

WALES AND MAGNA CARTA

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I want to begin by thanking the Honourable Society of Cymmrodorion for having honoured me with the invitation to speak here this evening.¹ Being asked to lecture to this Society is a significant moment for any Welsh academic, and I am very conscious of the standing of this society in the history of Welsh scholarship and culture. Its illustrious history is a witness to the influence it has exerted, and with it that of the London Welsh, on the formation of the national identity of modern Wales.

I also want to thank Lord Judge for chairing my lecture here this evening. I am very conscious of the contribution he has made to the study of Magna Carta since his retirement from the Bench,² and in particular of the numerous occasions that he has lectured at home and overseas on the topic during the last year or so. These include his Youard lecture to the Welsh Legal History Society and the Hywel Dda Institute at Swansea University last autumn. It is therefore somewhat daunting to have to lecture in his presence on a similar theme. His title that evening was *Magna Carta and Wales*, and in it he emphasized the particular attention paid to Wales in certain clauses of the charter, namely clauses 56, 57 and 58. In choosing to entitle my offering *Wales and Magna Carta* I not only wanted to distinguish my effort from his masterly survey, but also to try to shift the focus of the discussion. So much has been spoken and written about the Great Charter in the year of its octocentenary that I felt it would be purposeless to retread well-worn paths or to seek to emulate the earlier contributions of scholars with much greater learning on that chapter of English history than I have.

What I want to try to do, therefore, this evening is something rather different. Instead of asking what did Magna Carta have to do with Wales or to say about Wales, I want to explore the significance of Magna Carta from a Welsh perspective. It may be that I shall be asking questions to which no clear, if indeed, any answers can be given – but I believe that a consideration of how the Charter’s perspective on kingship and government differed from that of Wales may be worthwhile, together with the likely consequences for Wales of that difference. Moreover, I don’t want to focus entirely on the thirteenth century. The importance of Magna Carta is certainly not confined to the century of its making; indeed, its significance in later generations greatly exceeded anything that its contemporaries could possibly have envisaged. I want therefore to consider also what this signal document may have to say to us today about government and law-making not only for, but – since devolution – in, Wales.

1 This article is the text of a lecture delivered to the Honourable Society of Cymmrodorion at the Medical Society of London on 28 October 2015.

2 See, for instance, Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Oxford: Hart Publishing, 2014).

Magna Carta in legal history

Throughout the course of human history, there have been attempts to articulate principles or rules to govern the interaction of human beings with one another. Some such attempts constitute iconic moments not only in the history of particular societies but in the history of human societies generally: the descent of Moses from Mount Sinai with the tablets of the Law for the children of Israel; the promulgation of the Law of the XII Tables in early republican Rome; at the other end of that empire's history, the publication by the emperor Justinian of his great codification of Roman law which later ages would call the *Corpus iuris civilis*; more recently the similar publication by Napoleon of the French *Code civil*; the making of the constitution of the United States by the founding fathers of that nation. All of these events, significant in themselves, have achieved even greater significance for later generations. Magna Carta ranks among them. Some of what has been handed down about these events savours more of legend than of historical fact, but even when the historical evidence is considerable, they have still become the stuff of legend. That is true of Magna Carta. There can be no gainsaying the position it has acquired in the pantheon of legal and political history.

Magna Carta, certainty, and the rule of law

Several of the examples I have given, Magna Carta among them, are concerned with ensuring that the laws governing people's lives should be certain. In his book, *The Rule of Law*, the late Lord Bingham of Cornhill, the first Lord Chief Justice to include Wales in the title of his office, reflected on the need for certainty regarding the rules which govern people's lives. 'Questions of legal right and liability' he wrote 'should ordinarily be resolved by application of the law and not the exercise of discretion'.³ People should not live their lives at the mercy of their governments, acting at their peril as to whether their actions are or are not lawful. The rules which govern their lives should be certain. In contrast, the Emperor Justinian's compilations expressed the Roman empire's view of legislative authority: *Quod principi placuit legis habet vigorem* – 'what is pleasing to the prince has the force of an enacted law'.⁴ The revival of Roman legal learning based on Justinian's Digest gave fresh currency to this idea, which was to issue as a basis for the later absolute monarchies of mainland Europe. In England, on the other hand, any such tendency towards government at the ruler's discretion was nipped in the bud, so that in the generation following Magna Carta, it would be written that the king ruled 'under God and the law', *sub Deo et lege*,⁵ words which Chief Justice Coke would famously quote to James I,⁶ even if cynics commented that, by the law, Coke

3 Tom Bingham, *The Rule of Law* (London: Penguin, 2010), p. 48.

4 Justinian, *Institutes*, I.1.6; D. I.4.1 (Ulpian, *Institutes*, Book 1).

5 Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. by G. E. Woodbine, trans. by S. E. Thorne (Cambridge: Belknap, 1968), II, 33.

6 *The Reports of Sir Edward Coke in English*, 13 vols. (London, 1738), abbreviated to Co. Rep., xii, 65.

meant the Court of Common Pleas and by God, Coke himself as the Court's chief justice.⁷ Subjecting government to the rule of law is at the heart of Magna Carta's significance and legacy.

Certainty and the native laws of Wales

Most societies will have a law-giving event of iconic status in their history, albeit they may be less well-known and less celebrated than Magna Carta. Wales has its iconic moment and corresponding text. For Wales, it is that meeting in the first half of the tenth century at Yr Hen Dŷ Gwyn ar Daf, when Hywel ap Cadell called together clerics and laymen from across his lands to record the customs of the country. It may well be that he was more conscious than others of the significance of what he was attempting in terms of unifying his people by giving them a 'common' law. It is unlikely however that he could have foreseen the extent to which those laws would become not just *a*, but arguably *the*, focus of a Welsh national identity in succeeding centuries.

