

Efficiency and Chinese Legislation

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In 1995, China established a socialist market economy functioning within a transparent legal framework. However, the legislative process faces numerous problems, for example the lack of legislative theory, skills and methodology, the unreasonable structure of legislative procedures and budgetary constraints in the training of legislative staff. For these reasons, many laws and regulations still fail to resolve China's social problems efficiently. At present, the quality of the legislation is attracting much attention.¹ The concept of efficiency has been the focus of scrutiny in line with further economic reforms. However, the efficiency of current legislation has not yet been examined. The aim of this article is to explore legislative efficiency in China. The article examines the correlation between efficiency and legislation from three aspects: first legislative institutions, secondly legislative procedures, and thirdly legislative human resources in China.

A. The Current State of Chinese Legislation

The current situation, where regional legislation largely copies national legislation, results in the waste of legislative resources.² According to current Chinese legislation, regional rules do not effectively come into being locally until further regional legislation is passed though it may simply repeat national law. Meanwhile, without careful investigation and precise understanding of the national legislation, these so-called rules do not necessarily tackle the actual needs of the regions. They also inappropriately implement the legislation in the way that policies are always implemented by simply transferring documents. Moreover, the regional legislators often blindly rely on national laws and administrative regulations as examples for regional legislation. Consequently, the overlapping legislative

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¹ After the ninth NPC session (2002), the guideline for legislative strategy changed from the quantity of legislation to the quality of legislation in line with the national environment (such as the social, political, economic changes) and the international environment. See Wu Gaosheng, *The Legislation Work by the National People's Congress in 2002*, in Blue Book of the Rule of Law: the Development Report of the Rule of Law in China 247 (2003); The Editorial Group, *A Report on the Development of the Rule of Law In China, 2003*, in Blue Book of the Rule of Law: the Development Report of the Rule of Law in China 1-8 (2004).

² This situation is outstanding due to the lack of legislative capacity of the regional legislation, especially making administrative regulations. See the Report of Legislative Office of Jinan Government, Shandong Province, Southeastern China: *Problems in Administrative Legislation*, at <http://www.jnfzb.gov.cn/show.php?id=571> 2005-06-07, on line available.

programmes result in excessive repetition without the necessary modification and frequent inclusion of inappropriate national stipulations and administrative regulations. These complicated legislative stipulations are typical of the waste of legislative resources that impairs the establishment of the legislative authority.

The waste of the legislative resources can be attributed to the disjuncture between law-making and law-enforcement.³ The legal system as a whole contains law-making and law-enforcement elements and determines that legal research as a whole includes the study of both legislation and law-enforcement. However, law-enforcement receives more attention than legislation in China. As a result, our knowledge of legislative theory, legislative institutions and legislative techniques is still very patchy. The legislators and their staff are still deeply affected by such legislative values: “making a law when matured, something better than nothing, fast better than slow, better than less”⁴ as ever dominated in legislative theory. The difficult application of some laws and regulations in society is due to the paucity of legislative research, the blind importing of foreign laws and an ignorance of legislative efficiency. There is still too wide a gap between the law in theory and the law in action. At the same time, bad legislation damages law enforcement, weakens justice and undermines observation of the law and, on the whole, damages the legal position of the people. These problems can be mainly ascribed to inherent flaws in the legislation, especially their low quality, which necessarily leads to the bad application of laws.

The unreasonable distribution of legislative products has not met the needs of civil society. Current legislation is incompatible with the idea of the market economy. In the shadow of the feudally autocratic institutions that prevailed for the previous two thousand years, the government has over-emphasized the importance of the central administration, strengthened governmental control and weakened the protective legal rights of the people. The imbalance between supply and demand in legislative products is obvious. There are two particular interesting aspects here. One is the lack of private law, which would be useful under current economic circumstances as it would benefit society, such as property law, company law, and guarantee law, but which lags behind the current state of socio-economic development. On the other hand, administrative regulations have not satisfied the demands of society. Civil and commercial legislation is so thin that people have to bear high costs in the process of transactions. This situation contradicts the aim of the modern state. The goal of the legislation lies in the fact that the state protects stable transactions by enacting a series of laws regulating behaviour within civil society. At present, though the quantity of legislation is multiplying in China, the regulating effect has not improved accordingly.

³ The issue relates retrospective legislation and retroactive legislation. See Tian Chengyou, *Challenges in Transformation for Legislation*, at www.gongfa.com/lifatiency.htm; Shao Xinhui, *Research to Selecting Legislative Opportunity*, at www.legaltheory.com.cn/info.asp2005-06-07.

⁴ After the Cultural Revolution, on 22 December 1978 Deng Xiaoping published his famous speech focusing on Chinese Legislation in the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China. See Deng Xiaoping, *Florilegiums* Vol. 2, at 146-147 (1994).

Legislative corruption wastes legislative resources.⁵ Under current legislation, there are few stipulations that set out the obligations and responsibilities of national bodies. This phenomenon is vividly described in terms of “the interest of power, the division of interest, the legalization of division of interest.”⁶ Regional protectionism and division protectionism interfere with too many domains and expropriate illegal benefit through legislation at the cost of valuable and scarce legislative resources. Hence, interdepartmental bickering and conflicts of interest are very common. For example, how long has the tug of war over the Corporation Law lasted? According to some reports, it is ten years.

The costs of formulating and enacting legislation are not budgeted independently. For example, in some regions, governments have not established legislative costs as an exclusive budgetary item. Costs are often paid by administrative bodies, which also provide finance for the making of regional regulations by the administration.⁷ At present, the fact that the Standing Committee of the NPC (the National People’s Congress) as a legislature has insufficient funds to support human resources, finance, materials, information and so on is an embarrassment to the production of sound and sober legislation. Hence, that legislature has to depend on the administration and other groups. This leads to less autonomous legislation and more passive and ordered legislation.

The distribution of human resources is irrational. Legislation requires professional knowledge and time for investigation, but Chinese representatives are never exclusively dedicated to this task. Most of those who are involved are, in fact, those government officials who also assume other important responsibilities and are almost social celebrities. For them, legislation is provisional not professional. They usually invest too much time in their own busy work to engage in legislation with the necessary time and energy. Indeed, those members of the committee undertaking important legislative work are mostly over 60 years old and most of them are retired from party or administrative posts. Though they are experienced and have a broad knowledge base, they are not familiar with legislation. This means that they must learn these skills. Both Chinese legal capacity in general, and the legislative abilities of the NPC and the administration in particular are unable to meet current needs. As a result, those who know a little about law even though their experience is limited are also those who draft and make many laws, regulations or rules even as they continue their own legal study. The laws produced by this method are often of low quality and cannot be implemented. The current distribution of legislative resources in China is, in summary, such that it reduces the efficiency of social operations.

⁵ Chinese legislation pays more attention to the social impact of legislation. This is especially the case for administrative legislation. From China Nation Radio, *Legislative Corruption is a New Serious Problem in Chinese Legislation*, at http://www.cnr.cn/luntant20050323_329839.html; www.peacehall.com/news/gb/pubvp/2005/05/200505200016.shtml

⁶ The term ‘Interest Parties’ is very sensitive in the traditional ideology, but following the marketing economic ideology Chinese people should meet these common things under its development like democracy, liberty, freedom, human rights and so on.

⁷ Li Gaoxie, *The Research of Allocation of Local Legislative Resources*, at <http://www.chinaelections.org>.

