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Human Rights as Born in Europe and Its Fate in China: A Historical/Structural Analysis

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Summary

Human rights have their roots in citizen's rights. The development of citizen's rights has been centring on property rights. Property rights own its root to Rome.

Private property rights are crucial elements in the Roman law, but were less recognized in the Middle Ages. Then it revives in the medieval cities. This thesis explores the development of property rights in Europe with the transformation of agricultural economy to commercial economy as the background, concluding that citizen's rights are products of a commercial economy. The expansion of commercial economy to the world is the essence of colonization, particularly in its British version. Conflicts over colonization are among the causes of the two World Wars and the establishment of the United Nations, which in turn ushered an age of human rights. The thesis then explores China's failed attempt to transform agricultural economy to commercial economy in a very broad historical context, which ultimately resulted in the emergence of a totalitarian regime in 1949. However, a totalitarian regime can be friendly to some human rights, as illuminated by the substantive poverty reduction during the last three decades' economic growth. Unfortunately, economic growth alone is not enough to liberalize China, which is made clear by analysing China's state report to the Committee of Economic, Social and Cultural Rights, and the Committee's Concluding Observations of said state report. Finally, the thesis draws the conclusion that transformation of land regime is the key for China's full realization of human rights.

Preface

The motive for this thesis is human dignity. Human dignity is well connected to human rights, as they are perceived in liberal states. However, a citizen from a non-liberal state normally has no knowledge of human rights and often inclines to go against such a connection. Therefore, as a Chinese citizen, before I present the discussion about human dignity and human rights. I shall first present my reasons.

I was born in a peasant family in China and according to Chinese law that automatically makes me a peasant. The word peasant is a curse word, a synonym of second-class citizens, or inferior people. I developed a bad habit because of this fact: when people ask me where I am from, I automatically answer, 'I am a peasant.' I do this because I am afraid people might otherwise think they offend me or perhaps feel superior.

Life in China is tough for peasants. For instance, peasants have no access to medical care, which in liberal states is provided by the government as a basic human right. People who have severe diseases, such as cancer, do not get treatment, and are bound to stay at home until death takes them. I often wonder if my father could afford regular physical examinations, would he still die in his bed of cancer.

One of my neighbouring families was fined 3000 *yuan*¹, for violating the one-child policy. This family consisted of three people; a man in his 80s, his son who was deaf and mute and the son's wife who was mentally retarded. The fine was approximately half to one thirds the family's yearly income. If the fine was not paid, the local authority would force the couple to abort the baby. The couple got pregnant with their first child after twenty years of marriage. This was their first baby so the couple obviously did not violate the one-child policy. The authority claimed that they were punished because they did not apply for permission beforehand, which was an outright excuse to blackmail people. The family borrowed money to pay the fine in order to be able to keep the child. Several years later, the old man became sicker, barely able to help support the family. One day he left home and never came back.

Childhood friends from my village are not doing well either. One girl for instance who was pretty and cute could not find a decent job when she grew up and ended up as a prostitute in the city, which is illegal by Chinese law. At the time, I graduated from Law School and worked in the same city as a policeman I saw a flood of prostitutes in town. I knew she was somewhere among them, earning money at the cost of her dignity. I handled prostitutes occasionally. I felt lucky that I never had her before me.

¹ 1 USD= 7.24 *yuan*, 1 Euro= 10.77 *yuan*, 15 January, 2008

There is one good thing about being a peasant: you get to understand this country. China has, for thousands of years, been and will in the near future remain an agriculture-based civilization. People legally identified as peasants constituted 57% of the population in 2005. They are the true colour of the country. However, they are also mute, deeply despised, and excluded from the vision of the country. This could explain why most studies of China are not completely accurate. The foreigners or the Chinese townsmen, who normally are the researchers, do not see the real China. Only a peasant going through all the traumas and insults can really see China.

I started wondering when I was eleven: do we deserve dignity? And if we do, why? How do we achieve dignity? By saying 'we' I mean my father, the old man, the girl, my fellow villagers, and me. Since rural China is a homogeneous conglomerate of villages, 'we' also means all Chinese peasants. Because the fate of the peasants defines the fate of China, 'we' also means all Chinese, who are all insulted and humiliated for not enjoying dignity. 'The focus of human rights is on the life and dignity of human beings.'² In this thesis, I try to analyse China and human rights from a peasant's eyes. Even though my approach might have universal application to all Chinese, my ultimate concern is the people of my village.

I am very grateful to Raoul Wallenberg Institute, for offering me the opportunity to conduct this research. And to my supervisor, Professor Asbjørn Eide, who has been guiding and encouraging me throughout the process of this thesis.

I am deeply indebted to Sweden and Ray Huang for this research. I studied in Sweden during 2002-03 as a master student. It was the first time I lived abroad. I learned liberty from the trivia details of life, such as the spirit of the people, the smile on the cashiers' face and the way people say hi to strangers. This knowledge is indispensable in order for me to understand Ray Huang's work. Huang is an American - Chinese historian, who unfortunately past away in 2000. He developed the unconventional macro history view focusing on the long trends of history, overlooking the details. According to his scholarship, the history of the world evolves around certain inherent logics. The ultimate reason China was left behind in the 19th century according to Huang was that China was not 'mathematically manageable', while the liberal states were. The term 'mathematically manageable', however, is difficult to understand. Five years after my first contact with Huang's work, studying at the Raoul Wallenberg Institute, I interpret the term as the inalienable characters of the commercial economy, which require independence, sovereignty, rule of law, market mechanisms, property rights, and so on. In short, it requires human rights.

² Manfred Nowak, *Introduction to the International Human Rights Regime*, Martinus Nijhoff, 2003, p. 1.

1 Introduction

1.1 The background

One of the greatest achievements of mankind in the 20th century is the establishment of the United Nations. The mission of the UN is to maintain international peace, security and respect for human rights, as stated in the Preamble of the UN Charter. However, the two aims are to some extent contradictory with each other. One of the core notions of sovereignty is non-interference. According to the classic international law theory, the international community does not interfere into internal affairs of a state, which is also laid down as a constitutional principle of the organization in the UN Charter. Nonetheless, the Art 2(7) of the UN Charter constitutes an exception to the non-intervention principle. The Security Council is vested with the power to interfere with a state if the Security Council determines the existence of threats or breaches of peace or aggression. Gross violations of human rights are sometimes regarded threats of peace and are subject to intervention.³ Hence, human rights can penetrate the shield of sovereignty. Moreover, human rights were coined into the International Bill of Human Rights and other international documents. Through the international human rights regime, human rights are obliged in all Member States.

The mass adoption of human rights into international treaties resulted from the scourge of the Second World War, which proved that trespassing of human rights within one states could lead to wars abroad. Human rights thereafter have taken precedence over sovereignty, which is likely to be an important explanation for the accomplishment of world peace in the UN age. Furthermore, the triumph of human rights has substantively changed the international environment, and the game of the international community with it: from military expansion and arms race to development. Japan, for instance, came back to the international community as an economic superpower rather than a military power. This illustrates that military power no longer is the decisive factor of a state's international status, legitimacy of the regime, or even existence. It is fully illuminated by the dissolution of the USSR. This change also leads to the change of how international relations work. The international relations in the colonial age was characterised by military race. States tried to contain each other from growing strong. However, in the game of development, international relations feature with interdependence. States are generally willing to see other states growing strong, except militarily.

In the age of colonialism, the world had separated into two: the West and the rest. Military power was the demarcation line. There is also a separation in the UN age: the developed and the less developed. Development became

³ For instance, the apartheid in South Africa was regarded as threat to world peace. The Security Council authorized sanction against South Africa since 1963 until the abolishment.

the new line. The colonial powers were all liberal states featured with a complete citizen's rights system. In the UN age, the developed states have complete human rights institutions, and the less developed states are those that have not. Citizen's rights are forerunners to human rights. A positive connection is assumed between development and human rights. Development is regarded as a result of the triumph of human rights. Human rights did not penetrate into the Eastern Bloc and most Third World states because of the Cold War and other reasons. This was widely accepted as the reason why these states did not achieve great development. When the Cold War entered its latter period, human rights' new implication for development, on top of its role for world peace, was well received. The developed states have been incorporating human rights in their diplomatic policies. The understanding of the connection between human rights, development and international cooperation is fully expressed in the Declaration on the Right to Development. 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'⁴ 'States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development'.⁵ In the international relations and cooperation, the human rights-based development was best represented by development compact, such as the Cotonou Agreement.

However, international efforts to promote human rights and development in the less developed world are not very effective. Neoliberal reforms in the Latin-American states and the 'shock therapy' in the former Eastern Bloc states produced economic catastrophes. Subsequently, Russia and some Latin American states adopted approaches contrary to the Washington Consensus policies. In addition, most developing states receiving aid packages perform disappointingly. Ironically, the major development phenomenon happened in China, the last stronghold opposing liberalist human rights. Therefore, pre-1980s development and prosperity was limited to the states upholding human rights. In the post-1980s, however, countries in the less developed world newly accepting human rights system performed frustratingly. China, a state perceived by the world as opposing human rights, performed the other way around. This scene is dramatically controversial.

As a basic fact, a citizen's rights system is not easily fitted into an existing society. Even in Europe, it cost a series of violent wars to establish the citizen's rights dominance, such as the Thirty Years' War, the English Revolution, and the French Revolution. One important point about liberalization is that it depends very much on the situation of individual states and therefore no unified model is available. No liberalization case was found resembling another. Any successful liberalization cases more or less make exceptions to the existing models, and expand the database of

⁴ Declaration on the Right to Development, art 1.1.

⁵ Declaration on the Right to Development, art 3.3.

liberalization models. However, after the liberalization has taken place, the citizen's rights systems in all liberal states are similar, so that an international human rights regime is possible.

The UN stated, in the preamble to the Universal Declaration of Human Rights, that it proclaimed 'this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.' While representatives of many states from different parts of the world participated in the drafting of the Declaration, it is nevertheless clear that the rights included in the Declaration were those that had emerged in the Western liberal states from the 17th century and onwards. It has been argued that with the adoption of this Declaration, the United Nations initiated a human rights project with the purpose to promote the recognition and enjoyment of human rights worldwide.⁶ However, there is only few cases of successful liberalization since the adoption of the Declaration, mainly the Asian Tigers: Taiwan, South Korea, Hong Kong and Singapore. None of the Tigers liberalized in the classic model set in the Declaration. Taiwan and South Korea began with military dictatorship for decades, and Hong Kong and Singapore are not democratic even by today. The international human rights regime can serve as a measurement of liberalization, but it is not a solution for liberalization.

China is also one of the exceptions. Even though the Chinese economic miracle has been lasting for three decades, and so far there does not seem to be an end to the economic boom. There is still a long way to a human rights system for China. However, China has already started challenging the mainstream human rights concept. The transfer of sovereignty of Hong Kong from the UK to China breaks the conventional notion of sovereignty as containing ultimate authority over internal affairs. Under the 'one country, two system' structure, the central government of the People's Republic of China does not control any affairs of Hong Kong, except defence and diplomacy. Hong Kong has her own judicial system, independent legislative body, border control, passports, currency, customs, and so on. In addition, Hong Kong does not pay any tax to the PRC government. The Hong Kong experiences, therefore, changed the notion of sovereignty.

China is still far from liberalization. Due to China's long history and unique social structure, the future development of China will challenge the current human rights theory, as the USSR influenced the formation of the

⁶ See Asbjørn Eide, *Making human rights universal*, Human Rights in Development Yearbook 1999/2000, Kluwer Law International, 2001.

international human rights regime, even though the USSR herself was not liberalized.

1.2 The research hypotheses

The purpose of this thesis is to examine the structural conditions for the emergence and acceptance of human rights. The main research question of this thesis is the hypothesis that human rights can be comprehensively implemented only in liberal societies. Two basic necessary conditions for the existence of a liberal society are that private property and rule of law are recognised in that society.

A second hypothesis is that human rights could not emerge before societies moved from primarily agricultural to commercial and industrial economy. Although extensive private commerce may emerge from a traditional agricultural society, a liberal society with rule of law and comprehensive recognition of private property could not exist in a traditional agricultural society. The further development of commerce buries agriculture political regimes.

A third hypothesis is that human rights, which are initially a product of Western liberalism, were not possible unless private property was established to be the main pillar in the economy, with its attendant political consequences of freedom

To explore these hypotheses I shall process vast time, space and events in very limited pages. I seek to show that human rights are long-term history trend and they can be used as the key to understand the history of the world and China.

I analyse the different historical regimes in the term of their economic and financial bases. I start with the great agriculture civilization which sustained for centuries, the Roman Empire. Then I go through the decline of the Roman Empire, the emergence of the feudal system in Europe, and the rise of liberal powers, concluding that the reason for this change is the replacement of a commercial economy over an agricultural economy, all to test my hypothesis that human rights are the inherent requirements of a commercial economy. The rise of human rights is a natural result of the rise of commercial economy.

In the case of China, I describe her failed transformation of the agricultural economy to a commercial economy, and the subsequently turn to totalitarianism in order to defend her independence. I look into the economic development that has happened in China in the last thirty years, pointing out the consequences of developing a commercial economy without implementing a human rights system. Showing that commerce without widespread private property is not sufficient to ensure a human rights culture in the country. In the conclusion, I will argue that the land transformation is a key to realization of human rights system in China in

that it will lead to a property regime and widespread recognition of private property.

For the thesis I draw mainly on historical studies, in particular those that work within the field of macro-history. The most important sources for this thesis have been the *Capitalism and 21st century* (in Chinese), by Ray Huang and *China: a macro history*, by Ray Huang. *China, a new history* by John K. Fairbank, the *Cambridge history of China* series, *Mediaeval history* by Carl Stephenson and Bryce Lyon and *A history of the world* by Hugh Thomas are important source of references in this thesis.

1.3 The structure of the thesis

In Chapter One, I present the background to the thesis and explain the research question as well as the methodology used to respond to the research question. In Chapter Two, I examine more closely the concepts and effects of human right, and then the evolution of law and later of human rights in the Western society. I examine the Roman Empire, the feudalist period that followed the breakdown of the Roman Empire, the emergence of the city-states and of citizens' rights in the later stage of the feudal era, followed by an exploration of the emergence of the European nation-states from the Peace of Westphalia. I examine the emergence of the notions of sovereignty and the rule of law, the notions of sovereignty and independence, the link between sovereignty and human rights and the formation of liberalism.

Chapter Three examines the developments from the Age of Colonialism to the Age of Human Rights: It describes the process of colonization, the colonization effects in Europe and in the colonies. It examines the role of the United Nations, the Soviet effects on Human Rights, and explores some aspects of Chinese Development including Shenzhen and Hong Kong, and investigates the role played by the UK. This is followed in Chapter Four by discussing the situation in China 221 BC-1842 AD, going from Centralism to Absolutism. Chapter Five examines the transplanting of a Commerce System into China, its limitations and problematic aspects, and the uses of alternatives to property rights, to market systems and to the rule of law. The chapter introduces the important distinction between Treaty-port China and Inland China – the first is commercial, the latter is agricultural.

Chapter Six examines modern China from a human rights perspective, arguing that there is a miscommunication on human rights in non-liberal states. This is investigated among others through an examination of the state report presented by China to the UN Committee on Economic, Social and Cultural Rights, and of the concluding observations made by that Committee regarding Chinese performance in implementing the Covenant on Economic, Social and Cultural Rights.

Chapter Seven contains my conclusion, that although China is undertaking liberalization on her own, it has a global implication, and the international

community shall cooperate in this process by exerting their influence in the transformation of the land regime.

2 The Evolvement of Citizen's Rights: Property rights, Legal System, Rule of Law, and Sovereignty

2.1 The Concept

2.1.1 Human and Rights

Human rights formally entered the international law as binding obligations for all nations in 1945 with the proclamation of the UN Charter. However, human rights as citizen's rights in national law date well before 1945. As early as in the 18th century, the Virginia Bill of Rights of 1776 and the French Declaration of the Rights of Man and Citizen of 1789 has uttered human rights, in the sense of individual rights. Citizen's rights are forerunners of human rights, especially when it comes to civil and political rights. The major difference between human rights and citizen's rights is their relations to sovereignty. Citizen's rights are considered internal affairs and are not of concern for the international law, while human rights are part of international law.

Certain features of human rights can be read from the name. 'Human' rights, as opposed to 'privileged' rights, refer to *universalism*, the rights that all human beings in the world shall be entitled to. It implies equality. Equality is an inherent notion of citizen's rights. Historians have found that human beings lived in equality for a long time. However, the agriculture revolution set off a chain reaction of urbanization, class differences, and social cleavage that undermined the appealing equality of primitive society.⁷ The agriculture civilizations witnessed the fall of equality. All great agriculture civilizations ruled out equality in the political, philosophical and religious systems, such as Monarch, dictatorship, despotism, absolutism, Confucianism, Hinduism, and Christianity. Equality reappeared in the liberal Europe as one of the high principals of the political structure of the liberal state. Not just a coincidence, the liberal states were not agriculture civilization.

'Right', in a legal context it is a legal concept denoting an advantage or benefit conferred on a person by rules of a particular legal system.⁸ Hence, a legal system is the premise of rights. A legal system is enforceable only when backed up by a political power. Political power derives from the monopoly of military force within a certain region. One of the most

⁷ L. S. Stavrianos, *A Global History*, Prentice Hall, 1991, pp. 9-14.

⁸ David M. Walker, *The Oxford Companion to Law*, Clarendon Press, 1980, p. 1070.

important ancient legal systems is the Roman law. The Roman law delivered rights. However, the Roman law did not deliver equality. Equality before law comes only after *rule of law*. Rule of law implies the subordination of all authorities, legislative, executive, judicial, and other organs to certain principles that would generally be accepted as characters of law. It also implies respect for the supreme value and dignity of individuals.⁹ Rule of man, however, is a more natural consequence since a legal system is a product of military monopoly. Rule of law is diametrically opposed to, and very likely to ruin the military monopoly. The collapse of military monopoly will inevitably result in loss of order, instead of offering rule of law. It is only after complicated economical, social, and political evolvments that rule of law can be achieved without jeopardizing order. As a rule, the military force belongs to one person or group in all kinds of non-liberal nations. The military force belongs to the nation in a liberal state. A process of military nationalization is a character of the liberalization process.

2.1.2 The Effects of Human Rights

The international community set up the universal human rights standard. The realization of human rights, nevertheless, is essentially a domestic process. Therefore, human rights are of regional or national differences and peculiarities. Hence, human rights are compared among states. Measured by the situation, all states can be categorized into two groups, liberal and non-liberal states. Liberal states practice human rights, and non-liberal states do not.

In the era of the UN, human rights measurement is employed in virtually all fields of the UN, even outside the UN. Then there is a question of measuring human rights in non-liberal states.

Non-liberal states are not rule of law states. Therefore, it is not possible to measure human rights of non-liberal states in a legal approach. However, it is possible to measure human rights of non-liberal states in an indirect approach: measuring human dignity and freedom in non-liberal states. Human dignity and freedoms are the ultimate value and aim of human rights. Better human rights bring broader dignity and freedom to people, and vice versa. The effects can be measured and compared, not only among liberal states but also non-liberal states. Even though they equally lack human rights among non-liberal states, they are of different situation of human dignity and freedoms. For instance, comparing 1978 and 2007, it is widely accepted that the human rights situation in China improved, even though technically human rights do not exist in either year.

The human rights measurement in non-liberal states has a legitimacy issue. Why should non-liberal states be measured by human rights if they barely understand the concept of human rights? Why they cannot live by their non-

⁹ *Ibid.*, p. 1093.

liberal way as they have been living for thousands of years? Is it fair that China is measured by human rights, but Europe is not measured by Confucianism values?

Yes, it is fair according to realism politics, '*the standard of justice depends on the equality of power to compel and that in fact the Strong do what they have the power to do and the weak accept what they have to accept.*'¹⁰

Before the 19th century, all tributary states of China were measured by Confucian merits, which was also fair. The Western powers have build up predominance over the world, and an international order. Under the UN roof, member states enjoy sovereignty and bear human rights obligations.

In the human rights measuring, it is therefore crucial to differentiate liberal states and non-liberal states. It is not easy to define the benchmark because more or less any state today adopts some sort of human rights. Even North Korea ratified Convention on the Rights of the Child. Nevertheless, certain rights exist in both liberal and non-liberal states, and certain rights exist only in liberal states. When analyzing, human rights are divided into civil and political rights and then economic, social and cultural rights. The economic, social and culture rights, which were mainly pushed by the Eastern Bloc, are not a good benchmark since these countries are not liberal.

The civil and political rights include the passive civil rights of non-interference (above all by state) and active political rights of participation define the democratic freedom towards the state.¹¹ Considering that by the 19th century all the major European liberal powers were not democratic, political rights cannot be a good benchmark. International Covenant on Civil and Political Rights sets a comprehensive list of civil rights. Nonetheless, none of them serves as a good benchmark, because none of them can be found in ancient Europe, from which the modern Europe evolves. There is, however, one right omitted by the Covenant, the *property rights*.

The property rights are found in all liberal states and missing in all former states of the Eastern Bloc. It is the right that is too important to be listed in the Covenant. It is the only civil right that can also be traced in ancient Rome.

2.2 Property rights in the Roman Law

2.2.1 The Roman Empire: a Centralistic State

Since the emergence approximately 100,000 years ago, human beings have been living under the mercy of nature.¹² Humans were able to achieve

¹⁰ The Melian dialogue, see John Baylis and Steven Smith, *The Globalization of World Politics: An Introduction to World Politics*, 3rd ed., Oxford, 2005, p. 168.

¹¹ Manfred Nowak, *supra* note 2, p.10.

¹² W. H. McNeill, *A World History*, Oxford, 1979, p.7.

security against natural powers only after the agriculture revolution which brought civilization into human history around 4000 B.C.¹³ The productivity leap provided necessary tools for humans to build up *economy*, the mechanism helping humans to overcome natural threats, such as weather, hunger or predators. Economy is the utilization of natural resources under certain *technologies* for human *welfare*. The resources and production of economy were *property*. Property, not like natural resources, could only serve welfare of humans accomplishing the necessary technologies.

Freed from natural power, humans only found themselves facing a much more intimidating threat which was the human contention for property, both from outside and inside the society. Security and order were then the largest concern. States emerged to achieve these two targets. The forms of state evolved corresponding to the updates of the art of war. Both forms of states and arts of war relied upon the advancement of technology and economy. The competition for security among countries was endless, because any standing military organization was a threat to others and should be conquered. The continuity of warfare led to only one winner, Rome in the case of the West. The Roman Empire ended the major wars, establishing order and security mechanisms in this region.

Proper arrangements of international relations were indispensable for security. International relations were about how states which were capable of inflicting military actions against each other dealt with one another. The Roman Empire maintained an international order. The international order of that age was different from the international order under the UN framework. First, there was not a global international order in the Roman age. This was because of the agricultural economy which could not provide necessary technological methods to support deploying military forces all around the world. Instead there were several regional international orders in the world. Second, to survive the war for security, countries in the Roman age needed to mobilize all possible resource. Only the country with the best mobilization capacity could be independent. Centralism was a mechanism where the state's mobilization power reached all individuals, for instance through the *tax* system, and one person or group, such as the monarch, controlled the whole system.¹⁴ Therefore, a centralised state, like the Roman Empire, or the Han Dynasty of China, stood to the end. Third, in international orders of the Roman age, the international relations are realistic. The conquering power increased not only the size but the security of the empire.¹⁵ It was not possible for states to coexist peacefully and equally under realist international relations. However, this is not really a difference. It is said the international relations in the UN age are liberalistic. Even though states in the UN age roughly coexist peacefully and equally, the international relations are still realistic. The difference between the realism of the Roman age and the UN age is that, in the Roman age, the

¹³ *Ibid.*, pp. 13-15.

