11

Shari'a and the rule of law

Preserving the realm

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Introduction

There is a certain irony in commemorating Magna Carta today, since so little of it survives as statute. Most of its articles have been repealed by subsequent legislation. For a document that is over 800 years old, that should not be surprising.[1] Yet it endures as more than a mere document. It is an icon of law and order, justice and rule of law. In the light of that sentiment, however, one cannot help but flinch at some of its provisions, in particular those that seem to identify as potential threats minority groups who, given their minority status, may have been vulnerable at the time. In this regard, clauses 10 and 11 of Magna Carta of 1215 are of particular interest:

> 10. If anyone who has borrowed from the Jews any amount, great or small, dies before the debt is repaid, it shall not carry interest as long as the heir is under age, of whomsoever he holds [his lands]; and if that debt falls into our hands, we will take nothing except the principal sum specified in the bond.
>
> 11. And if a man dies owing a debt to the Jews, his wife may have her dower and pay nothing of that debt; and if he leaves children under age, their needs shall be met in a manner in keeping with the holding of the deceased; and the debt shall be paid out of the residue, saving the service due to the [deceased's feudal] lords. Debts owed to others than Jews shall be dealt with likewise.[2]

[1] Magna Carta (1297), 1297 c 9, 25 Edw 1 cc 1 9 29. The texts of 1215 and 1225 are given in translation, pp 338–66 below. For an online version of the text and subsequent legislative history, see www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents (accessed 5 June 2014).

[2] J Holt, *Magna Carta* (2nd edn, Cambridge, 1992), pp 453–5.

As much as Magna Carta is celebrated as a testament to law and justice, the reference to Jews can understandably unsettle modern readers. It is troubling to see how often these clauses can quickly be brushed aside as if aberrations that distract from the main thrust of the document, namely its commitment to rule of law. For instance, Kent Worcester, when introducing a symposium on the Great Charter, briskly remarked: 'While [Magna Carta] affirmed numerous social distinctions, it nevertheless assumed a rough legal parity among those people designated as *free men*.'[3] Such legal parity among 'free men' begs important questions about who was free, who was not free, what social distinctions mattered under the Charter and the conditions that made any and all of these differences intelligible, let alone justifiable, in the context of its issue. As much as Magna Carta is offered as an early testament to the rule of law, these provisions about the Jews suggest that rule of law might have more adverse bite against some of the king's subjects than some commentators and theorists would want to admit.

Given the conditions of the thirteenth century, it is perhaps not surprising to see provisions that particularly identify the Jews. The history of anti-Semitism in Europe has already been well documented, and need not be pressed any further here. Rather, the reference to the Jews in this document raises important questions about the analytic heft (and bite) of rule of law. It might be that we can simply read out these provisions entirely when thinking about the rule of law. What might matter most, on such a reading, are provisions such as clause 39, which provides:

> No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.[4]

The generality in the clause speaks naturally to the abstract generality of rule of law as a principle. Indeed, one might even say that rule of law does operate at this most general level, thereby rendering all the particular historically contingent features of Magna Carta irrelevant to a rule of law reading of the Charter.

This chapter will suggest, however, that such an approach to Magna Carta specifically, and to the rule of law more generally, betrays at best a redemptive romanticism, at worst an intellectual dishonesty, about the

[3] K Worcester, 'Editor's introduction', (2010) 43 *Political Science* 451–5.

[4] Holt, *Magna Carta*, p 461.

relationship between the rule of law and minorities. Indeed, as we witness today in countries such as Canada, the United States, the United Kingdom and Continental Europe, religious minorities such as Muslims are typecast as the new threat to the realm. Moreover, they play this role not merely as a matter of lowbrow politics but as a matter of law. From anti-shari'a legislation in the US, the anti-halal movement across Europe and the surveillance of Muslim communities, the law is invoked to *defend* the realm, and in doing so, to *define* it by demarcating a religious minority as the quintessential Other. In Magna Carta the quintessential Other was the Jew. In today's Europe and North America, it is the Muslim. And the rule of law lies at the heart of any and all efforts to *defend* the realm by *defining* the realm in a manner that plays upon minority status, often to the detriment of those minorities.

This is not to claim that the Other is always defined by religion. Within living memory the feared or resented Other in the United Kingdom would have been (at times of national insecurity and high unemployment) Afro-Caribbean immigrants and (during the IRA's bombing campaign) the Irish. Forty years ago families recently arrived from the Indian sub-continent were insulted in racial, not religious terms. Even among religious minorities, Muslims have not always been the UK's religious Other. Maleiha Malik tells us how Magna Carta itself was invoked in the eighteenth century to demonise the Jews;[5] and she has reminded us how the Jewish Anarchists of the late nineteenth century were as frightening to London as the IRA was to be, a hundred years later. In today's secular Europe, Muslims are the Other; what seems to some as the strange, even incomprehensible dedication of many Muslims to Friday prayers and of some Muslims to traditional dress, feeds the perception of Muslims as a visible 'threat'. Nor is this dynamic of Othering specific to the UK or Europe. Indeed, we see it at work in some Muslim majority countries, where the Other is the Jew or the Christian or even other Muslims who are deemed heterodox (for example, the Ahmadis in Indonesia and Pakistan, the Shi'a in the Sunni world).