B. Arguments for Legislative Efficiency

Due to limited legislative resources and poor legislative techniques, there is a debate as to whether legislative efficiency should be considered a factor in the development of legislation in China. Some argue that it is impossible to require efficiency in this phase, whilst, on the contrary, others hold the opposite view. Their arguments refer to the reasons for difficulty in promoting legislative efficiency. There are five main reasons to support the opinion that legislative efficiency in an inappropriate current aim in China. The first view is that the idea for promoting efficiency is very thin. It is inappropriate to promote the idea of efficiency in current legislation in China because the nature of the traditional self-sufficient economy has to be rooted in the will of the majority of the Chinese people and not only the leaders of the CCP. Secondly, since most legislatures have not developed programmes for legislative efficiency or have treated it as unimportant, promoting it is impractical since it would currently require too much effort. Thirdly, legislative awareness is limited. Economic development and a consequent improvement in the overall quality of life are thought to be more important and pressing. Though the concept of efficiency has influenced people, nevertheless, it is still not profound. Fourthly, it is argued that democracy and efficiency are at opposite extremes. Promoting legislative efficiency will ignore legislative democracy. The last point is that efficiency and fairness are contradictory. Promoting legislative efficiency will undermine legislative fairness. So, the current environment is not a suitable environment for promoting legislative efficiency.⁸

Moreover, there are six main reasons why people argue that it is necessary to promote legislative efficiency. First, if the idea of legislative efficiency is established, the legislature will be able to better focus legislation on satisfying social needs. Second, greater concentration on efficiency would promote more effective enforcement and better observation of the laws enacted, through improved efficacy and quality of legislation. Third, in terms of the core status of economic development in China, efficiency should be accorded greater attention in the legislative value system. Fourth, given the importance of the market economy, the state as the economic subject seeks the maximization of overall benefits. Therefore, the goal set by the state clearly involves the promotion of legislative efficiency. Fifth, a democratic approach does not impair efficiency. Introducing more democracy to legislation may bring efficiency in the end by increasing observation of the law from those who feel they have had a democratic input into its formulation. Finally, legislative fairness and efficiency benefit each other. In terms of sociology, the need for laws varies according to different subjects: some prefer fairness, others prefer efficiency. As a consequence, there are various

⁸ These opinions come from the governmental officials of legal departments. In the Summer of 2005, I interviewed two people who work in legal departments in China to discuss legislative efficiency. And see Feng Lixia, *Democracy of Legislation and Professionalism of Legislators*, 3 *Legislation Review of China* 226 (2002); Lilin, *Value of Legislation and Selection*, at <http://www.iolaw.org.cn>.

choices and different ideals for legal rules abound. In a society, the different value choices of the society as a whole determine the evolution of legislative values. The value choices or goals and their realization that the legislature seeks to represent are the result of agreement between the legislature and wider society. Hence, de facto legislative fairness and efficiency are not in conflict.

As a result of these arguments, others contend that promoting legislative efficiency is completely appropriate for China at this time, and it is important and inevitable that we promote the maximization of legislative efficiency whilst also emphasizing legislative quality.⁹ According to the dictionary of modern legal usage, the expression 'efficiency' is commonly used in two senses. The first expression is competency to perform a task. The second expression is to be capable of bringing about a desired effect (by agents or their actions or instruments).¹⁰ Before the nineteenth century, the concept of efficiency was only applied to engineering, such as mechanical efficiency and heat efficiency. Generally, the concept of efficiency referred to the ratio between the effect of some labour, work or physical movement and the quantity of labour, work or energy invested. From the twentieth century onwards, the concept of efficiency was gradually used in the domains of economics and management. In the context of economics, efficiency refers to the ratio between the quantity of productive elements invested in manufacture and the output.¹¹ In the 1960s-1970s, law and economics as independent schools analysed the economic roots of laws by using the basic principles of economics to uncover the internal nature of laws.¹² Studies determined in which situations laws are most economic and convenient and function best and also demonstrated how law is used to maintain social fairness, justice and maximize legal efficiency. Therefore, it is worth borrowing this approach and analyzing frameworks for legislation. According to the idea of law and economics, we could view efficiency as a comparative relation between actual results and the expectations of the people.

'Legislative resources' refers to the social resources including human resources, finance, materials, technology, information and so on which should or might be used in legislative activities.¹³ It is notoriously difficult to measure the efficiency of legislation. Nevertheless, it remains clear that these resources are scarce. Theoretically, the state monopolizes legal power and makes laws without limitation. However, any formulation and application of laws will incur costs. Consequently, the productive capacity of a legislature in any society is limited, so it is necessary to enhance legislative efficiency in our legislation. Legislative

⁹ Although there is little material focusing on this area, their opinions have been so powerful to affect not only legislators and academic staff but also the whole socialist society. See Xiao Beiging, *The Legal Order of Constitutionalism* 216-221 (2002); Feng Lixia, *Democracy of Legislation and Professionalism of Legislators*, 3 *Legislation Review of China* 226 (2002); Lilin, *Value of Legislation and Selection*, at <http://www.iolaw.org.cn>.

¹⁰ B. A. Garner, *A Dictionary of Modern Legal Usage* 306 (2002).

¹¹ He Chuanqi, *Efficiency Management* 24 (1995).

¹² Gu Chunde (Ed.), *History of Western Legal Thoughts* 516 (2004); R. A. Posner, *Economic Analysis of Law* 4 (2003).

¹³ Neo-classical economists basically treated a society's economic and other institutions as a black box, e.g. P. A. Samuelson, *Economics: An Introductory Analysis* 56 (1989).

efficiency reflects the ratio between social ends and the real results of legislation.¹⁴ The social ends, also called legislative ends, are the ends that the legislature attempts to realize. As Posner stated, legislation must reflect real social demand; it must satisfy the underlying social needs that engendered it in addition to producing a narrower legislative benefit.¹⁵ Therefore, legislative efficiency refers to the fact that, given the constraints of the system, the maximizing behaviour of legislature will increase the output of good legislation and enhance the operation of society.

In this article I will incorporate some principles of Marxist philosophy, such as dialectic thought, causality, the union of objective and subjective factors, external and internal factors and so on. These methods are employed to analyze existing crucial problems in current Chinese legislation, while using the “Problem-solving”¹⁶ and “Learn the Truth from Facts”¹⁷ methods, which involve combining legislative theory with current legislative practice. Utilising law and economics analysis will demonstrate the significant role of legislative efficiency in the legislative area. Secondly, and related to legislative areas such as the legislative institutional environment, legislative procedure and legislative professionalism, this article relies on primary and secondary literature related to Chinese legislation, UK legislation, and US legislation and investigates the adoption of other countries’ legislative processes. It also visits other disciplines such as economics, sociology, philosophy, since it deals with theories tackled in economic-law analysis, such as CBA (Cost-Benefit Analysis) as it contributes to the notions of legislative efficiency. Thirdly, the article presents many opinions of social observers and legal scholars who want to answer many hard questions and explain many current situations, which exist in China. These areas underline some of the arguments of this article. Finally, and in order to combine theory with practice, learn truth from facts, some limited interviews were conducted with individuals who participated directly or indirectly. The interviewees range from officials of the bureaus of legislative affairs of local governments, staff of the Committee of Legislative Affairs in the NPC, judges of the Medium People’s court and High People’s Court, and lawyers of private law firms.

Some limitations arise. Due to the unique Chinese circumstances, it is difficult to get real and direct official materials about legislation, such as the data on the local and central legislative costs and legislative benefits. Moreover, there is still not a stable standard of legislative quality to balance legislative efficiency. Furthermore, there are limitations imposed by the nature of the political and social system, the model of state management; the constitutional order; traditional culture and so on; the concept and doctrines of legality never occupied a central role in traditional imperial China. There has never existed a legal culture with

¹⁴ Wang Quansheng, Lifa Xiaoyi Yanjiu [Research of Legislative Benefits] 93 (2003).

¹⁵ Gu Chunde, *supra* note 12, at 523.

¹⁶ Seidman *et al.* think policymakers must be guided by reason and informed by experience. They advocate the ‘problem-solving’ method in creating effective laws. See A. Seidman *et al.*, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (2001); A. Seidman *et al.*, *Legislative Drafting for Market Reform: Some Lessons from China* 40 (1997).

¹⁷ The Chinese dictum “*Learn truth from facts*” underscores this requirement.

elements like officials' fidelity to law or citizens' consciousness of their legal rights, which provide the necessary conditions for the effective operation of a modern Western style legal system. Finally, the research approach of Law and Economics is flourishing in China; however, using this approach to legislative studies is rare in China. The materials about this topic are very limited.

C. Legislative Institutional Arrangement and Legislative Efficiency

In China, due to its unique circumstances, there are many problems such as the imbalances in legislative power, legislative corruption, legislative repetition and so on. What is the relationship between legislative institutions arrangement and legislative efficiency? To be more precise, what are legislative institutions and what forms do they assume? Why are they important for legislative efficiency? How do we improve legislative efficiency?

