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From Medina to Runnymede: Comparing the Foundational Legacies of the *Constitution of Medina* and the *Magna Carta*

JEREMY KLEIDOSTY

ABSTRACT *Identifying an Islamic constitutional tradition can be controversial due to orthodox Muslim understandings of God's sovereignty and agency. Further complicating such discussions are arguments surrounding the compatibility of Muslim traditions with international norms alternately referred to as 'Western' or 'universal', depending upon one's political preferences. This comparative examination of Muhammad's 'Constitution of Medina' and the Magna Carta argues that where there is assent and accountability, there is also agency. Just as the relatively spare discussion of rights in the Magna Carta laid the foundations of what would become a far more expansive constitutional tradition in the West, the very existence of Muhammad's covenant along with the fact that this covenant details specific tribal duties with corresponding rights to societal goods and a vision of the rule of law, indicates that Islamic states can indeed codify and negotiate the challenges of governing, even within the framework of a transcendent law (sharī'a). Assessing the unique constitutional characteristics of the 'Constitution of Medina' and the Magna Carta will reveal that each of these documents, while not properly constitutions, are concerned with fundamental constitutional issues that have surprising resonance in the aftermath of the Arab Revolutions of 2011 and in other redistributions of international power.*

If the Magna Carta is constitutive of the Anglo-American legal tradition – and, after all nearly a thousand federal and state courts in the United States have cited the Magna Carta in formal decisions, and, in the half-century between 1940 and 1990, the Supreme Court cited the text in over 60 cases – it is at the same time indebted to Roman, Saxon, Norman, and Church (canon) laws, customs, and practices.¹

Surely the Constitution of Medina provides valuable information on the founding of the Ummah and its nature. There is nothing in the document concerning the Ummah which contradicts what the Qur'an says. The two sources are mutually confirmatory in many respects, and they supplement each other. The Constitution spells out in greater detail than the Qur'an the political structure of the Medinan community and the agreed upon military aspects of life, such as 'neighbourly protection', blood-wit, alliances, clients, and so on. The religious nature of the Ummah is, of course, to be learned above all from the Qur'an, but the practical detail needed for a fuller picture must come from other contemporary documents.²

¹ Kent Worcester, 'The Meaning and Legacy of the Magna Carta', *PS: Political Science & Politics* 43, no. 03 (2010), p. 452.

² Frederick Denny, 'Ummah in the Constitution of Medina', *Journal of Near Eastern Studies* 36, no. 01 (1977), pp. 39-47.

As the quotes above illustrate, both the Magna Carta and the Constitution of Medina are formative documents in their respective legal/constitutional traditions. A vast amount of scholarship has been produced concerning the Magna Carta in particular, and the literature regarding the Constitution of Medina is also becoming more expansive. Surprisingly, little to no work has been undertaken to understand the actual roots of these disparate constitutional narratives and traditions, and to compare them in such a way that their commonalities and distinctive elements can be usefully employed. As the continuing protests and political upheaval throughout the Muslim world show, the conventional wisdom which portrays Muslims as politically complacent or as opposed to 'Western' constitutional norms is now largely discredited. If these events and, more importantly, their potential ramifications, are to be understood, then it is essential that more work is done in understanding how these traditions may act and interact in a world that is highly interdependent and in which cultural and historical influences are subject to constant renegotiation.

In order to appreciate the Islamic constitutional tradition, it is helpful to consider the foundations upon which the constitutional frameworks of Western and Islamic governance have developed. The story of European forms of constitutionalism begins, in a philosophical sense, in classical Athens. From a practical perspective, however, the constitutional norms still in operation are largely considered to date back to one very particular time and document: the Magna Carta promulgated by King John of England in 1215. This is one of the oldest documents which still has force of law under some of its provisions and it explicitly influenced many subsequent constitutional regimes in a variety of Western contexts. Although its immediate impact was minimal, the legendary legal status and legitimacy it attained can be traced as follows:

In 1225, the court of King Henry III prepared yet another version of the document, which the king stamped with his seal 'in return for a grant of taxation from his subjects sufficient to pay for war in both France and England' (Vincent 2007, 19). Within a few decades, it became 'virtually inconceivable that Henry III or his successors could in any way seek to annul Magna Carta' (Vincent 2007, 20). The 1225 version was transcribed onto England's first statute roll at the end of the thirteenth century, under the aegis of Henry's formidable heir, Edward I (see Carpenter 2003 and Morris 2009). By the middle of the following century, officers of the state were legally required to pledge to observe the terms of the charter. Three of its clauses remain statutory law in England and Wales.³

Although there are vast quantities of scholarship that dispute the relevance, intentions, and implications of the various provisions of the charter, the position taken in the context of this article is one which acknowledges that 'the significance of Magna Carta lay not only in what it actually said, but perhaps to an even greater extent, in what later generations claimed and believed it had said.'⁴ Whatever the limited initial intentions of its authors were, the popular and political impact that Magna Carta retains is undeniable. As Tom Bingham notes in his history of the rule of law, 'The myth proved a rallying point for centuries to come... more than 900 federal and state courts in the United States had cited the Magna Carta... between 1940 and 1990, the Supreme Court had done so in more than 60 cases.'⁵ Thus, despite the fact that the secular republican United States explicitly rejected British sovereignty in its founding, an ancient charter of an ecclesiastical and monarchical England continues to

³ Worcester, 'Magna Carta', p. 452.

