Magna Carta and Hong (Magna) Fan (Carta): A Comparison of Their Nature and Institutions

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This Article examines Magna Carta and Hong-Fan, the Chinese Magna Carta, through the lens of modern constitutional jurisprudence. It compares the nature of the two constitutional documents and their institutions. Hong-Fan represents the Chinese ideal of virtue politics (De-Zhi) and is the Confucian guide to good governance. However, it espouses absolute monarchy, advising the monarch to exercise unlimited power morally, which is the antithesis of Magna Carta. Magna Carta’s contractual spirit between the ruler and the ruled, bound under law, is at odds with Hong-Fan. Hong-Fan predates Magna Carta, but Hong-Fan is

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no Magna Carta, whether by nature or institution.

Introduction

I. China’s Legislative System

Magna Carta is the ‘[m]other of the modern state’\(^3\) which made way for the ‘revolutionary break with earlier feudal tradition and established new rights and freedoms’.\(^4\) It was ratified by King John of England in 1215,\(^5\) reaffirmed by King Henry III in 1216, 1217 and 1225,\(^6\) and confirmed by King Edward I ‘as both common law and statute law’\(^7\) in 1297. And its legacy lies in its contractual spirit between the ruler and the ruled, ‘bound under law’.\(^8\)

Hong-Fan is similar to the Magna Carta, containing ‘the manifesto for good governance’ \(^9\) in ancient China, and

\(^{3}\) Thomas Fleiner and Lidiya R. Basta Fleiner, Constitutional Democracy in a Multicultural and Globalised World (Kate Le Roy tr, Springer 2009) 223.

\(^{4}\) ibid.

\(^{5}\) See generally Danny Danziger and John Gillingham, 1215: The Year of Magna Carta (Simon & Schuster 2004) 245-266.

\(^{6}\) See generally Toby Purser, Medieval England 1042-1228 (Heinemann 2004) 185-186.

\(^{7}\) Peter Linebaugh, The Magna Carta Manifesto: Liberties and Commons for All (University of California Press 2008) 272.

\(^{8}\) Frederick Betz, Social Dynamics: Understanding Social Knowledge and Wisdom (Springer 2012) 263.

\(^{9}\) Daniel P. Morgan, Astral Sciences in Early Imperial China: Observation, Sagehood and the Individual (Cambridge University
Magna Carta and Hong (Magna) Fan (Carta) persisted as the Confucian guide to good governance for thousands of years. It is believed to have been written down in 1046BCE, ‘when King Wu of Zhou defeated the Shang dynasty’, and its text is now part of the Book of Zhou, the Book of Documents (Shang-Shu). For the Chinese, Hong-Fan represents the Chinese ideal of virtue politics (De-Zhi).

Are Magna Carta and Hong-Fan comparable? If yes, to what extent are they comparable? Answering the two questions entails a look at their nature and institutions. The two documents are not comparable in terms of nature, because Magna Carta embodied the spirit of contract, so much so that the monarch was legally bound, but Hong-Fan was a good king manual, which counselled the monarch to exercise unlimited power morally. The former fostered limited monarchy, whilst the latter endorsed absolute monarchy. Also, Magna Carta provided an institution for law enforcement, but the only institution Hong-Fan ushered in was absolute monarchy (Huang-Ji), which pre-empted

Press 2017) 16.


11 Jiang Hao and Qian Wu-Zong (eds), Shang Shu [The Book of Documents] (Earth Publishers 1994) (772-476BCE) 281 (Authors’ translation).

12 See generally Li (n 8) 5-9.

13 Compare Magna Carta pmbl. (1215), with Magna Carta § 61 (1215).

14 Jiang and Qian (n 9) 281-298.

15 Magna Carta § 61 (1215).
rebellion\textsuperscript{16} by either stripping the people of the power to rebel (power centralisation) or giving them no motive to rebel (good governance).

\textbf{II. Theoretical Insights: Magna Carta}

On 15 June 1215, King John of England was forced to ratify the ‘Articles of the Barons’, i.e. \textit{Magna Carta}, at Runnymede,\textsuperscript{17} ‘limiting the power of kings to infringe on rights’\textsuperscript{18} by laws\textsuperscript{19} henceforward. Though King John, supported by Pope Innocent III,\textsuperscript{20} quickly defied \textit{Magna Carta} (1215), which led to the First Barons’ War,\textsuperscript{21} \textit{Magna Carta} was still reaffirmed, but largely modified, in 1216, 1217 and 1225.\textsuperscript{22} Since then, ‘Englishmen had demanded that their king respect their rights’,\textsuperscript{23} and ‘[o]ver the years these rights became embodied in such parliamentary enactments such as the English Bill of Rights (1689), such treatises as Sir Edward Coke’s \textit{Institutes of the Laws of England} (1628-1644), and such common law judicial

\begin{thebibliography}{99}
\bibitem{16} Jiang and Qian (n 9) 288-289.
\bibitem{17} \textit{See generally} Danziger and Gillingham (n 3) 245-266.
\bibitem{19} Betz (n 6) 263.
\bibitem{20} \textit{See generally} Bernard H. Siegan, \textit{Property Rights: From Magna Carta to the Fourteenth Amendment} (Transaction Publishers 2001) 9-10 (indicating that Pope Innocent III called \textit{Magna Carta} a ‘shame for England’ and therefore ‘forbade King John to obey or the nobles to enforce its terms’).
\bibitem{21} Hunt Janin and Ursula Carlson, \textit{Mercenaries in Medieval and Renaissance Europe} (McFarland & Company 2013) 88.
\bibitem{22} \textit{See generally} Purser (n 4) 185-186.
\end{thebibliography}
decisions as *Wilkes v. Wood* (1763)’.24

