MEDIEVAL POLITIES AND MODERN MENTALITIES

TIMOTHY REUTER
EDITED BY JANET L. NELSON

CAMBRIDGE UNIVERSITY PRESS
The reflections that follow have grown out of my preoccupation with two sets of problems. First, I have been working for far too long on a new edition of the letter-collection of Wibald of Stablo, which as you will all know contains the major part of all surviving Staufer mandates as well a considerable number of papal mandates, and it therefore seems an obvious challenge to compare these two governmental systems and their methods.¹ Second, not long ago, I tried to sketch for anglophone historians the basic features of the style of rulership in the twelfth-century regnum Teutonicum;² now is the time to fill out that sketch a little further. What I am offering here is certainly not polished or complete. It is, rather, work in progress, which means that it is preliminary and has many gaps (I especially regret the omission of France and its high court) – but that can’t be helped when I am trying to tackle mandate, privilege and court judgement³ in only an hour.

In my title, I have deliberately used the word ‘age’ rather than ‘reign’. As long ago as the 1920s and 1930s, leading German medievalists dealt with the period of Barbarossa in the framework of processes of modernisation that became evident in the twelfth century. To some extent, this was a new version of the old battle between historians of ‘Big Germany’ and those of ‘Small Germany’. At the same time, it was a debate that turned around certain specific and characteristic features of the ‘modern’ states of

¹ The edition of Wibald’s letter-collection which TR left unfinished has been completed by Martina Stratmann and will shortly be published by the MGH. Meanwhile, the old edition of P. Jaffé, Monumenta Corbeiensia, Bibliotheca rerum Germanicarum, 6 vols. (Berlin, 1864–9) is cited below.
² This paper is reprinted as chapter 10, above.
³ ‘Court judgement’ was the term TR used in translating the title of this paper; but Hofgericht also has a different, institutional, meaning, and I translate it below in such cases as ‘the royal court of justice’, ‘the ruler’s judicial court’, or, for shorthand, ‘the high court’.
Political structures and intentions

Europe in this period: royal legislation; financial policy; policy on royal lands; the building of central government on the basis of a post-feudal bureaucracy; exploitation of feudal law for the ends of state power; putting writtenness and rationality at rulers' disposal. On these criteria, the various historians, not surprisingly, awarded Barbarossa different marks, but by and large he was judged positively, especially for his allegedly successful efforts to construct a royal domain of Capetian type in the Alpine zone of southern Swabia, northern Burgundy and northern Lombardy, and also for his policy of using ministeriales. If his legislation left much to be desired, at least Barbarossa could be seen to have taken enough key initiatives to make him part of contemporary processes of modernisation.

Thanks to our good fortune in now having the completed edition of Barbarossa's charters, together with the Regesta and the Hofgerichtsregesten (Register of Judgements of the Royal Court), it is possible to study Barbarossa's acta as witnesses to such processes (or to their absence), by measuring what we can call his chancery's output against the output of other chanceries. 1 I will briefly summarise some well-known facts. For the whole empire, just over a thousand royal documents survive from the period 1152 to 1190. For Barbarossa's contemporary Henry II, some 4,500 documents, according to the most recent research, survive for the rather smaller Angevin empire; 2 and for the papacy in the same time-frame, at least 10,000 documents survive from the whole of Europe. 3 We should certainly assume considerable losses, yet there is a certain intuitive plausibility in treating these relative orders of magnitude as reflecting twelfth-century realities. Such comparisons do not take us very far, though. For the overwhelming

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1 The editions referred to here are H. Appelt with R. M. Herkenrath, Die Urkunden Friedrichs I., 5 vols., MGH Urkunden X (Hannover and Vienna, 1975-90), with Einleitung, Verzeichnisse, in vol. V (1990), pp. 24-74, and B. Diestelkamp and E. Rotter, Urkundenregesten zur Tätigkeit des deutschen Königs- und Hofgerichte bis 1451, vol. I, Die Zeit von Konrad I. bis zur Heinrich VI., 911-1197 (Cologne, 1988). For TR's criticisms of this register, see above, chapter 20, n. 22. References below to Barbarossa's diplomas have been left in the text, as TR had them, cited as Diplomata Frederici, with number in Appelt's edition, vols. I-IV.


3 See P. Jaffe, S. Löwenfeld, F. Kaltenbrunner and P. Ewald eds., Regesta pontificum Romanorum, 2nd edn (Leipzig, 1883), vol. II. An ongoing series, Papsturkunden in Frankreich, eds. H. Meinert, J. Ramackers, D. Lohmann and R. Grosse, 9 vols. (Berlin, 1932-). It is now being complemented by the provincial-institute editions of Gallia pontificia: repertoria et documents concernant les relations entre la papauté et les églises et monastères en France avant 1198, eds. B. de Vregille, R. Locatelli and G. Moyse, co-ordinated by D. Lohrmann (Göttingen, 1998-). Similar volumes are planned for the rest of Latin Christendom.
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majority of the material that survives originated not in the ruler’s own initiative but as a response to others’ requests. It is evidence, therefore, not only for the practice of government but also for what it meant in practice to be governed. We need a two-pronged approach, qualitative as well as quantitative, if we are to assess this balance of elements correctly.