I. Legislative Institutions and Legislative Efficiency

Different authors define 'institutions' differently. Wang Quansheng points out that an institution is a normative system of social relationships and related human activities formed under certain historical conditions, also including the broader social institutions and structures executing the functions of the institution.¹⁸ Seidman et al state in a manual for legislative drafters that 'institution' means a set of repetitive patterns of behaviour.¹⁹ According to their definition of an institution, to transform an institution requires changing the ensemble of repetitive patterns of behaviour that together constitute that institution. In addition, according to institutional economists, an institution is a kind of social resource that is sparse and can be analyzed through a comparison and distribution of costs.²⁰ Therefore, the scarcity of institutional resources and constraining conditions of institutional supply are related to the limitations of institutional arrangements and the political, economic, cultural and technological environments in which the institution is based. In China, due to the one party leadership, the development of democracy and freedom, government accountability and transparency are limited, and the resources related to democracy, freedom, accountability, and transparency are sparse. As the institution is a kind of resource and social public good, it will bring different rewards to different groups, classes and individuals. Hence, this problem will be concerned with the distribution of resources.

According to Li's *Encyclopaedia of Marketing Economics*, distribution of resources is rational allocation of resources by some subject, whose forms mainly include legal distribution, administrative distribution, market distribution

¹⁸ Wang Quansheng, Lifa Xiaoyi Yanjiu [Research to legislative benefits] 232 (2003).

¹⁹ Seidman (2001), *supra* note 16, at 11.

²⁰ Institutional economists treated a society's economic and other institutions as the principal variable in economic analysis, Gu Chunde, *supra* note 12, at 518.

and self-distribution.²¹ Optimizing the institutional resources of legislation will definitely increase legislative efficiency.

Institutionalization of legislation is a global trend. For example, the British Parliament and American Congress have very complete bodies of law, but they still further the institutionalization of legislation.²² They are extending the scope of legislation and enacting new laws. Middle and Eastern European countries in the post-communist period have also strengthened their parliamentary powers in order to improve the legality of the new regimes.²³ Generally, there are internal and external elements to stimulate this institutionalization.²⁴ When an institution becomes swollen and delicate, it has to establish a set of procedures to deal with its internal needs. A change in the external environment such as ideology, politics and economics could also be an incentive to institutional change. In the last twenty years, the internal structures and the external environment for the Chinese legislative system have undergone vital changes. Great progress in terms of the constitution, legislation and legal organization has been made in China. However, due to the limitations of the political system, the nature of party government and traditional culture, the existing legislative system has not been adaptable to idea of democracy and rule of law, and not able to promote the democratization, scientification, and normalization of legislation and so increase legislative quality and efficiency.

Zhou Ziang claimed,

We must attend to legislation and to economic development and reform at the same time...on the one hand, we should improve legislation and the procedures for law enforcement, enable the judicial organs to exercise independent authority as prescribed by the law. On the other hand, we should see to it that legislation guarantees good order in economic development. We should try to define in terms of laws and rules, what should be encouraged and what should be rejected. Only in this way can we bring about a new standard for political, economic, and social activities. In short, through reform we should gradually establish a legal framework for our socialist democracy and institutionalize it. This is a fundamental guarantee against a recurrence of the 'culture revolution' and for lasting political stability in our country.²⁵

This speech has been a significant guide to China's development from that time. China was no exception to many countries in the developing and transitional world, where good governance seemed in short supply; corruption appeared

²¹ Li Yining, *Encyclopedia of Marketing Economics*, in Wang Quansheng (Ed.), Lifa Xiaoyi Yanjiu [Research of Legislative Benefits] 235 (2003).

²² G. B. Nutting & R. Dickerson, *Legislation Cases and Materials* 369 (1977); W. D. Popkin, *Materials on Legislation: Political Language and the Political Process* 592 (1993).

²³ A. H. Y. Chen, *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*, in J. M. Otto, *Law-Making in the People's Republic of China* 71 (2000).

²⁴ According to the philosophy of Marxism, every thing has internal factors and external factors, and these factors react to each other. From University of Wuhan China, *Philosophy of Marxism*, at <http://www.cycnet.com/encyclopedia/education/kaoyan/000419024.htm>.

²⁵ Zhou Ziang, a general-director of the legislative office in 1989. His speech is also quoted in Seidman (1997), *supra* note 16, at 27.

rampant; authoritarianism too often the mode of governance; accountability and transparency notable by their absence; government implementation measures frequently proved ineffective.²⁶

II. Problems Distributing the Institutional Resources of Legislation

There are four major forms of repeating legislation. The first form is multi-legislation. After the NPC and its Standing Committee pass a law, the State Council follows by publishing its rule of application, and then regional NPCs make more rules that are concrete. Therefore, there are three or four legal norms from different legislative bodies all impacting on a piece of legislation. This leads to inefficiency in the legislative process and implementation process. The second form is lower legislation mainly copying higher legislation. The Local People's Congresses invariably copies the NPC's legislation when the NPC promulgates new laws. Although their purpose is to meet their local needs, they always copy the articles. Third, there is copying of legislation on the same level. For example, the local People's Congresses copy regulations, which are similar to the administrative rules made by the State Council's Ministries or Committees. Fourth, later legislation copying former legislation. Once a region makes a law, others will follow this example. The congruence of mode, structure and content become more serious. As a result, the regional legislation is an additional edition of national legislation. Without the regional features, the particular local problems are not addressed, whilst legislative resources are wasted for no reason. At the same time, because there are different stipulations covering an identical issue, it is difficult to execute the law.

It is necessary to adjust legislative programmes to accommodate changing circumstances. However, this adjusting is always at a distance from the desired move to improved scientific application in institutionalization: which programmes should be changed and what procedures should be taken lack the corresponding rules and mainly depend on the will of the legislature or administration, even the expectations and preferences of individual leaders. Consequently, the legislative programmes are not executed as efficiently as they could be. As Li mentioned in his report, many legislatures including the NPC only accomplish 40-50% of their planned programmes.²⁷ Moreover, whenever, legislative programmes are vetoed, investment in legislative resources already expended is wasted.

At present, the administrative distribution, which is controlled by the government, is the main form of distribution of legislative resources.²⁸ But this mechanism has been unable to completely master the information on demand and supply of legislative resources. The administrative guidelines control the flow

²⁶ Seidman (2001), *supra* note 16, at 6-10.

²⁷ Li Gaoxie, *The Research of Allocation of Local Legislative Resources*, at <http://www.chinaelections.org/readnews.asp>.

²⁸ According to governmental statistic data, the State Council is the Central Government and the highest executive body of China. They are major legislatures at state level. The State Council sponsored over 70 percent of the bills passed by the NPC in the past two decades. China.org.cn September 28, 2003, at <http://www.china.org.cn/english/kuaixun/76337.htm>.

of resources. However, these guidelines are often subjective and blind; hence, limited legislative resources can be wasted. The mechanism that combines the legislative power with administrative power is unfavourable to a state ruled by law.

III. How to Increase Legislative Efficiency?

One way to increase legislative efficiency is by setting up the distributive mechanism of legislative resources controlled by the legislature to increase efficiency. A more effective form of distribution of legislative resources, legal distribution and market distribution should be promoted positively. We should gradually lessen the administrative distribution and avoid the self-distribution.²⁹ The distributive mechanism controlled by the government should be changed into a mechanism controlled by the legislature according to the legislative programme. By adding the finance and materials to the finance budget, the legislature should determine the quantity of various uses of legislation and supervises the use of resources. A balance should exist between the supply and demand of legislative resources. More investment should not be necessarily viewed as a sufficient condition of success; rather, the key to maximizing efficiency is the more efficient and logical allocation of existing resources. This balance will be realized mainly through drawing up systematic plans and programmes of legislation and setting out a reasonable legislative budget. The criteria used to estimate the balance between supply and demand should be guaranteeing the staff discharge their responsibilities; guaranteeing the quantity and quality of legislation; guaranteeing proper legislative procedures; and guaranteeing cost effective legislation. If supply exceeds demand, resources may be left unused and this will cause waste; conversely, if demand exceeds supply, some important phases of the legislative procedure may be neglected.³⁰ For example, investigating and listening to public opinion may be jettisoned. This will impair the quality of legislation. Moreover, due to insufficient supply, the legislature may be forced to seek support from other relevant organs, such as regional assemblies, and then the subsequent laws will be influenced to a greater or lesser extent by regional protectionism.