¹⁴ From Babylon to China, from India to Aztec America, all despots sought their percentage of every crop. See Hugh Thomas, *A history of the world*, Harper& Row, 1979, p. 163.

¹⁵ The Melian Dialogue, see Baylis and Smith, *supra* note 10.

strong want the weak to be dependent and inferior, while in the UN age, the strong want the weak to be independent and equal, and implementing human rights.

2.2.2 Agricultural economy and Property rights

The Roman Empire was an extremely centralised state. Probably only the Han dynasty of China can be more centralised than the Roman Empire at their time. Roman Empire maintained a strong and well-developed legal system. One of the core features of the Roman law is the protection for private property, especially land.¹⁶ The land ownership included the rights to own crops, to manage and to trade the land.

Property rights by nature was a mechanism by which the farmers paid tax and soldier services and received security. The Roman property rights were the mobilization and security mechanism of the agricultural economy, which was co-produced by the agricultural economy and the centralistic political structure. It created an ideal balance between the production and the defence activities. It properly distributed the resources for welfare and security purposes.

The features of the agricultural economy were coined into the land regime. The agriculture production depended enormously on growth circles of crops which took months. During the growth circle, natural conditions, such as the quality of land, the species of crop and the weather, were at count for the production. It was not possible to modify the growth circle before the gene engineering technology. Therefore, agriculture was insensitive to technological advancement. The gravest concern was security. When planting, the farmers had to be sure that they were going to harvest. Threats mainly came from foreign invasion, government trespassing, and infringement from private parties. Property rights was the mechanism to overcome government trespassing and infringement from private parties. The tax funded the military mobilization safeguarding the economy from invasion. The ultimate purpose of property rights was to safeguard the owners control over their property.

The Roman property rights had the emphasis on land and could hence be named agricultural property rights, which should be differentiated from modern property rights. Property rights naturally included the right to disposal of property.¹⁷ Hence, exchange of property was legally established, which led to the door of trade. Trade was an important part of the Roman economy.¹⁸

¹⁶ Private ownership on immovables was established as early as 450 BC, see György Diószdi, *Ownership in ancient and preclassical Roman law*, Budapest, 1970, p. 40.

¹⁷ Fritz Schulz, *Classical Roman law*, Oxford, 1951, pp.343-354.

¹⁸ 'Development toward a trading economy was one of the new features of the second century', see Marcel Le Glay, Jean-Louis Voisin, Yann Le Bohec, *A history of Rome*, Blackwell, 1996, p. 106. 'Roman economy was predominantly based on farming, essentially agriculture... the non-agriculture sector of the Roman economy was of

Commercial economy developed into the dominant economy when Europe entered the liberal age. Commercial economy harboured the modern property rights, or the commerce property rights, which are closely related but significantly different from the Roman property rights. The objects of the Roman property rights are only movables and immovables,¹⁹ and land is the major concern of the immovable property,²⁰ while the line of objects of modern property rights extends far wider, such as intellectual property, to adopt the characters of the modern economy. The differences between a commercial economy and an agricultural economy are responsible for all the differences between the two property regimes.

The productivity of the agricultural economy depended on natural conditions, little on technological advancement. Hence, the agriculture production was stable and predictable. On the other hand, industrial production was given birth by technology, and the productivity greatly relied on technological advancements. It was not predictable. The focal point of the agriculture production was certainty, while the emphasis of a commercial economy was progressiveness. The more crucial difference was the economic resource employed. In agricultural economy, land was the only controllable factors in the whole production process. The top concern of the agricultural economy was the distribution of land. The economic resources employed in commercial economy were, however, virtually unlimited, restricted only by technology. The top concern of commercial economy was therefore *distribution and exchangeability* of economic resources. Although exchange was implied in the agricultural property rights, and trade existed in the agricultural economy, full exchangeability did not exist under agricultural civilizations. Full exchangeability required equality. However, equality was not possible in a centralistic regime from which the agricultural property rights came.

Agricultural economy conflicted with commercial economy in that the former had less concern on equality, and actually relied on political centralism which inherently opposed equality. Under the structure of agricultural property rights plus political centralism, commercial economy was able to survive, but not able to fully develop.²¹

The agricultural regimes, however, had been proved to be non-sustainable. The agricultural property rights implied trade of land. The trade of land had finally buried the base of the centralistic regimes in Europe, and were subsequently replaced by liberalistic regimes.

considerable importance at the regional level and that some cities show a degree of specialization in their commercial and/or manufacturing activity.' See David S. Potter, *A companion to the Roman Empire*, Blackwell, 2006, pp. 284-285.

¹⁹ Schulz, *Supra* note 17.

²⁰ *Ibid*, pp. 338-380

²¹ For instance, as early as 218, a *lex Claudia* had attempted to prohibit senators from engaging in any lucrative activity based on trade. See Le Glay, Voisin, Bohec, *supra* note 18.

Rome's success rested partly on a numerous and hardy peasantry. Farms in the Republican and early Empire Rome used to be small and family owned, and Roman farmers were the primary tax source and the backbone of the army.²² However, large estates owned by a politically privileged senatorial class flourished. For instance, the *latifundium* owned by the younger Pliny was worth twenty million *sesterces*, twenty times larger than the minimum property qualification for the Roman senate, one million *sesterces*.²³ L. Tarius Rufus, an admiral of Augustus, invested and lost 100 million *sesterces* in land.²⁴ Large estates were able to avoid taxes and soldier obligations to the state, and used slave labour extensively.²⁵ Exploitation by the state in the form of prolonged, mass recruitment into the army, high taxation²⁶, the disruption of civil wars and economic pressure from the rich, had drastically undermined the position of the free peasantry of the middle and late Republic. The collapse of the independent peasantry is a cliché of Roman agrarian history.²⁷ With the economy evolution, the political situation entered into a new stage. In this stage, owners of large estate mastered significant resources. They were able to organize their own defence. On the other hand, the tax and soldier sources of the central government dried up when independent peasants disappeared. Consequently its role as the security mechanism outdated. This precipitated the decline of the Roman Empire. Europe entered the Middle Ages featuring with *manorialism* and *feudalism*.

2.3 The Medieval Europe: Decentralization and Coexistence

2.3.1 Manorialism

The decline of the Roman Empire uncovered a chaotic and desperate page of Western Europe. Lost of imperial order had heavy impacts on economic life. The most fundamental one probably was that, commercial decay was thus unchecked, with the consequence that society became more and more thoroughly agrarian.²⁸ However, as far as rural life was concerned, there can be no doubt that the Roman villa persisted under the barbarian conquerors. The model for the Carolingian manor was the great estate of the later empire.²⁹ By the fifth century the mass of the agricultural population in the

²² Medium-sized and small properties seem to have been preponderant at the Third Century BC. The war and conquest in this century contributed to the formation of the first large-scale properties. Military service was both a right and a duty of the citizen, and it included no mercenaries in this century. See *Ibid.*, pp. 68-70.

²³ Peter Garnsey & Richard Saller, *The Roman Empire: economy, society and culture*, Duchworth, 1987, p.64.

²⁴ *Ibid.*, p. 67.

²⁵ *Ibid.*, pp. 71-73.

²⁶ The land tax commonly amounted to a third of the crop on a peasant farm. See N.J.G. Pounds, *An economic history of Medieval Europe*, Longman, 1974, p.16.

²⁷ *Ibid.*, pp. 76.

²⁸ Carl Stephenson and Bryce Lyon, *Mediaeval history*, Harper & Low, 1962, p. 158.

²⁹ *Ibid.*, p. 159.

west had already become an economically dependent peasantry. And as the greater landlords rapidly acquired grants of immunity, the dependence of the peasantry tended to become also political. These agrarian arrangements were in general left unchanged by the barbarians, who merely took over a share of the existing estates and allowed them to be cultivated as before. Even the distinction between the invaders and the native Romans soon vanished.³⁰ At the opening of the eleventh century, the manorial system was practically universal throughout Western Europe, while feudalism was not. A manor remained exactly the same, whether or not it was held by a vassal in return for feudal service.³¹

The manor may be defined as an agricultural estate possessed by a lord. In other words, the manor was a unit of seigniorial exploitation. The authority of the mediaeval lord, thanks to the lavish dispersal of royal privilege, had generally come to be political as well as economic. Rights that we should distinguish as public and private had been inextricably confused.³² Subsequently, property rights as a core notion of the Roman law was barely recognized in the Middle Ages. Transfer of land in the Middle Ages conducted through fief instead of contracts. The manorial system flourished on all sides because under it, and under it alone, the mass of the people found the possibility of livelihood. The lord owed his dominant position not so much to his own rapacious greed as to the defenceless condition of the countryside and the vital needs of the inhabitants.³³ The peasants' life was reasonably secure. Under the lord's protection he was assured at least of subsistence; even serfdom was infinitely better than the constant fear of death by violence or starvation.³⁴ Receiving protection and land from the lord, peasants paid unrestricted responsibility to the lord, including payments and labour service. Peasants were personally bound to the land, so were their children. As the most crucial difference from the Roman age, peasants did not bear responsibility directly to the state, which had profoundly influenced the political and military mechanisms.

2.3.2 Feudalism

As mentioned above, the manor was a defence unit as well as an economic unit. The lord was responsible of providing security. Under the feudalism arrangements, a lord justified his privilege through a grant of immunity or other delegation of authority by the king. A man became a vassal of a lord through ceremony of homage. A vassal as a fief-holder possessed manors that included peasant cultivators free or unfree. Along with his fief the vassal received from his lord a guarantee of protection and justice; in return he owned the lord various forms of service and assistance, very commonly mounted soldiers or knights. Each vassal could in turn give fiefs to vassals

³⁰ *Ibid.*, pp. 159-160.

³¹ *Ibid.*, p. 220.

³² *Ibid.*, p. 221.

³³ *Ibid.*

³⁴ *Ibid.*, p. 225.

of his own.³⁵ The picture of the feudal military machinery is now clear. Feudal kings had no mobilization power like the Roman Emperors did, because the Roman Emperor had direct control on farmers while the Feudal kings received financial and military service on a feudal contractual basis. The state power had thus decentralized. The feudal kings' power in mobilization was significantly compromised. It is shown in the scale of armies. The Roman army at its zenith in the second century AD included 400,000 men in all. The King of France commanded the largest army in feudal Europe at Crécy: 12,000 men. The German Emperor's all-out offensive against the Turks in 1467 numbered a mere 18,500. In comparison, under the Song dynasty (961-1279), China had trained several million men.³⁶ Since the feudal kings' capacity to engage in wars was seriously degraded, the situation of *coexistence* came into shape.

Coexistence was a situation where the states which could inflict military action upon each other could not conquer or control one another. Conquests were conducted through wars. The results of wars depended on the capacity of military mobilization of the invaders and the defenders respectively. In the thoroughly mobilized centralistic state, a state's offense capacity equalled its defense capacity. However, in a decentralized feudal state, the situation differed.

Feudal kingdoms were politically decentralized, so that their capacity to mobilize was heavily restricted. However, the centralistic administrative system inherited from the Roman Empire remained. Feudal kingdoms were able to mobilize maximum resources for defence. This mechanism functioned when being invaded. Subsequently, even though wars were abundant in the Middle Ages, few were decisive, and none brought Europe back into one regime.

There were also economic reasons for coexistence. Agriculture was a self-sufficient economy. It was not economically aggressive like outward commercial economy. The aggressiveness of an agricultural nation was inspired mainly by defensive purposes, and it only featured a nation of peasants: a centralistic state. The feudal nations were nations of lords. Lords were in great hesitation to support mobilization exceeding the need for defence, especially in aggressive wars. The military expense was high, and it did not bring proper reward. Moreover, the risk of military defeat was unmanageable. In short, feudal states were more mobilized as a defender than as an invader. Hence the invaders were militarily inferior to the defender.

According to Kant, non-republican states were more likely to engage in wars, while the republicans tend to perpetual peace, because in a republic the decision-makers are bearers of war costs. In a non-republican state, a declaration of war is the easiest thing to decide upon, because war does not require of the ruler, who is the proprietor and not a member of the state, the

³⁵ *Ibid.*, pp.203-208.

³⁶ Thomas, *supra* note 14, p. 70.

least sacrifice of the pleasures of his table, the chase, his country houses, his court functions, and the like. He may, therefore, resolve on war for the most trivial reasons, and with perfect indifference leave the justification which decency requires to the diplomatic corps who are ever ready to provide it.³⁷ Although Kant might refer feudal kingdoms as non-republics, feudal kingdoms could also be regarded as a middle type between centralistic state and republics. Lords who were bearers of war costs were in the decision-making process, but they were not the ultimate bearers. The ultimate bearers were peasants, which have no say in the decision-making. Therefore, the international situation in the Middle Ages was also a middle type: it was not as peace as under the UN framework, and it was not as peace as under the Rome rule. It was of incessant wars but of few conquests.

Another indicator of Europe's decentralization is the Christendom. The Pope shared substantial political power. The power struggles between the Pope and secular kings left power vacuum, which was the important reason for that a cluster of strong city-states grew in Northern Italy.

2.4 Cities in the Latter Middle Ages: Citizen's Rights

Since the eleventh century, Europe witnessed the revival of commerce and the rise of the new towns. New towns as commercial centres were built upon written guarantee of *bourgeois liberties*. Normally the bourgeois enjoyed free status: the man who lived in a town unchallenged for a year and a day secured complete liberty, exempted from all the typical servile or manorial obligations. It was almost universally written in the municipal charters that the townsmen should not be tried outside the town. The chief mercantile privilege of the bourgeois was his right to sell freely in the town market. The bourgeois community enjoyed a peculiar law, by which debts could be collected, contracts could be enforced, and property could be safeguarded.³⁸

In the core of the bourgeois liberties we found property rights, which was crucial in the Roman law, and was not recognized in the manorial system, and reappeared in new towns. Moreover, property rights reappeared with a new face. In Roman age, the focus of property rights was to *own*, while in the latter Middle Ages, the focus of property rights was to own and to *trade*. To facilitate full exchangeability of properties, which meant all economic resources besides land, feudal privileges should not apply in the new town market. The new towns were exempted from courts where justice was administered according to feudal or manorial custom. Anybody in the towns was subject to the law of the towns. 'Even the king and queen were to pay their bills inside two weeks.'³⁹ Subsequently rule of law were established.

³⁷ Immanuel Kant, Perpetual Peace: A Philosophical Sketch, see Baylis and Smith, *supra* note 10, p. 189.

³⁸ Stephenson and Lyon, *supra* note 28, pp. 266-281.

³⁹ *Ibid.*, p.278.

The *citizen's rights system*, the forerunner of human rights, was therefore established. A new kind of economy, commercial economy, evolved from the citizen's rights system.

Commercial economy is different from agricultural economy. First, in the commercial economy, resources were not limited to land. It was plural. The commercial economy could operate without agrarian land. Second, a free market was required to exchange property. The property rights and rule of law were the premise of a market mechanism, while social caste and political privileges were the inevitable consequences of agricultural economy and were unfavourable for the commercial economy. Third, the commercial economy depended on full exchangeability of economic resources and technology instead of ownership of land and natural conditions as in the case of agricultural economy. Fourth, political privileges constituted the major obstacle of the commercial economy, which prevented some resources from entering into market. Moreover, political privilege overrode the law, interrupting rule of law from functioning. Fifth, since the category of resources for commercial economy was open, only restricted by technology, the practice of the commercial property rights would not, like the agricultural property rights, lead to drying up of resources.

Even though agricultural economy and commercial economy conflicted on the issue of rule of law, commercial economy managed to emerge in agriculture regimes. Agricultural economy focused on land. Commercial economy could operate without challenging the lords' privilege on land. Therefore, most of the new towns were actually established by feudal nobility in order to establish a source of revenue within his own territory.⁴⁰ Nevertheless, the further development of commercial economy conflicted with the feudal political structure. The inherent conflict was that the feudalism society hindered the commercial economy from full access to economic resources and a market mechanism.

The commercial economy involved trade and industrial manufacturing, which were both sensitive to technological advancement, while the productivity of agriculture production, limited by natural conditions, was slow to technological advancement. Benefited from the technology improvement, such as new transportation methods, new production techniques, soon the commercial economy developed overwhelming superiority over the agricultural economy.⁴¹ It started challenge the old order where it emerged.

Year 1204, the fourth Crusade leading by Venice assaulted and captured Byzantine capital Constantinople. Venice took 3/8 of the capital and other

⁴⁰ *Ibid.*, p. 275.

⁴¹ In the early 15th century, the financial income of the Venetian government was roughly about the amount the Chinese Ming government received, and the population of Ming Dynasty was 500 to 1000 times of the Venetian population. See Ray Huang, *Capitalism and the Twenty-first Century (Chinese)*, SDX Joint, 1997, p.84.

territories essential to naval control, such as Crete. Byzantine in fact became colony of the European powers leading by Venice.⁴² Venice and Byzantine, one tiny and one giant, one strong and one weak, the invasion scene was astonishing. Observing from a human rights angle, the liberal states' strength came from respecting human dignity, while the agriculture empire's power came from trespassing human dignity. This is a simple way to explain the strength of liberal states which was simply small by size. The Venetian invasion of Byzantine made the debut of liberal powers. The scene of a 'mini' liberal power bullying a giant, clumsy agriculture empire would thereafter constantly show. The highest tide was the Sino-Anglo Opium War 1839-1842 where 4000 British beat the Chinese Empire.⁴³ Once the liberal states emerged, the giant agriculture empires were doomed.

The triumph of Venice announced the age of citizen's rights. Venice became a Mediterranean hegemony for a few hundred years.⁴⁴ As the main sponsor of the Renaissance, Venice witnessed the beginning of a sweeping liberalism storm which successively hit the Netherlands, Britain, Europe, and the rest of the world.⁴⁵

2.5 Sovereignty: the Formation of the European International Community

2.5.1 Sovereignty and the Westphalia Peace

In northern Italy, there emerged cluster prosperous city-states besides Venice, such as Milan, Florence, Genoa, and Pisa. It was because northern Italy was namely Byzantine soil. It was in fact out of reach of feudal kingdoms, the Papacy or the Byzantine, and had enough freedom to act. Venice was specially blessed. Venice had 'a great swamp that made it virtually immune from military attack; to seaward lines of sandbars constituted a naval barrier of even greater strength'.⁴⁶ The refugees from the inland regions chose this spot as shelters. Without challenging the secular or papal authority, Venice was free since the beginning, which was not changed even after Venice took dominance over the Mediterranean, for that Venice mainly stretched in sea and towards the Moslem and the Greek world.

However, the commerce development elsewhere in Europe inevitably conflicted with the Papacy and the kingship. The commercial economy made its way out of them. In the religious aspect, the Protestant Reform seriously challenged political influence of the Papacy. Furthermore, the

⁴² See Frederic C. Lane, *Venice, a maritime republic*, Johns Hopkins, 1973, pp. 36-43.

⁴³ The British force was 4000 in the beginning and gradually built up to 10,000 and fourteen steamers. See Ray Huang, *China: a macro history*, M, E, Sharpe, 1997, p. 228.

⁴⁴ Lane, *supra* note 42, p. 43.

⁴⁵ By 1600, when Venice was less a nation of seamen than of craftsmen, she reached a high peak of influence as a center of artistic creation. See *ibid*, p. 2.

⁴⁶ Stephenson and Lyon, *supra* note 28, p.284.

Dutch Independence brought forth a decisive battle between the commerce system and the feudalistic structure.

In the 14th century, the Low Countries economy had updated into a commerce fashion. The Lower Countries had some agriculture inland, but too little to breed domestic feudalism dominance, but they had to deal with interference from outside. The oppression from the Catholic Spanish pushed the Low Countries into revolt. The Dutch Revolt had profound influences all over Europe, and was directly connected to the Thirty Years' War. The Dutch Revolt and the Thirty Years' War both fought under the name of religion. However, two facts proved that religious belief was only a cover. First, Catholic France fought in line with the Protestant states. Second, both sides after the war withdrew their religion stand, agreeing to freedom of religion. The political and economic tensions were the issue that really mattered. The two wars were fought between the commerce Europe and the feudal Europe. The feudal Europe lost, just like Byzantine lost to Venice in 1204.

The war ended up with the Westphalia Peace, the start point of a new chapter of human history. In the human rights sense, there were four consequences of the Westphalia Peace: freedom of religion, *sovereignty*, independence of the Netherlands and Switzerland, and the breakdown of Germany.

The freedom of religion declined the political influence of the Papacy. Thereafter the Pope did not have much to do except praying. In the medieval period both rulers and ruled were subject to a universal legal order which reflected and derived its authority from the law of God. It was the church which provided the feudal order with an overarching, organizational and moral framework transcending both legal and political boundaries.⁴⁷ Since Westphalia Peace, new political arrangements replaced the role of the church, which was sovereignty.

Sovereignty was the premise of national states. As early as 1555, through the Treaty of Augsburg German principalities obtained the right to decide whether its territory would be Lutheran or Catholic, upon which sovereignty was established through the Westphalia Peace. The feudal society had thus given way to the Westphalian state system, that is a system of territorially bounded sovereign states, each equipped with its own centralized administration and possessing a virtual monopoly on the legitimate use of violence.⁴⁸

The independence of the Netherlands and Switzerland announced a new form of state, the *nation state*. Within a few hundred years, all nations in the world, despite what forms they used to be, transformed into nation states.

⁴⁷ Joseph A. Camilleri, and Jim Falk, *The end of sovereignty?* Edward Elgar, 1992, p.12.

⁴⁸ *Ibid.*, p. 14.

Germany was knocked down in hundreds of pieces. When it had accomplished its unification in the 19th century and tried to catch up in the game of colonization, Germany initiated the two World Wars, which ended up with the birth of the UN system, the mechanism extending sovereignty to all nations.

2.5.2 Sovereignty and Rule of Law

A commerce system relied on commercial property rights, which was roughly equal to agricultural property rights plus rule of law. The agricultural property rights were inherited from the Roman age. The rule of law was, nevertheless, new. In late Mediaeval Europe, the feudalism politics constituted a threat to the rule of law from the inside. The Papacy and foreign nations post threats from the outside. Sovereignty provided the necessary mechanism to clear threats to rule of law from the outside.

The state, for Machiavelli, is an organization of force which ensures security of persons and property. Machiavelli had made a great stride towards the notion of the ‘omnipotent legislator’. It was left to subsequent theorists, notably Bodin and Hobbes, to equate the state with the exercise of supreme authority within a given territory or society. Institutions and individuals in charge of the state represented the highest power in the land, acting as a court of last resort and holding an effective monopoly on the use of force. The state was identified with the power to make, administer and enforce laws and with the network of institutions necessary for this purpose.⁴⁹ Therefore, the principle of non-interference was implied in the notion of sovereignty, which was the premise of rule of law. A European international community thus took shape. By the conclusion of Westphalia Peace, in most states sovereignty only meant sovereign of the king or prince or emperor. However, with the situation evolving, popular sovereignty that “the will of the people shall be the basis of the authority of government” took over.⁵⁰ In the modern liberal sovereign state, none is above the law. Hence, the authority of law triumphed in an international background.

It should be noted that right after the Westphalia Peace, only the Netherlands established rule of law nationwide, while most other European states were still officially feudal. The nation state was virtually an updated form of agriculture and commerce coexistence. As analysed above, agricultural economy could be tolerant as long as the arable land was not at stake, and commercial economy could operate without arable land, therefore, the two economic systems could coexist. Bourgeois liberties used to be the form of coexistence. However, a charter offered the liberties, and sometimes the feudal lords breached the charter, such as the case when the Spanish king repressed the Dutch people. Sometimes the feudal nobility won, but when the commercial economy grew to a certain scale, they were able to defend themselves, such as the Dutch Revolt indicated. The nation

⁴⁹ *Ibid.*, p. 16.