According to Appelt’s Introduction to the five-volume edition of Barbarossa’s acta, there is a total of 553 formal diplomas, 230 simpler charters, 102 mandates and 49 letters, as well as 100 variegated documents. Because I intended to confine myself in this paper at most to the regnum Teutonicum and the structurally very similar territories in the northern part of the kingdom of Burgundy, I wanted to construct some statistics of my own, but I abandoned the task because the categories are too fluid. Still, I can say that from my samples and preliminary findings, it is clear that the ratio of privilege to mandate is not essentially different in the area north of the Alps from that in Italy: about 5:1. With the French royal acta, the ratio is similar to that in Germany; and I have not yet worked through the material for Sicily, Spain or Flanders. But the situation is very different in English or papal documents of this period. The ratio in the papal case is fairly consistently 1:1. In the English documents, we have to take into account the fact that the formal privilege fell completely out of use in the eleventh century, and was replaced by the writ-charter, a kind of mandate of appointment or protection. The ratio of writ-charters to other writs resembles that of papal privileges to mandates. Even if we take into account the certainly very much higher chances of loss of mandates as compared with privileges (and that does not apply only to the regnum Teutonicum), the fact remains that the preferred documentary form of Barbarossa’s chancery was the privilege. Our first question has to be: what does that mean?

From the formal point of view, privileges are legal acts. It was possible to do three things with a privilege: (i) confirm the recipient’s existing rights, (ii) grant or confirm new rights, (iii) record judicial or quasi-judicial judgements concerning the recipient’s rights (and this third category will concern us again presently when we turn to judgements made in the ruler’s court). The majority of Barbarossa’s privileges belong in the first category: they were confirmations of actual or alleged existing rights. Even privileges conferring new rights frequently did so in the context of confirming older ones, as in the case of D F 803 for Kremsmünster or D F 996 for Schaffhausen,

to name only two examples. Such acts of gift and confirmation were often combined with a grant of protection.

A reasonable assumption is that such a confirmation was viewed by whoever requested it as a means of protecting rights. By the same token, and whatever the source of those rights, by issuing a privilege the ruler so to speak took them under his own protection, made them his own. The privilege thus became a kind of credit-account, through which cheques could be drawn, as needed, on the fund of royal authority. From such a perspective, it becomes rather surprising that rulers' privileges did not actually play a dominant role in the legal life of the period. First, they were never automatically cited in legal disputes over property, and if they were cited, it was seldom on their own, despite the fact that, according to the current consensus of legal historians, a ruler's diploma was unassailable. Second, privileges were cited in no very consistent way when legal disputes came before the ruler's judicial tribunal. Third, Barbarossa's court and chancery found it difficult to deal with privileges that contradicted each other, and tended to circumvent such problems by silence or bending the facts. Fourth, Barbarossa never thought of the granting of privileges in a systematic way. Let me now give a few examples to illustrate these bald assertions.

Barbarossa's D 528 deals with the following case. In the absence of the plaintiff, the monastery of St Servatius at Maastricht, Count Ludwig of Loon had contrived to get a legal judgement in his own favour over the estate of Vlytingen, which belonged to the monastery. Maastricht possessed a forged diploma of Conrad III which concerned Vlytingen, but this document in fact played only a subordinate role in the complaint brought before Barbarossa's court of justice: instead the count's claims were first rebutted on formal and procedural grounds, and only then was the argument supported by the authority of Conrad III's alleged diploma. Again, in the dispute between the monasteries of Schaffhausen and St Blasien over the possession of Staufen, we find cited: a diploma of Conrad III (D K III 237) in favour of St Blasien; Barbarossa's privilege (D F 71) in favour of Schaffhausen, which makes no mention of Conrad's diploma; a probably contemporary beneficiary's draft-document (D F 72) never actually issued by Frederick, confirming earlier grants to St Blasien including D K III 237; and finally a ruling by three abbots from the year 1164, which says nothing at all about any rulers' diplomas.