Another way to increase legislative efficiency is by establishing relevant institutions to raise the level of legislative efficiency. Constitutionalism refers to a form or process of politics that is based on the Constitution and Rule of Law, and it aims to promote democratic politics and the protection of human rights.³¹ Seidman et al point out that good governance is the use of the resources of the state in a transparent and accountable manner for the benefit of society as

²⁹ Given the current development of the market economy in China, more laws and regulations for protecting private and individual rights are required. Therefore, we should strengthen this legislation.

³⁰ The 21st Textbook, Politics & Economics (2000). The Basic Principles of Demand and Supply, Economic Efficiency, and Socialist Marketing Economic System, at http://www.gjmy.com/Article/paper/paper_econ/2005-04-11/9294.html.

³¹ Xiao Beigeng, *The Legal Order of Constitutionalism* 58 (2002).

a whole.³² Government can only change existing resource uses by creating an enabling environment in which relevant social actors will be likely to allocate resources in more ways that are desirable. However, the theory of and practice of Constitutionalism in China is still in a primitive state. The exercise of government still falls short of good governance. If the concept of constitutionalism and the idea of the rule of law and good governance were to be fully adopted, legislative efficiency would be more readily realized.

Moreover, positively discovering and establishing the cost-benefit analysis will work wonder towards increased legislative efficiency. Cost-benefit analysis of legislative programmes has been widely used in occidental developed countries. For example, the 1981 Presidential Order in the U.S. required that all new regulations should meet the criterion set by cost-benefit analysis.³³ However, this methodology has largely not been put into practice in China, although the Chinese State Council did promulgate an *Outline of fully promoting administration by laws* in 2004 that brought forth a requirement to positively discover the cost-benefit ratio of administrative legislation, especially economic legislation. Moreover, the administrative legislation not only takes the cost of legislative process into account, but also studies the executing cost and social cost after application. Therefore, this procedure should be applied to both central and regional government in order to choose the legislative mechanism, programmes and procedures with low legislative costs, larger legislative benefits and high efficiency.

Furthermore, borrowing and transforming advanced legislative experience can contribute to legislative efficiency. Learning and borrowing from developed countries is not only a mark of human civilization, but also signifies greater maturity and openness. In effect, using the experience of consultants as a resource concerning foreign law to strengthen the capacity of Chinese drafters is very efficient. Meanwhile, it is necessary to borrow and assimilate the experience of legislation in various regions both current and historical, of which the good lessons could be modified cheaply, hence, time and effort will be avoided and abundant resources could be harnessed to increase efficiency. Given the limited legislature resources, this is certainly an optimal rational choice. Nevertheless, we should always remain aware of the particular Chinese circumstances and avoid simple imitation.

To sum up, in order to balance the supply and demand of legislative resources, by establishing a constitutional system and good governance, borrowing and transforming advanced legislative experience in terms of cost-benefits analysis, we will not only strengthen good institutions, but also renovate legal practice. More rational distribution of resources, incorporating market mechanisms, should further reduce costs, improve speed and so raise legislative efficiency and quality.

³² Seidman (2001), *supra* note 16, at 6-10.

³³ CBA: Cost-Benefit Analysis quoted by Wang Quansheng, Lifa Xiaoyi Yanjiu [Research of legislative benefits] 2 (2003).

D. Legislative Procedure and Legislative Efficiency

Let us turn our attention to the current legislative processes and frameworks of legislative procedure in China and deal with the methods and techniques of legislative procedures to improve legislative efficiency.

In view of the country's unique circumstances, legislation as a process for translating policy into effectively implemented law will likely induce a desired social, political and economic transformation. Many Chinese people hold that it is much better to take significant time to investigate and deliberate in the legislative process. Therefore, when explaining their work, legislative staff are always proud of the many years spent formulating some laws. Therefore, they insist that legislative efficiency is unimportant next to the pursuit of legislative quality in legislative procedures.³⁴ However, nowadays, with the influence of economic concepts of efficiency, many people have noticed that the law sometimes lags behind the rapidly changing circumstances of economic reform which has a negative impact on legislative efficiency. For example, due to the dissent of some leaders or executing divisions, an act, which might have been passed in one year, will be delayed for two or three years. This legislation like marathon that squanders legislative resources is not economic. Moreover, as time goes by, the fact that the draft has to be vetoed again and again requires reinvestigation and new debate. Consequently, several chances for promulgation and enactment are missed leading to low legislative efficiency. In those debates, arguments centre on the appropriate theory and method to utilize in guiding the legislative procedure. Therefore, it might be useful to explicate the nature and function of the legislative procedure and the relationship between legislative procedure and legislative efficiency.

There are many expressions of legislative procedure in academia.³⁵ According to Lilin's view, in China, the common expression is that legislative procedure is an order, according to which the legislative organs endowed with the power to legislate by the constitution make, recognize, revise, repeal, interpret, and supervise laws and regulations.³⁶ Modern states mostly set the pursuit of democracy and freedom as the end of their establishment. Many constitutions claim the principle of popular sovereignty, wherein state power belongs to the people and guarantees their various freedoms.³⁷ According to Chinese constitutional law, the first and most important way people exert state power is to use legislative power to transform their will into state will through different levels of legislatures according to various procedures and to regulate other national organs with the laws as an embodiment

³⁴ This opinion comes from a staff member of the Bureau of Legislative Office in local government, Zhejiang province, located in Southeastern china. According to her statement, this opinion is still popular in Chinese government's legislation.

³⁵ For example, Zhou Wangsheng, *Science of Legislation* (2004); Li Buyun & Wang Yongqing, *Chinese Legislative Basic Theory and System* (1998); Sun Wanzhong, *Textbooks of Science of Legislation* (1990); Luo Z., *Research to Legislative Procedure* (1986); Luo Chuangzie, *Legislative Procedure* (2001).

³⁶ Li Lin, *Legislative Theory and System* 142 (2005).

³⁷ Xiao Beigeng, *The Legal Order of Constitutionalism* 42 (2002).

of national will and to manage officials.³⁸ To better embody the will of the people, given it is impossible to allow all people to engage in the making of laws in the legislature, it is necessary to adopt a deliberative institution where representatives make laws. As the representatives are from all kinds of backgrounds and differ in levels, experience, capacity, interest and opinion, certain procedures to coordinate and integrate their will are indispensable in order to reach agreement formed by major opinions, whilst respecting the minority, promoting democracy and raising efficiency.

Ecumenicists hold that if a certain product of a certain quality can be made with the lowest cost in manufacture, this manufacture is efficient. Likewise, if a kind of manufacturing process makes the existing investment structure produce the maximum amount of product, this manufacture is also efficient.³⁹ Posner states that legislative procedure also has the same aim in pursuing efficiency, the maximization of legislative efficiency.⁴⁰ Therefore, in order to realize the maximization of legislative efficiency, it is necessary to choose a procedure and distribute procedural rights and obligations rationally through making every step of the procedure reasonable and co-ordinated, making best use of every minute of meetings, making each role function optimally and making the legislation orderly and effective. As a result, the legislative resources will be allocated in the most economically efficient manner.

According to the textbook of Chinese Legislation Science, the legislative period is the time taken from the beginning to the end of the legislation.⁴¹ As Zhou points out that legislative period could be divided into a common period and special period generally.⁴² The common period is the time span from the introduction of bills to promulgation of acts. The special period is generally based on the common period, but not the same as it is owing to complicated content and techniques.⁴³ Different kinds of bill have different legislative periods. Generally speaking, the longer the legislative period is, the higher the time cost and the consumption of human resources and materials. Consequently, the increase in legislative costs influences the efficiency of legislation.