⁴ Tom Bingham, *The Rule of Law* (London; New York: Allen Lane, 2010), p. 12. This same type of principle is behind debates about the importance and relevance of the 'original intent' of the authors of the United States Constitution.

⁵ *Ibid.*, p.13.

exercise a powerful hold on legal discourse and popular imagination beyond the shores of United Kingdom.⁶

Likewise, there is little debate that Islamic civilisation came into being under the inspiration and instigation of the Prophet of Islam, Muhammad. His first foray into government dates back to the very early days of his prophetic career, after the migration (*hijra*) to Medina in 622 CE.⁷ So fundamental is this event, that it marks the beginning of the Islamic calendar system, which demonstrates the utter centrality of the relationship of faith and governance in Islam. It is only once a polity is established, that the faith group following Muhammad's revelation is truly seen as established in history. Although the Qur'an gives few details of Prophet's life, the reporting of Ibn Ishaq in his *Life of Muhammad* is generally taken to be the most authentic account in existence.⁸ If this is the case, then this written covenant between Muhammad and his followers, including those who were not Muslims, provides the possibility of examining the principles which formed the core of Islamic government at its conception and which, given the status of Muhammad as exemplar for present-day Muslims, arguably establishes a legitimate basis for an authentically Islamic constitutional paradigm.

The idea of an Islamic constitutional tradition can be problematic in light of orthodox Muslim understandings of the utter sovereignty and agency of God over the entire world, governments and governed alike. Leaving the nature and extent of God's sovereignty to the theologians, this examination of Muhammad's covenant with the residents of Medina is one which argues that where there is assent and accountability, there is, at least in a practical sense, agency. The very existence of this agreement and the details contained therein (it lays out, for example, explicit expectations of the duties of various tribes and their rights to the benefits of society, and a vision of the rule of law) indicates that practicing Muslims and non-Muslims in Islamic states have codified and negotiated the various challenges of government from the earliest days of Islam, albeit within the framework of a transcendent law (*sharī'a*). Although some scholars might be reticent to claim that this document established a constitutional tradition, it is nonetheless accepted that day to day questions of governing require additional statutes to be passed. It is on this basis that the various schools of Islamic law developed their *fiqh* (Islamic jurisprudence) and it is this understanding of law which allowed Muslim rulers to 'implement *sharī'a*' through promulgating the necessary *qānūn* (statute) or using *siyāsa* (statecraft or management).⁹

Assessing the unique constitutional characteristics of Muhammad's covenant with the people of Medina alongside King John's concessions to the English nobles will reveal that each of these documents, while not properly constitutions, do concern themselves with particular duties and rights and define their respective polities (*umma*) in sometimes surprisingly contemporary ways.¹⁰ Thus the texts in question are being analysed in terms of the political ideas and theories that inform them, and which have been subsequently shaped by them. This article will begin with a comparative analysis of the following constitutional

⁶ This is particularly ironic in light of Kent Worcester's recent introduction to a symposium on the legacy of Magna Carta (2010) in which he notes that 'Strictly speaking, the original charter was valid only for a few weeks.'

⁷ See Montgomery Watt's discussion of the controversy surrounding the date and unity of the 'Constitution of Medina', in his *Muhammad at Medina* (Karachi; New York: Oxford University Press, 1981), pp. 225-8.

⁸ Denny, 'Ummah', p. 39.

⁹ See P.J. Vatikiotis, *Islam and the State* (London; New York: Croom Helm, 1987), pp.38-39. See also *The Encyclopedia of Islam* for detailed discussions of various words associated with law and legal questions in Islam.

¹⁰ W. Montgomery Watt, *Medina*, p. 228. It is important to state that this is not a historical exercise. In the case of the Constitution of Medina it is nearly impossible to confidently make historically-based arguments, as there is little agreement as to exactly when it was written, and even as to its documentary origins.

values present in the two documents in question: the definition and derivation of legitimacy, the definition of the subject, and the codification of rights and duties. From this initial comparison it may be possible to set the stage to identify future avenues of discourse for scholars of constitutionalism and government more generally, including Western and Islamic views of the rule of law, the character of government and governed, and the role that religion can, does, or should play within the apparatus of the state.

The Origins and Lawfulness of the *Constitution of Medina* and *Magna Carta*

Before analysing the texts themselves it is important to understand the contexts in which they were created and the ways in which they derived their legitimacy. As it is older and more difficult to establish in a clear context, the Constitution of Medina will be examined first. This document, or possibly amalgamation of documents, which is recorded in Ibn Ishaq's *Life of Muhammad*, serves as the earliest known model of Islamic government.¹¹ More importantly, it originates from the time when Muhammad himself was leader of both the Muslim and non-Muslim communities of Medina, which makes this text an obvious potential exemplar for those wishing to govern in an Islamic fashion. It also accounts for the possibility of an Islamic pluralism that allows for peaceful religious coexistence within a Muslim state. Due to its longstanding existence as a document independent of the *Quran* and *hadith*, yet one which nonetheless is compatible with them, the Constitution of Medina can potentially serve as an exemplary and foundational constitutional text for even those Muslims for whom their religious identity is more cultural and historical. It can accommodate a wide variety of interpretations as to the composition of the *umma*, the rights and duties of the ruler and ruled, and the fundamental role of the state. In other words, just as the Magna Carta serves a mythical role in Western jurisprudence that far outstrips the particularities of its provisions, so too might the Constitution of Medina provide a model of basic societal values, customs, and institutions for Muslim societies.