Indeed, later ages and rulers intent on creating or buttressing such a national identity may have deliberately set about elevating the significance of Hywel's endeavours to achieve that end. If that were the case, then it would probably have been during the centuries separating the coming of the Normans from the Edwardian conquest that it would have occurred, and in particular during the twelfth and thirteenth centuries.⁸ These are, of course, the centuries from which the first manuscript evidence of the laws survives. Those manuscripts often begin with the prologue describing the convention summoned by Hywel to the Hen Dŷ Gwyn and continue with a section on the Laws of Court. This deals with the identity and the status of those who compose the royal court. It is believed to have been composed by lawyers for the use of lawyers, both as a work of reference and as a source of instruction. Arguably, the view of kingship and royal government which it presents does not correspond to that which other sources of evidence suggest was actually the case in early thirteenth-century Gwynedd.⁹ Nevertheless, it does present a concept of kingship and of the personnel of government which are governed by law. The view of the law books is that royal government in Wales is subject to the laws of Hywel, and – regardless of actual practice – that is itself significant. According to the law books, there was little room for discretion.

7 See T. F. T. Plucknett, *A Concise History of the Common Law*, 5th edn (London: Butterworths, 1956), p. 243.

8 A prime candidate, or suspect, for pursuing such an initiative would be Rhys ap Gruffydd, the Lord Rhys, the twelfth-century ruler of Deheubarth whom Henry II appointed justiciar of south Wales: see T. G. Watkin, 'En route to Ireland: Henry II and the Laws of Wales', in *Law and Justice in the Integration of Two Lands*, ed. by Sylvain Soleil and T. G. Watkin (Bangor: Welsh Legal History Society, 2016), pp. 47–66.

9 See Robin Chapman Stacey, 'King, Queen and *Edling* in the Laws of Court', in *The Welsh King and his Court*, ed. by T. M. Charles-Edwards, M. E. Owen and P. Russell (Cardiff: University of Wales Press, 2000), p. 29. See also David Stephenson, *The Governance of Gwynedd* (Cardiff: University of Wales Press, 1984).

The Royal Court and its officers

The Laws of Court begin with a statement of the number of office-holders that the court ought to contain, namely twenty-four, and these are then listed. The number is redolent of the twenty-four elders to be found around the throne of heaven in the book of Revelation, but if the number is derivative, the offices listed are very functional, including for instance the Priest, the Judge, the Physician and the Doorkeeper, together with their tri-annual entitlements to woollen and linen clothing at the great Festivals. There is little room here for any discretion with regard to the number and the function of the court's officers; they are established by law, and – whatever was actually the practice – the law's view is that this is how it ought to be. Moreover, the precedence to be given to each of these officers is set out in detail, leaving no room for discretion or the promotion of favourites. Everything is seemingly governed by the rule of law.

This contrasts quite sharply with what we know of the court of the king of England during the twelfth century. Of Henry I's ministers, the Shropshire-born monk, Orderic Vitalis, wrote: 'He pulled down many great men from positions of eminence [...] [and] ennobled others of base stock who had served him well, raised them, so to say, from the dust, and [...] stationed them above earls and famous castellans.'¹⁰ Notice that the comment relates not only to the choice of ministers but also their 'stationing', where they were set about the king. This is often presented as a complaint against the king,¹¹ which it may well be, although the language seems to be carefully chosen to echo the words of the *Magnificat*, and the reference to 'raising them, so to say, from the dust', to be a conscious reference to the psalmist's description of the Lord his God taking 'the simple out of the dust and [...] the poor out of the mire;/ That he may set him with the princes: even with the princes of his people'.¹² Even if the message of Orderic's words is ambiguous, a generation later there is no mistaking John of Salisbury's contempt for such social mobility when it favoured the overly ambitious, who were simply out to get to the top and lord it over others.¹³ Significantly, Giraldus Cambrensis – the offspring of noble Welsh and Norman stock – criticized Henry II for behaving nobly to commoners but ignobly to the aristocracy.¹⁴ It is perhaps not surprising that England's first law book, the work written at the end of Henry II's reign and known by the name of one of those whom Henry had raised from humble beginnings, Glanvill, does not open with a careful delineation of the composition of the royal court nor of how its

10 Orderic Vitalis, *Historia Ecclesiastica*, ed. and trans. by Marjorie Chibnall (Oxford: Oxford University Press, 1968–80), vi, 16: 'Plerosque illustres... de sullimi potestatis culmine precipitavit... Alios... favorabiliter illi obsequentes de ignobili stirpe illustravit, de pulvere ut ita dicta extulit, dataque multiplici facultate super consules et illustres oppidanos exaltavit'.

11 Ralph V. Turner, *Men Raised from the Dust: Administrative Service and Upward Mobility in Angevin England* (Philadelphia: University of Pennsylvania Press, 1988).

12 Psalm 113. 6–7.

13 John of Salisbury, *Policraticus*, ed. and trans. by C. J. Nederman (Cambridge: Cambridge University Press, 1990), vii, 17.

14 Giraldus Cambrensis, *Opera*, ed. by J. S. Brewer, J. F. Dimock and G. F. Warner (London: Rolls Series, 1861–91), v, 199.

entourage should be ‘stationed’ about the king.