The often-discussed dispute over the countship of Chiavenna throws interesting light on how contradictory privileges were dealt with. In 1152,
despite claims lodged by the bishop of Como and a man named Henry of Orta, Barbarossa assigned the countship to the rectors of the city by a ruling of his judicial court. The grounds given for this decision were that the rectors had enjoyed undisturbed possession of the county for thirty years and that they could produce in their defence a diploma of Conrad III. In 1153, the case was reopened, and the decision of 1152 reversed: the bishop had been able to present older and better privileges, while 'the men of Chiavenna were completely deficient in their privileges' (DF54). According to the new diploma, what had been drawn up in 1152 were only preliminary documents in which both parties had received confirmation of their rightful claims, and from this passage we can infer that the bishop of Como had also received a privilege in 1152. But the extant privilege of 1152, DF54, is not presented as in any way provisional, and the most plausible interpretation is that what we have here is an attempt to defend an embarrassing situation. The objection raised by the rectors of Chiavenna, that the county was part of the duchy of Swabia, was explicitly dismissed in the privilege of 1153 as an irrelevance and a cause of procedural delay. Yet it was precisely this objection that became the basis for a third decision, probably in 1157, which again assigned the countship to the rectors. The documentation makes not the slightest reference to the preceding judgements, although that of 1153 had explicitly invoked the principle, 'older right breaks younger right'. Absolutely no forethought was expressed about a possible attempt to reopen the case in the future, should the bishop be able to prove the validity of his 'older' privilege – something the bishop of Como did in fact try to do in the early thirteenth century. Similar circumstances seem to underlie the issue of two privileges for the see of Cambrai in 1182 and 1184 (DF825 and 858). In the first one, Bishop Roger achieved the abolition of the commune of Cambrai. In the second, the commune's existence was confirmed de facto, and the relationship between bishop and commune was regulated. The second document mentions the first only dismissively in the clause nostdebitamoperamad honestam compositionem dederimus ('we had given due effort to [making] a fair settlement'), which can hardly be seen as a correct description of the first decision; and, again, no forethought is given to any subsequent attempt to reuse the first diploma.

As for the maintenance of privileges by the ruler, I would point to a passage of Lambert of Watrellos, where it is immediately clear that Count Theoderic of Flanders was entirely unwilling to recognise the privilege drawn up for the bishopric of Cambrai on the basis of an earlier court judgement; yet, although Theoderic obviously intended to contest the privilege with a feud, Barbarossa did not regard this as something that
threatened his authority, but instead he sought to act as arbitrator between count and bishop. Barbarossa’s D 8, for the community of Meerssen, was equally ineffective against Gozwin of Heinsberg, and that was a dispute which was to have a long sequel especially in the form of papal mandates and judges delegate. The crucial point here is not that a privilege did not always or immediately prove effective—that goes for English and papal documents as well—but, rather, that contempt of a privilege did not normally result in the ruler’s presenting himself as affronted. Only from Burgundy in the 1180s have I found cases where the ruler seems to have thought that the violation of a privilege as such justified measures to secure restitution.

It is easy to see that the privilege left much to be desired as an instrument for safeguarding the law in a case of dispute. Almost always, we are justified in harbouring doubts as to how far any particular privilege was effective—doubts that, unfortunately, given the state of current charter-editions, are hard to confirm or dispel, for such editions only very rarely give us any information about the afterlife of privileges. I cannot resist offering you the nicest example of this problem that I know of, even though it comes from another time and another place. An Old English mandate issued c. 1020 by King Cnut for the archbishopric of Canterbury opens with this declaration: ‘I inform you that the archbishop has spoken with me about the freedom of Christ Church Canterbury, [saying] that he now has less protection than formerly. I made him an offer that a new freedom (freols) should be drawn up in my name. He replied that he had freedoms enough if only they were good for anything.’ Even in the case of forgeries, where it is most reasonable to suppose an intention to exploit them, we have far more forged documents than any direct or indirect evidence for their use. Remember that the date of production of a forged or interpolated document can usually be deduced only from the internal context or from genuine confirmations. It is striking how few cases we know of in which ownership rights were deviously acquired by a privilege containing an expanded enumeratio bonorum (list of properties), although such expansions would have been easy enough to insert and very hard to control. There is one such case in Wibald of Stablo’s letter-collection: it is a papal privilege; and here we find, significantly, that the expansion was exposed only by accident and not in the course of any attempt to put the privilege into practice. Nor is this a unique example. We possess, for instance, two early privileges of Barbarossa (D F 31 and 47) for

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Italian beneficiaries, which in part contradict each other, but there seems to be no other record of any practical consequences that ensued from this contradiction.

In thinking about the privilege as a legal tool, we pay too little attention to its role in the repertoire of forms of political action. The most important element in the conceding of a privilege was the act of concession itself. This is very clear in Lambert of Watrellos's story cited above: the handing-over of the document usually had to follow in such a way that even the inspection of the content was reduced to something of a symbolic act. This explains, too, why privileges were most commonly mentioned when it was a matter of confirming them by a new document: they had, so to speak, their own sphere of application which could not impinge on other legal areas. Eckhard Müller-Mertens has recently stressed something else that arises from the significance of the act of concession: it is important to ask whether the would-be beneficiary travelled to the ruler to get his privilege, or did he wait until the ruler came to him?12 This is not just a question of how far the ruler’s authority extended in territorial terms. If I as a Swabian count or abbot, say, were to journey to Goslar to get a privilege, then the handing-over of the document would take place far outside the range of vision of my neighbours and potential opponents. That would matter less if you were considering the privilege only as legal tool; but if you want to think of it as a demonstration of closeness to the ruler as well, then visibility assumes key importance. The external form of the privilege confirms this point: it is a document of exceptional size, with a particularly elaborate script and an artistically designed lay-out; and precisely through its lavish consumption of parchment and sealing-wax, it makes visible in the very moment of its being handed over the immense wealth of the man issuing it. Questions as to whether the rights conferred in it could be exercised in practice or be maintained in the longer run, were, so far as I can see, of secondary importance, and in all cases, the answers were largely left to the recipient. Thus the privilege functioned as writtenness of more the magical than the pragmatic variety; its concession was an act that could almost be termed a ritual. In the thirteenth century, there was a move away from the principle that ‘older privileges take precedence over younger [i.e. more recent] ones’ and a transition towards general and specific cashing-in of older, alternative, rights connected with the granting of privileges. Of all this, however, nothing can be traced in the privileges of Barbarossa for beneficiaries north of the Alps (though there are isolated Italian instances).

