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CUSTOM IN WELSH MEDIEVAL LAW

by

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I. Region and period

A. Region: Wales

Most non-British readers have never heard of Wales (unless they are rugby football enthusiasts), and are even more careless than the British in naming the countries of our islands; hence the discussion of custom in medieval Wales must be given an historical introduction, which may show why the Welsh so bitterly resent the Continental practice of using Angleterre and the like as labels for the state of which England and Wales are different parts. That introduction will show how far there is an excuse for the practice.

In medieval Welsh tradition, Wales was bounded on the north, west, and south by the sea, and on the east by Clavidd Offa, «Offa’s Dike», the earthwork erected under the authority of the Mercian king Offa (ob. 796). If the Dike was ever the boundary in practice, it was not so for long, as the evidence of place names and of the use of the Welsh language shows. At some points west of the Dike the names are English, at some points east of the Dike they are Welsh; most strikingly, in the north-east there are on both sides of the Dike names which are Welsh adaptations of forms originally English. As the map shows, the boundary of what is now legally recognised as Wales has no clear relation to the Dike.

1 The language seems to have been the most certain mark of Welsh identity in the Middle Ages.
Medieval Wales was in no sense a unitary state: it was a collection of separate and independent realms, each ruled by a king who claimed full regal status. From time to time a strong king would extend his power over more than one realm, but his larger kingdom would usually break up on his death, and no Welsh monarch ever ruled the whole of what he would have regarded as Wales. From the standpoint of constitutional law, the most important of the rulers who did bring most of Wales under their power were Hywel Dda ("Hywel the Good"), who died in 949 or 950, and the two princes of Gwynedd, Llywelyn ab Iorwerth ("Llywelyn the Great"), who died in 1240, and his grandson Llywelyn ap Gruffudd, who died in 1282.

Each of these three left a mark on the law. Hywel Dda gave his name to the indigenous law of medieval Wales, Cyraith Hywel in Welsh, Lex Hoelii or Leges Hoelii in Latin; the lawbooks credit him with the convening of a codifying assembly from all his dominions, and he must certainly have brought about a unification of Welsh law in some way, though of course the texts which we now have are the result of several centuries of development and re-writing by professional lawyers.

This development reached its highest point in the reigns of Llywelyn the Great and his grandson. Both princes gained power over large parts of Wales, adding other realms to their inherited base in Gwynedd; they went far towards creating a feudal state in Wales, and tried to create a new and more stable relation with England. The political atmosphere of Llywelyn the Great’s reign was favourable to the development of Welsh law to the point at which it can fairly be called classical; his grandson was more concerned to defend the separate law of Wales against the attempt of the English kings to introduce English law principles in place of Welsh ones.

The constitutional and political situation in Wales was very different in the thirteenth century than what it had been in the tenth. Hywel Dda had indeed done homage to Athelstan of Wessex, and from then on English kings claimed the Welsh rulers as their vassals, with varying success; but though the boundary between the areas under Welsh rule and those under direct English control certainly fluctuated, no substantial inroads were made into Wales before William of Normandy became King of England in 1066. But very soon after being accepted as king, William appointed Normans as earls of Chester, Shrewsbury, and Hereford near the Welsh border; their primary function was of course to protect England from Welsh attack, and they did this very effectively by themselves attacking Wales.

The result was that a body of marcher lordships was established: most of these were (as the name suggests) a band along the border, which formed a buffer between England and Wales, but many were along the southern coast of Wales and even far to the west. Control over many of the lordships fluctuated: they passed from one Norman family to another, and some were re-conquered by the Welsh. What is constitutionally most important is that these marcher lords claimed the regal status

of the Welsh rulers whom they had displaced, just as King William claimed the status of the English king whom he had succeeded. They were subject to the king of England only in the same feudal sense as their predecessors had been, though the king was in a better position to coerce them because they also held lands in England. When Llywelyn ap Gruffudd took the title of prince of Wales in 1258, he was claiming to be the feudal superior of all other Welsh rulers, and that claim was recognised by King Henry III of England in 1267; Llywelyn would receive the homages of the Welsh rulers, and would do homage to Henry for all their lands as well as for his own, but the marcher lords were still direct vassals of the English king.