⁵⁰ Universal Declaration of Human Rights, article 21(3)

state served as the updated bourgeois liberties, where international law replaced the role of church, and sovereignty replaced the charter issued by feudal princes.

The emergence of nation states followed the rule of *realpolitik*: the commercial economy set rules for the feudal regimes as soon as they were able to. With the situation evolving, liberal states grew more powerful than the feudal states, for instance, the Netherlands soon became a global power. However, liberal states did not attack feudal states even though they were probably able to conquer them. This made sovereignty also a peace mechanism for Europe.

The Venice invasion of Byzantine and the Dutch resistance of Spain had proved that the power of a commerce system was asymmetrical to its size. There rarely was a case of non-liberal states conquering liberal states, which was proved by the Soviet invasion of Finland 1939-1940 where the USSR suffered 400,000 casualties to win little reward against a state of 3.7 million people. Liberal states were the ones capable of initiating wars against other states. However, liberal states were least inclined to wars. Liberal states were more politically decentralized than feudal kingdoms since all people were equal before the law. All citizens enjoyed property rights. Although the political democratization did not occur in the beginning, the decision-making body was wider represented than in the feudal kingdoms, and the representatives were bearer of war costs. Hence, according to Kant's theory, the liberal states were unwilling to initiate a war. If the stronger did not initiate a war, nor would the weaker, then peace was made.

Nevertheless, the liberal peace was not equal to eternal peace. The philosophy under sovereignty was reason of military action, which left the possibility of war. The liberal states were military moderate, but commercially aggressive. War itself could be business as long as it brought profits. Liberal states do not oppose a war with manageable risk, bearable cost and promising profit.

2.5.3 Sovereignty and Independence

Under the UN roof, all nations assume self-governing, sovereign equality and independence, which make an international order different from all precedent ones. However, the picture that all nations are independent under the UN is more like an illusion, or at least it depends on the notion of 'independent'. In the sense of 'having their own government', it is right.⁵¹ In the sense of 'capable of acting for oneself or on one's own', it is not.⁵² To be a sovereign state, a nation shall have a central government. However, why a central government makes a nation independent if this nation does not need a central administration is disputable.

⁵¹ *Oxford advanced learner's dictionary*, 7th edition, Oxford, 2005.

⁵² *Collins dictionary of the English language*, 2nd edition, Collins, 1986.

Sovereignty is ‘a product of particular social and economic conditions’.⁵³ It closely relates to the particular history of Europe when the ‘decentralized political arrangements characteristic of feudal society’ evolved into ‘centralized authority in early-modern Europe’.⁵⁴ Therefore, viewed from a distance, Europe reached central government in Roman age but with the fall of the Roman Empire it was lost; then it was picked up again in the liberal states during the high Middle Ages, now also with civil liberties. However, sovereignty does not necessarily mean independence. For most civilizations, African and Oceanian tribal communities, the multi-state system of ancient China, the Greek city-states, the Egyptian, Persian and Roman empires, sovereignty has not been a defining characteristic of political life. In India and Africa, the nations had been living a life without central governments for centuries, and they organized central governments simply because this is the only way they can obtain ‘independence’. If they had been capable of *acting on their own*, they would have lived without a central government. Therefore, a central government in an Indian or an African nation is a symbol of non-independence.

Besides a central government, all states are also required by international law to install rule of law, democracy, civil liberties and so on. For liberal states, these elements are inherited from their commercial economy. They are *acting on their own* and are hence independent. For non-liberal states, these elements are alien to their economies. By installing these elements they are not *acting on their own* and hence they are not independent. Subsequently, for non-liberal states, they are independent only when they are capable of not installing these elements, for example the USSR which disrespected the sovereign independence of its satellite state, and China which has opposed human rights after the Cold War.

It is said that the international order under the UN is no longer realistic because equality is assumed for all states. This is not quite true. In the UN age, the basic rule of realism, ‘*the strong do what they have power to do and the weak accept what they have to accept*’, still applies. What the weak have to accept is, since 1945, ‘independence’. This is conditioned independence. If states do not accept the conditions, they do not obtain independence unless they can defend themselves. Hence, non-liberal states are generally not independent, unless they have the power to choose among the international laws, accepting the favourable and disrespect the non-favourable. China is one of few examples of independent non-liberal state.

2.5.4 Sovereignty and Human Rights

Modern conceptions of popular sovereignty and human rights are indivisible. For a commerce system, sovereignty guarantees security and rule of law maintains order. Both sovereignty and rule of law derives from citizen’s rights. The citizen’s rights system requires a rule of law order, and

⁵³ Camillary and Falk, *supra* note 47, p.12

⁵⁴ *Ibid.*, pp. 12-14

the authority of law demanded sovereignty. On the other hand, human rights are key to maintaining the sovereignty system. The lack of human rights is often an underlying reason for any major invasion war.

Rule of law and human rights could also exist in a nation without sovereignty, as shown in a colony. Colonies sometimes has rule of law and human rights, such as Hong Kong as a British colony. Then what was the difference between a liberal colony and a liberal state? Can human rights survive without sovereignty? Even though not written in the International Covenant of Civil and Political Rights and the International Covenant of Economical, Social and Cultural Rights, property rights is written in the Universal Declaration of Human Rights, and regional human rights documents, such as the European Convention on Human Rights. Property rights is the focus of human rights. Property rights are about the disposal of national resources which is upon the law in a rule of law regime. Since the colonies do not have legislative power, they could not dispose their national resources in their interests. Thus they do not have a complete property regime. The people in the colony hence do not enjoy human rights, even though there is rule of law and human rights implemented in the land.

Both Covenants state that all people may freely dispose of their natural wealth and resources.⁵⁵

2.6 The Formation of Liberalism

The sovereignty system provided the environment for rule of law, but rule of law did not spread over night. The Netherlands is the first sovereign state to establish rule of law. Step by step the conflicts between commercial economy and agricultural economy escalated and transformed the feudal states into rule of law states.

Venice hardly had any challenge from feudal forces from either inside or outside. The Netherlands fought foreign interference to win sovereignty. The commerce development in England, however, raised major domestic unrest. Unlike Venice or the Netherlands, England was one of the major feudal powers of Europe. The feudal organizations in England were heavy. The conflicts gave rise to civil war. This was the English Revolution. The triumph of rule of law in England, and later in France declared the coming of liberalism: the individual liberties replacement of political privileges. Liberalism carried out the classic human rights. Thereafter liberalism acquired the legitimacy over feudalism. All kingdoms and empires, in Europe or not, would soon lose their legitimacy, because England and other liberal states dispatched their gunboats to escort their commercial interests all over the world.

⁵⁵ Article 1(2) of International Covenant of Civil and Political Rights and article 1(2) of International Covenant of Economic, Social and Cultural Rights.

3 From Age of Colonialism to Age of Human Rights: Citizen's Rights in a Global Stage

3.1 The Colonization

The Age of Discovery presented Europe a new world. Those new-discovered overseas civilizations composed no security threats to Europe. An agriculture regime might have left it along, like the Chinese did. During 1405-1433, the Ming Dynasty of China dispatched a series of seven naval expeditions. Zheng He commanded the great fleet cruising by India, Persia Gulf, Arabia, and East Africa.⁵⁶ The fleet engaged pirates in the Malacca strait, intervened in the local politics of Java and set up one contestant as the legitimate, captured the king of Ceylon who has attempted to seize the ships. Nevertheless, the Chinese expeditions were diplomatic, not commercial, much less piratical or colonizing ventures. They exchanged gifts, enrolled tributaries, and brought back geographic information and scientific curiosities like giraffes. After 1433, the personnel were dispersed, the ships laid waste, the navigation chart burned by the vice-president of the War Ministry about 1479, and Chinese overseas commerce was severely restricted until 1567.⁵⁷

While the Imperial China prohibited seafaring at the cost of significant commerce interests, the European merchants were on political rise under the feudal structure.⁵⁸ They won the support from the nobility in the Iberian Peninsula to launch naval expedition.⁵⁹ The Portuguese and Spanish initiated and led the colonization in the beginning. In this period the European colonization did not seem much different from the old-style imperial expansion. Spain and Portugal were feudal kingdoms when they maintained a colonial empire. Their colonial policies were characterised by special interests on overseas land and gold of the feudal nobilities. The Spanish and Portuguese transplanted their feudalism social structure into the

⁵⁶ He's first voyage in 1403 consisted of 317 ships holding a force of 26,800 men, while Hernan Cortze landed in Mexico in 1519 with 11 vessels, 100 sailors and 600 soldiers, and the Spanish Armada of 1588 would total 132 vessels. See John King Fairbank, *China: a new history*, Belknap Harvard, 1992, pp. 137-138.

⁵⁷ About the information of Zheng He voyages, see Huang, *supra* note 43, pp. 176-177, and Fairbank, *supra* note 56, pp.137-138.

⁵⁸ Chinese traders transformed into pirates after 1433, which caused China's further withdrawal from the seacoast, vainly aimed at starving out the pirates. This defensive posture included restricting foreign trade by demanding that it all be in the guise of tributary trade. See Fairbank, *supra* note 56, p.139.

⁵⁹ See Marc Ferro *Colonization: a global history*, Routledge 1997, p.7.

vast South America.⁶⁰ However, the colonization in this wave was not like the one perceived by today. The European military superiority did not totally prevail by then. For instance, the attempts to colonize China had been defeated in the first 300 years. 1521, the Portuguese adventurers were forcefully expelled from south coast of China. 1662, the Chinese force ended the 38 years of Dutch colonial rule of Taiwan. 1689, the Chinese army defeated Russia colonizing of Manchuria, forcing Russia into a border treaty. Feudal states did not have the necessary hard and soft power to conquer the world. Consequently, Spain and Portugal lost their colonial empire by the early 19th century.

Then Britain led the second wave of colonization. Unlike Spain, Britain was a liberal state by the time. The Industrial Revolution as a natural result of liberalization significantly boosted Britain's strength, which enabled Britain to build up a global military superiority. 1842 when the Sino-Anglo Opium War concluded might be the summit of the colonial war: China's military machine of millions, probably the strongest defence ever organized before the Europeans, was soundly defeated by the tiny British naval force. British's force was unrivalled and hence Britain assumed a colonial empire where the sun never set. Moreover, liberalism not only trained Britain's military superiority, but also shaped Britain's colonial policy, which differentiates the Britain Empire from the Mongolian Empire and all other empires. All empires have disappeared. The British Empire, on the other hand, established an international order which inspired the UN.

The liberalist colonial policies focused on commercial interests. If Britain had behaved like an old-style empire then they should have assumed themselves as the ruler of China in 1842, which would be a disaster for both Chinese and British. On the contrary, Britain had pursued to preserve China's sovereignty and order. It was proved by the facts that Britain supported the Qing court to suppress the Taiping Rebellion in the 1860s; supported Japan to fight the Japanese-Russian War to banish Russia from Inner Manchuria; stood in line with China in the Sino-Japanese War 1937-1945.

As a liberal state, Britain's top interest was trade rather than control. Britain's primary concerns in the colonies were resources and markets. Protection of private property and rule of law were required to facilitate trade and industry. The aims were achieved through different approaches depending on the situations in the individual nations. For nations with no centralised administration, such as India, a legal system was installed, which resulted into the colonial authority. In centralistic states, it was fulfilled through extraterritoriality, under which merchants from liberal states were exempt from the jurisdiction of local law and thus able to do business under their home law. Hence, commercial economy was built up in non-liberal states for liberal states. There were not many cases of extraterritoriality because no many nations had centralized administration. However, Britain

⁶⁰ The mediaeval European category of serf had an equivalent in Mexico immediately after the Spanish conquest. See Thomas, *supra* note 14, p. 115.

was one of them. Before liberalization, England gave extraterritoriality to Italian bankers in the Lombard Street of London.⁶¹

The British colonization or extraterritoriality had virtually installed the liberalist citizen's rights system overseas. British did not intend to jeopardize foreign nations' integrity if not necessary. This is a prototype of the UN system: a sovereignty system plus universality of human rights. Therefore Britain has transformed rather than conquered the world.

The liberal colonial expansion, however, conflicted with the principal of sovereignty. Liberal states normally were reluctant to engage in war because of war costs and risks. However, war can also be business. The disparity of military strength between European and non-European nations was significant enough to manage the costs and risks of colonial wars. In order to make maximum profit, commercial companies, such as the British East India Company, and the Dutch East India Company, dealt with war as business.

3.2 Colonization Effects in Europe

There was flaw in the European sovereignty system, which resulted into the failure of the mechanism. The designers of the mechanism did not envisage the great expectation of Europe. By 1648, English revolution just began. Feudalism dominated Europe. Colonization had been carried out for more than one century under the leadership of Spain and Portugal. However, 'The colonial expansion of the first wave was not distinctive from the previous type (colonization by the Turks, the Arabs, even by the Romans), in the sense that the economic, military, and technical gap between the colonizers and the colonized was narrow and *trade* was on a very small scale'.⁶² Europe did not yet show strategic superiority to other mature civilizations, such as the Ottoman Empire or the Chinese Empire.

Shortly after the Westphalia Peace, with the liberalization, Europe suddenly galloped ahead of any other civilizations. Military superiority adding up to the nautical revolution, European states suddenly faced the issue of dealing the relations with the vast non-European nations which were totally under the mercy of the European gunboats. In order to install citizen's rights institution overseas to facilitate trade, European states did not recognize the sovereignty of the non-European nations, and forcefully inserted their legal systems into the non-European states through colonization or extraterritoriality. Hence the resources and markets of the colonies were manipulated by the mother country, and only by the mother country. Therefore merchants, liberalist or not, from outside the mother states did not have full access to colony resources and markets, which raised serious issues. Resources and markets were key elements of commercial economy.

⁶¹ Which was repealed only in the English Civil War during the late Stuart period, see Huang, *supra* note 43, p. 231.

⁶² Ferro, *supra* note 59, p. 17

With the progressing of liberal economies, especially after the industrial revolutions, they played heavier and heavier weight in the economy. Liberal states normally were reluctantly to engage in wars, however, not in the case when their core interests were at stake. When the feudalism frustrated the full exchangeability of resources, the commerce system responded with a series of grand wars and revolutions. The colonialism posted the same crisis in a new landscape. Subsequently, it led to colonial wars on distribution of colonies among colonial powers. Britain and France roughly kept an order for that no other states were able to challenge them. However, when the European power map significantly changed with the unification of Germany, the escalating of war on contention for colonies brought major wars to Europe, smashing the European sovereignty system. The UK and France managed to sustain the European international regime against the first German impact. However, the British and French hegemony did not survive the second German impact. The US and the USSR seized the world power after the World War II. They dismantled the colonial system, replacing it with the UN system, which established a global mechanism of resource exchangeability through the international human rights regime. From a long distance, the Dutch Independence and sovereignty are the triumph of commercial economy in the European international stage, the English Revolution and liberalism are the triumph of commercial economy over feudalism, and the two World Wars and the UN are the triumph of commercial economy in a global international stage.

The flaw of the Westphalia Peace was that, it did not consider the issue of the status of non-European states. Any liberal states enjoyed the rights not to be infringed, and the obligations not to infringe. Colonialism started at European states trespassing colonies' independence, ended up with the collapse of European sovereignty mechanism. The inherent notion of equality of commercial economy not only caused the extermination of feudal social caster systems, also caused the dismantling of colonial system, and the democratization of the international community. In this sense, the UN was the continuity and extending of the Westphalia Peace.

3.3 Colonization Effects in Colonies

The colonization effects on the colonies, however, varied depending on the situations of respective colonies. Citizen's rights system was advanced social institution, which has the potential to improve the national strength and people's welfare dramatically, but only if a nation was able to accommodate the liberalist institutions, which only few non-European nations were. The most important conditions included an enforceable legal system, which mostly derived from centralism tradition, and political decentralization. Japan actually stood as the only instance. In other nations, there was either no central regimes, such as in Sub-Sahara Africa and India, or not politically decentralized, like China.

In nations which were not centralized, the imposition of a central regime, the colonial authority, served principally commercial interests of mother

state. It left the local society along as long as the commercial interests were not jeopardized. Hence, the colonial authority played little role in transforming the local society. In nations with centralism tradition but not decentralized, the introduction of citizen's rights system normally took the form of extraterritoriality, thus the influences only went as far as the foreign military existence went, such as in the Concessions. On the other hand, the compromise of central authority in certain areas crippled the authority of the central regime nationwide, raising violent social unrest, such as the Chinese revolutions.

Normally the imposition of the citizen's rights system in non-Western nations produced destructive effects. It did not bring property rights and liberal freedoms to the local people. Instead, it brought damages to the life style of the local people. However, those countries able to transform benefited fully from the citizen's rights system. The outstanding cases included Japan and the United States. The liberalization of non-European countries rendered consequences. As we know, the power of the liberal states was asymmetrical with their size. However, when it came to the power among liberal states, size mattered. From Venice, to Holland, then England, the hegemony shifted whenever a bigger state liberalized. Britain was a big country in Europe, and Britain was a small one comparing to the US. Playing by the rule, the United States was going to take over the hegemony.

On the other side of the successful stories, there were cases of leap backward of people's liberty. The colonial process was carried out along with military conquests, which were met with resistance. Normally resistances were completely crushed, such as in North and South America where the aboriginals were slaughtered nearly to extinction. There were cases that nations survived the colonization. The Emancipation Reform in Russia, the Self-Strengthening Movement of China, and the Meiji Restoration of Japan all took place in the 1860s. While Japan managed to liberalize which helped Japan to safeguard independence, due to the failure in liberalization Russia and China had to rely on their old way to survive the colonization surge, which was the centralistic mobilization mechanism. Due to the fact that the liberal states were overwhelmingly strong, they had to drive the mechanism to the maximum, which was totalitarianism, the mechanism depriving all people's liberties in order to mobilize all resources for military use. Russia turned into totalitarian regime when attacked by Germany in World War I. China turned into totalitarian regime when attacked by Japan in World War II. Subsequently, people's dignity and liberty were compromised in the two states.

Totalitarianism repeals both agriculture and commerce property rights. It is thus neither agricultural economy nor commercial economy. In a totalitarian regime, the central power controlled all resources, serving the military enhancement. Totalitarian regime only suits centralistic agriculture economies which have a powerful mobilization mechanism. The liberal states were far advancer than centralistic regimes, but they were far less

mobilized than the centralistic regimes in military mobilization, which left room for agriculture nations to stand attacks from liberal states. This was the reason Germany were defeated by the USSR in the World War II, and the US strategy in Korea Peninsula was frustrated by China in 1950s. Totalitarianism was actually the only options left for people seeking independence in Russia and China under the overwhelming aggressive superiority from Germany and Japan, respectively. Therefore, colonization produced a new liberal power, the US, and two anti-liberty powers, the USSR and China. The three countries would thereafter redefine the international order and define human rights.

3.4 The United Nations

The United Nations continued the Westphalia Peace by inheriting the sovereignty institution, and rectified the Westphalia Peace's flaw by extending sovereignty to all nations in the world. In the first three decades of the UN, the movement of self-determination and decolonization dismantled the colonialism and colonial system. This step primarily eliminated the monopoly of resources and markets of one nation by another nation, creating the basis towards a global resource full exchangeability system. However, lacking of property protection and rule of law in non-liberal states would frustrate such a prospective. Abolishment of extraterritoriality and colonial authority in non-liberal nations might mean no resources exchangeability instead of full exchangeability. Moreover, non-liberal states were inclined to dictatorships, which were sources of wars as proved by the two World Wars, and therefore could not be tolerated. Citizen's rights system was the cure for the above-mentioned two problems. Hence, even though sovereignty was assumed to all nations, the notion of sovereignty changed. Basic liberties were required by international law to install into every state, overriding the principal of non-interference. Since every liberal state had different set of citizen's rights, it was a long process of negotiation on which rights should be made universal and obligatory to all states. The decisions were made in the form of international treaty, such as the International Bills of Human Rights. The agreed set of *universal* rights was called human rights, which derived from citizen's rights of the liberal states but were quite different. The most important difference is that property rights is the core right of any citizen's rights system, but it is not incorporated into the international human rights regime.

One basic fact of human rights is that, under the appearance of universality, non-liberal states are in disadvantageous status. Citizen's rights system is indispensable for commercial economy. However, citizen's rights system is alien to non-commercial economy. Moreover, democratic rights are fatally harmful to centralistic agriculture regimes with no complete private property structure and liberal freedoms. Democracy in centralistic regimes causes malfunction of central authority and compromises the security mechanism. Human rights regime required little extra efforts for liberal states because they are mostly already in place. However, human rights generally do not exist in non-liberal states. Lacking a commercial economy, it is also an

impossible mission to implement human rights regime. To implement human rights regime to transform the economy is also not practical approach. Human rights as an incomplete set of citizen's rights lacking property rights have no hope to accommodate a commercial economy.

Observing colonialism and human rights both as citizen's rights promotion project, we see that human rights obtain universal recognition, but colonialism is more successful. In the colonial age, Britain trained several commerce economies, such as the US, Hong Kong, Singapore. The colonization is efficient way to transplant citizen's rights in non-liberal states, also a non-sustainable and illegitimate way. In the UN age, human rights are poorly realized in non-liberal states. This is foreseeable. Without basic economic infrastructure, it is not possible to implement human rights. The human rights situation in non-liberal states after World War II was not encouraging. The promotion of human rights brought about this kind of states that could offer democratic election to the people, but could not offer security to the people or basic property protection to foreign capitals. On the other hand, the concept of human rights itself became controversial. The USSR fundamentally opposed the liberalist human rights, and raised their set of human rights.

3.5 The USSR and Human Rights

Kievan Rus', the predecessor state of Russia formed in the 9th century, was political decentralized like other European kingdoms. However, Tsardom rising after the Mongol rule was centralistic. The Oprichnina during Ivan IV, the first Tsar, clearly showed this feature.⁶³ Tsardom was challenged after the death of Ivan IV, and was restored by Mikhail Romanov in 1613. Thereafter Tsardom steadily stayed in the following 300 years. Five years later in 1618, the Thirty Years' War broke out in Europe, which led to the era of sovereignty, an era of glory of Europe. The growth of Europe posted a grave threat to Russia. Russia launched several major reforms to catch up with Europe. None really worked. The power gap between Russia and Europe was based on different economy. Tsardom smothered chances of economic transformation, which in turn frustrated attempts to liberalize. The Emancipation Reform 1861 neither freed the peasant from excessive obligations nor reordered their social and economic constraints to a significant extend. So were other ambitious reforms. Russia suffered the conflicts between the impetus to liberation reforms and its centralism tradition. A series military frustration and unfavourable treaty humiliated Russia. Then the real crisis came in the World War I. Germany's half-hearted attacks had almost destroyed the Russian defence. Facing the real risk of being colonized, Russia initiated the highest possible mobilization mechanism for an agricultural economy: totalitarianism.

⁶³ The Oprichnina was small but included all economic and military strategic points. It was responsible to the Tsar alone. It was administrative system, secret police and tax gatherer. It acted illegal, ruthless, and irresponsible. It was inhuman tax gatherer. See Walther Kirchner, *History of Russia*, Barnes & Noble, 1955, p. 42-43

The 1941-1945 German-Soviet War proved that totalitarianism had changed Russia. The USSR was tough enough to defeat the German attack. Totalitarian policies featured depriving any sorts of property rights. The USSR created a very unique economy. It probably should not be called economy, because distribution and exchange were not involved in the USSR production process.

Economic resources were source of welfare. Welfares went to the owner. Therefore, a totalitarian regime only serves the welfare of the state, because no other entity owns property in a totalitarian state. From the viewpoint of property rights and welfare, the USSR regime was the worst human rights regime. The reason to maintain such a regime is to safeguard the agricultural economy which most people have their living on. Comparing to Tsardom, the totalitarian regime was tougher to the peasants in order to gather more resources for military programs. This was the reason the USSR became tough enough to confront Germany thirty years later. Nazi Germany, as a commercial economy, could never mobilize as deep as the USSR did.