One important caveat about the Constitution of Medina must be made before further discussion of its features. The works of Uri Rubin and R.B. Serjeant show that to call it a constitution at all is simply a convenience rather than an accurate descriptor. Furthermore, there is debate amongst scholars as to whether the 'Constitution' was written as a unitary document. Documentary evidence supports the contention that it was largely written in the period just after the *hijra*, when Muhammad became judge and arbiter of Medina. Furthermore, much of the text finds echoes in the Qur'an itself, with many passages being nearly identical. However, one of the leading scholars of this document, R.B. Serjeant, has made the following claims about its authenticity:

The eight documents of which it is formed are doubtless traditional in pattern and diction, not at all novel to the age, and comprise the following distinct elements.

- A. The confederation treaty
- B. Supplement to confederation treaty A (These two pacts A and B are to be considered as al-Sunnat al-Jdmi'ah cited in the arbitration treaty between 'Alli [*sic*] and Mu'awiyah.)
- C. Treaty defining the status of the Jewish tribes in the confederation
- D. Supplement to the treaty (C) defining the status of the Jewish tribes
- E. Reaffirmation of the status of the Jews
- F. Proclamation of Yathrib a sacred enclave (haram)

¹¹ Muhammad Ibn Ishaq, Ibn Hisham, Abd al-Malik and Alfred Guillaume, *The Life of Muhammad* (London; New York: Oxford University Press, 1955).

G. Treaty concluded prior to Khandaq among the Arabs of Yathrib and with the Jewish Qurayzah, to defend it from Quraysh of Mecca and their allies

H. Codicil to the proclamation of Yathrib a sacred enclave (haram)

The two early versions of the text at present known to me are that of Ibn Ishaq which is the basis of the version given below, and that of Ab-i 'Ubayd which is defective. The late copy of Isma'il b. Muhammad Ibn Kathir has also been consulted. Ibn Ishaq's text... looks substantially reliable and correct...¹²

Though some scholars have disputed Serjeant's findings,¹³ the fact that the document is comprised of these complementary and contemporaneous elements, whether or not it is a unitary work, means that the discussion that follows will look at it as presented by Ibn Ishaq in the singular form which it ultimately came to possess.

The Medinan period occurred after intense persecution of Muhammad and his followers in Mecca which forced them to uproot and settle elsewhere. Having heard of his gift of prophecy, he was invited to Medina to act as a judge (*ḥākim*) to mediate disputes between the various clans and clan chiefs.¹⁴ In Western terms, Muhammad was *primus inter pares* (first amongst equals) and the intent of the invitation did not include changing the status quo of power relationships within Medina beyond recognising him as a prophet able to give rulings on behalf of God.¹⁵

In much the same way that the Roman Republic gradually ceded its authority quite willingly to the able and magnetic Caesar, so the Arab tribes of Medina, and eventually of the whole Arabian Peninsula, accepted the rule of a conscientious, able, and charismatic Prophet. What makes the Constitution of Medina so interesting to study is that it originated in a period where the political authority of Muhammad was relatively weak. It also begs the question that if Muhammad made this covenant at such an early stage in his career, was it the 'constitution' itself that was the foundation of what has become the political-religious structure of Islam?

To begin with, Ibn Ishaq simply relates that 'The apostle wrote a document concerning the emigrants and the helpers in which he made a friendly agreement with the Jews and established them in their religion and their property, and stated the reciprocal obligations.'¹⁶ This seems an odd introduction for something that is often referred to as a type of constitution. In the first place, it only mentions an agreement between the 'emigrants and the helpers' and the Jews, rather than with the people of Medina, as one might expect. It clearly delineates a separate identity between the Muslims and the Jews rather than a unified populace. What one may assume is that this served the purposes of Ishaq's narrative in explaining the eventual falling out between Muhammad and the Jews, an assumption bolstered by the fact that Muhammad himself went on to contradict this division when he asserted that various groups of Jews are 'one community with the believers'.¹⁷ The precise nature of the community aside, the authority by which Muhammad propagated this covenant with the various Medinan communities is one which was based primarily on secular and pre-

¹² R.B. Serjeant, 'The "Sunnah Jāmi'ah", Pacts with the Yathrib Jews, and The "Taḥrīm" Of Yathrib: Analysis and Translation of the Documents Comprised in the So-Called "Constitution of Medina"', *Bulletin of the School of Oriental and African Studies, University of London* 41, no. 1 (1978), p. 9. See particularly, pages 5-10.

¹³ For example, Michael Lecker contends that Serjeant's argument is unconvincing as it is based on 'ethnological data relating to contemporary Yemen, in addition to comparative evidence from the primary sources.' See Michael Lecker, *The 'Constitution of Medina'- Muhammad's First Legal Document*, (Princeton: The Darwin Press, 2004), pp. 3-4.

¹⁴ Jonathan Porter Berkey, *The Formation of Islam: Religion and Society in the near East, 600-1800*, Themes in Islamic History Vol. 2 (New York: Cambridge University Press, 2003), p. 68.

¹⁵ W. Montgomery Watt. *Muhammad at Mecca* (Oxford: Clarendon Press, 1953), p. 238.

¹⁶ Ishaq, *Life of Muhammad*, p. 231.

¹⁷ *Ibid.*, p. 233.