Llywelyn ap Gruffudd’s principality was drastically reduced in 1277 and came to an end with his death in 1282. Edward I of England then (claiming that Wales, which had always been feudally subject to him, had now fallen into possession) created a new organisation, on the pattern of the English shire system, for those parts of Wales which had adhered to Llywelyn; in 1301 he made these parts into a principality for his son Edward, born at Caernarvon in 1284”. This was the origin of the title “Prince of Wales” which is conferred on the heir apparent to the United Kingdom; from the constitutional point of view it is more important that it was the confirmation of the division of Wales into two parts, the Principality and the Marches. Both parts were subject to a mixture of Welsh and English law: the Marches because each lordship was originally subject to Welsh law, which was modified by its lord’s innovations, and the Principality because the Statute of Wales of 1284 introduced English law and procedure for some matters only, while for others (especially for land law and inheritance) Welsh law was allowed to continue.

In 1536, by an Act of Henry VIII’s Reformation Parliament, this double status of Wales was brought to an end. The law of all Wales was assimilated to that of England, except for a few trivial differences; the preamble to the Act indeed declared that Wales had always been an integral part of England, but that the differences of law and language had led ignorant persons to treat the Welsh as inferior. It is at least clear that after 1536 the name of the state of which Wales formed a part was England; this would continue until the Union of England and Scotland in 1707 created the new state

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2 On the relation of Lywol to the law which went by his name see Celtic Law Papers, ed. D. Jenkins, Brussels, 1973, pp. 6-7, 12-17.


4 To speak of a principality is a simplification: a distinction is drawn between a northern and a southern principality, and between these and the county of Flint, which was attached to the county palatine of Chester; see Edwards, Principality, pp. 11-14. Since the English princes of Wales were also earls of Chester, this distinction was of little practical importance. By the sixteenth century, two sets of lordships, those of Glamorgan and Pembroke, have assumed the appearance of counties, and they were treated by the 1536 Act as "estates of long and ancient time"; see Laws in Wales Act 1542 (34 & 35 El. 18, c.26), s. 1.

5 The Act is commonly called the Act of Union by Welsh historians; for lawyers it is the Laws in Wales Act 1535 (27 H.8, c.26). For a suggested explanation of the discrepancy in date, see The Date of the Act of Union, 1970, 23 BCL, pp. 345-6.
of Great Britain. Since it became fashionable for a time to use «North Britain» as a name for Scotland, a Welshman finds it surprising that «South Britain» has never been used for England-and-Wales; the constitutional rule that Wales was part of England was given legal status in 1746 by the statutory provision that

in all cases where [...] England hath been or shall be mentioned in any Act of Parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the Dominion of Wales».

The Welsh have usually been content to share the name «British» with the English and the Scots; only a few of them know that in the early modern period «British» meant «Welsh». But very few of the Welsh have been content to be subsumed under the name English, and it has been found very difficult to explain this to continental hearers, because there are few parallels. Perhaps the best analogy would come from Czechoslovakia, for when the state of that name was set up, it was quite usual for English writers to complain of the name as a new-fangled substitute for the traditional «Bohemia»; but it is to be expected that a Moravian would resent being called a Bohemian though he would accept (and in proper contexts claim) the name of Czechoslovak.