To illustrate how rule of law both defends and defines the realm, this chapter will adopt an analysis of rule of law as a 'claim space' within which arguments of justice are made. As a space, though, rule of law begs important questions about the boundaries that define and delimit that space. Indeed, boundaries offer an important trope by which to appreciate the analytic heft of rule of law. Boundaries not only include (by pushing

[5] Chapter 14 of this volume: M Malik, 'Magna Carta, rule of law and religious diversity', pp 248–63.

towards the centre) but also exclude. Moreover, depending how porous they are, boundaries even let passage back and forth occur.

First we glance at how the boundaries of a rule of law claim space are imagined and the effects of their operation. To do so, I will look at a Supreme Court of Canada case involving international human rights instruments, and the extent to which they can or ought to be relied upon when interpreting domestic legislation. The case analysis will illustrate how such boundaries are implicit in the very idea of rule of law, without succumbing to the polemics that often attend more controversial questions about legal limits and boundaries. For instance, there has been heated debate over the possible accommodation of minority legal systems within or alongside the systems of a Western nation-state.[6] To do justice to the metaphor of claim space and boundary, it is helpful to stand back from the intensity of domestic law and of the fears engendered by any perceived threat to its integrity. I will then turn to specific formulations of the rule of law boundaries, which can have a particularly pernicious effect on the well-being of minorities. As much as the boundaries may still remain porous in some regard, we will see how the defence of the realm can, through the definition of its boundaries, work to the disadvantage of the most vulnerable members of society.

Law, rhetoric and history: rule of law as claim space

The phrase 'rule of law' is both ambiguous and ubiquitous. Though legal philosophers admit the difficulty of defining it, the term presumably offers a panacea for good governance and the promotion of human development. Broadly speaking, rule of law means that governing officials are no less held to the law than a regime's citizens. Relatedly, rule of law stands in stark opposition to arbitrary discretion.[7] Beyond that, it can refer to legal institutions, regulatory frameworks, constitutional design, rights regimes and so on.[8]

[6] This was a major motif in R Griffith-Jones (ed), *Islam and English Law: rights, responsibilities and the place of shari'a* (Cambridge, 2012). The debate has been intense in Canada as well: see M Boyd, 'Ontario's "sharia court": law and politics intertwined' in ibid, pp 176–86; A Emon, 'Islamic law and the Canadian mosaic: politics, jurisprudence, and multicultural accommodation', (2009) 87 *Canadian Bar Review* 391–425.

[7] J Raz, 'The rule of law and its virtue' in J Raz (ed), *The Authority of Law: essays on law and morality* (Oxford, 1994), pp 210–29.

[8] B Tamanaha, *On the Rule of Law: history, politics, theory* (New York, 2004); R Dworkin, 'Hart's postscript and the character of political philosophy', (2004) 24 *Oxford Journal of Legal Studies* 1–37; A Vermeule, *Judging under Uncertainty: an institutional theory of legal interpretation* (Cambridge, MA, 2006).

To reflect on rule of law by starting with Magna Carta introduces a historical feature to rule of law thinking. As I have shown elsewhere, thinking through rule of law in such a comparative *diachronic* perspective – moving back and forth from the medieval to the modern period – offers an important, analytically critical vantage point for rule of law discourse.[9] This vantage point allows one to understand the conditions of intelligibility in certain legal particularities, and to demarcate the periphery of a legal system. A historical approach to rule of law, I suggest, fundamentally reveals rule of law to be a *claim space within which arguments of justice are made.* That space, to be a definable and distinctively legal space, is bounded by particular, historical characteristics informing the conditions that make certain legal claims intelligible in our retrospect on the time of their making.

Law is not always, and probably cannot be, the site in which philosophical virtue takes flight. Rather, law is about balancing competing interests of people who have a lot to lose depending on how the law takes shape. That pragmatic balancing is reflected in the way courts in constitutional democracies, for instance, engage in consequential analysis when considering which judgment to make when faced with a range of possible legal outcomes.[10] Approaching the Magna Carta in this light is important precisely because of the historical distance between its time and our own. The power of the Charter lies not in some romantic, presentist reading but in the diachronic analysis that it makes possible.

To explain the metaphor of boundary and how it helps define the claim space of a given rule of law tradition, I examine a case concerning international law and statutory interpretation. In *Baker v Canada*, a 1999 Supreme Court of Canada decision, a foreign-born woman residing in Canada, and with Canadian-born dependent children, applied for permanent residency.[11] Pursuant to the relevant immigration law provisions, though, she had to apply for permanent residence status from outside Canada. She applied for an exception to this rule on humanitarian and compassionate grounds, given the needs of her dependent children. She was denied the exception. The Supreme Court of Canada reviewed her case and considered, among other things, that international

[9] See A Emon, *Religious Pluralism and Islamic Law: dhimmis and Others in the empire of law* (Oxford, 2012).