Inefficiency is the key feature of the totalitarian production mechanism. In the production process, resources are gained through mobilization instead of exchange. The purpose of the totalitarian production machine is military upgrade instead of profit. Subsequently, the production machines produce less than the input. The totalitarian production machine is therefore haemorrhage of the state. The USSR finally died of lack of vigour.

From human rights point of view, the USSR died of disrespecting human dignity. However, before her death, as a victory power, the USSR played a major role in the designing process of the international human rights regime. The USSR could not agree with the liberalist human rights, but the USSR did have interest to replace the colonial system. The negotiation process was arduous. First of all, property rights as the most important civil right had to be excluded from the two Covenants, because it was too threatening to the totalitarian regime. Second, based on the same reason, two distinct Covenants rather than one were drafted. While the International Covenant on Civil and Political Rights derived from the Western world, the International Covenant on Economic, Social, and Cultural Rights was insisted mainly by the USSR.

The theory of economic, social and culture rights was not produced in the USSR though. It was the left-wing thinkers, most notably Karl Marx, in the liberal states developed this theory out of the weakness of liberalism. The fundamental weakness of liberalism was that, it provided equal rights, but produced unequal results. In the 19th century, the social gap in the liberal age probably was not wider than the one of the feudal age. The living standard of people in liberal age was surely better than that of the feudal age. However, social gaps were legitimate according to feudalism, but it was illegitimate according to liberalism. Socialism, including Marxism, was theories focusing on social justice to challenge liberalism. It was employed by the USSR as ideology weapon to defend their human rights weakness.

Nevertheless, the USSR and the liberal states had to diametrically oppose to each other. Socialism and Liberalism did not. Social justice was a notion of liberalism. It was seriously treated in liberal states. Most liberal states ratified the International Covenant of Economical, Social and Culture Rights. Moreover, the Nordic states were considered model of realizing economic, social and cultural rights. Ironically and reasonably, economical, social and cultural rights were not decently realised in the USSR.

The USSR was no doubt a disaster of human rights. Nevertheless, in the sense of human rights, the USSR was positive than colonies which had complete human rights system from the mother state because the USSR enjoyed independence. Independence is the highest-rated human rights, even superior to property rights, because both agriculture and commercial economy need to dispose of the national resources.

After the dismantling of the USSR, the two sets of human rights, civil and political rights, and economic, social and cultural rights, formally merged. 'All human rights for all', was the slogan of the 1993 Vienna World Conference of human rights. The international promotion of human rights within international law context came to a new level. However, despite all efforts made by the liberal states, the world's main development phenomenon since 1980s was China, the country openly denouncing liberalist human rights. China is one of the five states did not yet ratify the International Covenant of Civil and Political Rights, and the other four were Guinea Bissau, Laos, Nauru, and Sao Tome and Principe.

3.6 China's Development: Shenzhen, Hong Kong, the UK

In June 1995, two years before the transfer of the sovereignty of Hong Kong from the UK to China, *Fortune* magazine published an article predicting that Hong Kong's prosperity would terminate right after the transfer.⁶⁴ In June 2007, on the 10th anniversary of Hong Kong's transfer, *Fortune* issued another article acknowledging that Hong Kong was more prosperous than before the transfer.⁶⁵ *Fortune* recognized they made a wrong judgement. This mistake was actually not only *Fortune*'s. This idea was commonly hold by the international community at the time. There was a mass migration wave before the transfer. During 1984-1997, one-sixth of the Hong Kong population emigrated.⁶⁶ Based on the fact that Shanghai, one of the biggest financial and commercial hubs in East Asia, declined right after the fall to

⁶⁴ *The death of Hong Kong*, 26 June 1995, *Fortune*, money.cnn.com/magazines/fortune/fortune_archive/1995/06/26/203948/index.htm, visited on 15 January 2008.

⁶⁵ *Oops! Hong Kong is hardly died*, 28 June 2007, *Fortune*, money.cnn.com/magazines/fortune/fortune_archive/2007/07/09/100122332/index.htm, visited on 15 January 2008.

⁶⁶ Nan M. Sussman, *People on the move: the transnational flow of Chinese human capital*, 2005, Conference at Hong Kong University of Science and Technology, p.1, www.cctr.ust.hk/conference/papers/Sussman.NanM_paper.pdf, visited on 15 January 2008.

Mao's army in 1949. Later on, economy of all China's port cities collapsed under Mao's rule. It was reasonable to be pessimistic on Hong Kong. It was therefore surprising for Hong Kong to end up differently.

Hong Kong had an extremely liberal economy, fulfilling most kinds of human rights. On the other hand, China had a totalitarian system, barely fulfilling any human rights. Putting these two entities into a single sovereignty, there was only two possible results according to classic sovereignty theory, the PRCnization of Hong Kong, or the Hong Kongnization of the PRC. Nevertheless, a third way applied to Hong Kong.

Deng Xiaoping, since back in office in 1978, launched a series of reforms. The reforms were conducted in two parts, the rural reform and the urban reform. The urban reform focused on transplanting economic model of Chinese societies not under PRC rule: Taiwan, Hong Kong, and Macau. The three regions were on the similar development level as mainland port cities before the PRC rule, but by 1978 the three regions were economically in par with developed economies, and mainland China was one of the least developed economies. It was therefore convenient to transplant model from there due to the same culture, language, and ethnicity background. Four spots geologically close to these regions were established Special Economic Zones (SEZ), the experimental laboratories for economic reform. Because Macau was too small, and Taiwan was separated by the sea, plus technically still in a civil war with the PRC, only Shenzhen, the SEZ bordering Hong Kong, achieved a major success.

A fishing town with a population of 310,000 in 1979, the year of the SEZ establishment, Shenzhen was one of the fastest growing cities in the world. GDP per capita of Shenzhen in 2006 is 69450 *yuan* (9600 USD), the highest among big Chinese cities.⁶⁷ By 2007, 14 million people lived in Shenzhen.⁶⁸ Shenzhen has transformed into an economic powerhouse of China and manufacturing base of the world mainly by the capital from Hong Kong. Far more importantly, the Shenzhen experience, summed up as creating a foreign capital-friendly environment to train commercial economy, was applied nationwide. China's 2487 county level administrative units throw in an all-out match of attracting foreign investment. China became a major host of foreign direct investment (FDI). From 1978 to 1995, 'China has received USD 128.1 billion in FDI. Recent (1997) FDI inflows to China account for 40% of such flows to all developing countries combined.'⁶⁹ After 1997, due to the Asian Financial Crisis and China's

⁶⁷ Shenzhen Bureau of Statistics, www.szjtj.com/pub/sztjpublic/tjsj/tjnb/default.html, visited on 15 January 2008.

⁶⁸ China Radio International, *Shenzhen to Keep Permanent Population below 9 Mln by 2010*, 3 December 2007, english.cri.cn/2946/2007/12/03/189@300737.htm, visited on 15 January 2008.

⁶⁹ H. G. Broadman and X. Sun, 'The distribution of foreign direct investment in China', 3 *The World Economy* (1997) p.339-361.

accession to WTO, FDI to China surged, reaching USD 72 billion in 2005.⁷⁰ China's GDP increased 58 times from 364.5 billion *yuan* of 1978 to 21 trillion *yuan* of 2006.

In China's economic transformation process, Hong Kong served as a major impetus, less for the huge investment, more for a model provider. Hong Kong was not an ideological heresy since the day the Shenzhen SEZ established. Instead, it was an admired place, towards which China pursued with all her strength. For this reason, China sincerely tries to protect Hong Kong's way of life, not for the view of the western states, but for her own sake.

Hong Kong was a British colony for 155 years. The UK had shaped the liberalist Hong Kong. The key role Hong Kong playing in the transformation of China was ultimately a role of the UK in China. The UK was also the primary foreign influence over China since the 1842 Treaty of Nanjing.

The British influence over China separated into two phases. 1842-1949 being the first phase, through colonization of Hong Kong, and extraterritoriality in treaty ports, the British established a complete citizen's rights system in Hong Kong and port cities. However, the enormous rural inland of China was not touched by this system. During 1949-1978, the British influence remained limited to Hong Kong, but mainland China was influenced indirectly, as Hong Kong was the only trading channel for China with the liberal world during this period. This influence jumped to cover the whole of mainland China since 1978. Although unprecedented in the term of scope, the degree has greatly decreased in comparison to the first phase. There were barely any *rights*, and a human rights system was not discussed, despite the thirty years study-from-Hong Kong movement.

The UK was not the only source of influence of human rights for China. It was the liberal world that forcefully drove China into a human rights system. In the following part I will discuss the two China: the centralistic China 221 BC - 1911 AD and the totalitarian China since 1949.

⁷⁰ *FDI from developing and transition economy: implications for development*, 2006, United Nations, p. xx, www.unctad.org/en/docs/wir2006_en.pdf, visited on 15 January 2008.

4 China 221 BC – 1842 AD: from Centralism to Absolutism

The Qin Dynasty established a centralistic regime in China in 221 BC. Although only lasted 15 years, this imperial centralism tradition went all the way down to 1911 under the reign of successive dynasties. During this period, there were tens of dynasties, among them eight were regarded main dynasties: the Qin (221BC-206BC), the Han (206BC-220AD), the Sui (581-619), the Tang (618-907), the Song (960-1279), the Yuan (1271-1368), the Ming (1368-1644), and the Qing (1644-1911). Ray Huang categorize the eight dynasties into three empires, the first empire included the Qin and the Han from 221BC to 220AD. The second empire was the Sui, the Tang and the Song from 581to 1279. The Ming and the Qing, from 1368 to1911, composed the third empire. The three empires are not real empires. They are only academic usage to depict common characteristics of certain history phase.

4.1 The First Chinese Empire: Establishing Centralism

‘Students have been impressed by the parallel sequences in ancient China and in the Graeco-Roman world: an age of philosophers and warring states, an age of unification and empire, and an age of disintegration and collapse of central power. Thus Confucius and his disciples were roughly contemporary with Plato and Aristotle; Alexander the Great preceded the First Emperor of the Qin (221 BC) by only a century; and the imperial systems of Rome and Han flourished contemporaneously. Similarly, the barbarians on the northern frontier grew more dangerous as each of these empires declined, and the economic and political disintegration within the “universal state,” in Toynbee’s phrase, was market by the spread of foreign religious to which the distressed people turned for solace. The entrance of the northern nomads into China and the spread of Buddhism in the period from the third to the sixth centuries AD were actually contemporary with the inroads of the Goths and Vandals and the spread of Christianity in the West, the triumph, as Gibbon put it, of “barbarian and religion.”’⁷¹

Inheriting the political structure from the short-lived Qin, the Han developed a mature centralistic regime. This regime, like the Roman Empire, safeguarded an agricultural economy of small self-cultivators. Also like the Roman Empire, the legal system of the Han protected peasants’ ownership over their land, but presented no rule of law. The small self-cultivators were the major source of tax and soldier of the state. Politically privileged group

⁷¹ Fairbank, *supra* note 56, p.47

owned large estates without paying tax obligations to the state. During the process of the expansion of the large estates over the small farms, the tax and soldier source of the state dried up.⁷² Subsequently the Dynasty declined, in a similar way as the decline of Roman Empire.

It did not seem that China would went back to unification in the beginning of the post-Han era. The gentry class, owners of large estates, abandoned hope of reviving the central leadership and returned home to organize self-defence forces, playing the similar role of the European knights and barons.⁷³ The gentry class and the north nomadic people set up numerable kingdoms after the Han. Warfare among them was incessant. 'Large-scale engagements and decisive battles, however, did not occur very often'.⁷⁴ Gentry influence, which had diffused the rural power during the Later Han period, *made general mobilization difficult if not altogether impossible*. The records show that in the period of disunity armies were often made up of hired mercenaries'.⁷⁵ Many kingdoms, rampant wars and Buddhism, the foreign religion, spread, the situation was similar to Dark Age Europe.

However, while Europe was advancing their way into feudalism, in China the Sui suddenly restored a centralistic dynasty in the 6th century. Thereafter, the history of China was by no means resembled the European history.

Slavery shall be able to explain this diversification. The Graeco-Roman used slave labour extensively.⁷⁶ However, 'There were few slaves in the Chinese empire.'⁷⁷ Household slaves had existed all the time throughout the centralistic history from 221 BC down to 1911, but mass use of slaves in economic production was never found. In Later Han, there is little evidence of slaves being engaged in agricultural work or of any legal restraints on tenant cultivators.⁷⁸

The decline of the central power inevitably disabled the security mechanism. Now a farmer planted with no confidence that he would reap. In the upheavals of the Dark Ages the crying social need was for protection. A farmer's 'only course was to barter with a lord, offering what he had in return for protection: *his labour, his freedom of movement, and the freedom*

⁷² 'Despite the distress evident in the countryside in the second century and the increasing incidence of drifters, starvation, and unrest, agriculture in general does not appear to have been depressed. For the large landowner, this period seems to have been one of prosperity.' Denis Twitchett and Michael Loewe, *The Cambridge history of China, Volume I, The Ch'in and Han Empires, 221 BC – AD 220*, Cambridge, 1986, p622.

⁷³ Huang, *supra* note 43, p. 67

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, pp. 69-70

⁷⁶ 80% of Roman families had, in the second century AD, once been emancipated from slavery. See Thomas, *supra* note 14, p.111.

⁷⁷ *Ibid.*, p. 114.

⁷⁸ Twitchett and Loewe, *supra* note 72, p. 626

and labour of his children. He agreed to become, in a word, his lord's hereditary serf.⁷⁹

Serfdom was, nevertheless, not rudimentary different from slavery. From the legal viewpoint, a serf was freeman and a slave was not. However, from the economical viewpoint, they were similar: a serf or a slave, his freedom, labour and children were bound to the master's land in the same way. The reason the serfdom replaced of slavery was also economical: slaves worked badly in comparison with free men. By the end of the war of expansion, the amount of Roman slave owners had already reduced.⁸⁰

Serfdom provided a security mechanism for the mass in the Middle Age Europe, restraining the emergence of another centralistic regime. Subsequently, the decentralization nature of the feudal regime gave chance to city-states, which brought forth liberalism.

In China, barbarian invasion into the North drove the ethnic Han Chinese migrating to the areas of the Yangzi valley further south. This laid the basis for a dual development of small regional kingdoms north and south.⁸¹ These kingdoms were not as centralistic as the Han. Rural communities organized self-defence forces and erected fortifications under local gentry leadership.⁸² Unlike serfs in the European manors, the peasants of the rural communities were not personally bonded to the local gentry. The personal freedom of the peasants was never lost to the gentry class. The gentry leadership was also not politically and legally perpetualized. Subsequently, significant numbers of peasants were not under any protection, becoming drifters. The drifters provided convenient soldier sources for the warring kingdoms. Major battles in this age were rarely fought by less than a quarter of a million men. The mobile warfare over a large region, which favoured huge bodies of fighting men, raided the self-governing units organized by the gentry, thus compromising the formation of a decentralization structure.⁸³ With the situation evolving, a new centralistic regime, the Northern Wei, emerged.

Northern Wei was one of the kingdoms build by nomadic people in northern China. When the Northern Wei conquered the eastern China in 409, they made the local gentry into government officials, instructing them to collect as much grain as possible for the capital. The Chinese local gentry worked in close collaboration with the Chinese officials at court, 'a fact which determined the whole fate of the Northern Wei'.⁸⁴ This institution of *juntian*, Equalization of Land Utilization, was finalized and promulgated in

⁷⁹ Maurice Keen, *A history of medieval Europe*, Routledge and Kegan Paul, 1967, p. 37.

⁸⁰ Thomas, *supra* note 14, p.12.

⁸¹ Fairbank, *supra* note 56, p.73.

⁸² In about 350, within six prefectures in today's Shanxi Province, there was a league of 300 such autonomous self-defence units. In the late fourth century, the territory west of the Yellow River was said to be dotted with 3000 of them. A league of these units might boast a membership of as many as 100,000 households. See Huang, *supra* note 43, p. 76.

⁸³ *Ibid*, p.77.

⁸⁴ See Wolfram Eberhard, *A history of China*, 4th ed., Routledge & Kegan Paul, 1977, pp. 139-140.

485. 'It took the position that all the land belonged to the emperor; individuals derived the right to use it at the sovereign's pleasure. Without elaboration, the edict authorized the *granting* of forty *mu* of land to every male subject over the age of fifteen, and half of that amount to every female. Additional allowances were made for draft animals and slave labour within the household. All this was to ensure the planting of staple crops, and all reverted to the government upon the death or retirement of the grantee. Land set aside for hemp, mulberry trees, fruits, and vegetables belonged to a different category. It was also rationed to the households according to the number of persons in them. But acreages in this latter category could be inherited or even transferred under certain restrictions.'⁸⁵

In the fifth century, the north China was devastated by wars. Lands were deserted, mass people escaping home. *Juntian* served as security mechanism that promptly connected people and land, and established the government's direct control of land and peasants. *Juntian* was later copied by the succession dynasties and through them passed on to the unified empires of the Sui and Tang. Similarly, the Northern Wei taxation and militia system was also a prototype for institutions of later dynasties.⁸⁶ The gentry influence was completely cleared. The land was once again distributed equally among peasants. All farmers paid tax directly to the emperor, and were directly controlled by the central regime. Universal conscription was now possible to put into effect. In short, the Northern Wei restored centralism, and regained general mobilization capacity.

'There was a competition for general mobilization. Both the non-Chinese nobility, who claimed their hereditary privilege on the strength of their tribal affiliation, and the large Chinese household, who built up their local influence by extending a protective umbrella over the general population, had lost their commanding position and with it their ability to tip the balance. The tension between these two groups had been largely responsible for China's disunity over three and a half centuries. When their power diminished, the reintroduction of imperial bureaucratic management was not far off.'⁸⁷ The Sui reunified China in 581, opening the Second Empire.

4.2 The Second Empire: a Centralistic regime Reaching for Commercial economy

During the 6th century to the 10th century, Europe was struggling in the Dark Ages. In China, on the contrary, the early Tang dynasty in the seventh century marked the most splendid and satisfying period of China's centralistic era. The Tang capital at Chang'an became a great international metropolis, a focal point of the Eurasian world. Between 600 and 900 no

⁸⁵ Huang, *supra* note 43, p. 90.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 94.

Western capital could compete in size and grandeur.⁸⁸ Comparing with the Second Chinese Empire, Europe seemed hopeless. Nevertheless, the glory of China was achieved by going back to centralism. The old style prosperity was featured by ‘growth with no development’.⁸⁹ The agricultural economy, as analysed above, had certain cap in increasing productivity. The technological advancement benefited agriculture limitedly. Subsequently, national wealth and people’s welfare never went over a certain point. On the other hand, Europe was arduously exploring new political structure, and would soon emerge with new face in China’s sea level, and completely change China.

The Second Empire not only restored the centralistic order, also made it ever more secure. The Second Empire eliminated the gentry class influence, and was therefore immunized from the crisis of local power eclipsing the central authority, which had killed the First Empire and the Roman Empire. The social structure in the Han was three layers: the emperor on the top, the gentry class in the middle, and the peasants in the bottom. The structure of the Second Empire was, nevertheless, two layers: the emperor on the top, and the peasants in the bottom, likes a ‘submarine sandwich’.⁹⁰ Decline of the gentry class enabled the central power complete dominance of local communities, the farthest development of this trend is in the Mao era the power of the central regime stretched into individual and family life.⁹¹

The Second Empire overcame the structure weakness of the agricultural centralism. Nevertheless, it could not dodge the economic weakness of the agricultural economy. The productivity of the agriculture was hard to improve. As far as the there were no more arable land, there was no more room to boost production. On the other hand, the population kept growing, especially in peace age. Soon the economy could not support the population, and crisis broke out.

The registered population of the Tang increased from some three million households in the early seventh century to the 9,619,254 households of the mid-eighth century.⁹² The Tang court could not maintain the *juntian* at this point, simply because the government had no more land to distribute. In 780 a new tax plan replaced *juntian*. Thereafter land taxed would be collected from the actual owners wherever they were found, instead of the fictitious land *grantees*. The giving up of *juntian* indicated the fatal institutional flaws that could not be fixed: an agriculture peace could not support the population growth which was a natural results of peace. A gravely destructive rebellion broke up before the replacement. Tang rule was nominally restored after eight years rebellion, but never fully revived for the rest of her tenure. Peasant drifters were on large-scale uprisings. One of

⁸⁸ Fairbank, *supra* note 56, p. 78.

⁸⁹ *Ibid.*, p. 167.

⁹⁰ Huang, *supra* note 43, p. 220

⁹¹ Fairbank, *supra* note 56, p. 85

⁹² Huang, *supra* note 43, p. 110

them even occupied the capital. The Tang collapsed only two decades after this attack.

Another wave of barbarian invasion followed the decline of the Tang. The nomadic people invaded the north China, setting up four dynasties, three of which were successive. The ethnic Han people held the South. The ethnic Han region was unified under a centralistic dynasty after 53 years disunity: the Song. Although also a form of Sino-barbarian north-south confrontation, the post-Tang situation was different from the post-Han age. The kingdoms in the post-Han era were not centralized, until the rise of the Northern Wei, while in the post-Tang era, all regimes were centralized, and the number of regimes was far less. The nomadic peoples acquired centralistic administrative skills through sinicization. They now possessed an agricultural base, and they could take up walled defence. Yet at the same time they retained a swiftness of mobilization and a high degree of mobility in field manoeuvres, qualities cognate to their pastoral life.⁹³ In the first time of the Chinese history there at the same time existed several centralized dynasties with equal mobilization capacity.

The Song's superiority was the complicity of commerce, which the northern regime could not learn. The Song chose to rely on it. The founder of the Song, Zhao Kuangyin, made no effort to redistribute agricultural land; nor did he design a universal conscription program. The Song was the only major dynasty in Chinese history to rely on recruited soldiers to fill out army ranks. Aware of the fact that military sinew had to be backed up by economic strength, Zhao was determined to accumulate two million bolts of silk fabrics in his warehouses as financial reserves in dealing with the sinicized states on the northern frontier.⁹⁴ He did accumulate this many silk, but he did not achieve military victory.

Achieving a major commerce success, the Song was well ahead of the rest of the world in technological invention, material production, political philosophy, government, and elite culture. The use of gunpowder, movable type, flamethrower, compass navigation, astronomical clock, and bulkheads and watertight compartments in shipbuilding emerged with the Song. The population approached 50 to 60 million at the height of the Tang. It grew to perhaps 100 million in early Song and stood at about 120 million at the end of the twelfth century. By 1078 North China was producing annually more than 114,000 tons of pig iron (700 years later England would produce only half that amount). During the Southern Song (1127-1276), foreign trade bulked large in government revenues for almost the only time before the nineteenth century.⁹⁵ Fairbank named the Song China's 'greatest age'.⁹⁶

⁹³ One of the main nomadic dynasty, Liao, had a population of perhaps four million, which made it somewhere about 1/15th the size of the Song empire to the south. Yet the Liao cavalry had such striking power that the Song finally paid them annual subsidies to keep peace on the border. See Fairbank, *supra* note 56, pp. 113-114.

⁹⁴ Huang, *supra* note 43, pp. 120-121.

⁹⁵ Fairbank, *supra* note 56, pp. 88-94, and Huang, *supra* note 43, p.120.

⁹⁶ Fairbank, *supra* note 56, chapter four, 'China's greatest age: Northern and Southern Song'.

