

Effectiveness and Legitimacy in Early Medieval kingdoms

The project we are dealing with here is a historical one, and it is by far the most remote of all historical projects, reaching back as far as to the time span between, roughly speaking, 500 and 900 AD, that is the late Roman and early medieval periods. The project “Law, security and order in early medieval kingdoms” is dealing with modes of governance in the transition from ancient to medieval statehood that is when the former Western Roman provinces such as Gaul, Spain and Italy came to be ruled by barbarian kings and their peoples such as the Goths, the Franks etc. This transition is commonly understood to have led to a massive reduction of state structures and by the same token to have caused a lack of legitimacy of the new rulers among the vast majority of their subjects who until then had been citizens of the Roman Empire. One of the main objectives of our project is to detect how these new rulers were able to cope with this. For in this period the development of new modes of governance took place which would have a consolidating effect. But these modes of governance came to be developed along different lines in comparison with the late Roman statehood and its former fairly systematic legal order. But it would be misleading to qualify the new legal measures taken as Germanic, archaic, feudal or whatever. It is governance theories here that provide us with important heuristic tools for analysing legal process in a way that allows for a deeper understanding of what was actually happening in the first centuries of “barbarian rule”. The successors of the Roman state were able to build on the remains of Roman statehood in order to absorb a huge and socially disintegrated realm. However, ethnic, religious, cultural and lingual fragmentation soon led to legitimacy problems. Moreover legal uncertainty, propensity towards violence, self-justice and feud added up to limited capacities of governmental assertion. We analyze which legal

policy steps were undertaken to constitute obligatory (legal) norms and, along with these, guarantee a minimum of (legal) stability.

Now, returning to the point of legitimacy, I have to admit that is of course extremely difficult to measure the effectiveness of political and legal measures in the period we are concerned with. This is primarily due to the scantiness of our sources which are widely scattered over a period of several centuries. We thus have to focus on certain periods better documented, and this will for our purpose today be the ninth century, the age of the Carolingians. In doing so I may proceed from Cord Schmelzle's theoretical approach that "legitimacy is a normative concept in the sense that it shapes the rights and duties of the actors involved". Much of the evidence produced by legal texts from the 9th century may be read as an attempt of the Carolingian rulers, their advisors and scribes to do exactly this, as is illustrated by this manuscript. The rulers were issuing instructions to their officials and vassals, to clerics and monks and to the people of the Frankish realm. There is lot of debate on the effectiveness of these provisions among historians and legal historians. But it does not seem helpful to pose the questions of effectiveness as we might try to put it with regard to the modern state. As we just have heard, and here again I quote Cord Schmelzle, that "the belief in the normative authority of a given political order can produce stable compliance without costly enforcement mechanisms", it does not seem helpful to stick too closely to modern conceptions of law as a set of norms guaranteed by sanctions. Rather, I should like to suggest, we should proceed from an important point made by legal sociologists – namely that law and the legitimacy of legal norms have a lot to do with expectations, in particular with norm expectations. In fact, "law" as defined by some sociologists, may be regarded as a set of rules which are not simply obeyed because of their being guaranteed by sanctions.

Of course moral convictions are relevant here, too, helping people to keep up their norm expectations. They expect certain rules to be valid as long as they may assume that other people share these expectations. Of course this twofold expectedness of expectations can be warranted by legal sanctions, but the process by which norms become expectable is a much more complicated one with legal sanctions being only one important aspect among others. In fact, it takes a lot of preconditions which help people to uphold their mutual expectations with regard to law, legal procedure and legitimacy – Cord mentioned some of them which seem to be particularly relevant here. Thus the issue of legitimacy is indeed a crucial one when related to that of mutual norm expectations.