Among the twenty-four officers listed in the Welsh Laws of Court is the *penteuilu* or Captain of the Household. Listen to what the Welsh texts of the law books have to say about this officer.

It is right for the captain of the household to be the King’s son or nephew, or a man so high that he can be made captain of the household. It is not right that an *uchelwr* should be captain of the household; the reason it is not right is, that the captain’s status depends on the King, and that no *uchelwr*’s does so.¹⁵

Interestingly, it is added that ‘for this reason’ the men of Gwynedd removed the *penteuilu* from among the twenty-four, and no trace of his position and qualifications remain in the Latin texts of the law books. This may be a sign that the rulers of Wales coveted a measure of that discretion which their neighbours in England had been able to employ, and which they may have recognized as having strengthened the development of the neighbouring kingdom.

Feudal services, incidents, and authority

The Norman Conquest had also brought to England that system of land holding which later generations would christen the feudal system. The concept of land being given to tenants in return for services, and for the loyalty of the tenants to their immediate lord being reciprocated by the lord’s holding of a court to do justice for them, created a sturdy, robust pyramid for landholding and the administration of justice: land in return for services; justice in return for loyalty.¹⁶

Land in return for services. The land allotted would be carefully defined in metes and bounds. The services also should be certain. Certainty with regard to services was the mark of a freeholder. Villeins had to perform whatever duties their lords required; the free man held his land for services which were certain: military services from those who held tenures in chivalry; agricultural services from those who held in socage.

Yet it is clear from the Articles of the Barons which preceded Magna Carta that the certainty of services had not always been respected. John was forced to agree by clause 16 that ‘No man shall be compelled to perform more service for a

15 Dafydd Jenkins, *Hywel Dda: The Law* (Llandysul: Gwasg Gomer, 1986), p. 8. The translated text is based in the main on the version of the Welsh laws contained in Llyfr Iorwerth, which reads in the original: E penteylu a dely bot yn vab y’r brenhyn, neu yn ney, neu yn kywuvch gvr ac y galler penteylu ohanav. Ny dely mab uchelwr bot yn penteylu; sef achavs nas dely, vrth uynet y ureynt ef vrth y brenhyn, ac nat a un mab uchelwr. Vrth henny y duc guyr Gvyned e penteylu o euryf y petwar svydawc ar ugeynt, y adan y dysteyn – *Llyfr Iorwerth*, ed. by A. R. Wiliam (Cardiff: University of Wales Press, 1960), §6.

16 The connection between allegiance or loyalty and having access to the court of the lord to whom such loyalty is owed is manifested in the derivation of the word *loyalty* from *loi* meaning ‘law’.

knight's fee or for any other free tenement than is due therefrom'.¹⁷ The freeholder's obligations were not to be a matter of discretion. Nor was an obligation to perform a military service in person guarding a castle to be changed into a demand for money payments at the discretion of the constable if the knight was prepared to perform the service personally.¹⁸

What was to be the case with regard to the regular services to be rendered in return for one's land was also to be true regarding the occasional payments that might become due, the incidents as opposed to the services of feudal tenure. The adult heir succeeding to his deceased ancestor's land was to pay no more than 'the ancient relief' which the Charter defined as £100 for a barony and 100s for a knight's fee.¹⁹ Likewise, lords were not to seek monetary aid to meet their expenses other than in defined circumstances – being ransomed when captive; knighting their eldest son, and marrying their eldest daughter.²⁰ The Charter allowed reasonable aids to levied at such times, and later legislation would define the amounts for the last two for even greater certainty – 20s was to be the norm.²¹ The king was not to exact an aid on any other occasion without the consent of the 'common

- 17 Clause 16: Nullus distringatur ad faciendum majus servicium de feodo militis, nec de alio libero tenemento, quam inde debetur. [No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.]
- 18 Clause 29: Nullus constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si facere voluerit custodiam illam in propria persona sua, vel per alium probum hominem, si ipse eam facere non possit propter rationabilem causam; et si nos duxerimus vel miserimus eum in exercitum, erit quietus de custodia, secundum quantitatem temporis quo per nos fuerit in exercitu. [No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.]
- 19 Clause 2: Si quis comitum vel baronum nostrorum, sive aliorum tenencium de nobis in capite per servicium militare, mortuus fuerit, et cum decesserit heres suus plene etatis fuerit et relevium debeat, habeat hereditatem suam per antiquum relevium; scilicet heres vel heredes comitis de baronia comitis integra per centum libras; heres vel heredes baronis de baronia per centum libras; heres vel heredes militis de feodo militis integro per centum solidos ad plus; et qui minus debuerit minus det secundum antiquam consuetudinem feodorum. [If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be of full age and owe 'relief' he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl, 100 pounds for a whole earl's barony; the heir or heirs of a baron, 100 pounds for a whole barony; the heir or heirs of a knight, 100 shillings at most for a whole knight's fee; and whoever owes less let him give less, according to the ancient custom of fiefs.]
The *Confirmatio Cartarum* of 1297 revised the relief for a barony to 100 marks, a mark being two-thirds of a pound, that is, 13s 4d.
- 20 Clause 15: Nos non concedemus de cetero alicui quod capiat auxilium de liberis hominibus suis, nisi ad corpus suum redimendum, et ad faciendum primogenitum filium suum militem, et ad primogenitam filiam suam semel maritandam, et ad hec non fiat nisi rationabile auxilium. [We will not for the future grant to any one license to take an aid from his own free tenants, except to ransom his body, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.]
- 21 Statute of Westminster I (1275), c. 36.