In the communities of the twelfth century, the privilege played an ever-smaller role, although it retained some vestige of its old symbolic function. If rulers wanted to insert their own authority into a legal system, they preferred to do so not by committing to 'unchallengeable' writing certain assertions of facts whose effects could not, in fact, be controlled. Instead rulers worked with mandates.

The essential distinction between privilege and mandate lies in the intentions of the parties involved. In the case of a privilege, it is first and foremost the recipient who has an interest in the issue of the document, for it is hard to imagine someone being privileged against their will. In the case of a mandate, on the other hand, the recipient or addressee was usually involved only passively. The active intention here is to be found with the issuing authority or with a third party, that is, whoever had requested the mandate (though it could sometimes happen that a requester managed to get a mandate issued for himself). The person who issued the mandate, and the requester, could be concerned in a mandate in three possible ways. First, the issuer could impart a command or desire in a particular matter to an agent or power-holder on the spot. Second, the issuer could introduce a legal or natural person as the possessor of rights which had until that moment belonged to the issuing authority or which only that authority could confer by grace or judgement: at this point the mandate assumed, as it were, the function of the privilege. Third, a requester could use a mandate to initiate a legal process.

The first of these categories has usually been very highly rated by historians, for reasons which are not entirely clear to me. It is obviously important to know how far the 'central power' can make its will effective on the spot; but whether this is made to happen by means of the written word or by an oral instruction seems of rather secondary importance unless writtenness is part of a system of supervision and control. While the overwhelming majority of Barbarossa's mandates and letters fall into this first category, and though we have to take into account losses in this area due to the accidents of survival, it is clear that these instruments are being used ad hoc rather than systematically. This is evident not least from the fact that there was hardly a single fixed formula for such documents, except for such common Europe-wide greetings-formulae as gratiam suam et omne bonum or gratiam suam et bonam voluntatem, (‘[sending] his grace and all good wishes'; ‘... his grace and goodwill') and the expression sub obtentu gratiae nostre (‘as a condition of gaining our goodwill') in the case of commands. It seems a permissible conclusion that such documents hardly belonged to any day-in, day-out governmental routine.
The second type of use is more interesting from the standpoint of governmental technique. The classic case is the English writ-charter which, as noted above, up to a point assumed the function of a privilege, though leading in another direction. The writ-charter ordered a public installation of the recipient in his rights, and therefore was addressed to the sheriff or to the general community. Now it was the opinion of the great nineteenth-century diplomatist Theodor Sickel that from at least the Carolingian period, any privilege that conveyed new rights was accompanied by a command of installation, probably in written form.13 Perhaps we can recognise such a command in the account of Lambert of Watrellos cited above. We possess examples for this in D F 139 for Hilwartshausen, which is addressed to the community's ministeriales and commands attention to D F 138, a diploma for the community probably issued at the same time. Other examples are D F 389 and 949–50 for the church of Geneva, flanking measures connected with court rulings in the form of privileges D F 388 and D F 933. A decision of the court tribunal could thus be communicated at the same time, as, for instance, in D F 661, for the clergy of the cathedral and city of Minden, which is addressed to the clergy, vassals and ministeriales of the cathedral-church. But here too what we have is a beneficiary's document. I need only quote Appelt's comment in the introduction to his edition: 'It is characteristic that at this period, obviously, no special formula was envisaged for the documentary record of court judgements.'14 Whoever wanted to have such a record could receive one, but any such request seems to have been quite exceptional.

The most important twelfth-century development in governmental technique was without any doubt the third category of the mandate's use, namely, to initiate a legal process whether explicitly or potentially: explicitly, when the mandate was addressed to judges delegate who would decide a case in the ruler's name, or implicitly, when what was understood and used by everyone was no longer the privilege's unassailability in principle, but the openness in principle to legal contestation of the ruler's command in mandate-form. This development was the outcome of a long and very interesting process which is still in need of further research and clarification, but, at least in the fields of English and papal diplomatic, is visible in broad outline. The essential hallmark of this development was (I am simplifying here a good deal, especially as regards the differences between

Roman-canonical procedure and English ‘action by writ’) that it originated in a response to rulers’ authority: authority which, while certainly theoretically well-grounded and to a large extent accepted, nevertheless could not be effectively imposed in this form in practice nor was it considered desirable in theory. Out of the straightforward command of a ruler grew a complicated process, in which such a command, even when it looked just the same from the standpoint of diplomatic form as the older mandate, now served only as the introduction to an ongoing legal process at local level.