The issue which perhaps most aptly illustrates this in the period we are dealing with is the emergence of various kinds of oaths of promise as a source of legitimacy. The political order of medieval kingdoms came to rest upon such oaths to an extent hitherto unknown in ancient statehood. Oaths of promise were an important means to create social bonds between rulers and subjects by creating and confirming mutual normative expectations. The oath of promise therefore worked as an instrument of social transformation by linking political bonds more closely to an individual's religious commitment and local reputation. For a person swearing an oath is pledging his or her spiritual welfare after death in order to fulfil a promise given during his life on earth. This provides an individual with an enormous motivation to do so if we take religion and belief serious as having a profound impact on an individual's behaviour in this period. It was thus the oath which enabled a person to neutralize some of his or her obligations towards other people – friends, relatives, for instance – and role expectations, while at the same time providing a possibility to enter new bonds and norms by a mode of self-compulsion.

But what was promised? In his sociology of law, Max Weber (adapting ideas of Henry Sumner Maine here) introduced a distinction between „status contracts“ and “purposive contracts” as ideal types. Whereas “purposive contracts had a very limited validity which made them useful within a market economy, “status contracts” involve, as Weber put it, “substantially a change in what may be called the total legal situation (the universal position) and the social status of the persons involved. To have this effect these contracts were originally either straightforward magical acts or at least acts having a magical significance [such as the oath]. [...] The contract ... meant that the person would ‘become’ something different in quality (or status) from the quality he possessed before. For unless a person voluntarily assumed that new quality, his future conduct in his new role could hardly be believed to be possible at all. Each party must thus make a new ‘soul’ enter his body.” Now already Weber observed that in history it is very often the oath of promise which allows for shaping and legitimizing such different types of contracts in a flexible manner.

But oaths are dangerous, for they base an individual’s obligation on their ultimate expectation for this and the next life. Thus taking an oath was a risky business which explains serious reservations about oath-taking as we find expressed in Christian doctrine. Once promises become broken on a large scale, religious and social cohesion of society as a whole can be in danger. It is thus necessary to create new bonds with oaths while at the same time preventing that they would not be broken too often. This is reflected in almost all oath formulas we have from the period we are concerned with here, which therefore require a close reading.

In 802, for instance, Charlemagne ordered all his subjects to swear fidelity to him “as a man should be faithful to his lord according to law “

(*sicut per dicitur debet esse homo domino suo*). The relationship between ruler and subject is described here in military terms. It is important to note here that the precise content of fidelity is defined in accordance with legal custom. By contrast in 854, the subjects swore to their ruler Charles the Bald fidelity of the kind, “as a free man was indebted to his king according to law” (*sicut francus homo per rectum esse debet suo regi*). The emphasis is laid here on the ruler’s position as king rather than as lord, which means that they sought to regard kingship as office rather than as lordship; whereas the subject being characterised as a “free” man placed more emphasis on their liberty. These are only two examples out of many which may illustrate how the relationship between ruler and subjects based on the idea of fidelity could become redefined along different lines. But a bond of fidelity would also characterise the relationship between the Frankish king and his officials, clerics and lay people alike. In their case fidelity had to be redefined along the position an official held. In 757 for instance, a Bavarian duke swore that he would act faithful to king Pippin “as a vassal was obliged to do against his lord” (*sicut vassus dominos suos esse debet*), characterising the relationship between officeholder and king as one of vassalage and lordship. On the contrary, in 877 a group of bishops swore to king Louis II fidelity such “as a bishop would be indebted to his lord according to his office and according to law” (*sicut episcopus recte secundum ministerium suum seniori suo debitor est*), thereby expressing some kind of reservation that a bishop’s most superior lord was of course not the king on earth. Thus fidelity towards the king embraced something entirely different in each case. We know that in both cases long negotiations had taken place before the very terms of fidelity came to be fixed. As a result we find really long and complicated oaths formulas in our sources. In 851 for instance, the