According to Frederick Betz, *Magna Carta* is the ‘British political tradition between a King and a Parliament, bound under law’,25 and it was later developed by John Locke and Jean-Jacques Rousseau into the notion of social contract.26 However, the political ground for social contract is, in Rousseau’s words, legitimate equality, which presumes that ‘all become equal by convention and by right’,27 i.e. ‘equality under the law’.28 *Magna Carta* marked the political equality between the King and his subjects under law, in the form of contract.29 This point is critical because political equality between the ruler and the ruled is a barrier China30 has yet to overcome, and Chinese philosophy offers no solution,31 which makes the historical achievement of both *Magna Carta* and the spirit of political equality in the form of contract therein all the more remarkable. Jean Hampton said that ‘[i]t is the contractarian methodology itself, which says that government is created by people for a reason, that is putting overwhelming pressure on a theorist to say that a ruler is merely “hired” (not

24 ibid.

25 Betz (n 6) 263.

26 ibid.


28 Ibid.


30 Unless ‘China’ refers to the Republic of China, i.e. Taiwan.

made a permanent master) for this reason’.32

The notion embodied in Magna Carta and the notion that grew out of it warrant a closer look. For example, though social contract33 is not a notion embodied in Magna Carta, it could be developed only34 under the theoretical basis of Magna Carta.35 If there had been no Magna Carta contracting the relationship between King John (and his heirs) and the English faithful subjects (aliorum fidelium nostrorum),36 there would have been no notion of equality,37 and by extension no notion of social contract, asserting that ‘a ruler is merely “hired”’.38 No concept of good governance rooted in an unequal political system can create any right.39 When there is no contract between the ruler and the ruled, the ruler’s promise is no more than mercy

34 For example, the German concept of special power relationship is incompatible with Magna Carta – when the relationship between a king and his subjects is contractual, it is illogical to assert that the relationship between a state and its public functionaries is not contractual. Moreover, it is illogical to establish an administrative court dealing with issues regarding state power. Very likely for this reason, neither Great Britain nor the United States has established administrative courts.
35 See Betz (n 6) 263.
36 Magna Carta § 61 (1215).
37 See Williams (n 25) 62.
38 Hampton (n 30) 263.
demonstrated by him or her.\textsuperscript{40}

This characterisation of the ruler’s promise can be observed not only in China but also in pre-\textit{Magna Carta} England. In 1100CE, Henry I of England issued the Coronation Charter, which ‘was based on the spoken coronation oaths of Henry and his royal predecessors’.\textsuperscript{41} However, ‘[o]nce King Henry got settled in his monarchy, he largely ignored the promises he made in his charter. Perhaps this was not surprising’.\textsuperscript{42} This historical volte-face indicates a truth, that whatever Henry I of England had promised in the Coronation Charter (1100) would be honoured only if he was bound to deliver on his word.\textsuperscript{43} There is a saying in Chinese encapsulating this reversal of attitude: ‘People change their mind after they change their status’ (\textit{Huan-Wei-Zhi-Huan-Nao-Dai}).\textsuperscript{44} The reason \textit{Magna Carta} is a towering milestone in human history is clear: It legally bound the Kings and Queens, as Sir Edward Coke described:

\begin{quote}
\textit{Magna Carta} is called […] the Charter of Liberty because it maketh freemen. When the King says
\end{quote}

\textsuperscript{40} \textit{cf} \textit{De Freitas v. Benny} [1976] AC 239 (Lord Diplock holding in the Privy Council that ‘[m]ercy is not the subject of legal rights. It begins where legal rights end’).


\textsuperscript{42} Debbie Levy, \textit{The Signing of the Magna Carta} (Twenty-First Century Books 2008) 43.

\textsuperscript{43} \textit{Cf}. Betz (n 6) 263.

\textsuperscript{44} \textit{See generally} Ding Ling-Juan, ‘Huan Wei Zhi Dang Ran Yao Huan Nao Dai [It is Natural to Change Mind When the Status Is Changed]’ (\textit{Zhi Shi Jia} [Knowledger], 13 October 2016) < https://www.knowledger.info/2016/10/13/change-position-change-thinking/> accessed 30 August 2020.
he cannot allow our liberties of right, this strikes at the root. We serve here for thousands and tens of thousands.45 – Sir Edward Coke (1621)

III. Theoretical Insights: Hong-Fan

Hong-Fan (1046BCE) was a constitutional document of ancient China 46 and is ‘the manifesto for good governance’ 47 of Confucianism. Literally Hong means ‘Magna’ and Fan means ‘Carta’. Calling it the Chinese *Magna Carta* is convenient shorthand, even though in terms of nature it is more like the Chinese Coronation Charter.48 It is embodied in the Zhou Book of the *Book of Documents*, and its Preamble read:

Hong-Fan was recorded as a result of the return of Jizi, when King Wu of Zhou defeated the Shang dynasty, causing the death of King Zhòu of Shang but granting a peerage to [King Zhòu’s son], Wu-Geng.49 – The Book of Documents (772-476BCE)

At the core of Hong-Fan is the mandate of heaven,50 the Chinese equivalent of Dieu et mon droit,51 presuming that