In reaction to Welsh sensitivity, it had long been the tactful practice of Parliament to speak of «England and Wales», and in the Welsh Language Act 1967 legal force was given to the practice by the repeal of the relevant provision of the 1746 Act. A little later there was thorough revision of local government in England and Wales and a reorganisation of the system of local law courts. As the result of this legislation, «Wales» now has a clear meaning in law. Its boundaries are those of the administrative counties established by the recent legislation, and for the ordinary Welshman who is not an historian these are the natural and proper boundaries. The boundaries to north, west, and south are indeed natural, for they are the sea; the eastern boundary, that with England, is not natural, but is the almost accidental result of the legislation of 1536, and no-one seems to know quite why it was drawn in its particular way across the Marches, a band of country which had its own abnormal status as neither fully Welsh nor ordinarily English. Some of the marcher lordships were attached to the already existing shires of the Principality, some to Gloucestershire, Herefordshire, and Shropshire, which were old-established English shires, and some were joined together to form the new counties of Denbigh, Montgomery, Brecon, Radnor, and Monmouth.

The 1536 Act introduced at least two anomalies. On the one hand, it attached to English shires some districts which were essentially Welsh: the hundred of Oswestry in Shropshire was to remain largely Welsh-speaking until the present century, and its

6 In 1800 a further union created the United Kingdom of Great Britain and Ireland; since 1921 the state has been the United Kingdom of Great Britain and Northern Ireland. For some legal purposes the unit is the United Kingdom, for others Great Britain, for yet others England-and-Wales; for very few purposes is Wales distinguished from England.

7 Wales and Berwick Act, 1746, (20 Geo.2, c.42, s.3).

parishes were in the Welsh diocese of St Asaph until the disestablishment of the Church in Wales in 1920. On the other hand, the new county of Monmouth was not included in the special arrangements made for administering the law in Wales, and it was therefore often thought not to be in Wales, though almost all special legislation for Wales was made applicable to it. The fact was that in law Monmouthshire was certainly in England, as was the whole of Wales; whether it was also in Wales was legally irrelevant in 1536, since it seems clear that the intention of the legislation was to remove all marks of special status for Wales. By the same token, there was no reason for the legislature to regard the attachment of Welsh districts to English shires as irregular, if Welshness was destined to disappear. After 540 years Welshness still refuses to disappear, and the Monmouthshire anomaly has been eliminated, but that of the hundred of Oswestry remains.

B. Period: twelfth to fifteenth century

The period with which we deal is that of the later Middle Ages, from the late twelfth century to the end of the fifteenth or the early years of the sixteenth century. This is only part of the period during which the indigenous Welsh law was in force in parts of Wales, but it is the only period for which there is enough source-material on which to base any conclusions, since our only contemporary sources are the lawbooks. The courts of the Welsh kingdoms have left us no records; the lawbooks indeed suggest that they kept none. There are records of the courts of the marcher lordships which show Welsh law being applied, but it is Welsh law of a modified kind; there are land surveys from both marches and principality, but we cannot be sure that these reflect really clearly the position under native Welsh rule.

The Welsh lawbooks were written between the early thirteenth and the early fifteenth centuries. They purport to be based on a revision of the law carried out by Hywel Dda, the tenth-century king whose name is given to Welsh law, and they seem to assume that the same law applies throughout Wales, in spite of its political fragmentation. They record, however, some variation of practice between different parts of Wales, and (as those who used them well knew) much of their content was added as a later date to any core which may have come down from Hywel’s time.

These lawbooks were the working libraries of practitioners, whether advocates, teachers, or judicial officers; their content is«neither law made by any “sovereign one or many” to use Austin’s phrase, nor yet “judge-made” law, nor yet again a mere record of popular customs. It is lawyer-made law, glossators’ law, text-writers’ law».