Muslim customs that were later imbued with religious meaning. The existence of clan and tribal chiefs who acted as community judges was nothing new, nor was the recognition of someone as having the gift of prophecy or the ability to transmit revelations from God. The innovative part of the equation occurred in the exclusivity of Muhammad's message. He alone was the current Prophet and his God alone was God. At first glance this would seem to primarily create division. In fact it was instead a mechanism through which the old divisions created by the worship of different deities could be overwritten and subsumed under a universal and inspirational calling to serve the one God of all people. This led Muhammad to create a new *umma* (literally 'people') that was comprised not of blood ties but of spiritual brotherhood. Along these lines, Frederick Denny notes the following in his article 'Ummah in the Constitution of Medina':

The *umma* of the Constitution is made up of believers and Muslims, and quite possibly Jews as well (although they may constitute a separate *umma* 'alongside'). All the kinship groups mentioned are subsumed under this *umma* idea, a very significant fact. But why are the believers distinguished from the Muslims? ... It is probable that *mu'minūn* throughout the document means just what it means in the Qur'an: 'believers'. ... This preponderance of *mu'min* may indicate an early date for much of the Constitution, before *muslim* was used as the name for the followers of Muhammad, or at least before it gained a clear technical sense limited to the followers of Muhammad. Of course, it had a deep religious sense before the time of the Constitution, describing the human approach to God pre-scribed in the Revelation.¹⁸

The *umma*, then, constituted another layer of identity that contained many of the same tribal obligations and expectations that existed previously, except that these obligations now moved beyond the realm of the tribe and acquired a potentially universal scope. It is particularly interesting to see that the term *Muslim* was not exclusively used for those who accepted Muhammad as prophet, but rather included all those who submitted to God in the way his and earlier prophetic traditions required. Rather than being the exclusive provenance of committed followers of Muhammad then, the community at Medina and subsequent Islamic regimes (including that of the religiously tolerant and pluralistic Mughals on the Indian sub-continent) can be legitimately described as belonging to all who show submission to God. This, again, is a potentially universal ideal, depending upon how submission is defined.

Ultimately, the authority which undergirds the Constitution of Medina is simultaneously spiritual and secular, traditional and radical. Muhammad's genius is clear in the way he transformed his role as God's vessel and voice into judge, apostle, general, and exemplar of the faith. He could have, like the Christian Apostle Paul, de-emphasised temporal identities in order to place the focus solely on one's spiritual identity.¹⁹ Instead, Muhammad was happy to keep the existing social order intact as it provided him with opportunities for mass conversions by entire tribes, an infrastructure that managed law and order within smaller more manageable groups, and a steady stream of soldiers who could assist him in defence and in his conquest of the Arabian Peninsula. The unity advocated by Muhammad included believers in various faiths, but this did not negate their previous social relationships. Indeed, as stated in the Qur'an, those 'that have kinship by blood are closer to one another in the Book of God than the believers who are not kindred.'²⁰

Thus, it is unsurprising that he opens his contract with the people of Medina by saying, 'This is a document from Muhammad the prophet governing the relations between the

¹⁸ Denny, 'Ummah', p. 43.

¹⁹ See for example Galatians 3:28, where Paul says 'There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus' (NIV).

²⁰ Qur'an 33:6, cited in Antony Black, *The History of Islamic Political Thought* (Edinburgh: Edinburgh University Press, 2001), p.11.

believers and Muslims of Quraysh and Yathrib, and those who followed them and joined them and laboured with them.’²¹ He goes on to acknowledge Jews as belonging to groups like Banu al-Najjar and al-Harith. Amongst Muslims, he specifies the Banu ‘Awf, the Quraysh and others. The invitation to arbitrate disputes between these tribes was precisely the opening in the tribal power structure that would allow Muhammad and his message to become its centre. If God spoke through Muhammad, then who could disobey his revelation requiring all disputes between the tribes to be referred to God, and consequently to Muhammad?²² This revelation is then codified in the Constitution of Medina when Muhammad explicitly states to all the Medinans, Muslim or not, that ‘Whenever you differ about a matter it must be referred to God and to Muhammad.’²³ The authority of the state thus rests on its adherence to the message and example of Muhammad which is a direct revelation of the very word and will of God himself. A citizen could conceivably accept and follow this human example, even if he or she did not share his beliefs in whole or part.

Perhaps because it was necessitated in part by a religious dispute and a resulting crisis that at one point led to King John’s temporary excommunication, the Magna Carta opens not by combining spiritual and secular offices, but by reaffirming the Christian tradition of assigning each power to its own unique sphere. The goals of the Magna Carta were to allow King John to reconcile with the lords and barons who had been in revolt against his ruinous abuse of feudal taxation and land use privileges. At the same time, the document reaffirmed the independence of the church from the Crown and publicly affirmed the King’s acceptance of the Vatican’s choice for Archbishop of Canterbury.²⁴ The essential and often overlooked function of the Magna Carta as a document which guaranteed the independence of the church is, according to political theorist Cary Nederman, that individual freedom is not

...the only way in which the language of liberty is employed in the Magna Carta. In both the first and the final articles of the charter—and at several places in between—the text refers to another sort of liberty: the liberty of the Church. Indeed, Article 1 begins with King John’s declaration that he has ‘in the first place granted to God and by this our present Charter confirmed, for us and our heirs in perpetuity, that the English church is to be free (*Anglicana ecclesiastica libera sit*), and shall have its rights undiminished and its liberties unimpaired.’²⁵

The very idea that the Church and the State could inhabit different spheres is clearly one which is in stark contrast to traditional Islamic notions of the State, which conceive of State and Religion as conjoined twins that are utterly inseparable. There is however, a commonality in the concern that secular power not be allowed to infringe upon the higher prerogatives of religious authority. Indeed, it could even be argued that the Medieval Church, in some respects, aspired to exactly the same type of political-religious fusion of power and universal domination that traditional views of proper Islamic governance espouse.²⁶

King John’s (1215) opening statement gives a clear indication of the authority on which its legitimacy rests: ‘JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou...’. God’s grace is superficially acknowledged before the King’s titles and the power they reveal over various lands are placed on display.