counsel of the realm',²² and the manner in which that common counsel was to be obtained was also subjected to regulation.²³ Bailiffs were not to be allowed to proceed against the lands of a tenant if there were goods which could be distrained.²⁴ Horses, carts and timber were not to be taken from tenants without their agreement.²⁵ Discretion regarding legal obligation was being outlawed. People were to be secure in their property and in their rights rather than at the mercy of royal or seigniorial

- 22 Clause 12: Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad hec non fiat nisi racionabile auxilium; simili modo fiat de auxiliis de civitate London. [No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.]
- 23 Clause 14: Et ad habendum commune consilium regni de auxilio assidendo aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones sigillatim per litteras nostras; et preterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes illos qui de nobis tenent in capite ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonicionis causam summonicionis exprimemus; et sic facta summonicione negocium ad diem assignatum procedat secundum consilium illorum qui presentes fuerint, quamvis non omnes summoniti venerint. [And for obtaining the common counsel of the kingdom about the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moreover cause to be summoned generally, through our sheriffs and bailiffs, all others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.]
- 24 Clause 9: Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec plegii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, plegii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris, donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem plegios. [Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.]
- 25 Clause 30: Nullus vicecomes, vel ballivus noster, vel aliquis alius, capiat equos vel caretas alicujus liberi hominis pro cariagio faciando, nisi de voluntate ipsius liberi hominis [No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman]; and Clause 31: Nec nos nec ballivi nostri capiemus alienum boscum ad castra vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit [Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood].

discretion.²⁶

The English rejection of government by princely fiat was against the background of customary expectations – witness the reference to the ‘ancient’ or ‘age-old’ relief. Magna Carta marked an early reduction of those expectations to writing. The native law books within Wales provided a similar, solid basis upon which to criticize princely pretensions. The surprising factor is that, in the aftermath of Magna Carta, Welsh princes should have sought to act by discretion.

John’s great-grandson, Llywelyn ap Gruffydd, sought, during his reign, to adapt certain of the Welsh laws to meet the needs of the thirteenth century. He sought, for instance, to commute the *gwestfa* renders made in kind to support the court into money payments. This had the consequence, similar to past events in England, of blurring the distinction between the obligations of the nobility and those of the lesser, *maerdref* tenants. The assertion of a royal – as opposed to a seigniorial right to wreck, treasure trove and *bona vacantia*, his attempt to insist that his confirmation be obtained to alienations by lesser lords, that corn be ground at the lord’s mill and that betrayal, *brad*, to him was a wrong of a different, more serious, kind than betrayal of the nobility, all savoured of changes to the native laws which were not welcomed by his most powerful subjects. At bottom, Llywelyn was attempting to change the native laws by assertion of his royal will, and it was this assertion of royal power or discretion which undermined his popularity among his subjects. Those who opposed him could present themselves as guardians of the native traditions.

In this there is an echo of his great-grandfather’s difficulties which culminated at Runnymede. The Welsh nobility, like their English counterparts a generation or two earlier, were not prepared to accept that ‘what was pleasing to the prince should have the force of an enacted law’. Wales, like England, did not welcome government by executive discretion, and had in its law books a source of law to which its rulers, as well as their people, were subject. Clauses 56 to 59 of Magna Carta may have been part of the motive force for this assertion of a ‘kingly’ authority, for whereas in clause 59, Alexander II was described as *rex Scottorum*,

26 The peaceful enjoyment of one’s possessions is now protected under Article 1 of Protocol 1 of the European Convention on Human Rights, and can only be interfered with where the public interest in such interference outweighs the disbenefit to the private interest involved. This was indeed the issue regarding which the Supreme Court was unanimous in holding that the National Assembly for Wales had gone beyond its legislative competence in passing the *Recovery of the Medical Costs of Asbestos Related Diseases (Wales) Bill*: see *In re Recovery of the Medical Costs of Asbestos Related Diseases (Wales) Bill: Reference of the Counsel General for Wales* [2015] UKSC 3.

Llywelyn Fawr was accorded no such title.²⁷ Only with the later assertion of a royal authority did Llywelyn ap Gruffydd begin to describe himself as *princeps Wallie*.

True, in England, the years of Henry III's reign also saw further tensions between the exercise of royal authority and baronial insistence on respect for the 'common counsel of the realm'. Within fifty years, that method of obtaining the 'common counsel' would be developing into the beginnings of Parliament, and under Edward I that body would become the king's favoured method of obtaining consent for substantial and significant changes to the laws and customs of his realm, replacing his father's futile attempts to govern by feudal authority – by trying for instance to insist on consent for the granting of land to corporate bodies such as abbeys and churches, or that his tenants-in-chief obtain consent for any grants made by them. In Wales, the princes continued to attempt to exercise such authority, emulating the example of their English royal neighbours, even though they had never enjoyed the same degree of authority in their lands. Magna Carta began, in England, the process by which baronial opposition to such royal authority resulted in hardy institutions of government. In Wales, the frustration of royal ambitions merely halted development.

The writ praecipe and clause 34 of the Charter

If the granting of land in return for services, with the protection of the lord's justice being afforded to his loyal tenants, was legally coherent, politically the structure was dangerous, for each lord had at his disposal the services of tenants who owed him loyalty and upon whom he could call for support not only in disputes with other lords, which would weaken the good order of society, but even against the king, thus weakening the hold of the monarch on his kingdom. When late in the Conqueror's reign, such a revolt raised its head in England with the Conqueror's own half-brother, Odo, bishop of Bayeux and earl of Kent, amongst those fostering it, and the king's eldest son, Robert, amongst its supporters, William realised that a more permanent solution than suppression was required. In August 1086, he summoned a great assembly of free, landholding men to Salisbury Plain where he exacted from them an oath of allegiance, the famous Sarum Oath, by which they pledged an allegiance to their king which was to be greater than the loyalty they owed to any intervening lord along the feudal ladder.