Following the theory of economic-efficiency (e.g. Posner), optimizing the distribution of legislative resources refers to assembling rationally the elements of legislative procedure, establishing a logical structure for the legislative procedure, taking advantage of the legislative procedure and realizing maximizing efficiency.⁴⁴ According to Wang's view, the legislation is a comprehensive investment of limited materials, human resources and intelligence.⁴⁵ Hence,

³⁸ Article 2, Chapter 1, Chinese Constitution law.

³⁹ He Chuanqi, *Efficiency Management* 36 (1995).

⁴⁰ R. A. Posner, *Economic Analysis of Law* 555 (2003).

⁴¹ Zhou Wangsheng, *Science of Legislation* 156 (2004).

⁴² *Id.*, at 157.

⁴³ *Id.*

⁴⁴ Posner, *supra* note 40, at 555.

⁴⁵ Wang Quansheng, Lifa Xiaoyi Yanjiu [Research of Legislative Benefits] 258-259 (2003).

when we make an institutional plan for a legislative procedure, we must focus on taking full advantage of legislative resources and maximizing efficiency, raising the efficiency of legislation and shortening the period of legislation.

I. Functions of Legislative Procedure for Legislative Efficiency

Li claims that if legislative procedures become norms guaranteed by the authority of the state and observed by the legislature after recognition or enactment by the state, legislative activities will be orderly.⁴⁶ Moreover, Yin states that the goal of establishing these forceful norms lies in regulating the legislative activities, guaranteeing democratic discussion, justice, voting and public deliberation and finally reaching scientifically informed decisions.⁴⁷ Therefore, legislative procedures are normative forms expressed by laws, regulations or customs and observed by all staff and institutions.

Sturgis claims that the function of a meeting procedure lies in the ability to solve problems and coordinate responses; the guaranteeing of equal rights, favours and obligations for all members; the majority of members endowed with the highest power by the institution; the respect and protection of the rights of the minority; and respect for justice and equal benefits.⁴⁸

Sun Yatsen points out that procedures are an important part of a civil rights system in order to guarantee the full accomplishment of democratic principles; to maintain the order of a meeting, and guarantee the process of a meeting without wasting time; to promote democracy through enabling serious discussion and the gathering of opinions to solve problems completely; to raise the efficiency of deliberation; to implement the principle of democracy, in so far as the majority opinion is determinate; and to respect the rights of the minority to express their views and register dissent.⁴⁹

The first function is to make every step of legislation observe the procedures; guarantee that every phase, step and aspect will co-ordinate appropriately and harmoniously; to include checks and balances, and to harmonize the legislative democracy and efficiency with the least amount of friction. The second function is to ensure that bills are treated appropriately. Given that modern legislatures face the hard work of legislation, different bills vary in terms of their importance and urgency. Without strict legislative procedures that appropriately deal with these bills, the quality and justice of legislation cannot be guaranteed. Conversely, with just and equal procedure in place to handle various bills, flaws resulting in injustice of procedure will be circumvented. The third function is to make reasonable use of meeting time. Legislative efficiency and democracy are both

⁴⁶ Li Lin, *Legislative Theory and System* 155 (2005).

⁴⁷ Yin Zhongqing, *Comparison and Reference of Legislative Procedure*, 1 *Legislation Review of China* 486 (2000).

⁴⁸ A. Sturgis, *Standard Code of Parliamentary Procedure*, quoted by Li Lin, *Legislative Procedure*, at <http://www.jcrb.com/zyw/n6/ca11975.htm>.

⁴⁹ Sun Yatsen, *San Min Zhu Yi* [Three Principles of People – Nationalism, Democracy and People's Livelihood] (1905). Sun Yatsen, *Doctrine in the Modern World* (1989), quoted by Li Lin, *Legislative Procedure*, at <http://www.jcrb.com/zyw/n6/ca11975.htm>.

contradictory and yet need to be harmonious. The solution to this dilemma is using the meeting time reasonably. Thorough discussion and free expression of opinions reflects the substance of democratic legislation. Moreover, legislative procedure also stipulates the rules on holding meetings and sessions and appropriately determines the time of each meeting and rationally arranges the order and lengths of speeches, voting and hearing in order to avoid discussion without resolution to increase legislative efficiency. The fourth function is to ensure that the members of parliament correctly exercise their powers and discharge their obligations. Each member will have the right to express his or her views in the meeting, to bring forth questions and impeachment, to vote and so on. However, they should respect other speakers, the decision of the presiding person, the voting result and so on. To realize these ends, it is necessary that the rules be clearly stipulated in the legislative procedure and that they are properly enforced.

II. Using Problem-Solving Methodology to Make Some Concrete Measurements to Increase Legislative Efficiency in Legislative Procedure

Although legislative procedure has become a better and more efficient link in the whole legislative system of China, areas have been found in many respects in which legislative efficiency can be improved. First, interested parties should have the right of introduction of bills.

According to the Chinese Constitution and Legislation on Law, the NPC Presidium, NPC Standing Committee, State Council, Central Military Commission, Supreme People's Court, Supreme People's Procuratorate and the NPC special committees, as well as deputations or a group of more than 30 deputies, are entitled to sponsor legislation to the NPC.⁵⁰ However, other Democratic Parties, social organizations and economic entities do not have the right of introduction of bills,⁵¹ although they play an important role in the socialist construct and development. Therefore, in terms of legislative development, this is a serious flaw for legislative democracy and efficiency.

Secondly, NPC deputies should have a real right of introduction of bills. China is a country where the people are their own masters, so laws should reflect their will. According to the Legislation on Law, deputations or a group of more than 30 deputies are entitled to sponsor legislation to the NPC. However, deputations cease to exist after an annual session winds up. Therefore, there are very few chances for the deputations to introduce a mature bill as required. Moreover, due to the political background, deputies have sponsored very few bills so far. Posner's analysis explains that this difference in allocation is the reliance on

⁵⁰ Chinese National People's Congress, *China Constitutional Law* (1982); Chinese National People's Congress, *Legislation on Law* (2000); <http://www.china.org.cn/english/kuaixun/76337.htm>.

⁵¹ China has eight democratic parties except the leading party, the Communist party; social organization refers to young union, worker union, women union and so on; economic union refers commercial union, lawyer's association and so on.

the legislative process for the selection of a legislator who has drawn up rules of legislative procedure within a self-protective scope, and so will benefit from their enactment.⁵² Indeed, in the past two decades the State Council sponsored over 70 percent of the bills passed by the NPC.⁵³ Now the majority of bills still come from the State Council. The Chance of Introduction of Bills for the NPC's Representatives is a nominal right. Deputies are too numerous to organize an effective group in support of proposed legislation. Therefore, deputies' demand for legislative protection may be less than the State Council. According to the concept of economic-efficiency, entitling a single citizen with the right to introduce bills is impossible and inefficient in China, which has a vast territory and great population. Therefore, some people argue that China's current legislative structure is deeply rooted in the specific conditions of the nation⁵⁴. However, the fact that official organizations alone command the legislative resource of introduction of bills is deeply unfortunate for this country where the people claim to be their own masters. Redistributing the right of the proposal of bills could meet the demands of China's national conditions. For example, a group of 50 thousand citizens has the right of introduction of bills to the LPC (the Local People's Congress), and a group of 1 million citizens has the right of introduction of the bills to the NPC.

In China, many people think legislative proposals are the same as legislative bills. Actually, they are very different entities. According to Lilin's view, a legislative proposal refers to that which people propose in terms of the revision or provision of law.⁵⁵ The content of and reason behind legislative proposals is quite simple to ascertain. However, drafting legislative bills is a complicated and meticulous task. These bills basically include the title, cause, principle, framework, main content, conditions, and selected schemes and so on.⁵⁶ In some countries, after accepting a legislative proposal, a legal committee will present this legislative proposal for discussion and consultation before some special organization and committee.⁵⁷ In China, due to the limitation of legislative costs and the lack of specific legislative personnel, it is unsuitable for Chinese legislation to follow this consultation procedure. However, in order to improve legislative quality and legislative efficiency, we must standardize the format of legislative bills.