Nearly all the thirty-odd medieval manuscripts in Welsh fall into one of three groups, regarded as representing three Redactions; given «regional» names by Aneurin Owen (editor of the Record Commission’s Ancient Laws and Institutes of Wales, 1841: hereafter AL), they are now usually named after persons mentioned in

their texts. The Cyfrwch Redaction (abbreviated Cyfn: Owen's «Gwenian Code») seems to present the law in the least developed form. The Blégwyrrd Redaction (Bleg: «Dimetian Code») shows substantial ecclesiastical influence and was apparently put together in Latin and retranslated into Welsh; the Latin form is believed to have resembled closely Redaction D (hereafter LatD) of H.D. Emanuel's Latin Texts of the Welsh Laws (Cardiff, 1967). The Ionwerth Redaction (for: «Venedodian Code») has the oldest surviving manuscripts but contains the most sophisticated «classical law», developed in Gwynedd in the reign of Llywelyn the Great. Some classical material is found outside the Ionwerth Redaction, most notably in the miscellaneous collection known as Llyfr y Dymnaethau, «the Book of Case Law» (Dw). Though the more powerful rulers certainly left their mark on native Welsh law, the authority of any rule depended, not on its promulgation by any ruler, but on its being found in writing in a lawbook.²

II. Definition

In the sources indicated above, though custom is sometimes mentioned in the contexts cited below, it is nowhere defined. Nor is there a definition in the modern studies of medieval Welsh law. The most comprehensive (though now largely outdated) survey, that by T.P. Ellis, is entitled Welsh Tribal Law and Custom in the Middle Ages,³ but the catchword custom does not appear in the index, and the subject is only briefly mentioned in the introductory chapter. This paradox is partly the result of a peculiarity of English nomenclature: English has no words corresponding to Volksrecht and Kaiserrecht, and for Volksrecht makes do with «customary law». This usage perhaps reflects the French contrast between pays de droit étriqué and pays de droit coutumier, though a modern English lawyer would surely say that as soon as a legal rule was written down and accepted as binding it ceased to be custom. Medieval Welsh law has no doubt a kernel of custom written down with royal encouragement, but the general principle in our period is quite clearly that the authority of a legal rule comes neither from custom nor from the sovereign but from its being written in a lawbook.⁴

A. Words used

A warning must first be given against relying on published translations: a particular word in translation does not always represent the same Welsh word and may often give a false impression of the force of the original.

The word which would naturally be used in modern Welsh, cwstwm, was not borrowed from English until the sixteenth century and does not occur in the lawbooks. Two words do occur: arfer, whose primary meaning is use in the sense of «what is usual»; and defod, with a variant deddefod and a compound form cyneddefod. None of these forms is used for custom in modern Welsh: cyneddefod is not a living word, and the only use of defod is for «rite, ceremony» (which may be its original meaning, since its Breton cognate is found as a gloss to rius: GCp). Defod seems likely to be etymologically related to deddéf, «law, statute», which in turn is cognate with Greek διδος, δικαίωμα, in cyneddefod the prefix cyn- has the force of con-. The adjective cyneddefog is used in the lawbooks for «habitual» in relation to a biting dog.

B. Different senses of words used

1. Arfer

(i) Non-technical use for «what is usual», e.g. o'i remur hunna ed edys en aruer ynu etwa, «this measure is still used here», Ior 90/9. In Ior 30/1, sydogyon aruer a'r rey dewau a yw emewn llys, «officers by use and those by custom who are in a court», this sense merges into sense (ii).

(ii) Technical use for «practice», i.e. procedure: at Bleg 1.24 it is said that Hywel ordered the law to be written in three parts: first the law of his daily court, secondly the law of the country, and thirdly aruer o pob yn chwennut, «the arfer of each of them». Arfer is dweud in Lat D (316.16), and is translated «usage» in BBlég and «administration» in Al; practice would be a better translation. The first two parts are clearly identified in the manuscripts (see Bleg 2.14, 29.13-29); the final section in Bleg is introduced by a reference to this tripartite division, which in the printed edition has been placed before the editors' heading, Arferion Cyfraith, to the section.

This tractate of rather more than four pages sets out rules of procedure appropriate to various classes of cases; some of these are found elsewhere in the lawbooks, usually in association with the substantive law for the matter in question. Half the tracts have the form of commentary (Bleg 127.1-129.7) on the elements of the triad Tri Aruer Kyfreith, «the three practices of law», which are (1) a legal date for the hearing; (2) a legal mode of procedure appropriate to the particular claim; (3) a legal order of the several items in the procedure.