27 Compare the references in Clauses 58 and 59. Clause 58: Nos reddemus filium Lewelini statim, et omnes obsides de Wallia, et cartas que nobis liberate fuerunt in securitate pacis [We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace]. Clause 59: Nos faciemus Alexandro regi Scottorum de sororibus suis, et obsidibus reddendis, et libertatibus suis, et jure suo, secundum formam in qua faciemus aliis baronibus nostris Anglie, nisi aliter esse debeat per cartas quas habemus de Willelmo patre ipsius, quondam rege Scottorum; et hoc erit per iudicium parium suorum in curia nostra. [We will do toward Alexander, King of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do toward our other barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly King of Scots; and this shall be according to the judgment of his peers in our court.]

The logic of the Sarum Oath had consequences – consequences which, in a manner typical of the development of English law, took some eighty years to work through. If tenants owed loyalty to their lords in return for which their lords owed them justice in their courts, then those same tenants in owing allegiance to the king, deserved from him the protection of the royal justice available in his royal court. It was eighty years later that the Conqueror's great-grandson began to act on that logic and begin the steady growth of remedies in the royal courts which would become the common law of England. Henry II acted on the logic of the Sarum Oath to allow free landholding men generally access to justice in his court. He protected them by ensuring that no free man should be forced to defend his title to his lands without royal permission, acted to stop such landholders from being dispossessed without a judgement, and began to attract litigation about title to freehold land into his courts by use of the writ *praecipe*. The writ *praecipe* issued when one person claimed land of another, and it ordered that other to surrender the land in dispute to the claimant or else appear before the king's court to explain why he had not done so. It allowed those claiming land to resort to the royal courts for adjudication of their claim rather than go to the court of their immediate feudal overlord. The king's jurisdiction was being widened at the expense of the lords lower down the feudal ladder, among whom were the barons of the realm. This brings us back to Magna Carta.²⁸

Clause 34 of Magna Carta provided that the writ which was called *praecipe* was not in future to be issued to anyone in respect of any landholding whereby as a consequence a free man would lose his court.²⁹ This meant that in future, when someone claimed freehold land of another, the claimant would obtain not the writ *praecipe* ordering the other to hand over the land or else appear before the king's justices to explain why he had disobeyed the royal command but instead would obtain the writ of right, which would be sent to the lord from whom he claimed to hold the land and ordered the lord to maintain right in the matter. If the lord did not do so, the case could be moved from the lord's court into the shire court and from there to the king's court, whither it would have to go if the person from whom the land was claimed opted for the issue of title to be tried by a jury in the form of the Grand Assize rather than by trial by battle. Issuing *praecipe*, therefore, was a short cut into the royal jurisdiction whither the case might well eventually end up anyway, but it did not respect the lord's right to provide justice for his tenants. The barons had demanded that their right in that regard be respected,³⁰ and clause 34 of Magna Carta conceded the issue. In future, *praecipe* would only issue where the land was held immediately of the king, *in capite*, or where the intermediate lord did not hold a court in which justice to his tenants could be provided, *quia dominus*

28 The pre-Magna Carta form of the writ is given in *Glanvill*, ed. by G. D. G. Hall (London: Nelson in association with the Selden Society, 1965), I, 6

29 Clause 34: Breve quod vocatur 'Precipe' de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam [The writ which is called *praecipe* shall not for the future be issued to any one, regarding any tenement whereby a free man may lose his court].

30 Articles of the Barons, 24: Ne breve quod vocatur 'Precipe' de cetero non fiat alicui de aliquo tenemento unde liber homo amittat curiam suam.

remisit curiam suam.³¹ It also perhaps protected the lords' ability to influence the outcome of such trials in their own courts, where justice was done according to the custom of the lordship which might allow for a fair measure – or even an unfair measure – of seigniorial discretion, whereas the jurors on the grand assize might be altogether more objective and independent.

With hindsight, clause 34 can appear reactionary; feudal lords refusing to acknowledge the onward march of the common law administered by the royal courts. At the time, the king's courts were just one set of tribunals competing for jurisdiction, with feudal and ecclesiastical justice being other competitors in the field. In the competition, royal power eventually ensured a royal victory, and clause 34 can appear no more than a temporary obstacle in the path. It did however indicate that the growth of the common law needed to be achieved by consensus, by 'the common counsel of the realm', and not by royal fiat. What was pleasing to the prince was not in England to have the force of an enacted law.

However, whether the land disputes of tenants of lesser lords came before the royal courts by *praecipe* or ended up there having been commenced by the writ of right, the conclusion is inescapable that the king's court was open to provide justice to all those who owed him allegiance. The logic of the Sarum Oath prevailed. Indeed, despite the reactionary perspective of clause 34, the simple statement that no-one is to be denied right or justice seemingly affirms the king's obligation to do justice not just to his tenants-in-chief, but to all his subjects. The Plantagenet kings had successfully used the logic of the Sarum Oath to unify their kingdom by extending the justice available in their courts to their free subjects generally. The law of the king's courts was the common law of England.