[10] R Sullivan, *Sullivan on the Construction of Statutes* (5th edn, Markham, Ontario, 2008), pp 299–323.

[11] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

law could inform how it interpreted the domestic immigration statute concerning humanitarian and compassionate grounds. Specifically, the court split on whether it could incorporate the Convention on the Rights of the Child (CRC) into its analysis. The CRC presented such a divisive issue because, at the time of the case, Canada was a signatory to the Convention, but the federal Parliament had not implemented the Convention into Canadian law. Consequently, the question before the court was whether a convention ratified by Canada's executive could inform the Supreme Court's interpretation of domestic immigration law, despite the fact that the legislature had not legislated the convention in any way into domestic law. Writing for the majority of the Supreme Court of Canada, Justice L'Heureux-Dubé held in favour of the claimant, and in doing so, allowed reference to the CRC. The majority stated:

> Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute . . . I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law. Nevertheless the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.[12]

In a concurring opinion, Justices Iacobucci and Cory agreed with the result but disagreed with the majority's reference to the CRC. In a judgment delivered by Iacobucci J, they argued:

> It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation. I do not agree with the approach adopted by my colleague wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law because such an approach is not in accordance with the court's jurisprudence concerning the status of international law within the domestic legal system. In my view we should proceed with caution in deciding matters of this nature lest we adversely affect the balance

[12] Ibid, p 861.

> maintained by our parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.[13]

The debate on the CRC here reveals the boundaries that give content, legitimacy and intelligibility to a claim of justice made from within the claim space of Canada's rule of law system. The concurring opinion showcases the challenge associated with simply referencing international law to interpret domestic legislation. Certainly the executive signed the Convention. But a robust respect for both separation of powers and parliamentary sovereignty demands that Parliament, as the site of legislative authority, implement the Convention into domestic law before a court relies on the Convention to interpret domestic law. To do otherwise is effectively to permit the executive to legislate domestic law – a power vested in Parliament, not the executive. When Iacobucci and Cory JJ 'proceed with caution' so as not to 'adversely affect the balance maintained by our parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch', they are raising fundamental concerns about the boundaries that define and delimit the claim space of Canada's rule of law system. Indeed, it is perhaps out of concern for those same boundaries that the majority severely limited its resort to ratified but unincorporated international law conventions to human rights instruments only. As the majority wrote, 'the values reflected in international *human rights law* may help inform the contextual approach to statutory interpretation and judicial review'.[14] The reference to human rights law, as a subset of international law, arguably is meant to recharacterise international human rights law as somehow falling within Canada's rule of law claim space so as to allow reference to it without undermining a commitment to parliamentary sovereignty.

The debate in *Baker v Canada* between the justices illustrates how the 'boundary' metaphor operates to define rule of law as a claim space. To view rule of law as a claim space will help focus our attention on what considerations count when imagining what justice demands. Embedded in those considerations are various presumptions about the conditions that make particular claims distinctively legal. As the *Baker* case reveals, those considerations are often tied to a particular context, history or tradition. That context may be institutional (eg parliamentary systems) or narrative (eg the significance of human rights in Canadian political

[13] Ibid, p 865. [14] Ibid, p 861 (emphasis added).

and legal history). In either case, they showcase how a broad approach to history can inform our understanding of rule of law, and in particular define the distinctive features that distinguish one rule of law tradition from another.

Religious minorities before the law

I turn now to the boundaries policed by the rule of law. Reading the provisions about Jews in Magna Carta alongside the treatment of religious minorities under Islamic law (namely, the *dhimmīs*), I will suggest that the way the law features, characterises and situates minorities in relation to those who are members of the majority gives affirmative content to the rule of law. We need historically sensitive characterisations; for rule of law as an analytic concept must itself be framed and delimited with regard to history, context and the particular. Indeed, as the analysis will suggest, the analytic bite of rule of law can become particularly poignant the moment a minority member or group is brought before the law. If rule of law is meant both to define and to defend the realm, the realm in this case is all too often a proxy for the majority, and thereby positions minorities as outsiders, as Other. Whether that minority is the Jew of the thirteenth century or the Muslim of today, a rule of law analysis reveals the tendency of the law to operate against the interests of whoever is deemed the realm's Other.