²¹ Ishaq, *Life of Muhammad*, pp. 231-2.

²² Watt, *Muhammad at Medina*, p. 230.

²³ Ishaq, *Life of Muhammad*, p. 232.

²⁴ See the excellent overview of the historical context of Magna Carta at the website of the British Library (<http://www.bl.uk/treasures/magnacarta/index.html>).

²⁵ Cary J. Nederman, ‘The Liberty of the Church and the Road to Runnymede: John of Salisbury and the Intellectual Foundations of the Magna Carta’, *PS: Political Science & Politics* 43, no. 03 (2010), p. 457.

²⁶ A classic example of a Muslim juristic view of the state can be seen in Mawardi’s *The Ordinances of Government*. Likewise, the Catholic Church is replete with examples of popes who exercised substantial temporal power, for instance Julius the ‘Warrior Pope’.

He is King, Lord, Duke, and Count (at least in name) over a sizeable kingdom. These titles are not those of prophet, priest, or judge, but of raw earthly power and each of them denote his status at the top of the feudal pecking order. Perhaps because the text to follow was really a series of compromises and capitulations to the Church on one hand (the King had recognised the Pope as overlord in a successful bid to gain church support for his rule) and the barons on the other, King John felt it necessary to begin the document with a show of strength. This show is short-lived however, for in the very next paragraph he acknowledges that the terms were largely dictated to him by the ‘advice’ of ‘our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin ... [various other bishops] ... Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury ... [and several other lords and barons] ... and other loyal subjects.’ One can only imagine how much pride he had to swallow to call rebellious lords his ‘loyal subjects’.²⁷

Clause 1 of the Magna Carta is one of the few parts of the document that still retains legal force; it serves to reinforce the King’s role as sovereign in ordering his kingdom but at the same time contains the strong assertions of the rights of the Church and of all ‘free men’. In it, John says that ‘We have granted to God... that the English Church shall be free, and that it shall have its rights undiminished, and its liberties unimpaired.’ Even though the whole clause is an affirmation of rights that the King cannot transgress, he claims that it is he, King John who ‘has granted to God’ that these rights will be respected. This could be because even though Christian doctrine does not make claims to temporal authority or have an explicit legal or political programme, it does assert that ‘there is no authority except that which God has established.’²⁸ Indeed, the Church of the Middle Ages was both political and powerful and was content to flex its might through the muscle of whatever local king was in authority. The monarchs themselves rarely resisted because their faith taught them that the Church held the one and only key to the salvation of their souls. What ultimately sets the legitimacy of the Magna Carta apart from the Constitution of Medina is that the religious power undergirding the document is willingly subverted to the secular legal power even while it is simultaneously the implicit force behind the King’s authority and arbiter of his eternal destiny.

Of course, constitutional documents are never merely statements of authority or legitimacy. They are traditionally conceived as social contracts between both *ruler* and *ruled* or the *government* and the *governed*. In order to assess the legacies of these foundational texts it is therefore vital that one ascertain exactly which groups in society are being addressed. Who are the subjects or citizens who will be bound by the constitution?

Defining the Subject: The Object(s) of Authority in the *Constitution* and *Magna Carta*

As alluded to earlier, the Constitution of Medina is a document that subverts, elevates, and recreates tribal identities and obligations by placing them largely intact under a new umbrella identity. Uri Rubin argues that ‘the name of the new unity declared by the “Constitution” is “*umma*”. Western scholars... were aware of the fact that it must be examined according to its meaning in the Qur’an, where, in most relevant cases, it has a pure religious connotation.’²⁹ Rubin goes on to point out that in the opening of the Constitution it states that ‘They are one *umma* to the exclusion of all men’, which in its original form joins *umma* with *wahida*. In all

²⁷ King John, 1215. Magna Carta (Preamble). British Library Treasures Online, [Online], Available at: <http://www.bl.uk/treasures/magnacarta/index.html> [accessed 17 August 2009].

²⁸ See Romans 13:1.

²⁹ Uri Rubin, ‘The “Constitution of Medina”: Some Notes’, *Studia Islamica*, no. 62 (1985), p. 12.

nine instances where the phrase *umma wahida*, or singular people, occurs in the Qur'an it always 'denotes people united by a common *religious* orientation.' In other words, the Muslims and the Jews of Medina comprise a unified body that shares the same religion in distinction to those who practise other faiths.³⁰ So, in the first instance, the people with whom Muhammad makes his covenant are qualified for 'citizenship' based upon their faith.³¹

Lest one doubt the inclusion of the Jews, he continues by saying 'To the Jew who follows us belong help and equality. He shall not be wronged... The peace of the believers is indivisible.'³² Those who are not of the monotheistic Abrahamic faiths are *not* included in the social contract and regardless of their tribal ties to those within Mecca exist definitively outside of the protection of the community at large. Muhammad could not be any clearer on this point when he writes that 'Believers are friends one to the other to the exclusion of outsiders.'³³