This example was not lost upon the rulers of Wales, and in particular Llywelyn ap Iorwerth and Llywelyn ap Gruffydd. The policies pursued by both of these princes exhibit a clear understanding of how the taking of oaths of homage and allegiance could be unifying factors both within Wales and – to their disadvantage – within England and Wales as a whole. Ironically, however, if the example was not lost, it would appear that what might be termed the lesson of clause 34 of Magna Carta, that such changes to succeed required agreement, was wasted on the princes of Gwynedd.

Early in his reign, John received the homage and fealty of Llywelyn ap Iorwerth in 1201, and the nobles of Wales also swore fealty to the English king. Ten years later, John went further and demanded not only that Llywelyn swear allegiance to him but also that John be given hostages as security for the peace. These hostages, including Llywelyn's son, he was forced to agree to return by clause 58 of Magna Carta. Following John's death, Llywelyn sought and obtained the homage of his subjects at Aberdyfi, creating a relationship which could be the foundation for an exercise of jurisdiction similar to that which the Plantagenets were establishing in England. However, in competition with that development, first Llywelyn and then the Welsh lords generally did homage to the young king, Henry III – Llywelyn at Worcester, and the Welsh lords later at Woodstock. Ten years later, Henry III

31 See M. T. Clanchy, 'Magna Carta, Clause Thirty-Four', *English Historical Review*, 79 (1964), 542–8.

was again to receive the homage of the Welsh lords, this time at Montgomery. While receiving the homage of Llywelyn might be viewed as cementing a personal dependence, in much the same manner as later kings of England would perform liege homage to the kings of France, taking the homage of lesser lords suggested – indeed may have emphasized – a claim to jurisdiction within Llywelyn’s domains. This was asserted more boldly again in 1238, when Llywelyn, wishing to safeguard the succession for his son, Dafydd, a nephew of the half-blood to Henry III, called upon the Welsh nobility to do homage to his chosen heir at Strata Florida. Henry intervened to prevent this, recalling that it was he who had received their homage a decade earlier. Any extension of Llywelyn’s jurisdiction beyond his immediate vassals was not to be countenanced as competition with that of his own liege lord. Likewise, when Dafydd did succeed his father, Henry again asserted that, while the nobility of Wales might owe him fealty, their homage was due to the English king alone. After Dafydd died, his nephews, the four sons of Gruffydd ap Llywelyn, did homage to Henry III for Gwynedd, and, under the terms of the Treaty of Woodstock, Henry took the homage and service of all the barons and nobles in Wales.³² In effect, by so doing, he created in Wales the jurisdictional situation which had been established for England by his grandfather, uncle and father.

The following decades saw Henry’s authority challenged and undermined in England, while in Wales Llywelyn ap Gruffydd emerged as the dominant ruler. As Henry’s hand weakened against that of the baronial party in years leading to the Provisions of Oxford in 1258, which again sought to restrain the expansion of royal jurisdiction, so in Wales, Llywelyn sought the homage of the Welsh lords. At the Treaty of Montgomery in 1267, Henry was forced to concede the homage of the Welsh lords to Llywelyn. It was the Welsh prince who now had the opportunity to build a centralized royal government for Wales. However – and this was where the lesson of Magna Carta may have been wasted – the response of the Welsh lords to Llywelyn’s centralizing policy was, like that of the English baronage half a century earlier, to resist such an expansion of jurisdiction.

While Llywelyn encountered reluctance on the part of his nobles to permit their vassals to do him homage, he resolutely refused to do homage to the new king, Edward I, when he returned from crusade to succeed his deceased father. The consequence was the eventual humiliation of Llywelyn’s aspirations in the Treaty of Aberconway in 1277, under the terms of which the Welsh prince was not only required to do homage and fealty to his English overlord but was also deprived of the homage of all but five of his own nobles, and their homage was specifically limited to his own lifetime. Having sought to extend his jurisdiction in Wales in the manner that his royal relatives had done in England, he eventually faced the virtual extinction of his powers in the face of the extension of English overlordship into Wales.

The final irony, if not insult, came after his downfall and death in the form of the provisions of the Statute of Wales of 1284. Not only did the English government seek in the enactment to streamline many of the common law remedies which

32 On the Treaty of Woodstock, see Ceri W. Lewis, ‘The Treaty of Woodstock, 1247’, *Welsh History Review*, 2.1 (1964–65), 37–65.

in England bore the marks of their gradual development, Edward introduced into his lands in Wales a form of the writ *praecipe* which was untrammelled by the constraints of Magna Carta. In Wales, the English king had no problem in issuing the writ regardless of whether it deprived any free man of his court. The English king's jurisdiction in his parts of Wales fulfilled the policies of Henry II, Richard and even John.

Magna Carta and modern Wales

Although Lord Bingham's book on *The Rule of Law* begins with a recognition of the importance of Magna Carta to the concept, his concern regarding the balance of legal certainty for the citizen as against the convenience of executive discretion for the government was not focussed on the thirteenth century. His concern was primarily with the contemporary scene. The issue of how to control executive government has not gone away, not even in England and Wales.