From the analysis of the Jews under Magna Carta we will turn to the pre-modern legal regulation of non-Muslim permanent residents in Islamic lands, who were called *dhimmīs* in Arabic. These conditions were informed by certain assumptions about the governing enterprise, which was historically imagined as an imperial one. That enterprise has changed, yet we still hear about the *dhimmī* rules in various sectors of the Muslim world. Rule of law, diachronically analysed, forces us to determine the questions of governance that early doctrines (whether Islamic or British) once answered, whether or not pre-modern answers remain appropriate answers to today's questions of law and governance, and why.[15]

Jews in Magna Carta

Tracing the history of Jews in England, in particular during the twelfth and thirteenth centuries, falls well outside the scope of this chapter. But

[15] D Scott, *Conscripts of Modernity: the tragedy of colonial enlightenment* (Durham, NC, 2004).

of particular interest here are the historical roles Jews played as creditors to those who required loans to preserve their estates. Historians have documented the extensive association of the Jewish community with moneylending in early British history, and moreover as sources of revenue for the king.[16] As creditors, they were able to capitalise the underlying land passed through feudal mechanisms by taking the land as security for loans. Recharacterising this land in terms of a money market financial product had the potential (one which was not lost on the Angevin regime) for undercutting the stability of both the feudal regime and the landed aristocracy. Indeed, given the history of royal taxation on Jews and others at the time, it is not at all surprising that the baronial class seeking reforms through Magna Carta saw the Jewish lender as a threat to the stability and security of the baronial class.

In his commentary on Magna Carta, William Sharp McKechnie offered a rough periodisation for the history of Angevin Jews:

> In the policy of the Crown towards aliens of the Hebrew race, three periods may be distinguished. From the Norman Conquest to the coronation of Richard I, the Jews were fleeced and tolerated; during the reigns of Richard and John and the minority of Henry III, they were fleeced and protected; and finally they were fleeced and persecuted, this last stage ending with the ordinance of 1290, which banished Jews from England.[17]

Whether tolerated, protected or persecuted, the Jews were fleeced by various forms of royal taxation, given that they could play the role of lender in contexts that Christians could not. McKechnie noted that unlike Christians, Jews were not prohibited from charging interest on loans. But as the rates could be high, estates might be consumed by debts and the interest due on them.[18]

As lenders in this climate, Jews presented various kings with an opportunity for an easy revenue stream as well as a means of increasing their landholdings and sovereign claims, given that debts were secured by land. Monasteries and the royal family could expand their landholdings by taking over the debts from the Jews, and thereby the underlying land that served as security for the loan.[19] As kings taxed Jews with various royal *tallages*, the Jewish creditors would call in their debts. The debtors

[16] H Richardson, *The English Jewry under Angevin Kings* (London, 1960); M Adler, *Jews of Medieval England* (London, 1939); R Mundill, *The King's Jews* (London, 2010).
[17] W McKechnie, *Magna Carta: a commentary on the Great Charter of King John* (2nd edn, Glasgow, 1914), p 225.
[18] Ibid, p 224. [19] Mundill, *The King's Jews*, pp 106–7.

having no means to repay the loans were faced with the threat of foreclosure. 'Jewish business meant that land was being brought to the market and feudal rights were being capitalised.'[20] As the loans were generally secured by land, to default on a loan was to forgo land as a principle means of security and well-being for oneself and one's heirs. Land capitalisation and foreclosure involved far more than defaulting on a loan. As Mundill has remarked: 'Indebtedness had also made a change in the feudal checks and balances and now allowed various sections of society to aggrandize themselves by taking over debts that were secured with land. For the debtor this was more than just mortgage repossession – this was the total loss of his or her security.'[21] The Jews were not the only ones to serve as creditors. Indeed, as various historians have already shown, others (such as Christian businessmen, church institutions and others) were active in the money market.[22] Indeed, clauses 10 and 11 anticipate others besides the Jews as creditors. In fact, as Richardson has suggested, there were various parties involved in the money market at this time. Richardson went so far as to suggest that the various practices associated with the medieval money market were so commonplace that 'there is no reason for supposing that, before the spate of anti-Jewish legislation that began late in Henry III's reign and ended in the Expulsion, any stigma attached in public opinion to financial dealings with the Jews'.[23] Of course, the stigma referenced here would be of the debtor, presumably a non-Jewish debtor. The absence of such a stigma does not preclude, however, a sense of resentment against the Jews percolating in English society. As Sir James Holt remarked, 'To the Christian layman of this time, the Jews were an unfortunate financial necessity.'[24] Clauses 10 and 11 of the 1215 Magna Carta, therefore, corroborate that as much as they were interested in protecting their security and landed status, the rebellious barons were concerned about the systemic role the Jews played in the money market, and the implication of that market (however utilised by Jews, Christians and the king) on the barons' security as landed elite.