people of the West Frankish realm swore fidelity to their king Charles the Bald “as each person according to law, position and status was obliged towards his prince or Lord” (*sicut per rectum unusquisque in suo ordine et statu suo principi et suo seniori esse debet*). The oath formulas thus reveal the breadth of norm expectations that were confirmed by different sets of oaths. The basic idea of fidelity was centred around notions such as loyalty and military support, accepting the king’s right to give orders by way of military command. In a way kingship became defined as some kind of warlord-ship, but in fact fidelity was adapted on both sides according to divergent legal custom. Thus the king’s subjects (as we would say) could be seen as subjects, as men or as Frankish men, whereas the king’s officials were marked as vassals, counts, dukes, or as clerics, bishops etc., and the king could be king, but also lord. We have hundreds of these formulas dating from the following centuries. And these formulas were designed to define precisely the norm expectations in order that no one would promise something which he or she would not be able to fulfil.

If we regard these formulas as a result of preceding negotiations on the terms of loyalty it becomes perfectly understandable that even the king finally made promises towards his subjects. This serves to illustrate fidelity as a mutual relationship in the most explicit way. In 858, for instance, Charles the Bald promised under oath that he would be merciful to his subjects, “as a faithful king should honour and safeguard all his faithful subjects, his *fideles*, according to law and as he was obliged to accord law and justice to each of them according to his or her status, and that he should show mercy on all who need and ask for it (*sicut fidelis rex suos fideles per rectum honorare et salvare et unicuique competentem legem et iustitiam in unoquoque ordine conservare et*

indigentibus et rationabiliter petentibus rationabilem misericordiam debet impendere).

It seems relevant here that oaths served to create mutual norm expectations partly based on legal custom, also reflecting in most cases preceding negotiations and bargaining, which often included the giving of gifts or the payment of money. But oaths made the acceptance of such norms an issue of personal commitment and reputation, thus creating new layers of legitimacy and expectedness of norms. Of course the oath procedure conducted in public served to enhance a promise's legitimacy. By the same token, oaths deliberately made these expectations explicit and linked them to essential religious and social values, which shaped the identity of society as a whole.

It is of course extremely difficult to judge whether such an oath-based legitimacy was in any way effective. It is a lesson that early medieval historians want us to tell that oaths were broken time and again and that God took immediate revenge on people abusing his name. But the oath formulas I mentioned became redefined time and again according to situation, status and purpose, which attests to a belief in their effectiveness as a means to create legitimacy. When used to support the purposes of a Christian king ruling a Christian kingdom, oaths may underline an intrinsic conception of legitimacy, for Christianity in the Carolingian period may be regarded, again in Cord Schmelzle's words, "as an inherent quality which is independent of the consequences of a ruler's reign". But there certainly were also limits to such an intrinsic conception of legitimacy. For the ultimate objective of life and rule on earth in a Christian commonwealth was of course to provide all Christians with conditions and means to acquire their soul's salvation. And it was the highest responsibility of a Christian ruler, in fact the very essence of his divine right as king, to care for his Christian subjects'

salvation. Charlemagne's son and successor however, Louis the Pious, became deposed as king and emperor in 829 by his bishops and nobles. In order to legitimize his deposal as ruler they argued that his contradictory policies had urged his subjects to involuntarily breaking their oaths of fidelity. Louis the Pious thus could not be an effective ruler because he had betrayed the most important resource of legitimacy linking ruler and subject.

Thus, from the ninth century onwards, rulers were caused to promise that they would pay respect to legal norms and custom. The ruler's oath sworn as part of electoral capitulations embraced many different promises – to obey to the rule of law and legal custom, to make their court accessible to petitions, to judge lawfully etc. Thus oaths, by transforming external expectations into internal commitment, paved the way to a more contractual understanding of political order and to the idea of social contract. If we interpret the middle ages as an "age of fidelity", this can mean all or nothing at the same time. The importance of the governance paradigm for medieval history lies in the fact that it shifts our attention from fixed state structures towards the underlying process of negotiating modes of governance and terms of consensus. Creating a special bias of legitimacy thus allowed for an increase in reliability of norm expectations and for a more flexible adaptation of legitimacy, both of which would be crucial to societies in periods of historical change and transition.