The first aspect is to state the purpose of the legislative bill briefly and precisely. In China, the introduction of every legislative bill typically comprises an extensive preamble that states the purpose of the proposed legislation. However, these preambles' descriptions of purpose often seem too long and vague. Moreover, too many political slogans remain prominent. Therefore, it is appropriate to start by stating the purpose briefly and precisely in the bill. The second aspect concerns

⁵² Posner, *supra* note 40, at 532.

⁵³ See <http://www.china.org.cn/english/kuaixun/76337.htm>.

⁵⁴ Wu Gaosheng, *Legislation Work by National People's Congress in 2002*, in *The Development Report of Rule of Law in China No. 1 2003*, at 347 (2003).

⁵⁵ Li Lin, *Legislative Theory and System* 186 (2005).

⁵⁶ G. C. Thornton, *Legislative Drafting* 193-204 (1996).

⁵⁷ For example, in commonwealth countries they have special committees to discuss and consult on legislative proposals; see R. M. David & C. P. Alan, *Legislation* 113-135 (1982).

the classification, disposition, and language. As Peter claimed that even if bills are prepared by different legislative organs and deal with different subjects, it is important for the consistency of the legislation to use the same classification, disposition, and language whenever possible⁵⁸. In practice, general lines have been formed for classification. The practice of the technical organization of the law should be the same for all laws. For example, the basic division of the law is made in sections, subsections, and numbers.

China's legislative power is exercised by multi legislative organs.⁵⁹ Different levels of legislative organs have different legislative procedures. On the other hand, they have the same consideration process. The longest period for some phases, even the complete legislation, should be prescribed in advance to limit indefinite delay of the legislative process. The bill has to stipulate the precise times for the different phases and strictly limit changes in order to prevent the prolongation of legislation. Excessive time devoted to passing a given bill will be considered a failure. For example, in many countries each session is independent and meetings often fail to reach a decision and the bill will be void. If it is necessary to continue to deliberate on the act, the deliberation will be brought forth again.⁶⁰ Other countries set a limit on the frequency of deliberation, if the matter is not decided within the prescribed number of meetings then the act naturally fails and cannot be brought forward again for another six months to two years.⁶¹

Whether the legislative procedure is simple or not is necessarily linked to the legislative period. Generally speaking, the more complicated the legislative procedure, the longer is the legislative period. As a result, the simplification of legislative procedure necessarily leads to greater efficiency. Of course, legislative procedure cannot be simplified simply for simplicity's sake alone. Simplification is aimed at reducing the number of complicated and unnecessary procedures while retaining the basic procedural structure.

In the preparation of legislation, it is necessary to proceed in accordance with a systematic programme and plan; to focus on the prospect and proof of the legislation; and to establish the scope and timeframe of legislation. If problems are foreseen the legislative process will be a success, otherwise it will fail. The systematic programme and year plan are important methods by which the legislature can coordinate and distribute the legislative resources according to the priorities set by the plan and so maximize legislative efficiency. Zhao's view is that in the early stage of legislation, it is necessary to economize on

⁵⁸ P. Christensen, *Legislative Procedures*, in A. Seidman, *Legislative Drafting for Market Reform: some lessons from China* 81 (1997).

⁵⁹ Multi-level existence means the National People's Congress and its Standing Committee make state laws; the State Council and its relevant departments draw specific regulations respectively; and relevant authentic organs of ordinary localities and governments formulate local regulations. The practice of legislation and the authenticity of the laws and regulations made by the above mentioned three groups of organizations are of different levels, but the laws and regulations of different levels co-exist in China's legislation system. See <http://www.china.org.cn/english/kuaixun/76337.htm>.

⁶⁰ Wang Xiaomin, *Yihui zhidu jilifalilun yu shijian zhongheng* [Review Parliamentary systems] 56-78 and 183-237 (2002).

⁶¹ Li Lin, *Legislative Theory and System* 449-486 (2005).

the costs, distribute resources rationally and promote efficiency.⁶² In addition, Wang points out that in the later stages of the process, it is necessary to abide by the stipulations of the relevant laws and regulations in order to apportion costs appropriately and maximize legislative efficiency.⁶³ Hence, there are two aspects that need be completed in the future: first, establishing an analyzing institution on the appropriateness of legislation; secondly, incorporating the financing of legislation into the legislative planning.

Law is a set of norms that constrain the behaviour of citizens. Moreover, laws and regulations as public goods are exclusively provided by the legislature. However, this does not exclude the possibility of using market mechanisms in some phases of the legislative process to increase efficiency. First, this could be achieved by collecting advice and views from wider society before embarking on each programme and encouraging relevant individuals to join the legislative process. Secondly, public bidding for legislative programmes could be introduced. Private companies can compete with one another to present draft programmes for prospective laws. The major methods of public engagement include legislative discussion, expert demonstration, legislative hearing, publishing the draft, written advice, audition meeting and so on. So, it is necessary to take measures to consult the public on proposed legislation and to take their views into account during the drafting process.

To conclude, in order to improve legislative efficiency, new methods should be continually discovered and tried in China. The method not only fully exploits resources by providing for effective and workable legislation, it also avoids or reduces the waste associated with a redundant law. In essence, the legislative procedure effectively functions as a guarantor of democracy and freedom. Therefore, without these concrete methods, it is doubtful whether legislative procedure will be practicable.

III. Legislative Professionalism and Legislative Efficiency

The process of legislation combines both objective and subjective factors;⁶⁴ the former includes knowledge of the legal background, procedures and technical skills, while the latter refers to the legislator's individual acumen and powers of judgment. Every successful piece of legislation requires the proper mixture of these two factors. Furthermore, maximum efficiency can be achieved only when the two factors are well integrated. Legislative professionalism and the value of a professional legislature for legislative efficiency can be seen when it comes to drafting and enacting technically complex legislation. As Feng claims, much legislation is presented in response to popular demands but without a

⁶² Zhao Yingkun, *Phase of Legislation Preparation: Orientation and Perfection*, Legislation Review of China 301 (2000).

⁶³ Wang Yanping, *Several Issues on the Phase of Legislative Preparation*, Legislation Review of China 328 (2000).

⁶⁴ According to the philosophy of Marxism, every worked process includes objective factors and subjective factors. University of Wuhan China, *Philosophy of Marxism*, at <http://www.cycnet.com/encyclopedia/education/kaoyan/000419024.htm> (last checked 17 August 2005).

prior understanding of the difficulties involved in putting them into effect. A professional legislature aims to overcome those innate defects and limitations.⁶⁵ It can also help solve the low-efficiency and high-cost problem, as mentioned above, that has typified the legislative process in the past. The establishment of a professional legislature, therefore, is necessary for the legislation to adjust and respond to the needs of our ever-changing social life. In this part, we will focus on two questions: what legislative human resources are; and how we reasonably allocate resources in Chinese legislation for legislative efficiency.

E. Legislative Human Resources

Before answering the question, who legislates, it should be clear that there are two basic forms of legislation: institutional legislation and contractual legislation.⁶⁶ Institutional legislation covers laws made by a person or institution recognized as having the power and the authority to declare laws; and contractual legislation refers to the rules governing the future conduct of parties to the contract made by agreement between them.⁶⁷ In China, due to the historical background, our concern is with institutional legislation, although nowadays many Chinese scholars analyze the role of contractual legislation and the relationship between the two forms of legislation. With reference to public legislation, legislators include the following. The first group includes the members entitled to propose, discuss and vote in a legislative body and leaders of parliament. The second group involves the chiefs of state or administrative heads involved in legislation. The last is all those participating in legislation through the formation of statutes.

In sum, legislators can be viewed as both a group and an integral norm, meaning the legislative body as a whole and the members who direct, preside at and take part in a legislative body in accordance with well-established procedures. Seidman et al's view is that legislators should assess bills according to criteria of good governance and development. They need sufficient information to determine the likelihood that bills that come before them will help to achieve those objectives.⁶⁸

The qualities of legislators have a direct bearing upon the efficiency and merit of legislation. By qualities, we mean their knowledge, professional competence and moral character. Generally speaking, if the legislators possess these qualities they will be able to complete legislation with a high degree of efficiency, i.e., it will be less time consuming and more exact. Take a given legislative proposal as an example. The more able the legislators, the more precisely will they be able to draft a bill while taking into account its relation to relevant past and existing legislation. Thus, it will be a relatively straightforward matter for the legislative body to incorporate it into their agenda, and put it through the normal

⁶⁵ Feng Lixia, *Democracy of Legislation and Professionalism of Legislators*, Legislation Review of China 225-232 (2002).