Such a use of the ruler’s mandate was known in the regnum Teutonicum too, not least because of the extension of papal jurisdiction, and Barbarossa’s chancery was obviously quite prepared to issue such documents. From Wibald’s Letterbook, for instance, we have two mandates issued in Wibald’s favour in a dispute with a ministerialis. One names the bishop of Münster as judge-delegate: he must first restore the status quo in return for sureties, and then provide a judicial decision for the case. The other is addressed to Wibald’s opponent and serves as an invitation to, and spelling-out of, the procedure. Similar cases occur in a charter for Archbishop Arnold of Cologne dating to 1155, or in Barbarossa’s mandate D F 680 to Ulrich of Aquileia of the year 1177, with the addition, characteristic of English and papal documents, that the dispute is to be settled in such a way ut querimonomium nobis denuo proferre eum non oporteat (‘that it does not behove him [the judge delegate] to refer the dispute back to us again’). But such uses remained the exceptions in the twelfth-century regnum Teutonicum. We have only isolated indications of them, and these indications do not feature through the whole course of Barbarossa’s reign. Moreover, it is almost always a matter of the delegation of the office of judge, hence what we might think of as a spatial extension of the court judgement. Nor were there writs on the Anglo-Norman model, which a potential opponent could either come to terms on or contest before a court. Interesting in this context is D F 292 for Archbishop Eberhard of Salzburg. Barbarossa had delegated to Eberhard the case of a knight named Ulrich, but the other party to the dispute, the community of Chiemsee, came before him and gave a different account of the case which made the previous mandate invalid. There was obviously no attempt to argue out the case at local level on the principle of si preces veritate nituntur (‘if [the facts stated in] the pleas strive in truth [i.e. are confirmed as correct]’). Nor was any ruling ever given on how such cases should be tackled: there was was no ordo iudiciarius specific to

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15 D F 168, 169.  
16 Diestelkamp and Rotter, Urkundenregesten, no. 336.
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Germany, no Glanvill, no decretales, no decisions of the ruler’s court to settle the question.

Such mandates ordering that justice be done presuppose a ruler wielding, and delegating, the power of judgement. But in the regnum Teutonicum such power was much more frequently exercised by the ruler himself acting not as judge, but as president of a quasi-judicial assembly. Imperii nostri nos ortatur auctoritas omnium regni fidelium controversias ad presentiam nostrum perlatus diligentia examinatione dirimere et, ne in posterum exinde oriatur contentio, congrua sentencia terminare (‘the authority of our rulership urges us to deal with the disputes of all the faithful men of our realm that have been brought to our presence with careful scrutiny and to settle them with a fitting sentence, lest any contention arise from them thereafter’), said Barbarossa in his charter for Como, D F 54. I am going to leave to one side the spectacular cases involving high politics, and concentrate my attention on the well-evidenced everyday: roughly a quarter to a third of all documents issued by Barbarossa to beneficiaries north of the Alps depend on ‘rulings of the high court of justice’. By comparison with England or the papacy, the ruler’s high court was more of a collective tribunal. Here the ruler held something like a presidency. It was always permissible for someone to bring a complaint against the ruler himself, although I find it hard to imagine that this could ever have happened against the ruler’s own will. Other office-holders also drew up documents in curia Regis (in the court of the king) about particular judgements or rulings. Procedure was opaque, to put it mildly, because the written form of rulings only seldom mentioned the grounds on which they had been reached; even the way that judgement-finders were selected is totally obscure, save for the fact that, according to a principle that can only be inferred, they had to be of the same rank as the plaintiff. The way in which the written word was used to record judgements had no fixed forms, and indeed a written record was not strictly necessary: we have a number of references to cases in which the judgement was apparently never committed to writing. But the most important point was that the summoning of the high court was largely an ad hoc business. It was in fact exceptional for controversiae to originate from rulings of any lower court. It comes as quite a surprise when we read in an exchange of letters between Wibald and the young Henry VI of a ministerialis of Stablo who lodged an appeal (appellatio) in the middle of judicial proceedings, whereupon Wibald transferred the dossier to the high court for a decision.17