In addition to being a community or *umma* based upon faith, Medina was also a polity based upon the establishment of sacred territory, or *haram*. This sentiment is echoed by Hobbes and others who locate the basis of obligation between a citizen and the state in the state's role in protecting and preserving the lives of its citizens.³⁴ Thus Rubin notes that some traditions hold that Muhammad declared Medina to be sacred, therefore elevating it to the same religious status as Mecca, before the crucial battle against Mecca just two years after the *Hijra*. This would mean that the natives of Medina, or *Yathrib*, would be expected to protect and defend their sacred ground in the same manner that the Quraysh would protect the holy precincts of Mecca.³⁵ This basis of community originating from a desire to band together for the common defence is a regular feature of constitutional documents. What is interesting is that Muhammad's declaration of *haram* endows it with a religious significance that it would not otherwise have and reasserts the centrality of religious belief and faith in the formation of his polity. He goes on to assert:

The Jews must bear their expenses and the Muslims their expenses. Each must help the other against anyone who attacks the people of this document... The Jews must pay with the believers as long as war lasts. Yathrib shall be a sanctuary (*haram*) for the people of this document.³⁶

Like any other constitution then, this document creates an *us* and a *them*, allowing for the new *umma* to express itself not only by its positive affirmation of monotheism and residence in Medina, but also in its opposition to polytheism and its defence against outsiders and attackers.

³⁰ Ibid., p.13. It is unclear how the status of *dhimmi*, or protected peoples, applies to this passage. It could be that because this is prior to the definitive split between Muhammad and the Arab Jews, their monotheism and tacit acceptance of his leadership were enough to consider them part of the *umma* without additional distinction. Alternatively, the fact that many of the Jews were already clients of Arab tribes would make such a distinction redundant.

³¹ The use of *umma* in the sense of spiritual brotherhood being emphasised prior to political brotherhood is not intended to contradict claims that *umma* 'is basically a political confederation', but rather highlights the further point that these confederations were 'usually theocratic'. See R.B. Serjeant, 'Sunnah Jāmi'ah', pp. 4-5. Serjeant makes the further point that 'The Jews, when Muhammad made the confederation pacts after his arrival in Yathrib, were included in the ummah; "through the peace (sulh) which took place between them and the Mu'iniin 'Believers' they became like a collective body (jami'ah) of them, with a single word and hand".'

³² Ishaq, *Life of Muhammad*, p. 232.

³³ Ibid., p. 232.

³⁴ See *Leviathan*, Chapter 21, where Hobbes states: 'The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, as the power lasteth, by which he is able to protect them.'

³⁵ Rubin, 'Notes on Constitution', p. 11.

³⁶ Ishaq, *Life of Muhammad*, p. 233.

The emphasis on common religion and territory in the Constitution of Medina should not completely obscure its continued recognition of pre-existing family and tribal relationships, which continued to be relevant well after Islam became the established faith of Arabia. As mentioned previously, it consistently refers to groups based on tribal identity, particularly when it discusses Jewish clients of various Arab tribes.³⁷ The Quraysh and Tha'laba are distinguished from other tribes. In essence, the polity Muhammad sought to establish could be expressed in three iterations: a tribal polity, a territorial polity, and finally and most importantly, a religious polity.

Once again, the Magna Carta proves to be more monolithic in its definition of polity. After reaffirming the independence of the church, the rest of the document lays out the rights of 'all free men'. Left out of the protections are the peasants who had feudal bonds to their lords that required them to work without compensation and kept them in a state not far removed from slavery. The basis of the community falling under his protection as king is one that is purely territorial, as is made clear when 'all free men' is followed by the further stipulation that they are 'of my kingdom'.³⁸ Though ostensibly free, in essence nobody in the feudal framework was free of the rigid social hierarchy that extended from king to peasant with its corresponding set of duties and honours owed to those higher up the chain. Even the barons were required to provide military service or a quota of troops from their manors financed at their own expense upon the king's request. It was only under King John and his unprecedented abuse of this system that the lords felt the need to rebel and to assert that even the rights of the king himself came with their attendant duties. It is this dichotomy along with the fact that the Magna Carta makes law supreme over even the king that elevates it to the level of a constitutional document rather than simply a royal decree.

Rights, Duties, and their Respective Parties

The rights and duties spelled out in each of these documents range from the specific and time-bound to the universal and timeless. In Muhammad's contract there is far less emphasis on the duties imposed on Muhammad than on those required of the people of Medina. Instead the obligations listed in it are primarily those owed by one particular group to another within society. The duties and rights enumerated here can be split into those dealing with internal disputes and crimes and those dealing with external threats and war. The definition of internal and external is, as already discussed, both territorial and spiritual, and both requirements must be met for the provisions of this document to be in force.

Internal duties include payment of blood money, avenging those wrongfully killed, providing hospitality, and taking unresolved disputes to Muhammad. These imply the right of individuals to be recompensed for damages or deaths regardless of cause, along with the rights of people to obtain hospitality when in need and to have access to a judge to resolve disputes.³⁹

In reference to outsiders, the Constitution states 'A believer shall not slay a believer for the sake of an unbeliever, nor shall he aid an unbeliever against a believer' (a negative duty). No matter what tribal affinities one may have, that of belief supersedes any other. In a similar manner, 'believers must avenge the blood of one another shed in the way of God' (a positive duty). This defensive obligation extends to a territorial definition when Muhammad specifies that the 'contracting parties are bound to help one another against any attack on Yathrib.' The

³⁷ Rubin, 'Notes on Constitution', pp. 5-9.