46 See Li (n 8) 1-55.
47 Morgan (n7) 16.
48 Compare Jiang and Qian (n 9) 281-298, with *Magna Carta* (1215), and Coronation Charter (1100).
49 Jiang and Qian (n 9) 281 (Authors’ translation).
50 Li (n 8) 10-13.
51 See generally William T. Brande, *A Dictionary of Science, Literature, and Art: Comprising the History, Description, and Scientific Principles of Every Branch of Human Knowledge; with the*
‘rulers are empowered by Heaven’,\(^{52}\) which is undemocratic. However, Hong-Fan contains a ‘security clause’:\(^{53}\) ‘If Heaven is disgusted by immoral behavior … it will transfer the authority to rule to another man’.\(^{54}\) For example, the Preamble to Hong-Fan describes a regime change\(^{55}\) in which ‘King Wu of Zhou defeated the Shang dynasty’, \(^{56}\) and according to Hong-Fan, this change proved the transfer of the mandate of heaven from Shang to Zhou.\(^{57}\) Nevertheless, the rationality of this ‘security clause’ is rather questionable. When ‘the transfer of the mandate of heaven can be proved only by a successful rebellion or revolution’,\(^{58}\) it is merely the victor’s post-factum justification.\(^{59}\)

Hong-Fan and Magna Carta both attempted to stave off tyranny with a ‘security clause’.\(^{60}\) The difference is that Magna Carta stipulated good governance clauses that King John of England had promised his subjects\(^{61}\) in the form of contract,\(^{62}\) whilst Hong-Fan’s good governance clauses were described by Jizi as a safeguard against a transfer of the mandate of

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\(^{53}\) Compare Jiang and Qian (n 9) 282, with Magna Carta § 61 (1215).

\(^{54}\) Major and Cook (n 50) 121.

\(^{55}\) Jiang and Qian (n 9) 281.

\(^{56}\) ibid (Authors’ translation).

\(^{57}\) ibid 282.

\(^{58}\) Huang and Li (n 29) 335.

\(^{59}\) See ibid 334-336.

\(^{60}\) Compare Jiang and Qian (n 9) 282, with Magna Carta § 61 (1215).

\(^{61}\) E.g., Magna Carta § 39 (1215) (stipulating the habeas corpus).

\(^{62}\) Rutherfurd (n 27) 375.
The fear of dethronement, often a reality in a transfer of the mandate of heaven, is leveraged in Hong-Fan to deter rulers from acting immorally. As heaven could not express anything, whether the mandate of heaven was transferred was determined by the victor, and no victor would likely say ‘You don’t know the power of the dark side’, be the victor Chinese or otherwise. Sir John Harrington (1615) stated that ‘[t]reason doth never prosper, what’s the reason? For if it prosper, none dare call it treason’. When the mandate of heaven could be transferred, no institution restraining the royalty was established, because the simplest way would be regicide in the name of the transfer, and the leader of the rebellion would be entitled to be crowned and ‘none [would] dare call it treason’. As a matter of fact, regicide to enable a power transfer was a millennia-old Chinese political convention, and it was played out in the true story of ‘King Wu of Zhou defeated the Shang dynasty’. Perhaps, if Dieu et mon droit could be transferred in England, Oliver Cromwell might not be satisfied with the position

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63 See generally Jiang and Qian (n 9) 281-298.
64 E.g., ibid 288 (‘[prohibiting] the common people from association, so much so that they must comply with the imperial constitution [because] they cannot assemble’).
65 See Huang and Li (n 29) 334-336.
68 ibid.
69 Jiang and Qian (n 9) 281 (Authors’ translation).
70 See generally Clive Holmes, Why Was Charles I Executed? (Hambledon Continuum 2006) 147-174 (indicating why Oliver Cromwell refused to be crowned, though he was de facto a
'Lord Protector' either. In other words, the transfer of the mandate of heaven was often invoked along with successful rebellions or revolutions in China, so much so that it could be called the ‘none dare call it treason’ principle.

This ‘none dare call it treason’ principle implies that it would be in the best interest of the monarch if he ‘[had] a monopoly of wealth and power’, i.e. wealth and power centralisation, to the extent of absolute monarchy, i.e. Huang-Ji. In other words, Hong-Fan suggested that the monarch would be safe when no one had power to rebel, and good governance would eliminate any motive to rebel. Both wealth and power centralisation and good governance served the royalty and would definitely be compromised to serve the needs of the monarch. The political purpose determines the measures, and when the purpose is to secure the royalty, will a measure of good governance be chosen if it prejudices the interests of the monarch? And when the consolidation of royalty is the

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71 Loewen (n 65) 319.
72 ibid.
73 Jiang and Qian (n 9) 288 (Authors’ translation).
74 ibid 288-289.
75 ibid.
76 ibid.
77 For example, when the monarch needs to levy war against his enemy, will he not levy taxes upon his subjects first when his royalty is unlimited? History indicates that it occurs without end.
78 cf Witold Kula, Measures and Men (R. Szreter tr, Princeton University Press 1986) 18 (asserting that ‘[t]he right to determine measures is an attribute of authority in all advanced societies. It is a prerogative of the ruler to make measures mandatory and to retain the custody of the standards’).
final purpose, it should not be surprising that good governance and tyranny co-subsist if the monarch demands both. This theoretical paradox of Chinese political philosophy originated in Hong-Fan, and it is meaningless to compare Chinese good governance with the English ideal without comparing the theoretical bases of both.