The tension can today be found in the frequent disquiet concerning the extent to which changes to the law as it affects individual citizens are open to scrutiny and debate by their representatives in the legislature – in other words whether such changes are being agreed by the 'common counsel of the realm'. The extent to which Acts of Parliament at Westminster and Acts of the Assembly in Cardiff Bay reserve delegated law-making powers to government ministers is a frequent cause of disquiet in the committees called upon to scrutinize such delegations and the subordinate legislation which results from it. Within the last month, the Constitutional and Legislative Affairs Committee of the National Assembly has, in its report on *Making Laws in Wales* recommended that 'the Welsh Government reviews its approach to the balance it adopts between what is contained on the face of a bill and what is left to subordinate legislation'.³³ Essentially, the issue is encapsulated in the words of Lord Oliver of Aylmerton, after he retired from the Bench, when he wrote that 'the citizen [...] is entitled in a democratic society to have the rules by which his life is to be regulated properly debated and scrutinized by his elected representatives'.³⁴ The barons of Magna Carta would not have cast their net as wide as a modern democracy demands, but their concept that they should be participants in decision-making which affected their lives rather than the unwilling victims of them is part of the principle's pedigree. Moreover, the relevance of the principle is not limited to the doings of government with citizens. In the contemporary context of the United Kingdom, it is relevant also to the dealings of the state government with those of the devolved nations. The existing devolution settlement for Wales allows the United Kingdom government to intervene to prevent legislative proposals which have been passed by the National Assembly from being presented to the monarch for Royal Assent, even when the proposals are entirely within the legislative competence conferred upon the Assembly by the

33 *Making Laws in Wales*, Report of the National Assembly for Wales Constitutional and Legislative Affairs Committee, October 2015, Recommendation 6.

34 Lord Oliver of Aylmerton (1993) *Statute Law Review* 1, at 3.

United Kingdom parliament.³⁵ Such intervention may be justified in the interests of national security or defence, but some of the other circumstances in which it is possible are more questionable. Among these are the belief of the UK government that the proposals could have harmful effects on water supply, water resources or water quality in England – bringing to mind another, less happy anniversary which falls this year, or on the operation of the law as it applies in England. These are both cross-border issues, and it is to be hoped that mutually satisfactory resolutions of such cross-border issues can be achieved if and when the recently-published draft Wales Bill becomes law.³⁶ It is worth perhaps remembering that it was how to deal with a cross-border issue of which law to apply to the resolution of a dispute which occasioned the downfall of Llywelyn ap Gruffydd and independent Welsh government in the thirteenth century.

Earlier this year, in an article in the *Western Mail*, the former First Minister of Wales, the Right Honourable Rhodri Morgan, drew attention to the ‘strange’ fact that Magna Carta gave ‘precedence in Wales to laws made in Wales’. The *Western Mail* headed the article ‘How Magna Carta led the way to devolution’.³⁷ The reference is probably to clause 56 which provided that if Welshmen had been unjustly dispossessed of their property or rights, they were to be put back into possession. Any dispute over these matters was to be settled in the March – that is neither in England nor in Wales – and the matter was to be adjudicated ‘by judgement of their peers’. For lands in Wales, the native Welsh laws should apply; for lands in England, the law of England, and for lands in the March, the law of the March. The division is neat, but left open the question about which lands were situated in Wales, which in England and which in the March, and – perhaps more importantly – who should decide such questions. It was such a dispute, involving Gruffydd ap Gwenwynwyn of Powys’ assertion that the *cantref* of Arwystli in the upper Severn Valley lay not in Gwynedd but in the March, which led to the eventual downfall of Welsh princely rule. The importance of certainty regarding cross-border issues should not be underestimated. The imperfections of the ‘devolution’ clauses of Magna Carta played a part in bringing about the end of independent Welsh government in the thirteenth century. What will be the outcome of imperfections in the modern devolution settlements, one wonders, not only for Wales but for the United Kingdom?³⁸

35 Government of Wales Act 2006, s. 114.

36 The draft Wales Bill mentioned in the text was published by the UK Government in October 2015, but was ‘paused’ by the Secretary of State for Wales early in 2016 after its content had been subjected to sustained, widespread criticism. A new Wales Bill was published and introduced on 7 June 2016.

37 *Western Mail*, Saturday, 3 January 2015, p. 19: ‘The strange thing is that Magna Carta is also almost certainly the first devolution-proofed state document [...] Magna Carta gives precedence in Wales to laws made in Wales.’

38 Among such ‘imperfections’, the author would most certainly include the mechanism for achieving ‘English Votes for English Laws’ approved on 22 October 2015 by amending the Standing Orders of the House of Commons.

Magna Carta and the form and accessibility of legislation

Two further points about Magna Carta may be of particular relevance to contemporary Wales. They relate to its form and accessibility, two issues which, with regard to the laws of Wales, are currently the subject of a project by the Law Commission of England and Wales.³⁹ That the law which governs the lives of citizens should be accessible to them was one of the principles identified by Lord Bingham as underpinning the rule of law.⁴⁰ Laws must not only be certain; their text must be published and accessible to those governed by them. Whereas the stone tablets with which the children of Israel were presented with the Ten Commandments were placed in the Ark of the Covenant, the Twelve Tables of the Roman Republic were set up in the forum for all to see. Laws recorded in stone cannot easily be changed, and ironically the concept of their unchangeable nature can outlast the reason underlying and justifying their immutability. One reads that during the Babylonian captivity, the laws of the Medes and Persians were accounted immutable even though they were no longer written on stone but on less durable materials.⁴¹ The culture of the law-makers had not kept pace with the technology of the societies they served.

