatively short book, an outline index would have been a welcome addition, especially for those uninitiated in the mysteries of Welsh recension and redaction. After a first reading of T. M. Charles-Edwards' "The Welsh Laws", the impression of too many loose-ends and numerous unsupported insights (of both scholarly and general interest) remains. Perhaps such an impression is inevitable in a concise work attempting to address, *inter alia*, the root problem of a missing pre-Norman model legal text, which may or may have been that of Hywel Dda; yet as Charles-Edwards opines (p. 83): "Once an explanation in terms of dynastic politics is excluded, the likelihood that Hywel did indeed give his authority to a law book becomes much greater. There was a model law-book underlying the Versions of the Law of Hywel; it had a royalist character; and it was probably pre-Norman." The intending reader of "The Welsh Laws" may be well advised to postpone temporarily a reading of this attractive and stimulating work until a few of the more accessible secondary sources listed in the bibliography have been attempted. "The Welsh Laws" is a tantalizing invitation to analyse and deconstruct the legal literature of mediaeval Wales as a primary ingredient in the reconstruction of a more total picture of Welsh judicial and administrative life prior to the Henrican Act of Union.