The Chinese mandate of heaven, presuming that ‘rulers are empowered by Heaven’, implied a shamanistic hypothesis that all kings were sages unless and until they were overthrown. And these ‘sage kings’, according to Hong-Fan, demanded an absolute monarchy (Huang-Ji). Under such a framework and mechanism, how could China have good governance?

IV. Methodology

This Article examines Magna Carta and Hong-Fan through the prism of modern constitutional jurisprudence. As they were created in 1215CE and 1046BCE respectively, most of the rules and regulations are antiquated and are bypassed in this study. The focus is instead on the differences in the nature of the two constitutional documents and their institutions. Though the text of Magna Carta and Hong-Fan is left unexamined, its research value is undeniable.

79 Major and Cook (n 50) 121.
80 See generally Nigel N.T. Li, Ren Guo Zhi Li: Xian Fa Bian Qian De Kua Yue [The Classical Chinese ‘Li (Charter)’ of the Land and the People: The Transition of China’s Constitutionalism] (San Min Books 2012) 117-128.
81 Jiang and Qian (n 9) 288-289.
82 E.g., Magna Carta § 39 (1215) (stipulating the habeas corpus).
V. The Nature of the Two Magna Cartae

Hark, a mighty nation maketh glad reply;
Lo, our lips are thankful, lo, our hearts are high!
Hearts in hope uplifted, loyal lips that sing;
Strong in faith and freedom, we have crowned our
King! \(^{83}\) – Arthur C. Benson (1902)

More than a decade ago, one of our co-authors decided to
study constitutional law\(^ {84}\) in the United Kingdom instead of
the United States because of this song – Edward Elgar’s
Coronation Ode, \(^ {85}\) Op.44. He was not interested in ‘Land of
hope and glory’, \(^ {86}\) but was touched when the British people
chant ‘Strong in faith and freedom, we have crowned our
King’, \(^ {87}\) because there had never been a King (or Emperor) of
China who was crowned by the Chinese people having ‘faith
and freedom’. \(^ {88}\) Moreover, no kingmaker in China would bind
the sovereigns by law because almost all of them ultimately
crowned themselves, \(^ {89}\) so constitutional law was a completely

\(^{83}\) Victor Shea and William Whitla (eds), Victorian Literature: An
Anthology (John Wiley & Sons 2015) 164.

\(^{84}\) See Anthony King, Does the United Kingdom Still Have a
Constitution? (Sweet & Maxwell 2001) 3 (indicating the British
model of constitution that ‘Constitution … are never – to repeat,
never – written down. They might possibly in principle be
written down, but in practice they never are’).

\(^{85}\) See generally Shea and Whitla (n 81) 163-165.

\(^{86}\) ibid 163.

\(^{87}\) ibid 164.

\(^{88}\) ibid.

\(^{89}\) Though not all the kingmakers in China crowned themselves,
it is true that most of them eventually did – regicide was a
common phenomenon. Prime Ministers Yi Yin and Ji Dan (Duke
Wen of Zhou) were the rare exceptions, but even their
irrelevant concept when a kingmaker – either a Prime Minister or a Lord Protector – imposed a regime change. When a kingmaker was powerful enough to crown himself, why would he curb his power by a constitutional law?

In the Chinese Barons’ War,\textsuperscript{90} 1046BCE, the disaffected feudal lords led by Marquis\textsuperscript{91} Fa of Zhou, who later became King Wu of Zhou,\textsuperscript{92} defeated King Zhòu of Shang in the Battle of Muye.\textsuperscript{93} According to the \textit{Records of the Grand Historian}, Marquis Fa crowned himself by claiming that he was ordained by heaven,\textsuperscript{94} though David KC Huang and Nigel NT Li argue that it was nothing more than a victor’s justification for rebellion.\textsuperscript{95} The \textit{Records of the Grand Historian} recorded:

[Lord Historian] Yin Yi read out the [victorious] prayer: ‘Zhòu, the last King of Shang, tarnished the great virtue of the former Kings, committed

\textsuperscript{91} Shen Yue, \textit{Zhu Shu Ji Nian Ji Jie} [Interpretation: The Bamboo Annals] (Kuang-I Books 1936) (441-531CE) 70.
\textsuperscript{93} See generally Li (n 88) 293-294.
\textsuperscript{94} See generally Sima (n 90) 82-92.
\textsuperscript{95} See Huang and Li (n 29) 334-336.
sacrilege against the gods by offering no sacrifice, bullied the common people of the Shang, and [now] the gods have heard his misdeeds’. As a result, King Wu [of Zhou] saluted and said: ‘[I am] burdened with the mandate of heaven, [and accordingly I] overthrew the Shang because [I] accepted the mandate of heaven’.

The Records of the Grand Historian (145-86BCE)

According to the Bamboo Annals, Zhou was originally a feudal manor in the Kingdom of Shang, and when Chang was the Marquis of Zhou, he served as a Privy Counsellor (San-Gong). The relationship between Marquis Fa, son of Chang, and King Zhòu of Shang parallels that between Baron Robert Fitz-Walter and King John of England. However, the two rebellions ended quite differently; John’s heir, Henry III, was forced to reaffirm Magna Carta as King of England in 1216, 1217 and 1225, but Zhòu was successfully overthrown in 1046BCE, and Hong-Fan was submitted to King Wu of Zhou, i.e. the leader of the feudal rebellion against King Zhòu of Shang, and served as a good king manual. Robert Fitz-Walter was still the Baron of Dunmow after the First

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96 Sima (n 90) 88-89 (Authors’ translation).
97 Shen (n 89) 67.
98 Sima (n 90) 70.
99 See generally Shen (n 89) 70-78.
100 See generally Richard Thomson, An Historical Essay on the Magna Carta of King John (John Major 1829) 504-511.
101 See generally Graham E. Seel, King John: An Underrated King (Anthem Press 2012) 133-156.
102 See generally Purser (n 4) 185-186.
103 Jiang and Qian (n 9) 281.
104 Huang and Li (n 29) 354-355.
Barons’ War, but Marquis Fa became King Wu of Zhou after the Battle of Muye.