It is perhaps not surprising that clauses 10 and 11 were included in the 1215 Magna Carta. Holt noted, nonetheless, a certain irony in their inclusion. As many have written, while Jews may have been creditors, they often sold their claims to others in the form of bonds – a type of secondary

[20] Ibid, p 107. [21] Ibid, p 98.
[22] See, for example, Richardson, *English Jewry*, pp 67–82.
[23] Ibid, p 74. [24] Holt, *Magna Carta*, p 336.

mortgage market. As an example, Holt referenced a bond held by King John:

> In 1208 John took into his hand a debt of £1015.7*s*.II*d*. which Henry d'Oylly owed to Simon the Jew of Oxford. He laid down that Henry was to pay it off at 200 [marks] per annum. If he did not keep these terms then the chancellor . . . who held Henry's bond, would restore the bond to Simon the Jew and Henry would lose all that he had paid thereto.[25]

According to Holt, clauses 10 and 11 'were no protection against this'.[26] Consequently, though McKechnie considered clauses 10 and 11 as much an attack on moneylenders as on the king,[27] the real issue is whether and to what extent these clauses worked against the Jews while preserving the rights and privileges of the king. Indeed, it must be remembered that these provisions did not appear in later reissues of Magna Carta, especially as such restraints on the king could also apply to the barons, many of whom were creditors. Holt speculated that the 'drafters of the Charter hesitated to interfere permanently in the administration of the Crown at a point where amendments to royal procedure might come to have important and restricting effects on their own capacity to collect debts or distrain upon their tenants'.[28] The relationship between the Jews, the money market and the royal family arguably speaks to the very spirit (and certainly the terms) of Magna Carta. As much as other provisions are made to embody the spirit of the Great Charter for purposes of rule of law theorists today (for example, clause 39), clauses 10 and 11 are an uncomfortable reminder that the Great Charter's contribution to rule of law was in part built upon regulating the Other who presumably posed a threat. But the threat posed was not merely to the king or the sovereignty of the state. It was to those who had the most to lose, namely the baronial class who pressed for the Great Charter. Their clamour for the Charter was premised not only upon opposition to the king, but also upon their own interests and on popular attitudes about the Jews as a threat that must be managed by the law. And indeed the law came to the barons' aid in the form of clauses 10 and 11.

Those of us living well after these events might want to minimise the perniciousness of clauses 10 and 11. For instance, in his hypothesis about clause 11, Hogg held that it had less to do with the Jews and more to do with unscrupulous guardians.[29] Whether sustainable or not,

[25] Ibid, pp 335–6. [26] Ibid, p 336.
[27] McKechnie, *Magna Carta*, p 230. [28] Holt, *Magna Carta*, p 336.
[29] R Hogg, 'Jews, guardians and Magna Carta, clause 11', (1986) 4 *Law and History Review* 367–402.

Hogg's argument does not change the fact that the wording of the clause specifically identifies the Jews. Moreover, it is not clear why the two positions are mutually exclusive. Rather, clauses 10 and 11 are reminders of how attention to the legal treatment of minorities under the law can often reveal important boundaries and limits to the law. The implication of such boundaries is that rule of law theorists must be more attentive to history and its limiting effect on any theory of rule of law. Indeed, when reading clauses 10 and 11 alongside clause 39, one cannot help but notice how the existence of minorities helped to create the boundaries of the law.

Shari'a as rule of law

We have envisioned rule of law analytically as a claim space and turned our attention to the constitutive features that define and delimit that space. In this light we can appreciate its contribution to an analysis of shari'a, conceived here as both a historical tradition and a normative framework of law and governance. The analytic heft of shari'a as rule of law is in part built upon the historical dimension that shari'a brings to rule of law analysis. As I have addressed elsewhere, the historical difference between the pre-modern imperial world of Islam and the modern context of the Westphalian state system demands an analysis of how the prevailing governing regimes (empire and state) imply different and distinct boundary conditions.[30] Indeed, accounting for the shift and difference in boundary conditions is in part a virtue of rule of law as an analytic device. This accounting allows a more nuanced appreciation of the way in which the historical legacy of shari'a resonated one way in a pre-modern empire and in another way in the modern state.[31] For that matter, it can help us understand how Magna Carta resonated in one way to make specific mention of the Jews, and subsequently in a different way such that the provisions on the Jews were removed entirely. Indeed, when we take account of such difference, we can similarly appreciate in the case of shari'a the extent to which pre-modern Islamic legal doctrines (such as *fiqh*) were pre-modern answers to pre-modern questions. The conditions of their intelligibility were undergirded by certain assumptions about the governing enterprise. But what happens to the conditions of legal intelligibility

[30] Emon, *Religious Pluralism*, pp 17–22, 60–8, 206–18.
[31] On the modern state, see J Scott, *Seeing Like a State* (New Haven, CT, 1998).

when that governing enterprise shifts and changes? Rule of law, diachronically analysed, forces us to ask which questions early doctrines (whether Islamic or British) once answered, whether or not those answers remain appropriate for today's questions of law and governance, and why.[32]

For instance, the pre-modern context of the Islamic empire (whether imagined or real) informed the development of pre-modern legal doctrines. But the historical distance between that and the modern Westphalian state begs important questions: are pre-modern doctrines still good answers to more contemporary questions of governance?[33] Today's state, whether in the Muslim world or elsewhere, operates in a global context in which domestic law (constitutional and statutory) comes into contact with different forms of international law (whether customary or treaty-based), with transnational financial corporations and with migrant labour flows. All these require a co-ordination between domestic law, bi- and multi-lateral treaties, as well as international conventions and organisations, to name just a few. The presence of shari'a-based doctrines in the domestic legal arena complicates an already complicated, pluralist legal landscape.