On the other hand, Zhao's strategy did not achieve the military goal. The Song's economic power never converted into military power. A series of military defeats pushed up the Song into a major financial and commercial reform: *Wang Anshi reform* launched in 1069. The package of the reform programs was referred to as the "New Policies". One of Wang's innovations was the Green Crop Money, by which the government loaned money to the peasants in the planting season. The return of the loan after the autumn harvest carried a 20 percent interest, a rate not considered exorbitant by the standards of the day. Another program had to do with the commutation of service. The Song local government enlisted the service of a number of office attendants. Hitherto those positions were unpaid. Wang ordered that a new tax be collected to pay for these jobs. Wang made the idle goods sitting in government warehouses available to merchants on credit; interest was charged when the account was settled. The transportation intendants who carried native merchandise to the capital as tax proceeds could dispose of the cargo en route to make a profit. To restructure the land taxes, Wang planned to conduct a sweeping land survey in which taxable land was to be gridded into squares of 5000 feet on each side. For the supply of military manpower, Wang decided to revive the militia.⁹⁷

Wang was aware that state income could be widened without tax increases; he apparently understood that the advance of capital could stimulate production, and the greater productivity would in turn generate more public revenue. This expansionist view differed from the traditional economic perspective, which saw everything as a fixed quantity.⁹⁸ It is a fact that China had made the first attempt to institutionalize the monetary management of state affairs one thousand years ago. Such a system was first possible in the European city-states several centuries later. And it was not yet viable in China even by today in 2007. The result of the reform was therefore foreseeable. It ended up in futile, and was abolished in 1086. Moreover, the failure of the reform also disabled the hope to re-establish the link between the superstructure of the state and its infrastructure, which was maintained when taxation was in the hands of army personnel in the field in the later-Tang and post-Tang period, and vanished with the rise of the concentration of power of the Song.⁹⁹ This disconnection contributed to the Song's military weakness.

The Song remained militarily inferior to the north regimes, but managed to survive for three centuries, which the north regimes did not. The nomadic people were in harsh competition with each other, and sharpened their 'mounted archer's military prowess' during the competition.¹⁰⁰ In 1125, the Jin overthrew the Liao established on 937. The Jin was more powerful that they took the north part of the Song together with her capital, emperors and

⁹⁷ Huang, *supra* note 43, p. 131

⁹⁸ *Ibid.*, p. 133.

⁹⁹ *Ibid.*, p. 144.

¹⁰⁰ Fairbank, *supra* note 56, p.119.

35 million people.¹⁰¹ The Song had to build another capital in Lin'an to the south in 1127. In 1234, the Mongols extinguished the Jin. The Mongols were more powerful. They completely conquered the Song in 1279, plus most of the Eurasia continent.

In the post-Han era, the decentralization trend was reverted partly by a nomadic regime. The Song's state effort to commercialize the country also frustrated. A hypothesis question then rises: were it not for the nomadic invasion, would the Song be able to transform herself into a commercial economy? The answer would be a firm no. It is mainly China's internal weakness rather than external pressure caused the failure. The Song had been standing the north regimes for three centuries, and the Mongols for 45 years. They would have developed a new system they were ever capable to. They put all their efforts on this futile 'New Policies', which were not completely ended by the 1086 abolishment. In 1093 the 'New Policies' was restored. Then repealed, then restored again. In 1104, an imperial decree made Wang the Third Sage, allowing him a place inferior only to Confucius and Mencius in the Confucian temple.¹⁰² The Song's indecisiveness on 'New Policies' proved that Song had no means to overcome the empire's structure weaknesses. The truth is probably this, were it not for the nomadic people, the Song would not throw herself into a major commercialization campaign. Gunpowder was a good example. Chinese had invented gunpowder in the 9th century, which have the potential to help the Song to conquer the nomadic people. Even though the Song did put it in military use, it ended up the most destructive weapon of the enemies for the Song's defence.¹⁰³ Chinese had the intelligence to develop cool technology, but lacked organisational capacity to use the technology. This was the Song's entire problem, also all Song's successive regimes'.

A commerce system required rule of law, which was never possible under the absolute power of the emperor. The decline of the Song proved the impotence of the Song, or the attempt to commercialize a country in a centralistic state, which later happened repeatedly in Russia and China. The Song owned her root to the post-Han history: a regime which had eliminated the gentry class had no hope to decentralize and subsequent transformation into a commercial economy.

4.3 The Third Empire: Absolutism

The Mongols established the Yuan Dynasty, which inherited the structure of the Song, and problems as well. The Mongols' lack of governing skills worsened the situation. The Yuan was toppled only 89 years later by a peasant uprising led by Zhu Yuanzhang, who established the Ming. The Ming began the third Empire: 'an introverted and non-competitive state'¹⁰⁴.

¹⁰¹ *Ibid.*, p. 115.

¹⁰² See Huang, *supra* note 43, pp.132-133.

¹⁰³ See Fairbank, *supra* note 56, pp. 89-92

¹⁰⁴ Huang, *supra* note 43, p. 169.

The uniqueness of the Ming was decided in her way of emerging. Peasant uprisings were a feature of China. The decline of the Qin, the Han, the Sui, the Tang, the Yuan, and the Ming all featured with major peasant uprisings. However, the peasants never won the power before the Ming.

Understanding this from experiences of the Roman Empire that, the Roman Empire never fell into slave uprising, because slaves were not the dominant economy. Therefore, the success of Zhu as the first peasant uprising to establish a dynasty proved one fact: small self-cultivator had dominated the state economy. After the gentry frustration and failure of the state commercialization, commerce as a economic department was deprived strategic importance from the Chinese society. Small self-cultivator agricultural economy was then all left for China.

Zhu was the first to make effective use of the techniques of tax equalization and popular mobilization, and to adopt the cause of moral absolutism. The Zhu uprising was a 'consciously extremist, morally revolutionary' peasant movement.¹⁰⁵ Zhu's core proposition was egalitarianism, the ultimate care of the peasants. When ascended to the throne, Zhu fulfilled this principal nationwide. During 1376 to 1393, Zhu conducted four waves of political purges. The victims were high officials, ranking army officers, ordinary bureaucrats, government students, local landowners, and clan leaders. 100,000 persons lost their lives in these purges. State and society after the bloody purge appeared unusual even even by Chinese standards. In 1397, the Ministry of Revenue reported that there was 14,341 households possessed 120 acres of land or more. The entire country was actually packed with small self-cultivators. Minimum rates of taxation were assessed. The financial and tax design, unlike the Song, avoided commercial tool as much as possible. The collection of tax, wherever possible, was in grain and textile materials. Besides the basic assessment, peasants were obligated to deliver the consignments to designated warehouses and depots, some of them in far-off regions. Numerous kinds of service support essential to the routine operation of the government, such as stationery, office furniture, and building maintenance, were not made organic to the offices themselves, but requisitioned from the taxpayers item by item. The empire's fiscal operations were so fragmented as to make them virtually safe from capture. Mercantile interests were felt to be inherently in conflict with those of society. The state had to refrain from enriching herself because any gain to the government, in this naive view, meant a loss to the people. When certain sectors showed a tendency to grow through industry or foreign trade, the Ming government saw no reason to help them but rather opposed such a growth of imbalance which in turn would threaten the empire's political unity. It was better to keep all the provinces on the same level as the more backward sectors. This was sharp contrast to the Song, which had attempted to use the criteria of the advanced sector of the national economy to integrate the empire's fiscal resources, and only let to disastrous

¹⁰⁵ Herbert Franke and Denis Twitchett, *The Cambridge history of China, Volume 6, Alien regimes and border states, 907-1368*, Cambridge, 1994, pp. 584-586

consequences. Foreign trade was heavily restricted, maintaining through the tributary relationship and was closely supervised.¹⁰⁶

Zhu virtually announced to the nation that China could be content and happy without the complications of commerce. When a country of millions of square miles was rendered into a compact and homogeneous whole, certain administrative controls could substitute for the complex division of labour and exchangeability of services and goods that normally would have been determined by the works of the national economy. High political pressure was required to cut off all commercial departments to keep China a large conglomerate of villages. The simplification of social organisation structure also made centralization possible. Zhu issued a flood of admonitions and regulations to guide his subjects' conduct. These codes constituted a blueprint of the idea social order. Zhu abolished the central secretariat and prime ministership so that he as emperor would be the civil and military CEO of the realm. So he had to handle 3,391 issues per day by himself, which was obviously out of human's capacity, and led to eunuch control of the power. Eventually the court would have 70,000 eunuchs.¹⁰⁷ In short, in the Ming, 'anticommercialism and xenophobia won out, and China retired from the world scene.'¹⁰⁸

By the end of the Ming, population increased from 80 million to 160 million.¹⁰⁹ Peasants rebelled and captured the capital. The Ming emperor hung himself. A Ming general opened the gate for the Manchus. The Manchus defeated the rebel force and established the Qing in 1644. The Qing had inherited the Ming structure with only minor modification.¹¹⁰ At the point of 1800, the population had been in the vicinity of 300 million.¹¹¹ Major rebellion was approaching, and the European traders had come for centuries. Their invading fleet would soon come too.

¹⁰⁶ About Zhu's policies, see Huang, *supra* note 43, pp. 169-174, and Fairbank, *supra* note 56, pp. 128-137.

¹⁰⁷ *Ibid.*

¹⁰⁸ Fairbank, *supra* note 56, p. 139.

¹⁰⁹ *Ibid.*, p. 128.

¹¹⁰ Huang, *supra* note 43, p. 216.

¹¹¹ *Ibid.*, p. 224.

5 Transplanting a Commercial economy in China

When Sun Yat-sen, ‘the father of modern China’, sought to establish a republic, one of his missions was to find a name for it. China has a lot of dynasty names, but never had a name for the country. China as a country never needed a name, because China was the Celestial Empire. China never had the need to describe herself to anyone else. The tributary states, such as Japan, Korea, needed a name, but China did not. When the European traders went to China, the trade also conducted as a boon granted to tributary states, until the British sought to replace tributary relations with treaty relations.¹¹²

5.1 The Acceptance of Sovereignty

In 1793, British sent a diplomatic mission to China, requesting for broader trade opportunities, as well as diplomatic representation. Beijing turned it all down. In 1816, another British embassy was rudely treated as well and sent away.¹¹³ Britain had been bothered by the restrictions on trade and lack of legal protection of commercial interests. Subsequently, when in 1839 China cracked down the opium trade, the primary commercial interests of Britain in China, Britain sent gunboats to China.¹¹⁴ British’s gunboats won out the Opium War and secured Qing agreement to the Treaty of Nanjing 1842, which was the begging of a series of ‘unequal treaties’. As mentioned above, Britain did not intend to replace the Chinese government. Except a harbour, Hong Kong, they did not raise further land request. Britain regarded the defeated China as a sovereign state, from which they seek to secure trade by installing liberties. From the human rights viewpoint, among all the unequal treaties, the following provisions had far-reaching influences: the cession of Hong Kong, the opening of treaty ports, the abolishment of trade monopolies, a fixed, moderate tariff, and the extraterritoriality.

Commerce had been suppressed since the Ming. It then revived in port cities. More than just revival, commercial economy now enjoyed Western-style property rights and rule of law which never existed before, and after hand. China had a long history of commerce success, when favourable environment suddenly available, a commercial economy soon emerged from none to a significant part of the Chinese economy. The rise of the *new* economy then brought substantial impact to China.

¹¹² Denis Twitchett and John K. Fairbank, *The Cambridge history of China, Volume 10, Late Ch’ing 1800-1911, part I*, Cambridge, 1978, p. 163.

¹¹³ Fairbank, *supra* note 56, pp. 196-197

¹¹⁴ By 1836, China’s total imports of opium came to \$18 million, making it the world’s most valuable single commodity trade of the nineteenth century. See Twitchett and Fairbank, *supra* note 112, p. 172.

The commercial economy in treaty ports depended on citizen's rights like property rights maintained by extraterritoriality, which was secured by squat gunboats moored off the bund. Therefore, the extent of commercial economy matched exactly with the extent of the Western military existence, which was the Concessions and the treaty ports as written in the treaties. There was a clear line between the rural China and the treaty-port China. The vast rural inland under Qing rule was yet not able to yield commercial economy. In villages several kilometres away from port cities there saw no sign of modern industrial influence.¹¹⁵ The rural China suffered from overpopulation and lack of new arable land. The treaty-port China, on the other hand, flourished from a modern economy and active foreign trade.

The treaty-port China composed of a tiny part of territory and a relatively small population, however, its economy importance soon surpassed the vast rural China. The prosperity of the port cities, especially Shanghai, demonstrated a different face from the desperation in the rural China. China would soon separate into two parts, the treaty-port China, and the rural China. China had to choose between the disjointed two. Firstly China chose the treaty-port China, replacing the Qing court with a republic. Then the treaty-port China lost with the abolishment of extraterritoriality in 1943, subsequently China came back to a centralistic regime: the totalitarianism.

However, the issue right after the Treaty of Nanjing was not the port-rural disparity. For the Qing court, they encountered the weirdest situation in Chinese history. Being overwhelmingly defeated used to mean equally to lost power. Therefore, the Chinese ruler would always be the strongest. However, the British showed no interest to the throne. They took trade privileges and left. Opening trade was not a concern of the Qing court.¹¹⁶ Nevertheless, being a loser to foreign regime crippled the court's authority, which raised a legitimacy crisis. In the following two decades, the Qing court resisted the treaty, pretending the tributary system was still in effect. The liberal states were not satisfactory with the trade situation with China. They raised new proposal, which was bluntly refused by the new emperor who was a hard line xenophobe. This transpired the Anglo-French War against China, or the Second Opium War, 1856-1860. In 1860 the Anglo-French joint force occupied and looted Beijing. 1860 was also the year the Taiping Rebellion, the peasant rebellion from 1851 to 1864 which was the most threatening one in the Qing era, cracked a Qing Camp of 200,000 soldiers besieging Nanjing, the rebel capital. The double crisis led to a coup d'état in Beijing in 1861, which changed the policies of the Qing court: they accepted the treaty system, and put more Han Chinese in positions of real power in order to defeat the rebels. This more flexible policy began a restoration of Qing power.¹¹⁷

¹¹⁵ Huang, *supra* note 41, pp. 468-469.

¹¹⁶ As summarized in retrospect in January 1861, the Taiping and Nien rebels seemed to peding a mortal disease within the body; Russia, nibbling away at Qing territory, was a threat to the bosom; while Britain, with its violent demands for trade, was only 'an affliction of our limbs'. See, Twitchett and Fairbank, *supra* note 112, p.253.

¹¹⁷ Fraibank, *supra* note 56, p.212.

Even before the signature of the 1860 treaties, the liberal states had supported the Qing against the rebellion. On 19th and 20th, British and French troops repulsed the rebel's thrust at Shanghai. Ironically, at the same days other British and French forces were storming the Dagu fortress off Beijing.¹¹⁸ After the 1860 treaties, the liberal states offered the Qing various helps, the decisive one being military arms, which also served as the spark for the modernization of China's armies and military industry.¹¹⁹ On July 19th, 1864, the government army captured Nanjing, slaughtered its inhabitants, and burned the city. In this final cataclysm, some 100,000 are said to have perished.¹²⁰ Considering the Qing had just accepted the international law system which had its base on citizen's rights, the Nanjing massacre 1864 was a benchmark of Chinese human rights.¹²¹

Acting by *realpolitik*, liberal states wanted to include the Qing court into the new formed sovereignty system. The Qing, as the weak, accepted it in the hope to preserve her. However, as discussed above, sovereignty is only another form of realistic international relations. Therefore it did not protect China from foreign encroachment. After a series of land cessions and recoveries, the border of the *sovereignty China* was roughly settled only in 2004 with the signature of the Sino-Russia border treaty, which finally legitimized the Russian occupation of the 150 million square-kilometres Outer Manchuria, which Russia took during the Second Opium War 1856-1860 and have purged all Chinese inhabitants.

5.2 Empire's Attempt to Liberalize

After the Second Opium War, the Sino-Western relation became stable. The liberal states were satisfied with the trade situation. The Qing court secured domestic order because of the structure and military reform. Then they set out to seek to boost military strength to defend the country from the foreigners. The Self-Strengthening Movement came forth. It included the adoption of international law, the educational modernization, and the establishment of arsenal, shipyard, and a modern naval force and so on. This Movement lasted for three decades, and was unsuccessful and went bankruptcy at the fierce blow from Japan in 1895.

In 1868, several years later than the Self-Strengthening Movement, Meiji Restoration took place in Japan, which achieved major success. Japan had been a traditional tributary state of China, and was considered offshoot of the Confucian culture. However, the political structure of Japan was actually different from China. Japan was once centralised under the absolute power of the Emperor like China. Then the rise of the local power eclipsed the central power. The emperor became the figurehead and the daimyos hold the

¹¹⁸ Twitchett and Fairbank, *supra* note 112, p. 301.

¹¹⁹ *Ibid.*, p. 304.

¹²⁰ *Ibid.*, p. 309.

¹²¹ The Nanjing Massacre normally refers to the genocidal war crime conducted by Japanese army in 1937; the Nanjing massacre 1864 is less known.

substantive political power, which was the feudalisation process. Benefited from the geological isolation, which was believed the reason of the frustration of Mongols' two invasions of Japan, the process was not interrupted by foreign invasion.¹²² At the point Commodore Matthew Perry of the U.S. Navy ending Japan's seclusion with his four warships, Japan was a feudal state, the only feudal state outside Europe. A similar social background enabled Japan to liberalize and became a great power in a short session. Living in a tributary system beneath China for long, long time, adding up to the desire for abroad resources and markets, Japan aimed to restore the great Chinese tributary system, with Japan as the suzerain.

The Sino-Japanese War 1894-95 ended up with China's defeat on land and sea. This war heavily impacted China. First, the Japanese encroachment of China initiated a new wave of encroachment, during which, for instance, China lost Inner Manchuria, first to Russians then to Japanese. Second, with the ambition to be the new suzerain of East Asia, Japan was especially aggressive towards China. While the European liberal powers tended to preserve China's integrity, Japan aimed to colonize China. China could not satisfy Japan by granting trade privileges. China had to respond accordingly. Third, being defeated by a tributary state is not just the same as defeated by a foreign country like Britain, which deeply hurt the legitimacy of the Qing court. Fourth, the annihilation of the modernized Beiyang Fleet, the major achievement of the Self-Strengthening Movement, announced the bankruptcy of the Self-Strengthening Movement, which insisted that the Chinese political institution was still superior to the Western one. Political reforms were brought up into schedule.

From June 11 to September 21 of 1898, three years after the Sino-Japanese War, in 103 days more than 200 rescripts, decrees, and edicts, which announced a liberal reform, came down from the throne. This was the Hundred Days' Reform. The Conservatives did not like the reform. They staged a coup d'état and ended the reform.

This event could be regarded as the first conflict between the treaty-port China and the rural China. 'By the 1890s the growth of cities, most of which were treaty ports, had brought great material and social changes.'¹²³ The reformists, with their leader Kang Youwei from Guangdong, the foremost opening border, represented the proposition of the treaty-port China. The Conservatives represented the traditional rural China. It seemed the treaty-port China lost to the rural China very quickly in the first confrontation. The coup revived the power of the Conservatives which was restrained since the 1861 coup. Driven by their xenophobic inclination, the Qing court supported the Boxer Rising, which was an anti-foreign peasant movement ignited by the aggressive Western missionaries, but in the deep rooted in the tension between the West-supported treaty-port China and the rural

¹²² Franke and Twitchett, *supra* note 105, p. 442, p. 484. Ray Huang, *supra* note 43, pp. 158-161.

¹²³ Fairbank, *supra* note 56, p. 226

China.¹²⁴ The Boxers conducted killing and sabotage against Western personnel and property. The Qing supported them by declaring war on all the powers. The western states responded with the Eight-Nation Alliance invasion of China. The allied force crushed both the Chinese army and the Boxers. The Conservatives frustrated like what happened during 1856-1860. Then the Conservatives reactivated the reform package which they stamped out in 1898. The scope of the reform was even broadened, that even Constitution and national and provincial assemblies were planned.¹²⁵

The reform produced disappointing results. However, the reform had profound indications beyond the reform itself: when the Conservatives embraced liberal reform, who needed an empire? On October 10, 1911, a small revolution organization was exposed. They were forced into an unplanned revolution, and it succeeded. The revolutionaries even did not have a leader at the scene. A military officer who used to suppress revolution activities was abducted to be the leader and became the vice president of the Republic of China, which established on January 1, 1912. The whole process was almost blood-free. It was hardly a revolution. In fact, in 1911 the real revolution did not begin yet. The Qing was killed by its own liberal reforms rather than by the revolution.

5.3 The Republic: Triumph of the Treaty-port China

China fell into chaos after the establishment of the Republic. The first president attempted to restore the imperialism by proclaiming himself emperor, but was overthrown before long. Thereafter China sank into a period of warlordism until the establishment of the Nationalist government under Jiang Jieshi (Chiang Kai-shek) in 1928. The nature of this government was defined by one fact: 'it derived approximately 85 per cent of its tax revenue from the trade and manufacturing sectors of the economy-much of which was centred in the Shanghai area,' till 1937, the year the treaty-port China lost to Japanese.¹²⁶ Modern Shanghai did not exist by 1842, but by 1928, Shanghai supported a national government almost by her own. British made principal contribution to the rise of Shanghai, 'first of all by the Royal Navy which guaranteed the security of Chinese as well as foreign property, and then by British merchants, who made money and offered their Chinese assistants and counterparts a chance to do the same'.¹²⁷ In fact, Jiang never had actual control over the vast rural inland,

¹²⁴ After the Germany's seizure of Shandong in 1890s, aggressive German missionaries had attracted converts to Catholicism partly by supporting them in lawsuits against non-Christians. Antimissionary riots had led the foreigners to exact such onerous penalties that Qing policy required magistrates to avoid antagonizing the missionaries and their converts. In this situation Shandong peasant defended their interests through secret societies. See Fairbank, *supra* note 56, p. 230.

¹²⁵ Huang, *supra* note 43, p. 250.

¹²⁶ John K. Fairbank and Albert Feuerwerker, *The Cambridge history of China, volume 13, Republican China 1912-1949, part 2*, Cambridge, 1986, p. 132.

¹²⁷ Twitchett and Fairbank, *supra* note 112, p. 238.

which was in the control of warlords. As a national government with no control over the agriculture department and not financially reliance on taxing peasants, Jiang's regime was certainly the triumph of the treaty-port China.

Jiang's top challenge was the rural-port disparity. The port economy was growing, so was the suffering of the peasants.¹²⁸ The desperate rural world was in rebel under the leadership of Mao Zedong since the very beginning of the birth of the Nationalists government. Jiang was playing an embarrassing role here. He did not have real control over the rural world, which was in the hand of warlords, and he could not play a leading role in the port world either, which was dominated by foreign powers. The ultimate solution would be penetrating the citizen's rights system of the port world into the rural world. There was no way to know whether Jiang intent to do it or not. The Second Sino-Japanese War 1937-1945 came very soon.

Even though he did litter to liberalize China, Jiang managed to bring up a modern national Chinese government into the international community. On January 11, 1943, the UK and the US signed treaty with China *relinquishing extraterritoriality* in China, by the time they had lost their interest to Japanese. Jiang was even recognised as one of the four world leaders during the World War II. Furthermore, China became a permanent member of the UN Security Council.

In the conclusion of the Sino-Japanese War, Jiang appeared unprecedented powerful. The war disintegrated the warlords' power. He now had firm control over most of the country, and he had high international reputation. With an armed force twice the size of Mao's and moreover had the advantage of American equipment and supplies, it was a 'remarkable achievement' for Jiang and the Nationalists to lose the civil war.¹²⁹ Fairbank blames both 'stupidity on the battlefield and incompetence behind the lines',¹³⁰ which was true, however, the ultimate reason was this: *the collapse of the citizen's rights system* in the treaty-port China.