A second triad (Bleg 129.8-18) offers weir gossodediaeth herwyd Hywel Day y gwmpasu y gyfreith a e aruer yn perfeith, «three ordinances according to Hywel Dds to complete perfectly the law and its practice». These are general principles applicable to all kinds of case: (1) similar cases require similar judgments; (2) where two conflicting rules are both found in writing, the worthier is to be preferred; (3) where a rule is found in writing without any conflicting rule, it is to be upheld.

(iii) In some cases arfer seems to be added to cyfraith, «law», by mere hendiadys; see the examples cited below under defod.

¹¹ See note 9 above.
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III. Place of Custom in the Juridical Order

As we have seen, custom is contrasted with law as cutting across it. Very occasionally a lawbook will record a custom which thus diverges from the legal rule. So at Dw 142-4 we have the statement that woods are preserved from the feast of the Decollation of St John the Baptist (29 August) until 15 January, and en hynny o amser e delegr mesoby o keryff [dyw] mofn dyn arall en y coet hynny cafl nomyn trithdyfn. Ffryll a deuyw pan [yw] o decillyd. Keureyth eu e neyll a dedut eu [e] lliad decillyd, «and during that time there is a right to pannage if a person finds another’s pigs in his wood, even though he should find only three head. Others say ten head».


13 Book XIII contains the ‘Trials of Dywyll Mochmool’, reprinted from the Mwyssion Archeology of Wales (vol. ii, 1807, 2nd edition in one volume, Desbigh, 1870). According to the text (Al. li. 567) the source was a transcript made in 1685 by Thomas as Iwn of Tref Bryn, Glamorgan, from the old books of Sir Edward Mansell of Margam. Nothing is known of the transcript or the ‘old books’, and though no rigorous proof has been put forward, it seems certain that these trials, in their present form, are the work of Iolo Morganwg (Edward Williams, 1747-1825), antiquarian and creative romancer. Iolo may have had some foundation on which to build, but there is no known evidence of this.

14 See (1941) 49 TWR 340-42.

15 Liability in contract and in blood feud resulting from homicide, for instance, are the subject of rules relating to the effect of death.
IV. Analysis of the concept «custom»

The only analysis of the concept seems to be that of the triads quoted above. Anything in the nature of speculative general jurisprudence in the Welsh lawbooks seems to be confined to such statements of principle as those relating to procedure, already quoted. Perhaps the most significant statement about custom to be found in our texts is the naming of uncertain origin as weakening a custom.

V. Evolution of Custom: how formed, developed, disappearing

The passages cited suggest that non-insistence on legal rights is a primary source of legally-effective custom. The tractate on Corn Damage («distress damage peasant» in English-law language) has a significant observation in this context: when a man has impounded livestock taken on his corn, «though he lets them out to graze he does not lose his status [i.e. as impounder] by reason of doing better than he was bound to» (Io 158/8, LTMW 208). This provision could well have developed into a custom which required the impounder to let the livestock out to graze, but we have no evidence that it ever did so develop. Such a custom would come under the first head of the explanatory triad, the «custom which pursues law».

The second head, the «custom which anticipates law», seems to reflect growth in the power of the King. It is hardly possible to extract from the lawbooks a consistent theory of authority to legislate, though there are very strong hints that a ruler could legitimately amend the law with the consent of advisers or representatives of some kind. This triad seems to mean that a ruler could innovate without waiting for advice or consent, if the innovation followed an existing custom.