⁶⁶ R. M. David & C. P. Alan, Legislation 11 (1982).

⁶⁷ *Id.*, at 11.

⁶⁸ Seidman (2001), *supra* note 16, at 5.

procedures leading to its enactment. Secondly, as far as the discussion and debate of the provisions of the proposed bill are concerned, the higher the quality of the legislators, the shorter the time this will take and the more efficient the legislation will be in terms of both time and cost.

According to Seidman et al, the meaning of the term drafters covers two sets of officials intimately connected with the bill-creating process: officials formally trained in drafting techniques and ministry officials with expertise in the bill's substantive area.⁶⁹ In this chapter, the term of drafters also includes both sets of officials. Modern legislation covers a wide field, and often involves highly complicated measures and provisions in economic, social and political change. It goes without saying, therefore, that modern legislative drafters require specific professional training and many years of experience to handle the demands placed upon them. In recent years, there has been a rapid increase in the quantity of new legislation in China.⁷⁰ This is an essential component of its drive towards modernization. Both central and local legislation therefore confront a strenuous challenge. They must promulgate, amend or supplement a large number of laws, regulations and rules in a limited time. Hence, they need to find personnel who understand legislation thoroughly and have the necessary practical skills to draft bills speedily and scientifically and to solve tough problems in a prudent and efficient manner. This is particularly important in areas of legislation that involve specialist expertise and technical know how. It should be obvious that laymen are not competent to undertake the task of drafting legislation in such cases.

I. Problems in Allocation of Human Resources in Chinese Legislation

As Seidman mentions, Chinese legislative drafters have identified three underlying explanations for their drafting difficulties: they seemed to misconceive the function of law and their corresponding drafting task; lack of appropriate training has left them without the skills required to draft transformatory laws; and they have neither an explicit legislative theory nor drafting rules to guide the drafting process.⁷¹ After the United National Development Programme, assistance was to facilitate the transfer of international experience in economic legislation to China,⁷² yet Chinese legislative drafters still have the same problems. Seidman et al point out that most of the drafters lack the legal skills and the relatively narrow linguistic and writing techniques at the core of Anglo-American drafting instruction.⁷³

⁶⁹ *Id.*, at 6.

⁷⁰ http://www.legaldaily.com.cn/gb/content/2002-03/11/content_33423.htm; see also Li Lin, *Legislation Theory and System* 193 (2005).

⁷¹ Seidman (1997), *supra* note 16, at 33.

⁷² From 1991 to 1995 UNDP assisted the State Council Bureau of Legislative Affairs to draft economic laws based on the experience with similar legislation in other developed and developing countries.

⁷³ Seidman (1997), *supra* note 16, at 34-35.

The division of labour is now extremely sophisticated in modern society. As a result, the common people are busy making a living in their particular jobs and so have no time to play a role in the legislative process. Furthermore, people differ enormously in terms of their specialist knowledge and learning, energy and time, gifts and abilities, traits and interests, etc. They therefore lack a wider knowledge of society as a whole that is necessary to be a good legislator. Moreover, they do not have the time to learn about life outside their own narrow fields. Nonetheless, according to a recent research study, government departments take charge of more than 90% of bills drafted in the provinces all over China, yet over 90% of drafters received no training in legal science or legislative drafting; moreover, over 90% of drafters are part-time or temporary employees rather than professional legislative members.⁷⁴ The three “90%” mentioned above are not only unfit for a modern legislature, they also represent a great waste of human resources.

The present allocation of human resources therefore turns out to be unreasonable in the structure of both age and knowledge. Legislation takes time to investigate and research on the basis of specialist knowledge, but this is by no means the sole duty of deputies to the NPC in China, most of whom are leaders holding important offices and media celebrities etc. To them, legislating is a provisional task, not a professional practice, as they have little time and energy for legislation due to their busy working schedules elsewhere. This is particularly true of the members of the Standing Committee, who are responsible for the passing of key legislation. As Feng describes most of the members are over 60 and have been transferred from party and governmental office;⁷⁵ although they are experienced and erudite in their own fields, legislation is so strange to them that they have to educate themselves, as it were, on the job.

Talented legislators are greatly needed. China’s budgetary constraints have limited the Bureau of Legislative Affairs and the Department of Legislative Affairs staff members to a number that seems far too small to draft all the legislation required for a quarter of the world’s population. At present, too many laws, regulations and rules are drafted and framed by those who know nearly nothing about law, especially legislation, as they are often studying it for the first time and whilst they undertake their legislative jobs. As Seidman et al mention, almost all Bureau of Legislative Affairs (BLA) and Department of Legislative Affairs drafters had degrees from universities. Nevertheless, many had majored in history, the physical sciences, social science, especially in economics, or, after the universities reopened their law schools in 1986, in law. Among 164 BLA drafters, about 40 had graduate degrees in various disciplines, aside from a brief BLA-run course, however, none had any formal legislative drafting training.⁷⁶ Moreover, about two thirds of the BLA’s staff constituted professionals – drafters, researchers and administrators. The remaining one third constituted support

⁷⁴ Li Gaoxie, *The Research of Allocation of Local Legislative Resources*, at <http://www.chinaelections.org/readnews.asp>.

⁷⁵ Feng Lixia, *On the Legislation of NPC Standing Committee*, *Legislation Review of China* 88 (2000).

⁷⁶ Seidman (1997), *supra* note 16, at 53.

staff.⁷⁷ Thus, laws, regulations and rules made in this way are often defective, or frustratingly imprecise, or too coarsely formulated to meet the legislative intention.

So where do the problems in allocating legislative staff in the NPC lie? First, the NPC boasts of multitudinous members, 3000 delegates, hence, it is hard for the deputies to speak freely and discuss the bills thoroughly. Secondly, the delegates are uneven in quality. Although the Congress is adequately representative on account of the fact that delegates are drawn from all parts of China and various walks of life, this is not necessarily an advantage in terms of the legislative process itself. Bills need to be scrutinized by experts working in small groups rather than be discussed in general terms by hundreds of people. Unfortunately, the required experts are exceptionally rare amongst the deputies. Thirdly, the regular meeting period of the NPC takes 10 to 20 days each time it convenes. During this period, much time is taken up with each ministerial department reporting on their official work, which leaves little time for discussion of legislation. As a consequence, there is little insurance for the quality of the bills passed. Against the background of the astonishing social and economic developments in China, and the ever-increasing amount of new legislation, much of it containing highly complex subject matter, this is evidently an unsatisfactory state of affairs.

II. The Efficiency Principle in the Allocation of Human Resources in Chinese Legislation

Legislation as a technical process requires experienced and professional drafters for legislative efficiency. According to academic opinion, the 'Efficiency Principle' in the allocation of human resources in Chinese legislation, dictates that a legislative organization must achieve legislation efficiency and meet the requirements of legislation in the Initial Socialism Stage.⁷⁸ Whatever the legislative organization, staff must achieve legislative efficiency and therefore avoid such phenomena as overstaffing, overlapping institutions, unclear division of functions and flooding the organization with redundant personnel.⁷⁹

The efficiency principle in allocation of human resources in Chinese legislation is expressed in the following legislative activities. The first activity is that each legislative staff member must fulfil his duty, without neglect, malpractice or exceeding his powers. The second activity is that the legislative organization shall establish a highly efficient governance body, which contains a system covering decision-making, execution and supervision. The third activity is that we should survey, discover and appoint talented staff; and then allot them to appropriate

⁷⁷ *Id.*, at 28.

⁷⁸ Zhou Hanghua, *Principles of Law Reform*, at www.cdgc.edu.cn/yxbslw/pxjg/2002/zhouhanghua.htm; Li Lin, *Globalization and the Development of Legislation*, at <http://www.iolaw.org.cn/showarticle.asp>.