³⁸ Magna Carta, Clause 1.

³⁹ Ishaq, *Life of Muhammad*, pp. 232-3.

focus on war extends to raiding parties and offensive battles which present the opportunities for spoils from which 'everyone shall have his portion from the side to which he belongs.'⁴⁰

If this document is to be considered truly constitutional, however, it must place some sort of restraint upon the ruler so that the contract itself is truly binding and cannot simply be changed by the will of the ruler. This criterion is clearly not met in the text itself. Aside from requiring Muhammad to fulfil his role as judge, the only other requirement placed upon him is to give his permission for parties to go out to war and by inference to protect 'the good and God-fearing man' since God is their protector and he, Muhammad, is 'the apostle of God'.⁴¹ One could argue, however, that combined with Muhammad's example of how to rule rightly, there are a variety of basic restraints imposed by the very conditions of being a devout Muslim.

Unfortunately for King John, he did not inspire the same level of devotion that Muhammad did. His tyrannical actions cost him the trust of his people and so his charter primarily restricts his power and obligates him to respect a wide range of rights and privileges, all the while gaining nothing more than a reaffirmation of long-established duties from his nobles. In the interest of brevity, only the clauses which remain in force will be discussed here. First amongst the rights specified is that of the English church to be free from influence by the Crown.⁴² Secondly Clause 13 states that, 'The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities... shall enjoy all their liberties and free customs.' This can be broadly interpreted to support the right of localities to self-determination on local issues. It also affirms the legitimacy of the layers of government that exist below the level of the monarch or head of state. The king could have qualified this statement with the addition of a phrase such as, 'so long as these liberties do not impinge upon the good of the realm', but he chose not to do so and went so far as to call these liberties 'ancient', which would seem to bolster their legitimacy even further.

Finally, Clause 39, which deals with the fundamental right of *habeas corpus*, is perhaps the most relevant and important of the clauses still in effect. Tom Bingham's book *The Rule of Law* refers to this writ as 'the most effective remedy against executive lawlessness that the world has ever seen.'⁴³ This clause protects all free men from being 'seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way.' He points out that originally, *habeas corpus ad subjiciendum* simply meant that a person in custody had to be made available to a judge.⁴⁴ It was only later that this practice was used to ensure that the lawfulness of a person's detention was examined or, more generally, to protect individual liberty. However, the evolutionary process which produced *habeas corpus* as it is now conceived nonetheless is traceable to the belief that it is an essential precept in Magna Carta.⁴⁵ No less a legal luminary that Sir Edward Coke, who was involved in the seventeenth century effort to rebuke monarchical abuses of judicial power, argued in favour of Parliament's 1628 *Petition of Right* on the basis that detention was

⁴⁰ Ibid., pp.232-3.

⁴¹ Ibid., p.233.

⁴² Magna Carta, Clause 1: 'FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.'

⁴³ Bingham, *Rule of Law*, p. 14.

⁴⁴ Literally, 'you may have the body subject to examination'.

⁴⁵ Ibid., pp. 13-14.

forbidden by the charter without ‘due process of law’, and that the only way to ensure such due process was through the mechanism of the writ of *habeas corpus*.⁴⁶ It also enshrines the institution of jury trials in that punishment may only occur ‘by the lawful judgement of his equals or by the law of the land.’⁴⁷ To all of these guarantees is added the extra protection of Clause 40 which states: ‘To no one will we sell, to no one deny or delay right or justice’, thus protecting the citizen and the state from the corrosive effects of corruption and indefinite detention without charge. The totality of these clauses provides a substantial bulwark for the protection of individual liberty, even if the scope of that liberty was highly restricted at its conception. Thus, while the attribution of *habeas corpus* and its related protections may not be due to the Magna Carta in a strictly historical sense, they are clear developments upon the clauses of the original document and were advocated as such by those who strengthened and codified these protections in subsequent generations. Here it is helpful to consider Justin Wert’s concluding remarks on the myth of *habeas corpus* and jury trial as latent in Magna Carta:

The very fact that the substantive and procedural due process rights that both the Magna Carta and habeas corpus have protected through the centuries have varied considerably—even in negative directions—is proof enough of their liberty-regarding potential. In this sense, our acceptance of less than accurate histories is, at the very least, testament to our normative preference for more capacious notions of personal rights and liberties.

In his 1914 article critiquing Whiggish accounts of Magna Carta, Charles McIlwain came to the conclusion that while some modern rights, like trial by jury, were never implied in the document in the way that we imagine today, ‘we may still hold, as our fathers did, that the law of the land is there’ (McIlwain 1914, 51). Intentional or not, then, the wisdom of the barons who managed to secure feudal rights at Runnymede was present in the framing of procedural rights—like *legem terrae*—that were specific enough to protect their most immediate substantive concerns but, fortuitously, general enough to remind us that there is still work left to be done.⁴⁸

It would seem then, that the emphasis on the rule of law as an ideal that exists above and apart from the head of state, becomes in Magna Carta an inherent characteristic of the state itself and of the nation it governs. The reciprocal duties and rights it lays out are important not merely because their codification is binding, but also because they define the scope of the state and the limits of the ruler’s power. It is little wonder then, that despite its very specific context, that Magna Carta is considered *the* founding document for the establishment of individual rights as being a fundamental part of the constitutional order. From it, one can trace the key principles enshrined in the United States’ *Bill of Rights* and its subsequent emulators in various states and international institutions.