VI. Social Groups

A. Personal customs

Though personal status was of very great importance in medieval Wales, the lawbooks do not bring out any clear contrast between customs applicable to groups of different status. This is partly (perhaps mainly) because the lawbooks are concerned primarily with the rights of the free class and seldom refer to the position of the unfree except when the free are affected. For all we know, aliens and villeins may have had elaborate systems of custom to regulate their relations inter se: this is likely a priori, and is hinted at by a few passages in the lawbooks. Thus the rule that no-one in a «reckon townland» (i.e. a villein community) should begin to plough until all his fellows had found ploughing partners (WML 108.4-6) seems to reflect villein custom.

B. Territorial customs

There are occasional references to differing practice in different parts of Wales. At Io 115/1-8 a certain special procedure for bringing a charge of theft is described, and we are told first that no denial of the charge is possible, but afterwards that «other forms of law wish to allow denial... and that is what the men of Gwynedd most believe in» (LTMW 160). There are other references to the practice of the men of Gwynedd, and also several to that «according to the men of Powys» (e.g. Io 102/13, LTMW 136).

C. Other types of social group

The Law of Women is the subject of one of the most important tractates in the Ilorworth Redaction; comparison with the other Redactions suggests that it took shape at a comparatively late date, and it may well have begun as a record of customary practices — such as those relating to the sharing of the matrimonial property on the break-up of a marital union. The tractate has only one specific reference to custom: at Col 63 (LTMW 52) we have the rule: «If it happens that a man wants a woman... let him take a surety from her father and mother that she will not cause him shame by her body, and that she will not be offensive towards him, which is the custom of the Welshwomen»: the wording does not tell us whether the custom is in the offensiveness or the surety against it.

VII. Branches of law governed by custom

Our citations suggest that custom may affect any branch of the law.

16 In Welsh law theory, there were only three classes, the royal, the gentle, and the villein. Aliens and slaves were outside the pattern, and there was no separate noble class. Those called nobles or proprietors in Latin were only high-ranking members of the honedddig class; like the English gentleman, the Welsh honedddig was originally a man of known stock (W. bôn; L. gens).
VIII. Proof of custom

Our sources give no rules for the proof of custom. The principle that authority belongs primarily to written law should ensure that a custom recorded in a lawbook would be applied in the absence of a written rule to the contrary; and even if a contrary rule were also to be found in writing, the recorded custom might be allowed to prevail as offering the worthier rule.

IX. Record and redaction of custom

As we have seen, our Welsh sources have few specific references to custom; for this there may be several reasons. If we take the view that the ultimate core of the lawbooks is a digest of custom connected in some way with Hywel Dda, we shall not be surprised if later additions were made on the basis of custom without any mention of their origin. On the other hand, the principle that the authority of a legal rule depended on its being in writing could mean that once a custom had been written in a lawbook, its customary origin would be irrelevant and need not be mentioned, while any earlier rule which had a more strictly legal character would probably fall into disuse and could be dropped from a revised version of the lawbook.

Moreover, since our lawbooks are Rechtbücher produced for private use, it is likely enough that some of their compilers made changes in their text on the basis of custom. Some of the statements made in the books may be academic speculation (whether or not they offer a choice of rules); others may well record practices which were long established though never elsewhere put into a lawbook. The development of Welsh medieval law from Redaction to Redaction perhaps owes more than we have yet realised to the growth of customary practices outside the framework of law enforcement.

Abbreviations


BBCS : Bulletin of the Board of Celtic Studies.


Col : Llyfr Colan, ed. D. JENKINS, Cardiff, 1963. The manuscript from which this is taken is a revised edition of the Iorwerth Redaction, drawing also on a Latin text, from which Col 63 is drawn; references are to numbered sentences.

Cyn : The Cyfnerth Redaction, for which references are given to WML.


GPC : Geiriadur Prifysgol Cymru, A Dictionary of the Welsh Language, Cardiff, 1950-.

Ior : Llyfr Iorwerth, ed. A.R. WILIAM, Cardiff, 1960. References are to numbered sections and unnumbered sentences within sections.


LTD : Latin Redaction D in LTWL.

Tvr : see note 9.