⁷⁹ These phenomena seriously exist and many citizens have much complaint. Fortunately, current governments have paid more attention to treat them as the centre of political reform.

posts that will develop their wisdom and creativity to the fullest. Last but not least is that we should encourage legislators at all levels to work in harmony with the legislative body as a whole.⁸⁰

What would be the best strategy to improve legislative efficiency? The first strategy is to set up job competition and employment rules for legislative staff. Legislation requires personnel with research skills, legal analysis and powers of synthesis. Consequently, relevant posts must be filled according to strict and exacting criteria, distinct from more routine and less challenging positions. Staff should not be awarded posts unless they stand out after a fair competition and have gone through professional training. Another potential route is to establish a rigid threshold system, along the lines of the Lawyer Certificate or Accountant Certificate, which would require applications to attain a Legislator Certificate after a tough examination. Meanwhile, we can explore the possibility of government departments charged with the task of drafting a specific bill, who are mainly composed of non-experts, employing a team of specialists on a temporary basis. By this means, they can both conquer the problem of insufficiency of human resources and lack of talent, while at the same time improving efficiency.⁸¹

The second strategy is to raise the Capacity of the Legislative Organization. A Legislative Institute or Research Centre should be founded as soon as possible to research the most efficient ways of passing legislation and to provide legislators with professional training. This should continuously enhance legislative techniques, for example, in making amendments, in drafting the titles of bills, in organizing bills, and above all in using language in ways likely to avoid ambiguity and confusion. In order to improve legislative drafters' capacities, we should set up schemes for training and developing professional legislative drafters. For example, the legislative affairs committee or the legislative affairs office shall use the services of permanent legislative staff to the greatest extent possible.⁸²

The third strategy is to strengthen the info-construction of legislation. Measures shall include building a pc-processing system to collect information on all aspects of legislation; opening local legislative websites and offering a legislation-related info library.

The fourth strategy is to arrange legislative resources and assembling legislative strength. Currently, the salient problem national legislation faces comes from the legislative bodies existing in every province, which are uncoordinated and variegated in terms of their efficiency. We need to reflect on ways in which this diffuseness can be overcome and resources better focused. That is to say, dispersed legislation needs to be concentrated. A first step towards this goal is to appoint a team leader at the drafting stage of a Bill. The leader will not only preside over the drafting of the Bill but will also convene meetings between the heads of

⁸⁰ Wang Quansheng, Lifa Xiayi Yanjiu [Research to Legislative Benefits] 270 (2003).

⁸¹ In some provinces, Local People's Congresses have taken some measures to enhance legislative quality and legislative efficiency, for example, Chongqing, the city of Southwest China, has a good experience of bidding for rights of legislative drafting. See *How to Work the Bid of Legislation*, at http://news.xinhuanet.com/zonghe/2002-12/03/content_642955.htm.

⁸² 73rd OREGON Legislative Assembly – 2005 regular session: *Establish Joint committee on Legislative Efficiency*, at <http://www.leg.state.or.us/05reg/measures/hcr1.dir/hcr0002.intro.html>.

Provincial Congresses and their relevant institutions, for example, the Provincial Governmental Legal Office and Draft Department to ensure uniformity on a national basis. A working team will then be established to manage the substantial issues of draft investigating – analyzing, asking for opinions and expounding, proving and revising – which will work in accordance with the guidelines laid down by the centre.⁸³ The advantages are as follows: one is to allocate the limited legislative resources, exercise benefits of scale, and resolve supply – failure; the other is to decrease working links, reduce repetitive labour, cut down legislative costs and increase efficiency.

The fifth strategy is to set up modern legislation, which is dependent on legislator professionalism. This is reflected in the legislative practice of almost all modern nations, in which laws are mapped out and proposed by legal professionals, expert-administered departments or legal crafts. As Feng points out that with respect to the legislative allocation of human resources, international comparison suggests that measures are necessary to raise legislative efficiency, for example, setting up groups of expert consultants.⁸⁴

To sum up, in order to improve legislative efficiency, legislative professionalism equips the legislators and legislative staff with adequate legislative theory and legislative techniques to produce high-quality bills appropriate to this country's unique circumstances. Moreover, legislative drafters must make their draft legislation facilitate the desired transformation and identify, assess and utilize relevant facts as to proposed bills' likely impact in China's context.

F. Conclusion

Inefficient legislation reflects and contributes to a series of broader social problems. At present, China lacks either research or concrete measures on how to reasonably distribute legislative resources among various legislatures, legislative programmes, and legislative processes, especially, how to determine the proportion of legislative finance to be apportioned and the distribution of personnel. Moreover, there still exists debate as to how we should organise the various productive elements such as capital, technology, the labour force, materials, and natural resources and so on in social development, especially economic development. Optimization of the distribution of resources requires not only focus on the appropriateness but also the effect, for the aim of people manufacturing the legislative resource does not lie in the production alone but efficiency and maximization of efficiency.

In most modern societies, it is probably true to say that the most important rules that govern human behaviour will be found in the written laws that have been passed in the form of legislation by duly authorized law making bodies. A legislative tide is sweeping over China, which is gaining further momentum as

⁸³ During the interview with a local government official, this idea was from our discussion about how to relieve current situation, for example power- struggle, repetition legislation.

⁸⁴ Feng Lixia, *Democracy of Legislation and Professionalism of Legislators*, Legislation Review of China 221 (2002).

a consequence of China's entry into the WTO. The requirements of legislative efficiency deeply affect all aspects of the legislative process, including the investigation, statistical compilation and positive efficiency analysis of the supply and demand of law, the system environment of legislation, and the procedure of legislation and staffing levels. Improvements in all these areas, taken together, will modernize China's legislation, and enhance its quality.

Research into legislative efficiency is based on the assumption that legislation is a process with economic attributes. First, the research into the economic attributes of legislation must conform to the rule that "a market economy is a legal economy." China's entry into the WTO will profoundly affect China's legal system, as legislation for WTO members' rights and obligations under WTO rules are fulfilled generally by national legislation. The Rule of Transparency and Rule of Non-discrimination are two fundamental rules of the WTO system, which ensure fair international trade in terms of substantive law and procedural law respectively; therefore, all WTO member nations are required to legislate fairly and transparently. It follows that all levels of Chinese legislation will need to maintain integrity, fairness and transparency. Therefore, we should not only check legal documents against WTO Agreements and commitments undertaken by China to foreign countries, but also settle the relationship between central and local legislatures, as well as other kinds of legal rules. This will facilitate the effective resolution of legal conflicts and enhance the overall level of legislative efficiency and quality.

Secondly, we should explore the economic character of legislative activities by applying the theorem of Benefit-Maximisation of economic science. This will enable us to identify the main tasks of each stage of legislation, and to execute them with maximum efficiency. For example, in the preparatory stage of legislation, we must lay foundations for the next stage and when in turn we move onto the next stage, we must make use of the lessons we have learned to anticipate and resolve potential problems. Thus, if we consider the legislative procedure as a systematic project and treat every legislative problem as integral to the whole, we can utilize legislative resources with maximum efficiency. In short, by seeing legislative activities as possessing an intrinsically economic character, we can develop a practical allocation system of legislative resources, and establish a highly effective legislative process.

The criteria for determining the efficiency of a legal system are not simply quantitative, the number of the laws passed, but, also, perhaps more importantly, qualitative, i.e., the effectiveness of the laws once they are put into effect. The latter consideration involves a number of factors, including the interpretation of the law by the judiciary, its enforcement by the police, and its impact on the wider community in terms of the crime rate, social repercussions, demographic trends, etc. We can see therefore, that the actual effects of legal rules can only be determined by reference to the whole legal system as it functions in the social environment. In other words, legislative efficiency depends not only on the legal rules themselves, i.e., conditions of legislation, but also on a whole range of non-legal factors. Consequently, to increase legislative efficiency, we have to take into account the necessity for legislation to conform to cultural traditions, national

conditions and present social developments. In short, the law must keep pace with reality. In essence, a law should be workable; if it is not it will be difficult for the police to enforce and it may deprive people of trust in the law, and thus weaken the authority of the law itself. Moreover, such considerations should be addressed not after the law has been enacted but during the law-making process, in order to ensure that new legislation truly meets the requirements of the time.