Conclusion

When analysing the Constitution of Medina and the Magna Carta side by side, it is clear that they are texts which emerge from fundamentally different contexts. They are documents that address the particular concerns of a particular people in a particular place and time. Despite this, both of these documents retain a remarkable degree of relevance to present constitutional discourse as founding documents of Western and Islamic protections of the rights and duties

⁴⁶Justin J. Wert, ‘With a Little Help from a Friend: Habeas Corpus and the Magna Carta after Runnymede’, *PS: Political Science & Politics* 43, no. 03 (2010), p. 476.

⁴⁷ The clause reads in full: ‘No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.’

⁴⁸ Wert, ‘Habeas Corpus’, pp. 477-8.

of individual citizens. The fact that some of the Magna Carta is still in effect in legal terms demonstrates its lasting impact, as does the fact it is cited in court decisions even outside the United Kingdom as having the power of moral and legal precedent.

In the case of the Constitution of Medina, its enduring power mainly lies in its constituent parts being authored by Muhammad himself, and by Muhammad's role as Prophet/exemplar for the world's 1.6 billion Muslims. One can see that the symbiosis of religion and state power existed from the very origins of Islam, but that in its earliest form its definition of *umma* was far more inclusive and pluralistic. A fundamental lack of restraint on the ruler exists in the Constitution. This absence of restraint has often been cited in studies of Muslim polities to explain a particular type of 'Oriental despotism.' However, it can be argued that when one combines the Constitution with Muhammad's example as ruler, there are a number of restrictions that are implicit (for instance, a Muslim ruler cannot command people to do something forbidden by their faith). If these strictures are disregarded, one could argue that the legitimacy of the regime has been lost and that a change in power is justified.⁴⁹

Likewise the Magna Carta highlights the tension in Christendom and its successor states between the need to govern using secular and even violent forms of power, while acting in accordance with the respect for individual rights that some would argue Christian teaching advocates. In neither case will one find a ready-made system of government that would work today, but one does find well-established, time-tested principles that have achieved wide acceptance and legitimacy amongst the societies they represent. By understanding the areas in which these civilisational foundations overlap, it may be possible to continue the comparison into the nature of specific constitutional ideas in a way that can encourage greater understanding between these two traditions as the peoples they represent try to negotiate the best possible common future.

Furthermore, and more practically, the comparison of the Magna Carta and the Constitution of Medina is important if only for the fundamental reason that all majority Muslim states are part of the United Nations. This means that they are likewise signatories of the Universal Declaration of Human Rights and various other international charters which enshrine the very same values of individual liberty, right to fair trial, recourse to *habeas corpus* and other protections that are grounded in the nature of the Magna Carta. This has established the Magna Carta as the cornerstone of modern law for the entire globe in the context of international law. As people in Tunisia, Egypt and Libya grapple with how to best institutionalise their values, goals and societies in new constitutional regimes, they will undoubtedly grapple with the dual demands of preserving the Islamic nature of their identities whilst simultaneously ensuring that their constitutions adhere to international law and the entirety of its attendant requirements. Without this type of fundamental comparison, one is either forced to advance the very tenuous position that each civilisation is based upon fundamentally different norms and values which may be irreconcilable and bound for a clash, or to argue that Western norms have won the ideological struggle for survival and that we have arrived at some kind of 'end of history'.

Neither of these positions seems tenable in light of the overwhelming evidence that, from the very earliest times, people have borrowed ideas from one another based on a very practical desire to create stable governments for their respective societies. Additionally, there can be no ignoring the demands for Muslim states to in some way enshrine Islam in their

⁴⁹ In case one doubts the power of these implied restrictions, it is helpful to remember that in the United Kingdom there is no single constitution that restricts power, yet constitutional considerations are frequently cited if a government is seen to be overstepping its bounds. Likewise, in the United States, George Washington's tradition of serving only two terms as president was seen as inviolable until the extraordinary third and fourth elections of Franklin D. Roosevelt. After his death, this tradition was soon codified into actual law so that it could not be legally ignored again.

constitutions, or that these demands are being made in many cases with representative, accountable and responsive government as an end goal. Likewise, much more work needs to be done in non-Muslim states to address the need for minority groups to exercise their fundamental rights, which may include providing for family and private law courts that conform to Jewish Talmudic law or Muslim *sharī'a*. Sadly, progress seems to be rather absent on this front as governments in both the United States and the United Kingdom have denied recognition or even restricted the very mention of Islamic norms in court rulings.⁵⁰ For better or for worse, issues of religion and its role in the state seem to be wedded for the foreseeable future. Perhaps this discussion will provide a model of political and religious engagement, rather than denial, and better elucidate how they can negotiate a stable and harmonious marriage of the values they embrace.

⁵⁰ See for example Lady Cox's Arbitration and Mediation Services Equality Bill, recently tabled in the House of Lords (at <http://services.parliament.uk/bills/2010-11/arbitrationandmediationservicesequalityhl.html>) and the Oklahoma constitutional amendment banning the use of Islamic law in court (discussed amongst additional state measures in Andrea Elliott's 'The Man Behind the Anti-Shariah Movement,' *New York Times*, 30 July, 2011, available at <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>).