In this context of considerable legal pluralism and a fear of incommensurability, it is tempting to opt for one legal tradition over another, or in other words, to opt for legal monism. That temptation is not merely an option of political convenience. Rather, as I have argued elsewhere, the tendency towards legal monism in a context of potential pluralism is inherent to legal systems, whether pre-modern or modern, Islamic or constitutional-democratic.[34] This tendency is evident in the current debate among legislators in the US about shari'a and international law; it is implicit in the concurring opinion in *Baker v Canada*; and it is certainly part of an Islamic legal tradition in which the presence of non-Muslims raised serious challenges about the degree to which an avowedly Islamic public sphere could accommodate the religious Other's traditions. As will be suggested in the next section, the *dhimmī* rules reveal the boundaries of a pre-modern Islamic rule of law system, and as such raise fundamental questions about the intelligibility of past Islamic legal doctrines.

[32] D Scott, *Conscripts of Modernity*.

[33] While this essay focuses on the state, that focus is not meant to discount those in the field of international relations who have called into question the predominance of the state as the locus of authority in the global arena. See for instance, A Slaughter, *A New World Order* (Princeton, NJ, 2005).

[34] Emon, *Religious Pluralism*, pp 145–64, 260–313.

The *dhimmī* rules and the boundaries of intelligibility

Historically, the *dhimmī* rules applied to the non-Muslim permanent resident in Islamic lands. Examples of *dhimmī* rules include:

1. Non-Muslims must pay a poll tax (*jizya*) in order to reside in Muslim lands while preserving their different faith commitments and traditions;[35]
2. Non-Muslims must wear distinctive clothing so as to differentiate them from Muslims;[36]
3. Non-Muslims cannot be witnesses in court.[37]

At first sight, these rules simply discriminated against non-Muslims. But such a surface analysis does not actually get at the underlying conditions that made these rules legally intelligible at one time. Viewing shari'a as rule of law brings to the forefront the conditions of pre-modern governance that made the *dhimmī* rules legally cognisable. Viewing these rules as past answers to past questions of law and governance allows us to work *through* the rules to ask whether or not they retain that same intelligibility in today's rule of law claim space. If they do not retain the same intelligibility, important questions are raised about how the boundaries of today's claim space have changed, and why.

Pre-modern assumptions of empire conditioned the intelligibility of the *dhimmī* rules. Empire as a mode of governance shaped the pre-modern rule of law claim space. As Karen Barkey has explained in regards to the Ottoman Empire:

> An empire is a large composite and differentiated polity linked to a central power by a variety of direct and indirect relations, where the center exercises political control through hierarchical and quasi-monopolistic relations over groups ethnically different from itself. These relations are, however, regularly subject to negotiations over the degree of autonomy of intermediaries in return for military and fiscal compliance.[38]

Empire connotes conquest and domination as new subjects are brought under the imperium of the ruling regime. Empire presumes both a centre and a periphery, which has implications for the nature of authority and its delegation outward from the centre. The appropriate balance between

[35] Ibid, pp 97–106. [36] Ibid, pp 131–6. [37] Ibid, pp 136–41.

[38] K Barkey, *Empire of Difference: the Ottomans in comparative perspective* (Cambridge, 2008), p 9.

centralisation and decentralisation of authority is reflected in legal doctrines concerning the empire's fiscal needs, and how best to pass those costs to different categories of taxpayers, such as *dhimmīs*.[39]

For example, the *jizya* was the poll tax that *dhimmīs* paid to reside within the Muslim polity while retaining their faith commitments. The *jizya* makes most sense in a context of imperial conquest. As Muslim armies expanded the frontiers of the Muslim empire, they came across local populations whose lands they sought to conquer. According to the rules of warfare in Islamic law, the Muslim army was to give these local populations three choices. The first was to convert to Islam, in which case they would become full members of the Muslim empire. The second was to decline conversion but pay a poll tax (that is, the *jizya*). These resident non-Muslims, namely the *dhimmīs*, were subject to the law and enjoyed its protections, but did not have the same scope of legal entitlements or responsibilities as their Muslim co-residents. In other words, their membership was partial, not full. The third option for the local populace was to fight the Muslim army and, if defeated, become subject both in their person and in their property to the rules of law governing the spoils of war.

The political implications of the *jizya* were twofold. First, in a context of conquest and imperial expansion, it was a legal device by which new peoples could come under the aegis of the empire, without the regime having to expend the finances and personnel in expensive military battle. Second, as a tax specifically on non-Muslims, the *jizya* distinguished *dhimmīs* from Muslims, the latter of whom enjoyed full membership in the Muslim enterprise of governance that the former could not.