During the eight years war, Japan occupied the treaty-port China. The extraterritoriality system was thus vanished. Rule of law and private property protection were roughly maintained under the Japanese occupation authority. By the surrender of Japan in 1945, the treaty-port China for the first time since the establishment lost foreign supported rule of law and property regime. The right thing for Nationalists government to do was to establish a rule of law regime to fill up the vacuum. Unfortunately they did the opposite. 'The takeover of China's coastal cities from the Japanese was characterized mainly by a corrupt seizure of assets without much attempt to put them to industrial use... Meanwhile, Nationalists with money made a killing by using their overvalued Nationalist currency to buy up Japanese-

¹²⁸ See 'the agrarian crisis', Fairbank and Feuerwerker, *supra* note 126, pp. 256-270.

¹²⁹ Fairbank, *supra* note 56, p. 331.

¹³⁰ *Ibid.*

occupation currency at its inequitable conversion rate.’¹³¹ The Nationalists takeover of the treaty-port China simply meant rule of man, no protection for property rights. Subsequently the economy of the treaty-port China completely collapsed. Jiang took over the property of treaty-port China, but lost the economy of treaty-port China, which was the only economy that he had. On the other hand, Mao grew firm control over the Northern China. The traumatic blow from Japan helped Mao build up a fundamentalist peasant movement. Mao established an efficient mobilization mechanism basing in the rural economy, while for Jiang, without an economy, the only way to financing the war was to print money. Price rose 85,000 times in six months in 1948.¹³² Consequently, Mao’s poor equipped small force crushed Jiang’s formidable army in only three years.

Since the establishment of the treaty-port China, the Chinese history was centred on conflicts between the treaty-port China and the rural China. The treaty-port China longed for private property protection, and the rural China desired egalitarian life. The Boxers Rising had shown the desperate weakness of the rural China. The Mao’s movement demonstrated the rural China’s iron will to fulfil egalitarianism at any cost.

5.4 The Totalitarian regime

Were it not for the other Entente powers, Russia probably had been colonized by Germany during the Russian-German War 1914-1917. Were it not for the Allied Powers, China would have been colonized by Japan. The reason Russia and China both turned into totalitarianism lied in two facts. First, Russia and China were both agriculture centralistic state. Second, the likeness of Imperial Germany and Imperial Japan, which might be greater than the likeness of the USSR and the People’s Republic of China.

The PRC established in 1949. However, Mao’s revolution accomplished only on July 27, 1953, the day the Korean Armistice Agreement signed. Frustrating the American strategy in Korean Peninsula, the PRC secured itself from risk of foreign intervention into China’s independence.

5.4.1 Fulfilling Egalitarianism

The Mao’s movement was the second peasant uprising to seize the state power after the Zhu’s movement. The propositions of the two movements shared two elements: eliminating foreign influence and implementing egalitarianism. Zhu eliminated the Mongol influence. For Mao, although managed to frustrate the American’s potential intention to interfere China through the Korean War, the liberal states, although whose influences were eliminated in China, were still overwhelmingly stronger than China. Mao did not achieve the same level national security as Zhu did. Therefore, Mao implemented egalitarianism more thorough than Zhu did.

¹³¹ *Ibid.*, pp. 331-332.

¹³² *Ibid.*, p.334.

The top threat to egalitarianism was the merchants in the former treaty-port China, whom had been substantively robbed by the Nationalists government, but the major task was to redistribute land in the rural China. Both task accomplished before 1956. Merchants' property was nationalized with or without compensation. The so-called landlords, who normally only had a small piece of land, were deprived of their land, and distributed among landless peasants during the land reform. This was the 'Socialist Transformation'. From the legal viewpoint, this 'Socialist Transformation' had no legal ground and was outright trespass of property rights. Therefore, it was accomplished through mass mobilization. The process was marked by bloody violence. The nationalization process caused at least 500,000 to 800,000 executions, and suicide cases of at least the same number.¹³³ The land reform involved at least one to two million executions.¹³⁴ As the result of this violent process, commerce organization was eliminated, and 43% of rural land was redistributed equally to 60% of the rural population. More importantly, under the new land law, peasants had no rights to sell their land. Therefore, the peasants did not have property rights over their land. In Chinese legal history, peasants own their land in most of the time of the two thousand years since the Qin. In other word, Mao reversed the tradition of a continuation property rights. Mao's regime then went further than Zhu's regime. Zhu suppressed the commerce activity, but he still kept the agricultural economy. Mao eliminated both commerce organization and agricultural property rights. Therefore, Mao's regime was neither commercial economy nor agricultural economy, but a totalitarian regime. Mao's following measures further illuminated this fact.

A totalitarian regime was characterized by absolute public power in mobilization so that only state was legitimate to own property. Since property served the welfare of the owner, the national resources therefore served only the welfare of the state. The state's welfare was security. Hence a complete military industry scheme was deployed as soon as possible. Hundreds of State-Owned-Enterprises (SOEs) were set up. This *industry* was not a parallel of the industry in liberal states. First, SOEs did not own their properties, such as machines, profits. Second, SOEs utilized resources for free, and the productions were distributed instead of exchanged. SOEs did not function upon a market mechanism. Third, state cadres governed SOEs. SOEs were branches of the state executive organ rather than commercial companies. Fourth, SOEs were politically motivated, not profit-oriented. Subsequently, they normally did not make any profit. The output usually was smaller than the input. Inefficiency was the nature of SOEs so SOEs were not self-sustained. Fifth, SOEs had no help to people's welfare. They ate up national resources but their production did not come to the people. The economic statistics might show great growth, but people's living standard did not promote accordingly. Sixth, the huge scale transfer

¹³³ Roderick MacFarquhar and John K. Fairbank, *The Cambridge history of China, Volume 14, The People's Republic of China, Part I, The emergence of revolutionary China 1949-1965*, Cambridge, 1987, p. 88.

¹³⁴ *Ibid.*, p.87.

of resources, mainly from agriculture to industry department created an urban-rural disparity. Seventh, the disparity caused huge rural migration to the cities, which had pushed the urban population up to 130 million by 1960.¹³⁵ It in liberal states was a natural part of the process of industrialization. However, in Mao era it was a crisis. Lacking a market to provide employment and goods and service, the migrants was breaking down the urban order. The crisis was met by the systematic shipment of many millions of unemployed out of the cities to the countryside. A program of complete household registration thereafter effectively stopped illegal migration.¹³⁶

5.4.2 The *Hukou* System

Most of Mao's policies had vanished. However, *hukou*, the household registration system, remained in the heart of the Chinese political and legal structure till today as 2007. The importance of this heritage in today China proved that the post-Mao regime was not a revolution, but a continuation of Mao's regime.

The Regulations on *Hukou* Registration implemented in 1958. It developed into a crucial element of virtually all Chinese political, legal, social, and culture structures. First, the principal function of the *hukou* system was to separate peasants from townsmen. The mobilization mechanism of transferring resources from rural world to the state industry required the state coercion to make peasants accept such an arrangement. The *hukou* system therefore proved that China in 2007 was still a mobilization mechanism. Second, one's *hukou* records his identity and place of live and so on. It is nearly impossible to change one's *hukou* without consent of the state. One needs *hukou* to establish eligibility for basic needs, such as access to food, clothing, shelter, marry, education, employment or land, and enlistment. It was then impossible to survive outside the *hukou* system. Therefore, freedom of movement was completely blocked. No labour movement existed to worry. In big cities like Shanghai or Guangzhou, people without local *hukou* were even forbidden to enter. Violators were subject to arrest.¹³⁷ In Chinese history, peasants used to escape hometown at the time of famine or warfare, and then not anymore, which was partly responsible for the huge-scale death of the 1958-1960 famine. Third, there were two *hukou* categories separating people into two groups: peasants and townsmen. Townsmen enjoyed welfare differently according to their workplaces. Generally, townsmen had access to education, medical care, social service, housing, ration coupons, subsidized food, staple goods, recreation, lifetime pensions, political life, and so on. Peasants enjoyed none

¹³⁵ Fairbank, *supra* note 56, p. 374.

¹³⁶ *Ibid.*

¹³⁷ In 2003, a youngman who did not bring identity with him was arrested on the street and abused to death in the house of detention. This event stirred sensational effects and later in the year a decree forbad to arrest on street. See *China: migration workers dies in custody*, July 2003, Amnesty International, <http://web.amnesty.org/wire/July2003/China>, visited on 17 December, 2007.

of them. By the 1980s the workers in state industry that provided the greatest welfare and two fifths of the work opportunities, would total 27 million.¹³⁸ Peasants accounted for 76.29% of the population, or 807.57 million in 1985.¹³⁹ Fourth, the *hukou* system had virtually restored the port-rural disparity. China was split into two worlds, the urban world and the rural world. Policies in the two worlds were different, and sometimes contradictory. This disparity was inherited by Deng and served as the backbone of post-Mao Chinese regime.

5.4.3 Further Mobilization: State Slavery

By the accomplishment of the ‘Socialist Transformation’ campaign in 1956, private property and organized commerce were eliminated. However, China’s national strength was still far behind liberal powers. Mao proposed the scheme of ‘Surpassing the UK, gaining the US within 25 years’. According to the scheme, the rural world was reorganized into People’s Communes in order to provide more resources to support the state industry.

By the end of 1958, all peasants were living in People’s Communes. The Communes collectivized peasants’ land and tools such as hoes, ploughs, harrows, farm cattle, and even pan, pot and kitchen knives.¹⁴⁰ Peasants work under the instructions from the Communes. The Communes owned the production, which was the point of the system so that most possible resource could be transferred to the state industry. The peasants received rewards for his work. Rural markets, which had been in existence for thousands of years, were banned.¹⁴¹ Rural trade, which meant selling one’s homegrown hens, eggs, or plums, was criminalized. Some scholars call the People’s Commune modern serfdom.¹⁴² However, this might not be so accurate, because serfs owned the production, but the commune members did not. Considering that the commune members owned no land, no tools, no production, and they were not able to leave the commune, and their children inherited their identity tag, they were more similar to slaves, but there was a difference: slaves work for private owners, and commune members work for the state. They could therefore be recognized as state slaves.

According to the Roman experiences, slavery had low productivity. Similarly, the People’s Commune led to drastic crop reduction almost instantly. Combining with higher degree of resource extraction, a famine broke up during 1958-1960. Some 20 to 30 million people,¹⁴³ mainly

¹³⁸ Fairbank, *supra* note 56, p. 375

¹³⁹ *China Statistical Yearbook 2007*, National Bureau of Statistics of China, <http://www.stats.gov.cn/tjsj/ndsj/>, visited on 15 January 2008.

¹⁴⁰ ‘These shifts toward more collective activities entailed the wide spread confiscation of private agricultural tools and, to a lesser extent, personal household property.’ See, MacFarquhar and Fairbank, *supra* note 133, p.365.

¹⁴¹ In the second half of 1959, the government sanctioned the reopening of rural markets that had been closed in 1958. See *Ibid.*, p. 375.

¹⁴² See Edward Friedman, Paul G. Pickowicz, Mark Selden, and Kay Ann Johnson, *Chinese village, socialist state*, Yale University Press, 1991.

¹⁴³ Fairbank, *supra* note 56, p. 368.

peasants because townsmen enjoyed food ration, died of malnutrition and famine.¹⁴⁴ The government blamed the bad weather, which was not likely to be true. First, in China's long history, there was no record of bad weather killing so many.¹⁴⁵ Second, net exports of grain in 1958, 1959, and 1960 were 2.66 million, 4.15 million and 2.65 million metric tons respectively.¹⁴⁶ Therefore, the issue was not really food shortage, but lack of access to food. The situation of 1958-1960 was that, the last granule of grain was taken away from people's mouth and shipped to foreign country, mainly the Soviet Union, leaving people to death.¹⁴⁷ From the viewpoint of human rights, the People's Commune system was the abysmal in Chinese history.

After the great famine, peasants were allowed to keep a tiny piece of private plot, from which they owned the crop. However, the People's Commune system was only abolished after Mao's death in 1976. It should be note that during Mao's 27 years rule, although people's living standard was hardly improved, the GDP of 1978 was 5 times of 1950. 'Growth with no development' was one of the Chinese characters, which would continue further into the time of the China economy miracle in the following three decades. As we know, the reason is the state was the only legitimate owner, so that the welfare of economy growth only benefited the state.

5.5 The Totalitarianism Revised: State Serfdom

During 1961-1966 Liu Shaoqi and Deng Xiaoping were in power and tried to rectify Mao's leftist policies, but Mao crushed it with his powerful Cultural Revolution 1966-1976. Liu was killed in the Cultural Revolution, but Deng managed to come back to office after Mao's death in 1978, PRC's 29th anniversary, by the time the international environment had significantly changed. First, the UN accomplished the mission of maintaining world peace, and Japan was democratized. China did not face any substantive security challenge. Second, the game in the international arena shifted, from military competition to development competition. China's defeated rivalry Japan had grown into an economic giant, fulfilling China's dream of 'Surpassing the UK, Gaining the US within twenty-five years', while China's mobilization mechanism ended up in catastrophes. Japan's lead in the new game pushed China to seek economic power. Third, the development of Hong Kong and Taiwan considerably impacted China. Hong Kong's prosperity challenged the legitimacy of the PRC regime.

¹⁴⁴ 'First, the famine was disproportionately a rural phenomenon. Second, even within rural areas, death were highly concentrated regionally.' See MacFarquhar and Fairbank, *supra* note 133, p. 372.

¹⁴⁵ *Ibid.*, p.371.

¹⁴⁶ *Ibid.*, p. 381.

¹⁴⁷ On 22 February 1959, Mao issued the order, 'the problem of Production Concealing and Secret Distribution shall be resolved immediately'. This issue was reaffirmed in the Zhengzhou Meeting 27 February to 5 March 1959. Subsequently a campaign launched in 1959, during the campaign the tax gatherer broke into peasants' home to search for hiding food.

Taiwan was technically still in a civil war with China, and upheld an ideology of recapturing mainland China. Although not a substantive military threat, Taiwan by the end of the 1970s constituted a serious challenge to the weak PRC. Deng started his reform in the rural world, which he tried in the 1960s but was interrupted by Mao.

5.5.1 The Rural Reform: Household Responsibility System

The top challenge in the rural world was the population growth. From 1949 to the 1980s the population had doubled to one billion, most of them live in the countryside in abject poverty. The PRC had to control the population growth if they did not want to repeat the fate of the previous dynasties. Thanks to the western medical technology, one-child policy was then possible, and it worked.

The household responsibility system was installed to replace the People's Commune system. Land was distributed equally to peasants, again, as well as tools and so on. Peasants manage their share of land, owning the production, paying agriculture taxes. Ban on markets and commerce activities were lifted. However, peasants were not allowed to trade their land, which means they still do not own the land. The state slavery was ended. Nevertheless, due to the fact that peasants do not have personal liberty of movement, and they do not own their land, and they passed their identity tag to their children, the household responsibility system made a state serfdom. Therefore, Deng's agriculture reform pushed China from state slavery to state serfdom. Neither of them was ever found before in the Chinese history.

During 1978-1984, the agriculture output recorded high growth. Agriculture accounts 33.4% of GDP at the height in 1984. Huge population shook poverty. During 1981-2001, the estimated share of the population living on less than USD 1 per day has been slashed from 64% to 16%, lifting over 400 million people out of absolute poverty.¹⁴⁸ 'But by the late 1980s, when China's development strategy directed resources to industry and to the richer coastal provinces, poverty reduction began to stall. The allocation of public resources to agriculture declined, and the terms of trade turned against the sector. Special concessions for taxes and repatriation of profits went to foreign investment in the coastal areas while the producer prices for grain, important for poorer regions, were kept depressed.'¹⁴⁹ The share of agriculture in the national GDP by 2006 dropped to 11.7%, while the rural world still counts for 56.1% of the population.¹⁵⁰ The destitution of the rural economy was due to institutional obstacles. The lack of property rights in the rural world blocked the resources exchangeability, which excluded a commercial economy. Furthermore, it was illegal to utilize the land for non-

¹⁴⁸ UNDP *China wins 2006 poverty eradication awards*, UNDP, 17 October 2006, www.undp.org/poverty/stories/pov-award06-china.htm, visited on 15 January 2008.

¹⁴⁹ UNDP *poverty report 2000, China country assessment*, UNDP, April 2000, www.undp.org/povertyreport/countryprofiles/china1.html, visited on 15 January 2008.

¹⁵⁰ China statistical yearbook 2007, *supra* note 139.

agriculture purposes. Therefore investment and technology application in the rural world was further frustrated.

5.5.2 The Urban Reform: Granting Foreign Capitals Access to National Resources

The urban world was the major distinction between Mao's regime and Zhu's regime. It was not necessary in Zhu age because he had assumed superiority over 'the world', which was an unaccomplished job for Mao. The urban world was therefore designed and established to build up military and technology superiority. The urban world was entitled to utilize the national resources. The townsmen of the urban world, which were less than 20%¹⁵¹ of the population in Mao era, were strictly selected and were regarded as elites.¹⁵² Nevertheless, Mao's plan of 'Surpassing the UK, gaining the US' failed.

The reason was the inefficiency of the SOEs, which occupied all available resources but outputted miserable productions. The ultimate solution for this problem would be liberalization, but it would challenge the political centralism, which was essential to keep the order in the rural world. Then Deng came up with this: to keep the state monopoly of resources and bring up the efficiency. The foreign capitals then served as an alternative to the SOEs. Driven by profits, the foreign capitals would come to China with certain profit expectation. For China, foreign trade did not conflict with the core interests of the Qing court, nor would foreign capitals conflict with the totalitarian rule of the PRC. Subsequently, the essence of the urban reform was to grant foreign capital access to national resources.

To break the government's monopoly over resources required only an order. It was also easy to secure profits for the foreign capitals because the resources were for free such as land and natural resources, or almost free such as human resources. However, China lacked property protection, rule of law and market mechanism to support the operation of private companies. Since liberalization was not feasible, China had to figure out alternatives for those crucial elements. Learning from the extraterritoriality history, it should be possible.

5.5.3 Alternative to Property rights

In the Mao age, there was only one owner. The foreign enterprises created the problem of plurality of owners. How to protect the foreign owners'

¹⁵¹ 17.92% of the population was townsmen by 1978, and 43.90% by 2006, see *Ibid*.

¹⁵² The Constitution of the PRC, art 1, 'The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.' Therefore, workers are the leader and peasants are the alliance.

property without establishing a property regime?¹⁵³ There are three threats to private property: foreign military invasion, state infringement, and private trespassing. First, China has solid independence, so no external threats to property in China. Second, the totalitarian regime is highly efficient to protect state property from private trespassing, which could extent to protect properties of foreign capitals. Third, the major threat therefore came from the state, which could be overcome by government's self-control. Even though there were cases where the properties of the foreign capital are arbitrarily deprived, the PRC government roughly respects property of foreign capitals.

Private property was hence restored in the PRC, however, as political privilege more than legal right, and Chinese nationals enjoy no equal treatments. Chinese nationals have little access to the national resources. For instance, foreign financial institutions are expanding in China after the WRO accession. In the same time, it is a criminal offence for Chinese nationals to engage in financial services without authorization¹⁵⁴, which is not open for application.¹⁵⁵ Moreover, Chinese do not receive full respect for their properties. Chinese nationals are more likely to be blackmailed or deprived property by the state. An outstanding example is the corporate tax. According Chinese law, Chinese enterprises pay 33% corporate tax while foreign enterprises pay 15%.¹⁵⁶

5.5.4 Alternative to Market Mechanism

The operation of a private company centred on exchange of properties. The universal exchangeability normally is provided by a market mechanism. However, the lack of a property regime made it impossible to build up a full market mechanism in China.

The *hukou* control is loosened to meet the requirement of labour. Peasants are allowed to travel freely. They can obtain resident permission to work in the cities. Technically they are now workers except that the state does not recognize them as *workers*. They do not enjoy welfares the employees of the SOEs enjoy. They have no access to public service in the urban world, for instance, no access to medical care and no access to education for the children. They are called 'peasant worker', which in Chinese is a curse word.

¹⁵³ China enacted the Property Law in 2007. However, it is not a property regime because it does not grant universal property rights. For instance, peasants do not own their land according to this law.

¹⁵⁴ Criminal Law of the PRC, article 174, 176, 179

¹⁵⁵ 1996, Minsheng Bank established as the 'first bank with private capitals as majority shareholders'. However, 11 years later, it is still the 'first' and the 'only' bank 'with private capitals as majority shareholders'.

¹⁵⁶ The new Corporate Tax Law imposes a universal tax of 25% for all enterprises, which will enter into force in 2008. However, the foreign concerns still enjoy various tax preferential which are not available to Chinese enterprises. See *Beijing moves to end foreign favours*, Financial Times, 4 March 2007, www.ft.com/cms/s/0/f07370c8-ca74-11db-820b-000b5df10621.dwp?uid=9c33700c-4c86-11da-89df-0000779e2340.html, visited on 15 January 2008.

According to the CIA, ‘from 100 to 150 million surplus rural workers are adrift between the villages and the cities, many subsisting through part-time, low-paying jobs.’¹⁵⁷ The SOEs by 2006 employed 64 million.¹⁵⁸ The labour market is probably the most liberal market. Employers hire and fire people at will. They use the labourers with no respect to work hours and work conditions. They pay the labourers miserably and they barely have any social security. In addition, the labourers have no rights to form trade unions, collective bargains, and strikes. Fortunately, they still have two options: accept or leave. Things could be worse.

The commodity market also easily formed by giving up price control and ban on commerce activities.

The capital market is a difficult issue. Finance, land, natural resources are the strongholds of the state monopoly and the core elements of the mobilization mechanism. The state is not able to give up the monopoly and establish a capital market; otherwise they will lose control of the state. The solution is to keep the state monopoly while grant the foreign capital limited access. Subsequently, the foreign capitals have full access to capital resources, such as land, financing services and natural resources. Chinese national normally do not have, or only have marginally access to capitals, for instance, the stock exchanges generally do not list Chinese private enterprises. Hence the foreign capitals are sharing the monopoly with SOEs. It is a fact that the SOEs are not decent competitors. Therefore, foreign capitals are the dominator of Chinese resources, which secures profit expectation for foreign capitals, and explains the flood of foreign capital into China.

The absence of capital market compromises a market mechanism. Moreover, the market mechanism is further weakened by lack of full market access. The access restriction does not limit to capital markets. It stretches wider, such as in the field of transportation, telecommunication, express service, energy, power supply, auto manufacturing, and financial services. It is actually easy to judge where there is access restriction or not: if there are SOEs, there probably exists access restriction.¹⁵⁹ The foreign capitals are less restricted by the state monopolies. For examples, foreign automakers have virtually monopolized Chinese car market, and China nationals are virtually prohibited to engage in car industry.

5.5.5 Alternative to Rule of Law

Rule of law is the premise for exchangeability and arbitration mechanism for a market mechanism. Since the state including the SOEs opposes full

¹⁵⁷ *The world factbook 2007*, 2007, Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>, visited on November 27 2007.

¹⁵⁸ China statistical yearbook 2007, *supra* note 139.

¹⁵⁹ Currently there are 153 SOEs belonging to the central government, the list is available at www.sasac.gov.cn/zyqy/qym/default.htm, visited on 15 January 2008.

exchangeability of resources, rule of law is therefore excluded. Subsequently the market mechanism lacks an arbitration mechanism. In the Command Economy era, the state was the only owner. Neither exchange nor transaction involved. Therefore, an arbitration mechanism was not necessary. During 1966-1976, 'The law was literally abolished and the legal apparatus, which was already inert, was completely smashed.'¹⁶⁰ In the beginning of the Deng era, there were no procuratorates, no lawyers, no law education, and barely any laws. Deng streamlined the judiciary; restored legal education; set up lawyer profession. Furthermore, Deng launched law-updating campaign. Following the legal systems of the liberal states, China updated the legal system.¹⁶¹ The current Chinese legal system is quite advanced. However, Deng restored the legal system only as a legal system under the rule of men. Since the judicial system does not enjoy independent status, it cannot play a full role of safeguarding property rights and supporting exchangeability of resources. It is the political privileges instead of the law decide the distribution of resources. However, the legal system can still arbitrate certain disputes. Combining with the alternative to property rights and the alternative to market mechanism, the private enterprises has a possibility to operate in China. It is not an ideal environment. It is only a revised totalitarian regime. Nevertheless, it guaranteed profits.