Magna Carta was a written document. In that, it was like the native Welsh law books. If one opens a copy of the *Statutes at Large*, the great compendium of English legislation reproducing the texts recorded on the statute roll, the first 'statute' recorded there is the re-issue of Magna Carta by Henry III in 1225 as confirmed by Edward I in 1297. It is widely regarded as the first English statute, even though there was no parliament to pass it in 1215. The method of recording the laws and customs of the realm had changed in the centuries since the Norman conquest moving, to adopt the title of Professor Michael Clanchy's study of the process, *From Memory to Written Record*.⁴² Written collections, not recollections, were to be the authoritative sources of laws. Alongside the production of written texts, recording the decisions of the 'common counsel of the realm', there developed mechanisms for ensuring that those decisions were made known to those affected by them, by forwarding copies to other centres within the kingdom, requiring their proclamation at communal gatherings such as the shire courts, and also ensuring that they were read out in a language understood by the people – so that if the text was in Latin, the sheriff might be expected to be able to translate it into French. When the charter was periodically reissued during the thirteenth century, the text of the reissue was an updated version, not simply a record of changes from the earlier versions.

In the intervening centuries, the advent of printing saw a similar, revolutionary change in the manner in which legislation is made and recorded. The ability to mass-produce statutory texts changed not only the way in which they were published but

39 *Form and Accessibility of the Law Applicable in Wales: A Consultation Paper*. Law Commission, Consultation Paper No. 223. The Final Report was published on 29 June 2016 under the same title: Law Comm No 366.

40 Bingham, *The Rule of Law*, pp. 37–47.

41 See, for instance, Esther 1. 19 and 8. 8; and Daniel 6. 8.

42 M. T. Clanchy, *From Memory to Written Record* (London: Edward Arnold, 1979).

also the process by which they were enacted. To this day, amendments to bills before Parliament and the Welsh Assembly are tabled as, in effect, instructions to the printer – ‘insert this’; ‘delete that’; or ‘substitute this for that’. Amendments to earlier legislation are often made within subsequent statutes in the same form. Until the advent of online collections incorporating such changes, those using the statutes were left to amend their copies of earlier legislation in much the same manner that mediaeval scribes would have had to insert marginal notes and glosses into their manuscript sources.

Magna Carta as a document, quite apart from its contents, has a message to contemporary law makers. Modern technology not only allows the written, printed collections of laws to be accessed in amended form; it allows the legislators themselves to approach their work in a different way. There is no good reason for continuing to submit amendments to bills in the form of instructions to printers. Modern technology allows the amendments to be drafted so as to show how the change affects the text to be changed. An MP or peer with a Tablet computer, or an AM in Cardiff with a computer before him or her in the Senedd chamber, could at the press of a button view existing text, the proposed change and the text as changed, and even all three on screen at the same time. In the past, Keeling schedules were sometimes appended to bills to achieve this to some measure in print. If Sir Edward Keeling were alive today, I doubt whether he would settle for less than what current technology affords.⁴³

The thirteenth-century example of local proclamation also challenges the contemporary situation where up-to-date texts of legislation are not generally available, free of charge, to those whose lives are affected by changes made. Those who made Magna Carta and the thirteenth-century legislation which followed, addressed this need by calling for proclamation at communal gatherings, doing the best their age could provide. As technologies change, the obligation to address the question afresh in the light of such developments is part of the inheritance of Magna Carta. It too should be a duty and not a matter of discretion. To seize the moment to do that in Wales might well be the best legacy of Magna Carta to our generation.

Textual consolidation

The prologue to the Laws of Hywel recounts how the convention he summoned to Whitland ‘examined the old laws, and some they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew’. All of this, it was recorded, was done ‘by the common counsel and agreement of the wise men who came there’. This might be said to be, even in Hywel’s time, the traditional way of presenting such a legal text, echoing the instructions given by

43 Sir Edward Keeling MP suggested in 1938 that a Bill amending an existing enactment should contain a Schedule setting out the enactment as it would read when amended using ‘typographical devices’ to show the amendments proposed. Such schedules became known, and are still known, as Keeling schedules. Today, the typographical devices have been overtaken by more modern methods, the use of which Sir Edward Keeling would surely have advocated.

the emperor Justinian regarding the compilation of the Digest. The Statute of Wales makes claim to having been made in a similar fashion, with the Laws and Customs having been rehearsed before the King and the nobility of England ‘Which being diligently heard and fully understood, We have, by the advice of the aforesaid Nobles, abolished certain of them, some thereof We have allowed, and some We have corrected; and We have likewise commanded certain others to be ordained and added thereto’. Whether or not with a hint of irony, Edward I presented his subjects in Wales with a new body of law according to which they were to be governed.

The Law Commission has recently floated the idea that, in Wales, the problem of accessibility might be best addressed by creating codifications of the law, or at least of the legislation, regarding the subjects which have been devolved. Once consolidated, these codified bodies of law would themselves be changed as new laws were made, thus encapsulating on a permanent basis the relevant law on a particular subject in a single text.⁴⁴ It is a bold and an imaginative suggestion. To undertake such a task would require time, effort, considerable resource and a steadfast, determined exercise of political will to begin the project, bring it to initial fruition and thereafter maintain it. Such a step would perhaps be comparable to the work which Hywel ap Cadell instigated at Yr Hen Dŷ Gwyn and which Edward I may have emulated. The vision needed is usually found at significant turning points in a nation’s history. Both Wales and the United Kingdom are experiencing such a moment. The sealing of Magna Carta may not have been such an endeavour, but the spirit of its content, its form and its publication can inspire novel departures. It should also quicken – in both senses – the renewal of the commitment to certainty and the rule of law in the shaping of our legislation, perhaps the most important long-term legacy of Magna Carta for Wales, as it is for England, and those many other parts of the world that have inherited or been influenced by the latter’s legal and political traditions.

44 See *Form and Accessibility of the Law Applicable in Wales: A Consultation Paper*. Law Commission, Consultation Paper No. 223, now the subject of recommendations in the final report.