The ruler's court of justice was thus very largely a court of first instance, by contrast to the 'high courts' of the popes and the English kings (although those too could operate on occasion as courts of first instance). But this was not the court you first thought of. Normally you waited until the ruler was in the vicinity before you thought of his judicial court — just as you did before thinking of getting a privilege. People were prepared to travel to Rome several times — 'The bearer of this letter, E., has come five times into our presence', wrote Eugenius III, tired and irritated by a case in which the resultant travel expenses must have cost several times more than the value of what was in dispute — or to seek out the king of England when that meant journeying from one end of his dominions to the other, in order to get a decision or a mandate. In the regnum Teutonicum such a thing happened seldom. Perhaps this had something to do with the rules of regional customary law: for instance, if Swabian judgement-finders were required for a judgement involving Swabians, you could not be sure of finding a qualified tribunal in, say, Saxony. Again, it may have had to do with the need for visibility that I have already mentioned in the context of privileges. Yet it was precisely in that connexion that, if Barbarossa's court of justice really had been central for legal and political life, you would have expected the inevitable growth of that court's business with the equivalent of judges delegate or itinerant justices with full jurisdictional powers. Now, Karl Leyser, in his last Reichenau paper, and Karl-Heinz Spieß at the most recent Reichenau conference, have both drawn attention to some cases instanced in the diplomas of Barbarossa where the ruler's officers armed with full powers were sent out from the palace to conduct an inquisitio (judicial enquiry) on the spot and then either declare a decision or produce a report on the basis of which a decision could be made. It would be possible to add to those examples. These seem at first sight to work in a 'modern' way, yet on closer inspection it is evident that these procedures must also have been entirely ad hoc. Given the numbers of personnel at Barbarossa's disposal, we certainly don't need to ask ourselves if these examples are just the remaining tip of a now-vanished iceberg, for had that been so, the extant diplomas would have contained a higher proportion of

18 Jaffé et al. eds., Regesta, 9399. See below, chapter 22, p. 443, n. 41.
cases coming from a considerable distance. Most of the cases we know of were strictly comparable with a modern local hearing: the court process was briefly interrupted while selected officers informed themselves of the facts on the ground by means of a short journey. Barbarossa’s diploma for the priory of Meerssen (D F 8) can again be cited as an example: yes, it was issued at Paderborn, but the action underlying it took place at Aachen or Cologne, and so the nuntii (messengers) had to make little more than a couple of days’ ride. It is true that popes, Angevin kings and others were familiar with the technique of using itinerant representatives with full judicial and inquisitorial powers, but they never dreamed of employing such men on an everyday basis. Instead they were used as a court of supervision and surveillance, to deal with cases which had either been delayed beyond the legal limit by local courts, or not been successfully dealt with for some other reason; and they also functioned as a way of checking up on their own administration.

As we have seen, the ruler’s judicial court was not conceived of as a court of last resort in any clear-cut way. When its summonses or rulings were treated with contempt or ignored, that was clearly not considered an issue of principle or something that required a merciless reaction. That is evident from the Meersen case just mentioned. Here the inquisition and the court-ruling were quite without effect and the case had a long and intractable afterlife. Barbarossa’s chancery, like other European chanceries, could certainly produce impressive sound-effects, but any real effects often failed to materialise. Let me cite Wibald again: iudiciorum... vocem intra paucissimos pagos vix posse audiri (‘the sound of judgements could hardly be heard even within a very few localities’), or Barbarossa himself: Si palatinus comes de Sumereburg ad curiam venisset, correptiones et iudicii sentenciam pro injuria, quam tue dilectioni infert, non subterfugisset (‘If the count palatine of Sommerschenburg had come to my court, he would not have been able to evade its corrections and its sentence of judgement for the injury done to Your Belovedness’). But the count palatine had not come, and so Barbarossa had to be content with sending him another mandate. Whether that was effective, we do not know; yet this episode may well have revealed once again that it was not only in cases involving high politics that people could ignore the judgement of the ruler’s court. The word subterfugere – ‘evade’ – cropped up so often in Barbarossa’s charters that it became virtually a technical term for such avoidance of judgement.

10 See above, p. 418. 11 Wibald, D F 8; D F 66.
From the narrative sources as well as from the diplomas themselves, we can often see attempts on the part of those who took part in those judgements to reach solutions that preserved the honour and saved the face of all those involved, including the judgement-finders. On this point, I recommend, once again, a careful reading of Lambert of Watrellos: his account makes hardly any mention of legal questions, leaving all the more space, instead, for going into detail about the honour of the princes at Barbarossa's court who had taken part in the sequence of decisions, contradictory as those were. Basic elements in the procedure of the royal court of justice were verbal chastisements, putting people in the pillory, so to speak: in the passage just quoted, even the count palatine of Sommerschenburg had to undergo not just 'judgement' but 'correction'. In another diploma (D F 629), Barbarossa dealt with the case of a nobleman who had plundered the monastery of Beaupré, obviously to initiate a feud as a means of law-enforcement. *Vocatus itaque venit ad nostrum audientiam, ubi cum verbis duris et contumeliosis increpatus et exacerbatus coram principibus curie, nos altiore communis pacis et dilectionis intuitu satis indulsimus illi* ('Having been summoned, he came to our hearing, where after he had been reviled and bitterly denounced with many harsh and angry words before the princes of the court, we were quite merciful to him, thanks to our higher regard for collective peace and love.') There then followed the terms of a legal settlement. What is striking here is the concern to restore honour after acts of dishonouring, precisely in the same way that 200 years before, Otho I had restored to his good graces the dog-carrying retainers of Eberhard of Franconia and demonstrated this publicly with rich gifts. Part of this political culture of honour and face-saving was the fact that the ruler's judicial court itself very often functioned in public transactions as, in effect, a court of settlement, a role often stressed in the prologues of documents: this was indeed *suum cuique tribuere*—'to give each his due'—but an important part of that 'due' was, to use modern German parlance, *ein gutes Feeling*, a sense of feeling good. In papal and English judicial practice too, what was often sought was evidently a compromise that was likely to work. The Reich's alternative form of pressure in the background, was not feud and enmity but a strong lawfully conducted judicial process in the ruler's court.