5.6 The Revival of Treaty-port China?

The Deng regime inherited Mao regime as a military mobilization regime. It is by nature totalitarian, even though there is a commercial economy. The foreign capitals operating in China under political privileges just like the medieval merchants under the bourgeois privileges, and national Chinese are excluded from the access list. From certain angle, the Deng regime to some extent resembles China when under extraterritoriality. First, commercial economy exists in part of China in both instances, the urban world in the former instance and the treaty-port China in the latter instance. Second, protection of property is applied to only certain people in both instances, people in the Concessions in the former instance and foreign capitals granted political privilege in the latter instance. Third, in both instances, the commercial economy grows overwhelmingly strong over the agricultural economy. Fourth, in both instances, the commercial economy does not transform the agricultural economy and the centralistic politics. Fifth, in both instances, foreign capitals play key role in the boost of commercial economy.

However, there is a major difference between the two instances:

¹⁶⁰ Wang Chenguang, Zhang Xianchu, *Introduction to Chinese Law*, Sweet & Maxwell Asia, 1997, p.12.

¹⁶¹ Through 1979 to 2004, 323 national laws (111 of them no longer valid) were passed and more than ten thousand local laws were passed (a quarter no longer valid). See *For rule of law: in retrospect at the fiftieth anniversary of the NPC*, 13 September 2004, People Daily Online, www.people.com.cn/GB/14576/14957/2779900.html, visited on 15 January 2008.

independence. The treaty-port China was built upon extraterritoriality, therefore, serving primarily interests of the foreign powers. The urban world, however, serves as the mobilization mechanism of the PRC. This difference in turn influenced the human rights situation in the two instances. In the treaty-port China, the foreign gunboats maintained a complete citizen's rights system and rule of law. In the urban world, there were no citizen's rights, no rule of law, only some alternatives to guarantee the operation of private enterprises. Still, as a matter of fact, the overall human rights situation are better today than in the treaty-port China era simply because of independence. Also due to this fact, the commercial economy in the treaty-port China era never goes beyond the line of the Concessions, while it penetrates the whole urban world in the Deng age.

5.7 Challenges brought to the totalitarian regime by its reform

In the PRC, the reform has brought forth a giant urban economy. China's GDP poises to top Germany's as the world's third-largest by early 2008.¹⁶² Comparing the impact brought by the economy of the treaty-port China in the first half of the 20th century, the urban economy impacts heavier.

First, agriculture is no longer the whole economy, as stated above. On the other hand, the commercial economy has grown big, as shown in the following table.

Table 1: Output of selected economic departments in 2006 (in billion *yuan*)

Gross domestic product	Gross output of the primary industry	Gross output of the secondary industry		
		Gross output of state-owned enterprises	Gross output of private enterprises*	Gross output of foreign investment enterprises
21,087	4,242	9,891	6,740	10,007

Source: China Statistical Yearbook 2007

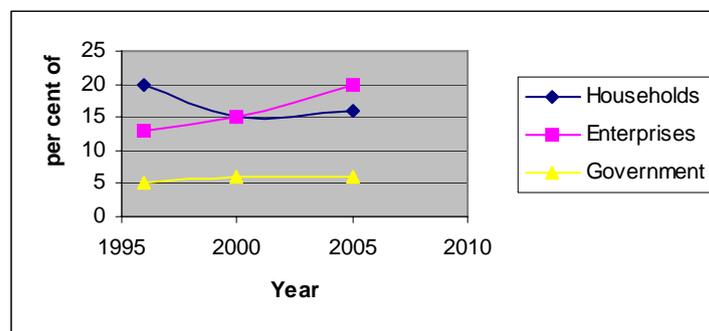
*As a general principle, private enterprises refer to only domestic private enterprises. Foreign investment enterprises are not categorized into *private enterprises*.

Agriculture is no longer significant in the economy, and foreign investment economy becomes the leading sector.

Second, the transformation of economic growth into people's welfare is low efficient. SOEs and foreign investment enterprises play the leading role in the Chinese economy. The welfare of the economic growth mainly goes to the state and foreign capitals, which is proved by China's saving. China's growth has been relatively capital intensive, thus requiring high savings. China's national saving between 1978 and 1995 is 37% of the GDP, very

¹⁶² *Chinese economy slows to still sizzling 11.5% growth*, 25 October 2007, USA Today, www.usatoday.com/money/world/2007-10-25-china-gdp_N.htm, visited on 15 January 2008.

high compared to an international average of 21%. In 2004, the saving rate is 47%. Even though saving increases dramatically, examining the structure of national saving, the household saving is actually decreasing and the enterprise saving is increasing dramatically.¹⁶³ (Table 2) Total wage bill in 1978 counts 15.6% of GDP, and fall to 11% in 2006.¹⁶⁴ Japan takes three decades to recover its war-ravaged economy to reach the wage level of the US in the 1980s after 30 years high-speed growth. Also after 30 years high-speed growth, the wages in China is only 8% of the Japan in 2006.¹⁶⁵ In 2006, Japan's GDP is USD 5 trillion, twice of China's USD 2.5 trillion. However, China's government revenue is USD 464 billion, well ahead of Japan's projected revenue of USD 417 billion.¹⁶⁶ On the other hand, Japanese government took care of the citizens basic needs, while Chinese government does not even pay the elementary education (see chapter 6).



Graph 1: Saving in China (in per cent of GDP)¹⁶⁷

Third, the deprivation of Chinese people in turn compromised the economy. The domestic market is insignificant comparing to the production power. Hence the Chinese economy heavily depends on export. (Table 2) The heavy reliance on foreign investment and overseas market make Chinese economy very atypical as a major economy. With the growth of China's economic power, the rise of protectionism of the Western countries posts shadow on China's further growth.

Table 2: Share of the Three Components of GDP by Expenditure Approach to the Growth of GDP (in per cent)

	Final Consumption Expenditure	Gross Capital Formation	Net export of Goods and Services
1981	93.4	-4.3	10.9
1991	65.1	24.3	10.6
2001	50.0	50.1	-0.1

¹⁶³ Louis Kuijs, *How will China's saving-investment balance evolve?* 2006, World Bank, p. 3, www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2006/06/28/000016406_20060628102757/Rendered/PDF/wps3958.pdf, visited on 15 December 2007.

¹⁶⁴ China statistical yearbook 2007, *supra* note 139.

¹⁶⁵ China statistical yearbook 2007, *supra* note 139, and Japan statistical yearbook 2008, www.stat.go.jp/English/data/nenkan/index.htm, visited on 15 January 2008.

¹⁶⁶ *Ibid.*

¹⁶⁷ Kuijs, *supra* note 163, p. 23.

2006	39.2	41.3	19.5
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Source: China Statistical Yearbook 2007

Fourth, the irresistible attractions of China to foreign capitals are the exclusive access to the resources that are not available to Chinese, which inevitably lead to misuse of resources by SOEs and the foreign capitals. The misuse of natural resources leads to the environment degradation and catastrophes. The misuse of human resources leads to huge rich-poor disparities: China's Gini coefficient for income distribution rose from 0.30 in 1982 to 0.45 in 2002, ranks 90th among 131 countries,¹⁶⁸ and social unrests: there were 74,000 *mass incidents* in 2004.¹⁶⁹

In a word, China enters into a track, which temporarily solves the economic crisis, but is generating new crisis of structural un-sustainability and social discontentment.

¹⁶⁸ *China human development report 2005*, 2005, UNDP, p. 2, hdr.undp.org/en/reports/nationalreports/asiathepacific/china/china_2005_en.pdf, visited on 15 January 2008.

¹⁶⁹ According to Zhou Yongkang, the former Minister of Public Security, there were 74,000 *mass incidents* in 2004 and total 3.8 million participants. *China Police established special team on anti-terrorism and violence*, 19 August 2005, Radio Free Asia, www.rfa.org/mandarin/shenrubao/2005/08/19/fangbao/, visited on 15 January 2008.

6 China in a Human Rights Law Perspective

6.1 The Miscommunication on Human Rights

6.1.1 The Sequence

Three truths: the human rights regime has evolved into full maturity to play a key factor in the maintaining of the world peace; human rights are universally recognized and binding to all nations; human rights are not universally realized.

The UN initiated the project to universalise human rights with the proclamation of the Universal Declaration of Human Rights on 10 December 1948.¹⁷⁰ As mentioned above, the campaign of realizing human rights in the non-liberal world has not ended up well. Although most states incorporate human rights in the national law, also many states are resentful to human rights. It is not surprising to find that so many states hate human rights; regarding human rights as something imposed on them. Therefore, it is important to make certain if those states have good reasons or if they are just acting irresponsibly.

The American invasion of Iraq 2003 serves as a good example. The democratization process in Iraq designed by the US seemly failed. Iraq is currently in a human rights crisis when the Iraqis in the first time have real elections. The coexistence of democratic elections and a human rights crisis has also happened in other states. It seems that democratic elections do not necessarily bring forth democracy or human rights.

In fact, all democratic states were liberal beforehand. Liberal freedoms were attendant consequences of the modern property regime. The modern property regime is wholly dependent on the rule of law. Rule of law is diametrically opposed to political privileges and social caste, which are essential structures to maintaining order for an agricultural economy. The series of events follow a certain sequence: political privileges -> rule of law -> property rights -> liberal freedoms -> democracy. In the top of this structure, democracy realizes the ultimate political decentralisation based on an extremely centralized administration that is essential to the safeguarding of human rights. Meanwhile, democracy in liberal states is based on a legal system, which enables centralistic governance to maintain necessary order and mobilization mechanisms. Therefore, democracy works only in states with a centralized administration and capacity to politically decentralize, so

¹⁷⁰ Asbjørn Eide, *supra* note 6, p. 3

do human rights. It is easy to impose democracy in a state without centralized administration, but human rights cannot survive with or without democracy installed in such states. In states with centralistic traditions, it is more complicated. The decentralization notion of democracy can heavily affect the centralistic administration, for instance the chaotic situation in the Russian democratization process in the 1990s. However, in a centralistic state with decentralization capacity democracy is a great mechanism to build up national strength. Therefore, the promotion of human rights is a job of sequence. In a hypothesis case, were Britain democratized in the 16th century, it probably would not do as great as it is now. Iraq is probably not even in the place Britain was in the 16th century. The human rights crisis is the consequence of rushed democratization.

6.1.2 The Procedural State vs. The Administrative State

When the feudal states in Europe evolved into rule of law states, one of the major consequences was the nationalization of the army. After the liberalization, the police, instead of the army, played the complete role in maintaining order. The police was entirely subject to the law. Therefore, in liberal states, all social changes or arbitration of property or interests are decided through certain procedures in the legislative or judicial process. On the other hand, in non-liberal states, the owner of the army decides in all issues. The most important issue in non-liberal states is the belonging of the army, which is always decided through war. In everyday life of non-liberal states, the administrative organs decide disputes over property or interests. The legal system and the judiciary, if they exist, are only a part of the administrative organs. In this sense, liberal and non-liberal states can be named procedural state and administrative states respectively.

In the context of human rights, liberal states are urging non-liberal states to act. However, based on the above-mentioned facts, they often fall into the trap of miscommunication. For instance, in the law-centred thinking of the liberal states, human rights equal law making and enforcing. Hence non-liberal states have similar legislations despite that they are of different social structure and their human rights situation varies. The structural weaknesses of non-liberal states are completely overlooked. No wonder the human rights legislations in non-liberal states largely remain only on paperwork or lip services.

China is going through an economic transformation which inevitably has human rights effects because the economic impetus comes from foreign capital from the liberal world. However, China has the political power to resist pressure from the liberal world. To satisfy the liberal states, China cooperates and ratifies most international human rights treaties when it is possible. However, it is not the source of China's human rights progress, as illuminated in the implementation of the International Covenant on Economic, Social, and Culture rights.

6.2 Analyzing China's State Report

China does not ratify the International Covenant on Civil and Political Rights, but China ratified the International Covenant on Economic, Social and Cultural Rights (hereunder referred to as the Covenant) in 2001. China submitted the state report (E/1990/5/Add. 59) according to article 16 and 17 of the Covenant in 2003. There is abundant information in this state report, fully expressing conflicts between the Western law-centred thinking and China's transformation thinking.

'As of 1840, China transformed a great feudal nation into a semi-colonial and semi-feudal State.' (para. 6, on self-determination,)

China's view of history is very much connected with its understanding of human rights. According to the Chinese middle school textbooks, China's history phase is this: pre-221 BC, slavery; 221BC-1840 AD, feudalism; 1840-1949, semi-colonialism and semi-feudalism; and socialism since 1949. This definition is, however, wrong. As discussed above, China never had slavery, and China was never a feudal state. Some foreign historians argue that the pre-221 BC history is feudalism.¹⁷¹ It is partly true in the sense that China was not politically centralised before 221 BC. Nevertheless, the concept of feudalism as originated from Europe contains a notion of centralised administration under the cover of political decentralization, which did not exist in China before 221 BC. Some historian argued the post-Han age is China's medieval history, which, as analysed above, is only partly true.¹⁷² China's history only has two phases: pre-centralism and centralism after 221 BC. Fairbank points out, 'if all of Chinese history for 2,000 years after 221 BC has been "feudal," the term lost meaning or was humiliating. "Proletariat" and "feudal" were only two of the key terms of Marxism, and they obviously did not fit the Chinese scene without really being bent out of shape.'¹⁷³

Fairbank's argument refers to the Communist ideology that misuses the terms in order to fit China into Marxism. Nevertheless, the Communists are not the only ones misusing the terms. This history is taught not only in the PRC, also in Hong Kong, Taiwan and in other Asian countries.

With the updating of the educational system since 1905, the year when China abolished the Imperial Examination, history was updated according to Western theories as a part of China's plan to modernization. Interpreting China's centralistic history as a parallel of European Middle Age is the first step to fully misunderstand the whole social and culture structure of Europe and China, including human rights. Under this approach, Europe's liberal

¹⁷¹ Eberhard, *supra* note 84, Chapter III Mature Feudalism (c. 1028-500 BC), Chapter IV the Dissolution of the feudal system (c. 500-250 BC).

¹⁷² Jacques Gernet, *A history of Chinese civilization*, 2nd ed., Cambridge, 1982, reprinted 1997, 'Part 3, the Middle Ages'.

¹⁷³ Fairbank, *supra* note 56, p. 322.

revolutions are interpreted as a parallel of China's peasant revolutions. The values sum up as righteous resistance against cruel rulers. Liberal freedoms as the machinery of Europe's power and the forerunner of human rights are completely ignored.

'Since its establishment, the People's Republic of China has spared no effort to institute and perfect a people's democratic political system that safeguards the democratic rights of the people as sovereign.' (para. 7, on self-determination)

China has never been democratized, nor politically decentralized. The PRC is the highest tide of China's political centralization. The claim of democracy in the state report is not made because of ignorance like the claim of Chinese feudalism is. The claim however, discloses China's attitude towards democracy and human rights. Compared to the Ming that regards absolutism as a political orthodox and assumed it to tributary states, the PRC government accepts that the international community does not see its political structure as legitimate. It is aware of the legitimacy of democracy. It is aware of the non-democratic situation in China. It fixes this problem by claiming that China is democratic. This is also China's politics towards human rights.

'Article 33 of the Constitution stipulates that "All citizens of the People's Republic of China are equal before the law." (para. 14, on Measures taken to guarantee the full realization of rights,)

It is true that the Constitution writes the principal of equality. It is also true that the electoral law writes, *'the number of people represented by each rural deputy is four times the number of people represented by each town deputy.'*¹⁷⁴ Nevertheless, the political discrimination does not really bother people because people do not vote anyway. Nonetheless, the discriminations are not limited to political rights. For instance, in fatal traffic accidents, the families of the victims are entitled to death reparation. The amount is twenty times the per capita annual income in the victim's *hukou* region of the previous year.¹⁷⁵ Hence, according to the data of 2006, in the case when a townsman from Shenzhen and a peasant from Gansu Province were both killed in a traffic accident in Gansu, the death reparation for the Shenzhen townsmen was 640,180 *yuan*, for the Guansu peasant it was 42,681 *yuan*.

Equality is an inalienable notion of liberalism, and diametrically opposes a centralistic regime. Realization of equality in centralistic regimes is more likely to bring forth chaos instead of justice. Therefore, it is predictable that equality cannot be realized whether it is written in the Constitution or not. Meanwhile, the constitution itself is not a good idea for non-liberal states where the army belongs to a person or group and the judiciary is subject to

¹⁷⁴ Electoral law of the National People's Congress and Local People's Congress of the PRC, article 12, 14, 16.

¹⁷⁵ Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, article 17, 29.

the administrative organs. As a matter of fact, none of the European states had Constitutions before the 16th century.

China's fundamental employment policies can be expressed in this way: "The worker is autonomous in his choice of employment; employment is regulated by market forces; the Government promotes employment." (para. 25, on the right to work)

"The State develops medical and health services ... Citizens of the People's Republic of China have the right to material assistance from the State and society when they are old, ill or disabled. The State develops the social insurance, social relief and medical and health services that are required for citizens to enjoy this right." (para. 145, on the right to good health,)

The case of Hepatitis B is a touchstone of the right to work and right to good health.

The WHO recognizes China as a high endemic area of Hepatitis B. The number of Hepatitis B virus (HBV) carriers is 10% of the population, or 130 million people.¹⁷⁶ The contagiousness of HBV is quite minor, especially for adults.¹⁷⁷ Moreover, effective vaccine is available.¹⁷⁸ However, Chinese employers, universities, kindergartens, the army, and so on, routinely refuse to accept HBV carriers. In 2003, Zhou Yichao, a 22-year-old college senior was rejected due to HBV at his application to a government position. Zhou stabbed 2 HR staffs, killing one and seriously wounding another. Zhou was then sentenced to death and executed in 2004. This case has a sensational effect, as the public generally sympathized with Zhou.¹⁷⁹ In October 2003 Zhang filed a lawsuit to the local government for HBV discrimination. The local court found he was not a HBV carrier and the local government's decision has found no ground. However, Zhang did not receive any compensation.¹⁸⁰ In March 2005, the government of Hunan Province was sued for HBV discrimination. The court ruled in favor of the defendant. The plaintiff appealed and lost again¹⁸¹. In May 2007 the Ministry of Labor and Social Security and the Ministry of Health issued the *Opinions on*

¹⁷⁶ *Country Cooperation of Strategy at a Glance*, 2006, WHO, www.wpro.who.int/NR/rdonlyres/E8BE4438-924F-4193-89F3-B81822AC408C/0/ccsbrief_en.pdf, visited on 15 January 2008

¹⁷⁷ When not vaccinated, chronic infection of Hepatitis B occurs in: 90% of infants infected at birth, 30% of children infected at age 1-5 years, 6% of persons infected after age 5 years. See *Virus Hepatitis B, fact sheet*, 26 July 2007, Centre for Disease Control and Prevention (CDC) of the US, www.cdc.gov/ncidod/diseases/hepatitis/b/fact.htm, visited on 15 January 2008.

¹⁷⁸ The vaccine is 95% effective in preventing chronic infections from developing. See *Hepatitis B*, October 2000, WHO, www.who.int/mediacentre/factsheets/fs204/en/, visited on 15 January 2008.

¹⁷⁹ *China: Killer Inspires Drive Against Hepatitis Bias*, Jan. 08 2004, Los Angeles Times, www.aegis.com/news/ads/2004/AD040117.html, visited on 30 November 2007

¹⁸⁰ *Chinese People's Republic is unfair to its short people*, 21 May 2004, New York Times, query.nytimes.com/gst/fullpage.html?res=990CE1DA113FF932A15756C0A9629C8B63, visited on 15 January 2008.

¹⁸¹ *Hepatitis B Virus Status*, China Law and Governance Review, December 2006, www.chinareview.info/pages/case.htm, visited on 15 January 2008.

Safeguarding HBV Carriers' Employment Rights. The Opinion states that HBV carriers shall not be discriminated, and no Hepatitis B virus serum test shall be incorporated into the employment physical examination except for special occupations. This is the first legal document prohibiting discrimination against HBV carriers. Nevertheless, the new Labour Contract Law of June 2007 does not prohibit HBV discrimination. In 2007, HBV carriers initiated a series of lawsuits against private companies, including Nokia.¹⁸²

In the social resistance against HBV discrimination, the website www.hbvhbv.com had played the leading role. This site arranged legal aid for most HBV discrimination lawsuits, and gathered evidences of discrimination by foreign investment enterprises. In November 2007, the site was shut down.

Currently there is no cure for Hepatitis B. However, many countries have prevented this disease by vaccinating newborn infants. In China, Hepatitis B vaccine was first recommended for routine immunization in 1992, but parents were required to pay for both the vaccine and the service.¹⁸³ The cost for vaccine was USD 0.60 per dose.¹⁸⁴ In 2002, Hepatitis B vaccine was fully integrated into the EPI (Expanded Programme on Immunization) and parents were required to pay a reduced service fee (approximately US\$ 1).¹⁸⁵ WHO in May 2004 estimated that there are around 4 million infants not receiving full Hepatitis B immunization every year in China, which was 70% of the overall cases of the Western Pacific Region.¹⁸⁶

Lack of health care is not restricted only to Hepatitis B vaccination. The government budgetary expenditure on public health in 2005 is 155.25 billion *yuan*, 4.9% of the government revenue, a fall from 6% of 1995.¹⁸⁷ Meanwhile, during 1979-2004, the average total health expenditure per person increased nearly 8-fold, from USD 9 to USD 70. Total health expenditure grew at an average annual real rate of 11%- adding on average 0.2 percentage points annually to the share of total health spending in GDP. Total health expenditure grows to 4.7% of GDP in 2005, and 61% of total health care cost were paid out of pocket. The rate of out-of-pocket payment is as high as 90% in poor rural areas in 2004.¹⁸⁸ By 2003, some 80% of the

¹⁸² *Nokia China in lawsuit over Hepatitis B carrier*, Financial Times, March 13 2007, www.ft.com/cms/s/0/91c54ca8-d182-11db-b921-000b5df10621.html, visited on 15 January 2008.

¹⁸³ *Hepatitis B working group (3rd meeting – 6-7 March 2007)- Meeting Report*, 2007, WHO, p. 7, www.wpro.who.int/NR/rdonlyres/CD4CC3F7-F3C2-4E8F-9A44-165234464745/0/MTGRPT_HepBExpert3.pdf, visited on 15 January 2008.

¹⁸⁴ *Hepatitis B in the Western Pacific Region*, 2004, WHO, p.3 www.wpro.who.int/NR/rdonlyres/B7B3CAFF-EE7D-4FD7-B51B-79E2367F714D/0/HepB_WPRNextSteps.pdf, visited 15 December 2007.

¹⁸⁵ WHO, *supra* note 183.

¹⁸⁶ WHO, *supra* note 184, p. 5.

¹⁸⁷ *China Statistical Yearbook 2002, China Statistical Yearbook 2007*, National Statistics Bureau of China, www.stats.gov.cn/tjsj/ndsj/, visited on 15 January 2008.