The extent to which the *dhimmī* was both included and excluded by virtue of the law in an imperial enterprise of governance is reflected in other *dhimmī* rules. For instance, a significant issue for modern commentators (not to mention advocates of often controversial government programmes for religious freedom)[40] concerns whether or not *dhimmīs* can build or refurbish churches or synagogues in Muslim-ruled lands. A review of the debates on this issue illustrates that whether *dhimmīs* could build or repair places of worship depended upon both how their land

[39] For a more extensive analysis of how empire conditioned the intelligibility of the pre-modern *dhimmī* rules, see Emon, *Religious Pluralism*, ch 3.

[40] M Boorstein, 'Agency that monitors religious freedom abroad accused of bias', *Washington Post*, 17 February 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021605517.html (accessed 6 June 2014).

came under Muslim suzerainty and also how the taxation regime applied to the land they occupied.

For some jurists, what mattered most was how the *dhimmīs*' land came under Muslim suzerainty. If the land was conquered militarily, the *dhimmīs* could not build new religious sites of worship, and some disputed whether *dhimmīs* could refurbish old ones. Jurists such as Malik b Anas, al-Shafi'i and Ahmad b Hanbal required that religious buildings on such lands be destroyed. The Hanafis disagreed among themselves about what should happen to existing religious sites. Some Hanafis wanted the buildings converted to residential units. Others such as Badr al-Din al-'Ayni allowed *dhimmīs* to refurbish old religious sites, as long as they were not made bigger than they had originally been.[41]

If the land that *dhimmīs* occupied came under Muslim suzerainty by virtue of a peace treaty, then whether the *dhimmīs* could build new religious sites or refurbish old ones was dependent on the authority by which they occupied the land and their liability for property tax. Muslim jurists imagined three scenarios:

1. If the Muslim governing authorities assumed *both* authority over the land *and* responsibility for the land tax, the *dhimmīs* could keep their existing religious sites, but not build new ones;
2. If the Muslim governing enterprise only assumed authority over the land, but the *dhimmīs* were collectively liable for the land tax (that is, not individually but as a community with fixed tax liability), existing religious buildings could remain, and whether *dhimmīs* could build new ones depended on the terms of the treaty;
3. If the *dhimmīs* retained authority over the land and were also responsible for the land tax, they could keep old religious buildings and build new ones.[42]

These regulations in the aggregate reveal an assumed imperial political reality that helped to render these rules intelligible. Conquest, treaty and delegations of regional autonomy reveal the significance of empire and expansion for how pre-modern Muslim jurists imagined the *dhimmī* in the shari'a rule of law claim space. Tax law, in this case, gestures to the existence of an authority that makes a prior sovereign claim over what one possesses and occupies. In other words, detailed analysis of pre-modern tax law on the *dhimmīs* reveals the imperial conditions that gave intelligibility to the pre-modern legal debate about whether and to

[41] Emon, *Religious Pluralism*, p 120. [42] Ibid, p 121.

what extent *dhimmī*s could build and refurbish old religious sites on lands under Muslim suzerainty.

These brief examples reveal an approach to the *dhimmī* rules that goes beyond the letter of the law, and instead situates them in the imperial context that conditioned their intelligibility as claims of law. All too often, these rules are read out of context, whether in the original Arabic or in translation, as if their meaningfulness and intelligibility are self-evident to the modern reader. But the modern reader is him- or herself embedded in a context in which the prevailing enterprise of governance conditions the intelligibility of law on considerably different bases. To ignore the distance between the past and the present is to indulge a presentist reading of these rules that a reading of shari'a as rule of law is designed to correct.

Conclusion: rule of law defining the realm

As a corrective, shari'a analysed as rule of law raises important questions about the nature of law, its relationship to governance and the conditions that contribute to or deny a law's intelligibility, legitimacy and authority. Further, in the context of the *dhimmī* rules, it forces us to inquire less about what the *dhimmī* rules say and more about what questions of governance the *dhimmī* rules were meant to answer. Moreover, when read alongside clauses 10 and 11 of Magna Carta, the *dhimmī* rules reveal the way in which the boundaries that define and delimit the rule of law claim space are built by reference to minorities in ways that will work to the disadvantage of those minorities.

As a starting point, it would be reductively simplistic to suggest that clauses 10 and 11 of Magna Carta or the *dhimmī* rules in Islamic law were meant to answer whether the Angevin period or the Islamic tradition was tolerant or intolerant of the Other, whether of the Jews of England or the non-Muslims in Islamic lands. Rather, that would be an argument from the present that perpetuates an anachronism in the form of critique. Both sets of rules were legal doctrines designed to manage a certain diversity in a context of sovereign expansion, rule and governance amid competing class interests. Those classes advocated certain checks and balances on governance, in both cases at the cost of minorities. All of us unsurprisingly flinch at clauses 10 and 11 of Magna Carta, just as many, both inside and outside the Muslim majority world, flinch at the *dhimmī* rules.