I will draw the strands of my argument together. The privilege was something other than a pragmatic legal tool; the ruler's mandate as part of an ordered legal process was certainly known in the *regnum Teutonicum* but

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Mandate, privilege, court judgement

was not particularly significant; as for the royal court of justice, it was not regarded as the apex of a hierarchy of courts, and only to a limited extent was its mode of operation judicial. Hence the political forms of procedure in the age of Barbarossa, as revealed to us in the documents considered above, seem to have been only peripherally touched by what historians have termed ‘modern’ trends. Now, it might be objected, perhaps, that the agents and techniques of government deployed by Barbarossa in Italy were generally much ‘more modern’: *iudices* (judges) whom Barbarossa found already in place and whose job it was to speak the law in the ruler’s name; legates whose activity imitated the style of papal government in representing the ruler, and whom we also meet in the kingdom of Burgundy and not in the *regnum Teutonicum*; *podestās* confirmed in their posts by the emperor, empowered by imperial authority to rule over the cities in a role that was a mixture of town-counsellor and judge; the derivation of all public authority from the ruler theoretically grounded on the constitution *Omnis*. All this shows Barbarossa familiar with the techniques of a ‘modern’ regime, and the few bits and pieces of evidence might thus be thought sufficient to suggest a desire and a plan to introduce ‘modern’ techniques into the *regnum Teutonicum*.

That objection, however, ignores two important features of medieval rulership. In the first place, we must never leave out of account the basic requirements of a regime that was, to use a slightly anachronistic term, a personal union. On his deathbed, Count Geoffrey of Anjou warned his son Henry, the later king of England, never to embark on any attempt to rule one territory according to the customs of another: his own experience was, he implied, that nothing good ever came out of such action. In fact the history of the Anglo-Norman/Angevin empire shows that the territories comprising it, despite a certain tendency towards institutional osmosis, all clung to their own political and institutional styles, and Henry II ruled differently in Aquitaine from how he ruled in England, just as Cnut in the eleventh century ruled in different ways in Scandinavia and in England. Moreover, the extent to which the old greater Frankish empire was ‘frankicised’ had its limits. You cannot automatically transfer conclusions

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33 DD F 1 no. 238, *MGH Urkunden* (as n. 4 above), X (2), p. 30: ‘Omnis iurisdiction et omnis districtus apud principem est et omnes iudices a principe administrationem accipere debent . . .’ [I am grateful to Susan Reynolds, Magnus Ryan and Caroline Humfress for help in tracking down this reference.]

from Italy to Germany. In the second place, we should not ignore the element of demand in high-medieval rulership. We tend to operate too easily on a model derived from the villains whom the hero confronts in James Bond stories: the villain's recipe for success lies in silently constructing a power-base which then enables him at a suitable moment to take control of everything. Yet nowhere in the 'developed' Europe of the twelfth century do we find any real transition from a rather passive rulership, which rules reactively by means of grace and punishment, to an active, more properly monarchical style of ruling, which gives shape to politics by issuing commands and wielding an omnipresent jurisdiction. These very 'advanced' techniques of government had their origin, amidst much trial and error, in reactions to demand. Recent research is now showing that this applies to the imposing structure of the common law under Henry II. It is true that we learn from Bracton that key elements of this structure were thought up in the course of many sleepless nights by Henry and his advisers. But the whole process of legal development shows quite clearly that these men were reacting to demand, and that the techniques they devised subsequently remained in use because those involved in their application wanted that to happen and took advantage of it. Something similar goes for the origins of papal jurisdiction - a subject on which unfortunately too little research has yet been done. The growth of the ruler's authority which in theory was something everyone accepted was something that in practice everyone exploited: appellate jurisdiction presupposes, after all, that there are people who will lodge appeals. At the same time, the ruler exploited the system as a whole: grace, or disgrace, were increasingly taken as indicators that iustitia had or had not been made available. Neither pope nor English king was merely a passive component in the system - as it were, a rescript-issuing automaton.

With some qualifications in the case of England, I would say that in the twelfth century, no such thing existed as a claim to justice that could be straightforwardly asserted in practice on the basis of a mandate or writ. You almost always had to wait for justice; you mostly had to pay quite a bit for it; and you had to be, or be on the way to being, persona grata with the regime, or you would have to wait a very long time and pay rather a lot. Nevertheless, this bureaucratic, routinised gratia had a different quality from the public handing-over of a diploma or the public pronouncement of a high-court

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21 Bracton is here representing a later office tradition: John Gillingham kindly supplied this comment. See also chapter 20, p. 396, n. 32.

ruling, though admittedly we should reckon, either way, with very high losses, through wear and tear and the sheer process of transmission, in the conversion of _gratia_ into right and possession.