The mandate of heaven is fundamentally to justify the pursuit of a regime change that required deposition of the king, and the establishment of a new regime signals a new dictatorship because it is now the victor’s time to enjoy the mandate of heaven. Even if King Wu of Zhou were a wise king, there was nothing to compel him to legitimise Hong-Fan after he won the war. He would rather consider it a good king manual (De-Zhi) than legitimise it as a constitutional law (Fa-Zhi).

The Records of the Grand Historian recorded:

[King Wu of Zhou] asked Jizi about the destruction of the Shang. Jizi did not want to

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105 See generally Gillespie (n 88) 125-126.
106 See generally Li (n 88) 293-294.
107 See Huang and Li (n 29) 334-336.
108 cf Sima (n 90) 71.
109 This is a very simple logic: When a king believes in virtue politics (De-Zhi), no place will be given to the rule of law (Fa-Zhi) because it is unnecessary. When a person says that he will comply with morality, it means law is redundant from his perspective. Hence, if King Wu of Zhou was a moral king, it implies he would not consider Hong-Fan as law, but as morality. Cf. Stephen C. Angle, Contemporary Confucian Political Philosophy: Toward Progressive Confucianism (Polity Press 2012) 58-73.
110 The fundamental hypothesis of modern constitutional jurisprudence, according to James Madison, is that ‘all individuals are egoists who wish to maximize their power’. From this perspective, why would King Wu of Zhou restrict his royalty voluntarily? Patrick Dunleavy and Brendan O’Leary, Theories of the State: The Politics of Liberal Democracy (Macmillan Press 1987) 14.
discuss whether Shang was tyrannical. [Hence, he] switched the subject matter to the rise and fall of a regime. King Wu [of Zhou] seemed embarrassed [by this subject, so he changed the topic again and] asked about the natural law regarding the ruler and the ruled.\textsuperscript{111} – The Records of the Grand Historian (145-86BCE)

Even if we have no doubt that King Wu of Zhou ‘asked about the natural law regarding the ruler and the ruled’\textsuperscript{112} because he wanted to be a good king, Hong-Fan, presented by Jizi to this tyrannicidal political leader, i.e. King Wu of Zhou,\textsuperscript{113} was not a legally binding instrument\textsuperscript{114} but only a morally persuasive text.\textsuperscript{115} The true nature of Hong-Fan emerges when placed next to \textit{Magna Carta} (1215). The Preamble to the \textit{Magna Carta} declared:

\begin{quote}
Johannes Dei gratia rex Anglie […] archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciariis, forestariis, vicecomitibus, prepositis, ministris et omnibus ballivis et fidelibus suis salutem. Sciatis nos intuitu Dei et pro salute anime
\end{quote}

\textsuperscript{111} Sima (n 90) 92 (Authors’ translation).
\textsuperscript{112} ibid (Authors’ translation).
\textsuperscript{113} Jiang and Qian (n 9) 281.
\textsuperscript{114} Cf. Hans Kelsen, \textit{Collective Security under International Law} (U.S. Naval War College 1957) 101 (holding that ‘[i]t is the essence of a legal order that it tries to bring about lawful and to prevent unlawful behavior by coercive measures – that is, by the forcible deprivation of life, freedom, property or other values as a reaction against a violation of the order’).
nostenet omnium antecessorum et heredum nostrorum, ad honorem Dei et exaltationem sancte Ecclesie, et emendationem regi nostri, per consilium venerabilium patrum nostrorum […] et aliorum fidelium nostrorum.\textsuperscript{116} – The Preamble to Magna Carta (1215)

(John, by the grace of God King of England [...] sends greetings to the archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, reeves, ministers and all his bailiffs and faithful subjects. You should know that, at the prompting of God and for the salvation of our soul and the souls of all our ancestors and heirs, for the honour of God and for the exaltation of holy Church and the repair of our realm, through the counsel of our venerable fathers […] and others of our faithful subjects.\textsuperscript{117})

A lawyer would see Magna Carta for what it is, a contract.\textsuperscript{118} Its Preamble named all the parties involved – King John (\textit{Johannes Dei gratia rex Anglie}) and all the signatories plus ‘others of our faithful subjects’\textsuperscript{119} (\textit{aliorum fidelium nostrorum}). Parties to a contract are legally bound by a contract.\textsuperscript{120} But Hong-Fan was

\begin{footnotes}
\textsuperscript{116} Magna Carta pmbl. (1215).
\textsuperscript{117} Nicholas Vincent, \textit{Magna Carta: A Very Short Introduction} (Oxford University Press 2012) 111.
\textsuperscript{118} Rutherfurd (n 27) 375.
\textsuperscript{119} Vincent (n 115) 111.
\textsuperscript{120} Jill Poole, \textit{Textbook on Contract Law} (12th edn, Oxford University Press 2014) 25 (indicating that ‘[a] contract is a legally binding agreement’).
\end{footnotes}
in no way a contract;\textsuperscript{121} the common people were not one of the contracting parties if it were interpreted as a contract, because the parties were more likely to be the King and heaven,\textsuperscript{122} and the common people were the beneficiaries at most.\textsuperscript{123} The first paragraph of Hong-Fan read:

King Wu [of Zhou] visited Jizi. The King said: ‘Oh, Jizi, [it is said that] the heaven blesses the common people, helping them to live peacefully. [But] I, [as their King who is burdened with the mandate of heaven,] do not really know the proper rules and methods of governance. [Could you enlighten me?]’\textsuperscript{124} – The Book of Documents (772-476BCE)

The first paragraph of Hong-Fan determined the nature of the document. It was not a contract demanding the King’s adherence; rather, it was only a good king manual dictated by Jizi\textsuperscript{125} at the request of King Wu of Zhou.\textsuperscript{126} In other words, it was a royal textbook and so was not legally binding by nature,\textsuperscript{127} regardless of whatever rules or methods within that purportedly produced good governance.\textsuperscript{128} No king would be legally bound by a textbook, so Hong-Fan failed to establish a

\textsuperscript{121} Apart from a ‘metaphysical’ agreement between the King and heaven, no concrete agreement can be found in Hong-Fan, and there is no intention to create legal relations either. \textit{See generally} ibid 25-190.

\textsuperscript{122} \textit{See generally} Jiang and Qian (n 9) 281-298.

\textsuperscript{123} cf ibid 282.

\textsuperscript{124} ibid (Authors’ translation).

\textsuperscript{125} ibid 281-298.

\textsuperscript{126} ibid 282.

\textsuperscript{127} Li (n 8) 41-46.

\textsuperscript{128} \textit{See generally} Jiang and Qian (n 9) 281-298.
constitutional framework as *Magna Carta* (1215) did. Hong-Fan never reined in the royalty *legally*; it only suggested a king should wield unlimited power *morally*.

**VI. The Institutions of the Two Magna Cartae**

May he defend our laws,
And ever give us cause,
To sing with heart and voice,
God save the King!\(^\text{129}\) – National Anthem of the United Kingdom (1745)

The aforecited lyrics of the National Anthem of the United Kingdom imply a condition, that the British people will not ‘sing with heart and voice’\(^\text{130}\) unless their King defends *their* law (rather than the *King’s* law).\(^\text{131}\) Hence, ‘God save the King’\(^\text{132}\) is conditional in Great Britain, and British law is the *British people’s* law, implying that it is no longer the *King’s* law, i.e. parliamentary sovereignty.\(^\text{133}\) Moreover, the King’s prerogatives are not only inferior to the law\(^\text{134}\) but also subject to Parliament for abolishment or modification.\(^\text{135}\) However, all


\(^{130}\) ibid.

\(^{131}\) cf ibid.

\(^{132}\) ibid.


\(^{134}\) E.g., *Case of Proclamations* [1610] EWHC KB J22; *Attorney-General v. De Keyser’s Royal Hotel Ltd* [1920] UKHL 1; *Laker Airways Ltd v. Department of Trade* [1977] 2 All ER 182.

\(^{135}\) E.g., *Bill of Rights* (1689).
these British institutions originated in *Magna Carta* (1215), which unequivocally restrained the royalty through a supervisory mechanism comprising twenty-five barons.  

*Magna Carta* stipulated:

\[
\text{Facimus et concedimus eis securitatem subscriptam; videlicet quod barones eli}
\text{gent viginti quinque barones de regno quos voluerint, qui debeant pro totis viribus sui}
\text{suis observare, tenere, et facere observari, pacem et libertates quas eis concessimus, et}
\text{hac presenti carta nostra confirmavimus […]}^{137} \text{ – Article 61 of Magna Carta (1215)}
\]

\[
(W)e \text{ give and grant them the following security, namely that the barons will choose any twenty-five barons of the realm they wish, who with all their might ought to observe, maintain and cause to be observed the peace and liberties that we have granted and confirmed to them by this our present charter […]}^{138}
\]

In contrast to China’s traditional concept of law,\(^{139}\) British law is the *British people*’s law instead of the *King*’s law, so royal prerogative\(^{140}\) in Great Britain is a concept entirely different

\(^{136}\) *Magna Carta* § 61 (1215).
\(^{137}\) ibid.
\(^{138}\) Vincent (n 115) 122.
\(^{139}\) *See* Huang Yuan-Sheng, *Zhong Guo Fa Shi Dao Lun* [The Introduction of the Legal History of China] (Angle Press 2012) 69 (stating that the Chinese legal system gave preference to the continuance of royalty).
\(^{140}\) *See generally* Andrew Le Sueur, Maurice Sunkin and Jo Eric
from that of parliamentary legislation. And most British jurists would agree that all of these institutions are derived from *Magna Carta*, under which the monarch is subject to an Act of Parliament. In China, the monarch was absolutely beyond the reach of the law, and the highest socio-political class subject to the law, at the maximum level of enforcement at law, was the prince. Hence, Article 61 of *Magna Carta* (1215), in which an institution for law enforcement was established against King John of England and his heirs, would have confounded the ancient Chinese. How the ancient Chinese looked upon their King can be glimpsed in Hong-Fan:

Imperial constitution: The King shall determine the imperial constitution, having a monopoly of wealth and power in order to award the common people extensively. The common people would uphold your constitution therefor. [My advice on] the continuance of your royalty is to prohibit the common people from association, so that they must comply with the imperial constitution