¹⁸⁸ *China statistical yearbook 2007*, *supra* note 139; *China, national expenditure on health*, 14 September 2007, WHO, www.who.int/entity/nha/country/CHN.pdf; *China, health*,

rural population and nearly one half of the urban population were not covered by any health insurance schemes. During 1993-2003, coverage of social health insurance declined with the coverage rate for the bottom quintile income group dropping from 37% to 12%. As a result, half of those surveyed refused outpatient services when sick, and 30% of those who were referred to hospitals refused inpatient care. Outpatient non-use also increased substantially from 36% to 49% in 1993 and 2003, respectively.¹⁸⁹

'At the same time, as foreign investment is encouraged, so is the development of collective, private and self-employment ventures' (para. 24, on the right to work)

'Foreign investment companies will be gradually extended the same conditions of treatment as national ones, as unified, standardized and transparent investment policies are formulated.' (para. 39, on the right to work,)

From January to September 2007, the top ten sources of foreign capital invested USD 40.955 billion in China. Among them, only 25% or USD ten billion comes from South Korea, Japan, Singapore, the US and Taiwan, and 75% comes from offshore financial center like Hong Kong and British Virgin Islands. (Table 3)

It is entertaining to find that the British Virgin Islands is the second biggest investor in China. The reason is that a significant portion of the 'foreign investment' actually comes from Chinese nationals. Chinese nationals use the offshore financial center to transform their *domestic* capital into *foreign* capital to enjoy generous privileges entitled only to *foreign* capitals. On 24 April 2006, the Ministry of Commerce, the State Administration for Industry and Commerce, the State Administration of Foreign Exchange, and the China Customs jointly issued an order to investigate and eliminate this sort of 'foreign' capital.¹⁹⁰

Table 3: The top ten sources of foreign direct investment in China January-September 2007 (in million USD)

Hong Kong	British Virgin Islands	South Korea	Japan	Singapore	US	Cayman Islands	Samoa	Taiwan	Mauritius
15,915	11,197	2,703	2,493	1,939	1,797	1,651	1,310	1,144	806

Source: Ministry of Commerce of the PRC

Foreign investment companies probably will not be happy if they are extended *the same condition of treatment as national ones*, just like when the new Corporate Income Tax Law that imposed a unified tax for all enterprises entered into force on 1 January 2008, the foreign investment companies have to pay more. The real issue, on the contrary, is to bring the

poverty and economic development, December 2005, WHO, www.who.int/entity/macrohealth/action/CMH_China.pdf, visited on 15 January 2008.

¹⁸⁹ WHO, *China, health, poverty and economic development*, *supra* note 188.

¹⁹⁰ Enforcement Opinions on Several Law Application Issues about Examining and Approving, Registration, and Managing Foreign Investment Companies

national companies *the same condition of treatment* as the foreign ones.

‘All citizens have an equal right to education in accordance with the law, without regard to their nationality, ethnicity, gender, occupation, financial situation or religious beliefs.’ (para. 210, on the right to education)

‘The State shall exempt students receiving compulsory education from paying fees.’ (Para. 211, on the right to education)

Children probably have right to education without regard to their nationality, ethnicity, gender, occupation, financial situation or religious beliefs, however, not without regard to HBV status. In September 2006, the municipal education authority of Urumqi expelled 19 new junior middle school students because they were tested Hepatitis B positive.¹⁹¹

‘Compulsory’ education in Chinese has two fold of meanings: obligatory education and free education. However, substantive fees were charged for the nine-year compulsory education. Hence, Chinese call the compulsory education ‘paid free education’. According to the National Report on Education for All in China released in 2006, China shall fulfil ‘free’ compulsory education by 2015, even though the government revenue of China surpassed that of Japan already in 2005.

6.3 Analyzing the Committee’s Concluding Observations¹⁹²

‘The Committee encourages the State party to take urgent measures to stop the spread of HIV/AIDS and other sexually transmitted diseases, including through sex education in schools and awareness-raising campaigns to eliminate discrimination against HIV-positive persons.’ (para. 60)

Once someone asked me why I had never talked about HIV/AIDS in China. I asked back, ‘have you ever talked about HBV?’ ‘No.’ ‘that’s right, you do not talk about HBV, neither do I talk about HIV/AIDS.’ The point is that, in China, there are 800,000 cases of HIV/AIDS, and 130 million HBV carriers. It is, of course, very important to take care of the marginalized people. However, their issue probably do not enjoy priority if the majority is in struggle. For the 130 million HBV carriers, the only way to participate in social life is to cheat. The hospitals deploy heavy anti-cheating mechanisms when the applicants for civil servants recruitment are under physical examinations. Everyday people are kicked out their workplaces and universities because of HBV. Cases of suicide or homicide inspired by HBV-related frustrations happen from time to time.

¹⁹¹ Seven of them sued the authority but were soon forced to withdraw their lawsuits. *Xinjiang hepatitis students fight school ban*, 20 November 2006, Radio Free Asia, www.rfa.org/english/uyghur/2006/11/20/xinjiang_hepatitis, visited on 15 January 2008.

¹⁹² Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macao), E/C.12/ADD.107.

The Concluding Observations mentions HIV/AIDS five times while HBV is not mentioned. This is understandable because the Western World is in a different situation, and HBV as a grave problem is never heard of. It is, however, sad to notice that China took considerable propaganda, legislative, medical and financial moves on the HIV/AIDS issue to respond to the Western urge, while it shut down www.hbvhbv.com, the only organization which was willing to offer some help to HBV carriers.

The liberal world is structurally different from non-liberal states. The concerns of the liberal world do not necessarily have the same application in non-liberal states. However, non-liberal states often have to spend resources on the Western concerns, which could be luxuries.

'The Committee calls upon the State party to implement its decision to dismantle the hukou system of national household registration and to ensure that in any system that replaces it, internal migrants will be able to enjoy the same work, social security, housing, health and education benefits enjoyed by those in the urban areas.' (para. 46)

Hukou is the backbone of all Chinese political and social structures. It gives rise to a lot of problems. The issue of internal migration is probably only a minor one. The principle issue about *hukou* is the ownership with land. There is no point if the *hukou* system is dismantled at the cost of peasants' land. Unfortunately, this is what is happening now. Few big cities, such as Shenzhen, have registered all peasants in the suburb as townsmen in 2004. One of the consequences was that peasants lost their land. According to China's land regime, peasants have right to keep a piece of land for cultivating and a piece of land for housing. Townsmen do not have right to keep any land. Subsequently, while the cities are expanding swiftly, large amounts of cultivating land is requisitioned, and normally the cultivators are paid substantive compensation. However, if the cultivators are registered as townsmen, they suddenly lose their land. Therefore, the municipal government of Shenzhen in 2004 suddenly came to own all the suburb land after the *hukou* reform. Since the incomes from land selling become much more important for the local governments, big cities are zealous on reforming the *hukou* system of their suburbs. Meanwhile, the *hukou* reform in the rural world is not so well engaged.

Besides land interests, *hukou* is also related to the right to housing. Under the current regime, peasants are entitled an allotment to build their own house, while townsmen have to buy their residence. If a person lost his rural *hukou*, subsequently he lost his allotment and has to buy his residence. In October 2007, the residence price in Beijing is 14,411 *yuan* per square meter,¹⁹³ while the annual income of Beijing peasant in 2006 is 19,147 *yuan*. It is therefore impossible for peasants to buy residences. Considering that

¹⁹³ *Residence transaction price in October 2007 in 36 cities*, National Development and Reform Bureau, www.sdpc.gov.cn/jgjc/jmxf/t20071122_173898.htm, visited on 15 January 2008.

the annual income of Beijing townsmen is 39,684 *yuan*, it is also very difficult for Beijing townsmen to buy a residence.¹⁹⁴ China's real estate market is in a major bubble. The reason is the local governments' monopoly of land and their financial reliance on land revenue.¹⁹⁵ Under this situation, registering peasants as townsmen equals to deprive peasants' right to housing in their hometown.

'The Committee, while recognizing the sizeable population in the vast expanse of the territory of the State party, notes that there are no significant factors and difficulties impeding its capacity to effectively implement the Covenant.' (para. 11)

From the viewpoint of the positive correlation among human rights, development and economic growth, China's astonishing economic growth ought to provide people better human rights. The Government's solid financial power, which is predicted to grow 30% from 3.88 trillion *yuan* in 2006 to 5 trillion *yuan* in 2007, shall result in better public services.¹⁹⁶ However, what if the correlation among human rights, development and economic growth in China is not positive?

One basic fact about China's economy is its nature of totalitarianism. The cost of the mobilization mechanism is property rights. The state monopoly of national resources is, paradoxically, the reason for China's economic success. Foreign capitals can therefore utilize China's national resources without regard to Chinese nationals' rights and benefits. Hence, the Chinese economy is a great game where Chinese nationals are not allowed to play. The introduction of foreign capitals is decided case by case, so that the impact for the SOEs is manageable. If Chinese nationals were allowed to play, the SOEs would not survive. The gravest problem of the SOEs is not inefficiency. It is that, in order to maintain them on the market in spite of their inefficiency, competitors must be expelled from the market. Since the Chinese economy does not grow from a human rights base, it cannot result in a good human rights situation.

China always has always had structural difficulties to transform national wealth into people's freedom and dignity. This situation was most prevalent in the Song, when China was economically overwhelmingly powerful but finally conquered by barbarian people.

If human rights shall be applied to Chinese people, the mobilization mechanism will be replaced with a property regime. In this case, the foreign capital-dominated economy will be outdated by the national economy. The

¹⁹⁴ China statistical yearbook 2007, *supra* note 139.

¹⁹⁵ Land selling incomes count for 40% to 60% of the local government's revenue. See *Difa daxing tumu, zhongyang nanshang jianan*, 21 September 2006, The Wall Street Journal, chinese.wsj.com/gb/20060921/chw182432.asp?source=NewSearch, visited on 15 January 2008.

¹⁹⁶ *China 2007 fiscal revenue projected at 5 trillion yuan*, 26 November 2007, China Daily, www.chinadaily.com.cn/bizchina/2007-11/26/content_6279857.htm, visited on 15 January 2008.

Chinese government will lose SOEs, hence loses control over resources, and will then lose political control. This has to happen after the establishment of a property regime. Otherwise China shall fall into chaotic struggles, just as illuminated in the case of the transition of Russia. It sounds impossible to implement a modern property regime in a totalitarian regime. However, China's experience provides an approach: when foreign capitals transform the economy, it becomes possible and imperative.

6.4 The Abolishment of the Agriculture Tax

Since January 1, 2006, the agriculture tax was abolished. The agriculture tax has been the major financial source for Chinese regimes, except the Nationalist Government, since forever. The Abolishment is one of the most important events in Chinese history. Considering that the Nationalist Government did not have a significant agriculture tax income only because it did not have real control over the rural area, it is the first time in Chinese history that the government does not rely on incomes from the agriculture.

After the abolishment of the PRC regime is stranger than ever. The PRC is not an agricultural economy because the peasants do not own their land. It is not a commercial economy because of lack of property regime and rule of law. It is not a totalitarian regime because the government does not rely on the agricultural economy: as discussed above, totalitarianism is a form of agriculture centralism. When the foreign-leading commercial economy has absorbed half of the population, and the significance of agriculture in economy and public finance has diminished, there is no way the totalitarian regime can stay. The same thing happened to the Roman Empire when free farmers disappeared. Therefore, crucial change has already occurred in China.

6.5 The Special Zones on Rural Development

On June 9, 2007, Chongqing and Chengdu were announced Special Zones on rural development. The mission of the two Special Zones is to explore a way for rural development. The two cities are authorized to modify the Household Responsibility System. Therefore, there is a possibility that the two cities would develop some sort of land property rights, and subsequently liberalize the rural world. According to the Shenzhen experience, which started the Chinese foreign-leading economic story, the Chinese government is able to bring a successful model to the whole country. These two Special Zones are China's chance to realise human rights.

7 Conclusion

In our planet, lives adapt to the environment through evolution, so that human beings have two hands and ten fingers. This process has been lasting for billions of years, and as a result the life circle is extremely diversified. However, in the last several thousands of years, human beings have changed this pattern. Humans adapt to the environment through technology. Technologies help humans free themselves from threats from natural forces. Nevertheless, humans then need to adapt to the technological advancement they brought about themselves. First the technological advancement brought the agricultural economy into shape. Great civilizations were built up to meet the needs of agricultural life. The most outstanding ones were the centralistic empires, which built up central administrations.

Restricted by the growth circle, the growth of the agricultural economy's productivity was capped. The centralistic regime of Rome was broken down into decentralized feudal kingdoms due to this reason. The new commercial economy, which fully could benefit from technological advancement, developed. In order to support the commercial economy, feudal regimes were reorganized into liberal states with centralized administration upon the base of civil liberties.

In the first millennium, the world was mainly agricultural or pre-agricultural. The second millennium witnessed the triumph of commercial economy and liberalism. The commercial economy displayed its overwhelming superiority over the agricultural economy. Year 1204 when Venice invaded Byzantine is the starting point of an age of commercial economy. By the end of the second millennium, human rights developed into a minimum set of liberties and rights to apply to all nations including non-liberal nations. At the beginning of the third millennium as we are now, human rights have assumed their universal legitimacy. However, despite their legitimacy, human rights are less successful in transforming non-liberal nations. Except Japan and the Asian Tigers, human rights are not generally fully realized in non-Western nations. Moreover, Russia and China transformed into anti-human rights powers.

As a matter of fact, most of the states in the world are not liberal, implementing human rights poorly. All member states of the Organisation for Economic Co-operation and Development, the group gathering most liberal states, have a population of 1.17 billion in total, less than the population of China. On the other hand, non-liberal states learn technologies quicker than human rights. Without restraints of human rights, certain technologies in non-liberal states created catastrophic consequences with global reach. This is exemplified by the environmental crisis. For instance, without electric saws and trucks, local people probably are not able to deforest the rainforests so efficiently, while these technologies would not create such a problem in the home country due to the environmental law.

In the beginning of the third millennium, the international community's top priority is human rights promotion, especially in non-liberal states. China's move is significant in this human rights project. First, China as one of the few non-liberal states presenting extraordinary economic growth shows potentials of liberalization. Economic growth alone is not enough for liberalization. However, economic growth is indispensable for liberalization. Second, the liberal world would instantly double its size if China manages to liberalize. The map of world human rights would radically change. Third, more importantly, China has the potential to offer a different model of liberalization for non-liberal states. China is an *independent* country so that China can act on its own. This means it is able to resist inappropriate measures recommended by the international community, for instance, democracy. Democracy is a mechanism combining extreme political decentralization and a centralised administration. It requires a very high threshold. As in the case of Europe, it is built up upon the legal system inherited from the Roman age and civil liberties, especially property rights achieved in the liberal revolutions. Universal suffrage were not available in all European states in the ninetieth century, which shows democracy is not a key element in liberalization simply because many European states were already liberal by ninetieth century. Democracy installed in states with no central administration, such as some African states, does not function. Democracy in centralised states with no property regime, even worse, causes catastrophic consequences, as illuminated in the Russia case. The current international human rights regime shows no competency in promoting human rights. Hence the China perspective is a probable approach for non-liberal states.

Despite that China acts on its own, China's liberalization is an international process. China's economic development relies on capitals from liberal states and trade with liberal states. China also cooperates on the human rights issue as much as possible by ratifying most human rights documents, and protection of human rights were written into the Constitution in 2004.¹⁹⁷ It is the international community's responsibility to exert their influence in the right way to facilitate instead of to jeopardize the liberalization process. For the moment, the international community shall urge and help China in the land regime transformation process, and do not push China into democracy before the accomplishment of the process.

¹⁹⁷ Constitution of the People's Republic of China, Article 33.

Bibliography

Literature

- Baylis, John and Smith, Steven, *The Globalization of World Politics: An Introduction to World Politics*, 3rd ed., Oxford, 2005
- Camilleri, Joseph A., and Falk, Jim, *The end of sovereignty?* Edward Elgar, 1992
- Diódsdi, György, *Ownership in ancient and preclassical Roman law*, Budapest, 1970
- Eberhard, Wolfram, *A history of China*, 4th ed., Routledge & Kegan Paul, 1977
- Fairbank, John K. and Feuerwerker, Albert *The Cambridge history of China, volume 13, Republican China 1912-1949, part 2*, Cambridge, 1986
- Fairbank, John King, *China: a new history*, Belknap Harvard, 1992
- Ferro, Marc, *Colonization: a global history*, Routledge 1997
- Franke, Herbert and Twitchett, Denis, *The Cambridge history of China, Volume 6, Alien regimes and border states, 907-1368*, Cambridge, 1994
- Friedman, Edward; Pickowicz, Paul G. Mark Selden and Johnson, Kay Ann, *Chinese village, socialist state*, Yale, 1991
- Garnsey, Peter and Saller, Richard *The Roman Empire: economy, society and culture*, Duckworth, 1987
- Gernet, Jacques, *A history of Chinese civilization*, 2nd ed., Cambridge, 1982, reprinted 1997
- Glaz, Marcel Le; Voisin, Jean-Louis and Bohec, Yann Le, *A history of Rome*, Blackwell, 1996
- Huang, Ray, *Capitalism and the Twenty-first Century (Chinese)*, SDX Joint, 1997
- Huang, Ray, *China: a macro history*, M, E, Sharpe, 1997
- Keen, Maurice, *A history of medieval Europe*, Routledge and Kegan Paul, 1967
- Kirchner, Walther, *History of Russia*, Barnes & Noble, 1955
- Lane, Frederic C., *Venice, a maritime republic*, Johns Hopkins, 1973
- MacFarquhar, Roderick and Fairbank, John K., *The Cambridge history of China, Volume 14, The People's Republic of China, Part I, The emergence of revolutionary China 1949-1965*, Cambridge, 1987
- McNeill, W. H., *A World History*, Oxford, 1979
- Nowak, Manfred, *Introduction to the International Human Rights Regime*, Martinus Nijhoff, 2003
- Potter, David S., *A companion to the Roman Empire*, Blackwell, 2006
- Pounds, N.J.G., *An economic history of Medieval Europe*, Longman, 1974
- Schulz, Fritz *Classical Roman law*, Oxford, 1951
- Stavrianos, L. S., *A Global History*, Prentice Hall, 1991
- Stephenson, Carl and Lyon, Bryce, *Mediaeval history*, Harper & Low, 1962
- Thomas, Hugh *A history of the world*, Harper & Row, 1979
- Twitchett, Denis and Fairbank, John K., *The Cambridge history of China, Volume 10, Late Ch'ing 1800-1911, part I*, Cambridge, 1978

Twitchett, Denis and Loewe, Michael, *The Cambridge history of China, Volume I, The Ch'in and Han Empires, 221 BC – AD 220*, Cambridge, 1986

Walker, David M., *The Oxford Companion to Law*, Clarendon Press, 1980

Wang, Chenguang and Zhang, Xianchu, *Introduction to Chinese Law*, Sweet & Maxwell Asia, 1997

Articles

Broadman, H. G. and X. Sun, 'The distribution of foreign direct investment in China', 3 *The World Economy* (1997)

Eide, Asbjørn, 'Making human rights universal', *Human Rights in Development Yearbook 1999/2000*, (2001)

Kuijs, Louis, *How will China's saving-investment balance evolve?* 2006, World Bank

Sussman, Nan M., 'People on the move: the transnational flow of Chinese human capital', *Conference at Hong Kong University of Science and Technology*, (2005)

Publications by International Organizations

Centre for Disease Control and Prevention of the US, *Virus Hepatitis B, fact sheet*, July 2007,

WHO, *China, health, poverty and economic development*, December 2005

WHO, *China, national expenditure on health*, 14 September 2007

WHO, *Country Cooperation of Strategy at a Glance*, 2006

WHO, *Hepatitis B*, October 2000

WHO, *Hepatitis B in the Western Pacific Region*, 2004

WHO, *Hepatitis B working group (3rd meeting – 6-7 March 2007) - Meeting Report*, 2007,

UN, *FDI from developing and transition economy: implications for development*, 2006

UNDP, *China human development report 2005*, 2005

UNDP, *UNDP poverty report 2000, China country assessment*, April 2000

Statistical Yearbook and Factbook

China Statistical Yearbook 2002

China Statistical Yearbook 2007

Japan Statistical Yearbook 2008

World Factbook 2007, Central Intelligence Agency

International and Chinese Legal Documents

Declaration on the Right to Development
International Covenant of Civil and Political Rights
International Covenant of Economic, Social and Cultural Rights
Universal Declaration of Human Rights

Constitution of the PRC
Corporate Tax Law of the PRC
Criminal Law of the PRC
Electoral Law of the National People's Congress and Local People's
Congress of the PRC
Enforcement Opinions on Several Law Application Issues about Examining
and Approving, Registration, and Managing Foreign Investment
Companies
Interpretation of the Supreme People's Court of Some Issues concerning the
Application of Law for the Trial of Cases on Compensation for Personal
Injury
Property law of the PRC

News

Amnesty International, *China: migration workers dies in custody*, July 2003,
<http://web.amnesty.org/wire/July2003/China>
China Daily, *China 2007 fiscal revenue projected at 5 trillion yuan*, 26
November 2007, [www.chinadaily.com.cn/bizchina/2007-
11/26/content_6279857.htm](http://www.chinadaily.com.cn/bizchina/2007-11/26/content_6279857.htm)
China Law and Governance Review, *Hepatitis B Virus Status*, December
2006, www.chinareview.info/pages/case.htm,
China Radio International, *Shenzhen to Keep Permanent Population below
9 Mln by 2010*, 3 December 2007,
english.cri.cn/2946/2007/12/03/189@300737.htm
Financial Times, *Beijing moves to end foreign favours*, 4 March 2007,
[www.ft.com/cms/s/0/f07370c8-ca74-11db-820b-
000b5df10621.dwp_uuid=9c33700c-4c86-11da-89df-0000779e2340.html](http://www.ft.com/cms/s/0/f07370c8-ca74-11db-820b-000b5df10621.dwp_uuid=9c33700c-4c86-11da-89df-0000779e2340.html)
Financial Times, *Nokia China in lawsuit over Hepatitis B carrier*, March 13
2007, [www.ft.com/cms/s/0/91c54ca8-d182-11db-b921-
000b5df10621.html](http://www.ft.com/cms/s/0/91c54ca8-d182-11db-b921-000b5df10621.html)
Fortune, *Oops! Hong Kong is hardly died*, 28 June 2007,
[money.cnn.com/magazines/fortune/fortune_archive/2007/07/09/1001223
32/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2007/07/09/100122332/index.htm)
Fortune, *The death of Hong Kong*, 26 June 1995,
[money.cnn.com/magazines/fortune/fortune_archive/1995/06/26/203948/i
ndex.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1995/06/26/203948/index.htm)
Los Angeles Times, *China: Killer Inspires Drive Against Hepatitis Bias*,
Jan. 08 2004, www.aegis.com/news/ads/2004/AD040117.html
National Development and Reform Bureau, *Residence transaction price in
October 2007 in 36 cities*,
www.sdpc.gov.cn/jgjc/jmxf/t20071122_173898.htm

- New York Times, *Chinese People's Republic is unfair to its short people*, 21 May 2004, query.nytimes.com/gst/fullpage.html?res=990CE1DA113FF932A15756C0A9629C8B63
- People Daily Online, *For rule of law: in retrospection at the fiftieth anniversary of the NPC*, 13 September 2004, www.people.com.cn/GB/14576/14957/2779900.html
- Radio Free Asia, *China Police established special team on anti-terrorism and violence*, 19 August 2005, www.rfa.org/mandarin/shenrubao/2005/08/19/fangbao/
- Radio Free Asia, *Xinjiang hepatitis students fight school ban*, 20 November 2006, www.rfa.org/english/uyghur/2006/11/20/xinjiang_hepatitis
- UNDP, *UNDP China wins 2006 poverty eradication awards*, 17 October 2006, www.undp.org/poverty/stories/pov-award06-china.htm,
- USA Today, *Chinese economy slows to still sizzling 11.5% growth*, 25 October 2007, www.usatoday.com/money/world/2007-10-25-china-gdp_N.htm
- Wall Street Journal, *Difa daxing tumu, zhongyang nanshang jianan*, 21 September 2006, chinese.wsj.com/gb/20060921/chw182432.asp?source=NewSearch