If things were different in the _regnum Teutonicum_ under Barbarossa, that was probably not because of any lack of vision or energy on the ruler's part, but because any such development was in itself neither compatible with the ways things were, nor in fact desired. Here we have to do with a different kind of community and a different legal culture. First of all, there existed no hierarchies of the sort that were necessary to bring the political culture of dispute within the framework of legal process. In England there were shire courts available to promote such a development, and there was also the feudal jurisdiction of the magnates themselves. As for the papacy, its mandates likewise had as their context a clearly articulated hierarchy, though here a system of appeals allowed the pope, by virtue of his overriding authority, to go over the heads of the hierarchy at any time by appointing men of lesser rank as papal judges delegate. Such structures and ways of thinking were completely absent from the _regnum Teutonicum_. For the political class, episcopal jurisdiction in the form of diocesan synods could no longer fulfil the role of a substitute for secular jurisdiction, as it manifestly had, if in a sketchy way, in the Ottonian and early Salian Reich and elsewhere in post-Carolingian Europe. Comital jurisdiction was now too heterogeneous and too fragmented to form legal communities analogous to the 'shire-communities' of England, and anyway it hardly touched the members of the political class itself. And, so far as I can see, relations between lords and vassals in the twelfth-century _regnum Teutonicum_ were scarcely brought within the framework of law, let alone brought under the jurisdiction of courts: anything corresponding to the court of an English _honor_-holder was simply non-existent (though lords had some kind of legal rights over their _ministeriales_).

In short, there was no network of more or less homogeneous ranked courts which might have been used to bring politics within a legal framework; and, by the same token, there was no attempt worthy of the name to summon any such process into being by a voluntaristic act of the ruler's will. This probably explains why concessions in the form of a writ-charter were rare: there was a lack of any institutionalised public at local level through which orders to install or protect could have been made effective. It is worth noting, too, that the papacy's developing appellate jurisdiction made only slow and halting advances in the _regnum Teutonicum_. I have not counted, but I have the very strong impression that even among papal documents for German beneficiaries, right down to the end
of the twelfth century, privileges predominated, just as they did in the case of imperial diplomas. Elsewhere, notably in England and Sicily, reactions against papal jurisdiction came from those who held rival jurisdictions, and, at least in the case of England, these reactions had, in the last resort, only limited success because the demand for papal judgement was so strong. In the *regnum Teutonicum* too, there were strong reactions, but these came not only from the ruler but from others as well; and despite Barbarossa’s problems with the reverberations of the fracas at Besançon, it is only very occasionally that we can see efforts on his part to limit papal jurisdiction in principle or to define its sphere of influence more sharply.\(^{27}\) Evidence pointing in the opposite direction comes almost exclusively from a string of mandates in favour of Hugh of Verden, and these should probably be ascribed to Hugh rather than to Barbarossa.\(^{18}\)

For the most part, people showed themselves quite unconcerned about handling potential problems here: Conrad III cancelled the interdict at Quedlinburg;\(^{29}\) Barbarossa declared that he was obliged *iuxta legum iustitia [sic]* et canonum decreta pacem et iustitiam providere (‘to provide peace and justice according to the justness of the laws and the decrees of the canons’), and ordered both Wichmann of Magdeburg and Arnold of Trier to conduct a canonical trial.\(^{30}\) In neither case was any offence taken by the churchman who received these instructions.

If you pick up a biography of Frederick Barbarossa, first apply the Otto-of-Freising Test. This is how it works: open the book precisely in the middle and note what subject is dealt with on this page. Halfway through the reign of Barbarossa would actually be 1171. If your author is still around 1160, they have probably not managed to liberate themselves from the perspective offered by Otto of Freising’s *Gesta Friderici*. This perspective is not really Otto’s own, though, so much as that of his interpreters. Otto’s work is too often read as a commentary on the years in which Barbarossa is supposed to have tried to push through a new policy: the cues here are *honor imperii* or ‘great design’. Well, the whole of Barbarossa’s reign is a key period in which the German *Sonderweg* (‘special way’) of the high and later Middle Ages was cemented more firmly. The political class of the *regnum Teutonicum*—including Barbarossa himself—remained orientated towards honour, face-saving, grace, feud and compromise-settlements, and it saw no reason to alter these ways of behaving, still less let them be recast as issues of jurisdiction. The letters and narrative sources of the later twelfth century provide the key to all this. We ought to read Otto of Freising’s work in the

\(^{27}\) See above, chapter 20, p. 408. \(^{18}\) D F 758, 759. \(^{29}\) D C III 217. \(^{30}\) D F 568.
same way as we do Thietmar of Merseburg’s: nearly every sentence yields information about the political culture of his age. But, in a less obvious way, so does the vast quantity of material set before us by Heinrich Appelt and his colleagues. If we study the documents with that expectation in mind, we might perhaps be able to say why the ways of behaving which I have described in this paper, but for which I have offered only structural explanations of a preliminary kind, continued in the Reich when elsewhere in Europe (although they could still be found there too), during the course of the twelfth and thirteenth centuries, they were slowly driven out of practice not just by rulers, but by the other people who had a part in them.