141 See generally ibid 427-460.
143 cf ibid 73 (indicating that *Magna Carta* ‘was an initial and powerful example of subjects forcing a king to subject himself to freshly defined laws’, though it was not really an Act of Parliament in retrospect).
145 *Magna Carta* § 61 (1215).
[because] they cannot assemble.\textsuperscript{146} – The Book of Documents (772-476BCE)

Some Chinese academics are perplexed by Hong-Fan’s teachings of good governance,\textsuperscript{147} arguing that China in fact has its own approach.\textsuperscript{148} Even if we choose not to challenge this argument, Hong-Fan should not be compared with \textit{Magna Carta} (1215) in terms of institution, as the former embraced absolute monarchy\textsuperscript{149} whilst the latter espoused limited monarchy.\textsuperscript{150} Hong-Fan reveals the Chinese fundamental logic of good governance, that it was based upon a hypothesis that all kings were sages and they were mandated by heaven to be kings.\textsuperscript{151} Hence, the Chinese institution was to centralise power in the King, a presumed sage,\textsuperscript{152} because a sage would be kind to everybody.\textsuperscript{153} But what if he was not? Thomas Meadows had an answer:

\textsuperscript{146} Jiang and Qian (n 9) 288 (Authors’ translation).
\textsuperscript{147} ibid 281-298.
\textsuperscript{149} Jiang and Qian (n 9) 288-289.
\textsuperscript{150} \textit{Magna Carta} § 61 (1215).
\textsuperscript{151} \textit{See generally} Li (n 78) 117-128.
\textsuperscript{152} Plato’s philosopher king is analogous to China’s sage king, but the Chinese analogue is even more extreme because a king ascended due to his royal blood (\textit{jus sanjuinis}) instead of his virtue. Hence, he was a ‘presumed sage’ unless and until he proved himself qualified. \textit{Compare} N. Jayapalan, \textit{Plato} (Atlantic Publishers 1999) 21, \textit{with} Li (n 78) 23-31.
\textsuperscript{153} \textit{See} Li (n 8) 31-35.
The Chinese people have no right of legislation, they have no right of self-taxation, they have not the power of voting out their rulers or of limiting or stopping supplies. They have therefore the right of rebellion. Rebellion is in China the old, often exercised, legitimate, and constitutional means of stopping arbitrary and vicious legislation and administration. ¹⁵⁴ – Thomas Meadows (1856)

Unlike Hong-Fan, Magna Carta was a contract. ¹⁵⁵ Hence, whether King John of England and his heirs were sages was irrelevant; ¹⁵⁶ preventing the English monarch from breaking promises was imperative (estoppel). ¹⁵⁷ For this reason, Article 61 of Magna Carta (1215) not only established an institution for law enforcement but also stipulated the punishment:

Et si nos excessum non emendaverimus, vel, si fuerimus extra regnum, justiciarius noster non emendaverit infra tempus quadraginta dierum computandum a tempore quo monstratum fuerit nobis vel justiciario nostro si extra regnum

¹⁵⁵ Rutherfurd (n 27) 375.
¹⁵⁷ Magna Carta § 61 (1215).
fuerimus, predicti quatuor barones referant causam illam ad residuos de illis viginti quinque baronibus, et illi viginti quinque barones cum communia tocius terre dstringent et gravabunt nos modis omnibus quibus poterunt, scilicet per capcionem castrorum, terrarum, possessionum, et aliis modis quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et regine nostre et liberorum nostrorum; et cum fuerit emendatum intendent nobis sicut prius fecerunt.\textsuperscript{158} – Article 61 of the Magna Carta (1215)

(And if we, or our justiciar, should we be out of the realm, do not redress the offence within forty days from the time when it was brought to the notice of us or our justiciar, should we be out of the realm, then the aforesaid four barons will refer the case to the rest of the twenty-five barons, and those twenty-five barons with the commune of all the land will distrain and distress us in every way they can, namely by seizing castles, lands and possessions, and in such other ways as they can, saving our person and those of our queen and of our children, until, in their judgement, amends have been made, and when it has been redressed, they are to obey us as they did before.\textsuperscript{159})

Clearly, when there is a contract between the monarch and the common people, there will be an institution for law

\textsuperscript{158} ibid.

\textsuperscript{159} Vincent (n 115) 123.
enforcement; \textsuperscript{160} the name given to this institution in contemporary times is ‘constitution’.\textsuperscript{161} And when there is a political theory on the art of being a king, there will be an institution to safeguard kingship, and benevolent governance is only one of the means to the end.\textsuperscript{162} In that world, the common people have no right\textsuperscript{163} but the king’s mercy\textsuperscript{164} at most. Sir William Blackstone talked about an ‘invariable principle’\textsuperscript{165} more than two hundred and fifty years ago, and Chief Justice John Marshall echoed it in \textit{Marbury v. Madison:}\textsuperscript{166}

For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.\textsuperscript{167} – Sir William Blackstone (1768)

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.\textsuperscript{168} – Chief Justice John Marshall (1803)

Sir William Blackstone’s (and Chief Justice John Marshall’s)