The difference, though, is that in the Muslim majority world, we are finding in recent years that these pre-modern *dhimmī* rules are still invoked at times to justify certain governance outcomes. From a rule

of law analysis, invoking these pre-modern rules today poses real conflicts with other legal doctrines to which modern states subscribe and which, in the aggregate, constitute the modern state's rule of law claim space. Indeed, the modern state, whether in the Muslim majority world or elsewhere, participates in an international context in which customary international law, treaty law, human rights conventions and other multilateral, bilateral and regional endeavours constitute and delimit its rule of law claim space. In the case of Muslim majority countries that seek to apply Islamic law, the result is a radical legal pluralism in a unitary, centralising state. In other words, whereas in the pre-modern period the *dhimmī* rules were responses to questions about how to govern a demographically diverse, decentralised and imperial domain, in today's Muslim majority world, the *dhimmī* rules reflect a different question – namely, how to govern a modern state in a context of demographic diversity, a unified centralising state *and* legal pluralism.[43]

Reflecting on the *dhimmī* rules and clauses 10 and 11 of Magna Carta, in light of today's diversity and legal pluralism, one cannot help but consider the extent to which different and distinct legal traditions can recognise their Other(s), give space to their Other(s) and ultimately even yield their own legal sovereignty in favour of their Other(s). The contest of Islamic law and human rights is perhaps the best-known current contest over legal sovereignty. Yet arguably, it is a contest built upon the *polemics* of legal sovereignty, since so much of Islamic law is not actually implemented as formal law in modern Muslim majority states. Moreover, in a recently published collection on Islamic law and human rights, the quest for common ground between both normative traditions has been contested as potentially incoherent.[44] An examination of how human rights law and Islamic law both grant freedoms and legitimately restrict those freedoms reveals the way in which law – whether human rights law or Islamic law – reflects a series of competing interests that are often resolved on particular, highly pragmatic grounds.

Such pragmatism was evident in how the *dhimmī* rules and Magna Carta clauses 10 and 11 reflected the variegated demands of empire and fiscal management. But most notably, that pragmatism reveals how minorities were both subjects of and subjected to the law, and thus helped

[43] The significance of the modern state's tendency to centralise, in contrast to the imperial model, is well illustrated in the important study by J Scott, *Seeing Like a State*.

[44] A Emon, M Ellis and B Glahn (eds), *Islamic Law and International Human Rights Law: searching for common ground?* (Oxford, 2012).

to constitute the boundaries of the rule of law claim space, whether of Angevin Britain or the pre-modern Muslim world. The Jews of Magna Carta and the non-Muslims of the *dhimmī* rules are evidence of that. But so too are the Muslims and Jews in today's Europe in light of debates on animal slaughter and halal/kosher butchers.[45] So too are the Roma, who are often vulnerable to various state policies of expulsion justified by reference to the freedom of movement and the voluntary nature of the repatriation programme, though quite often premised on the well-being and security of the state.[46] It is particularly poignant for this chapter that, as Magna Carta and the *dhimmī* rules reveal, constituting the boundaries of a rule of law system can have adverse, and even violent, results on the very bodies and well-being of those who are generally least capable of protecting themselves.

[45] B Cohen, 'Jews and Muslims unite – over meat: a battle to protect the legality of kosher and halal slaughter in Poland', *Wall Street Journal*, 10 October 2013, available at http://online.wsj.com/news/articles/SB10001424127887324492604579083230826549654 (accessed 14 July 2014).

[46] M Stewart, 'Hollande administration continues discriminatory deportation of Roma in France', (2012) 27 *Georgetown Immigration Law Journal* 247–55; C Gunther, 'France's repatriation of Roma: violation of fundamental freedoms?', (2013) 45 *Cornell International Law Journal* 205–25.

12

Democracy and the power of religion

Some lessons from India

SUDIPTA KAVIRAJ

The ongoing importance of Magna Carta lies chiefly in two principles. The first, derived from clauses 39–40, is the equality of all citizens under and before the law. The second, derived from the Security Clause, is a democratically realised restraint upon the power of the executive. Those in the modern secular West with an interest in religion and law tend to have a personal investment in religion and so in the protection of religion by the legislature, executive and courts. Such advocates of religion find only doubtful comfort in those principles derived from the Charter. The cases involving exemptions, opt-outs and apparently special considerations for religious believers find the courts correcting a perceived imbalance that has historically obtained in favour of such believers. These are the very cases in which religious believers, already beleaguered, yet again feel victimised. Perspective is all.

In India, by contrast, two religions, which have coexisted for centuries, have vast numbers of adherents. The Indian census of 2001 counted 827 million Hindus, 138 million Muslims. Secularism is not the major force there that it is in the West. I will be concentrating on Hinduism and on two of its features in India which stand in uneasy relation to the principles derived from the Charter. The first is internal to Hinduism: the religion's lateral tolerance over against its vertical discrimination by caste. The second informs its political role: the readiness with which Hindu nationalist politics, empowered by large majorities, threatens the existence of social pluralism. In this chapter I reflect on the importance for India's democracy of the principles that came to early expression in the Charter, and on the dangers confronting those principles. Magna Carta was not a programme for modern democracy; its democratic credentials can clearly be overstated. But it laid the foundations upon which any sustainable democracy must be built.