\textsuperscript{160} \textit{E.g., Magna Carta} § 61 (1215).
\textsuperscript{161} \textit{See generally} King (n 82) 1-101.
\textsuperscript{162} \textit{E.g.}, Jiang and Qian (n 9) 281-298.
\textsuperscript{163} Blackstone (n 37) 109.
\textsuperscript{164} cf \textit{De Freitas v. Benny} [1976] AC 239 (Lord Diplock holding in the Privy Council that ‘[m]ercy is not the subject of legal rights. It begins where legal rights end’).
\textsuperscript{165} Blackstone (n 37) 109.
\textsuperscript{166} \textit{Marbury v. Madison}, 5 U.S. 137 (1803).
\textsuperscript{167} Blackstone (n 37) 109.
\textsuperscript{168} \textit{Marbury v. Madison}, 5 U.S. 137 (1803).
thinking is in sharp contrast with the Chinese theoretical paradox. The Chinese legal system has been characterised as an instrument which ‘[preserved] the … hierarchy of relationships, the social order’,\textsuperscript{169} and Hong-Fan revealed the true motive of social order preservation – to preserve the King’s peace in order to secure the kingship.\textsuperscript{170} Hence, Hong-Fan promoted the absolute primacy of the monarch,\textsuperscript{171} and counselled supplication for the King’s mercy\textsuperscript{172} rather than exercise of rights against the King.\textsuperscript{173} And it went only as far as warning against tyranny, falling short of prohibition.\textsuperscript{174} As a result, China had no institution to militate against tyranny, because the Chinese people, from the perspective of Blackstone and Marshall,\textsuperscript{175} suffered a paucity of rights. For this reason, ‘[t]hey have therefore the right of rebellion’,\textsuperscript{176} ‘which is the worst democratic “procedure” we have ever known’.\textsuperscript{177} How \textit{Magna Carta} and Hong-Fan shaped the good governance systems in Great Britain and China can be summed up thus:

The lack of institutionalisation in Hong-Fan, the \textit{Magna Carta} of China, had resulted in different

\textsuperscript{170} Jiang and Qian (n 9) 288-289.
\textsuperscript{171} See ibid.
\textsuperscript{172} See ibid.
\textsuperscript{173} Compare ibid, with \textit{Magna Carta} § 61 (1215).
\textsuperscript{174} Compare ibid, with \textit{Magna Carta} § 61 (1215); see also Li (n 8) 31-35.
\textsuperscript{175} Blackstone (n 37) 109; see also \textit{Marbury v. Madison}, 5 U.S. 137 (1803).
\textsuperscript{176} Meadows (n 152) 24.
\textsuperscript{177} Huang and Li (n 29) 349.
consequences in contrast to England, where the English *Magna Carta* has built up England’s democracy with law. But Hong-Fan as China’s *Magna Carta* has built up China’s dem-orientation only with mercy. [...] [E]ven democracy for the people [in China] is mercy instead of right; ‘it begins where legal rights end’.  

**Conclusion**

In *Elements of the Philosophy of Rights*, Georg W.F. Hegel wrote that ‘[o]nly when what is right becomes law does it receive not merely the form of universality, but its own truest character’.  

Hegel’s argument about right, law and custom deepens the line separating *Magna Carta* and Hong-Fan: the former constituted a legal norm by contract, whilst the latter constituted only an ‘accidental’ and ‘obscure’ norm predicated on mercy at most. Hegel said:

> The difference between custom and law consists merely in this, that customs are known in a subjective and accidental way, and hence are in their actual form more indefinite than laws. In custom, the universality of thought is more obscured, and the knowledge of right is a partial

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178 ibid 354-355.
180 See generally ibid 24-30.
181 ibid 110.
182 ibid.
and accidental possession of a few.\textsuperscript{183} – Georg W.F. Hegel (1821)

By Confucian standards Hong-Fan is ‘the manifesto for good governance’.\textsuperscript{184} It was a good king manual which never reined in the royalty \textit{legally} but suggested that a king wield unlimited power \textit{morally}.\textsuperscript{185} Moreover, it preached absolute monarchy ruled by sage kings as the institution, maintaining that good governance would be concomitant.\textsuperscript{186} Using the metrics in Hegel’s \textit{Philosophy of Rights}, no (legal) rights were granted to the Chinese people in accordance with Hong-Fan; and all they had from their rulers was something ‘accidental’\textsuperscript{187} and ‘obscure’.\textsuperscript{188} This something could be termed ‘mercy’.\textsuperscript{189}

However, \textit{Magna Carta} is immortal. Though inequality is endemic to monarchy, the Kings and Queens of England had contractually promised their subjects legal rights owing to \textit{Magna Carta}, founding the ‘British political tradition between a King and a Parliament, bound under law’.\textsuperscript{190} Such ‘equality under the law’\textsuperscript{191} infuses modern British constitutionalism under the Crown, on which good governance has depended.

\textsuperscript{183} ibid.
\textsuperscript{184} Morgan (n7) 16.
\textsuperscript{185} Jiang and Qian (n 9) 281-298.
\textsuperscript{186} ibid 288-289.
\textsuperscript{187} Hegel (n 177) 110.
\textsuperscript{188} ibid.
\textsuperscript{189} \textit{cf} De Freitas \textit{v. Benny} [1976] AC 239 (Lord Diplock holding in the Privy Council that ‘[m]ercy is not the subject of legal rights. It begins where legal rights end’).
\textsuperscript{190} Betz (n 6) 263.
\textsuperscript{191} Williams (n 25) 62.
Truth and Right and Freedom, each a holy gem,
Stars of solemn brightness, weave thy diadem.\textsuperscript{192} –
Arthur C. Benson (1902)

\textsuperscript{192} Shea and Whitla (n 81) 164.
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