The Notion of Efficiency in China's Civil Law Scholarship

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Abstract: The pursuit of economic efficiency is the major driver for the birth of contemporary Chinese civil law. Contemporary civil law scholarship has demonstrated a serious concern for efficiency from the very beginning. However, many examples suggest that the notion of economic efficiency is often diluted or replaced by factors like civil law doctrinal scholasticism, moral notions, inertial thinking of the planned economy or the will of the leader. It has not been systematically attended to or expressed in a detailed and precise way in the contemporary civil law scholarship in China, rendering some economic judgments uneconomical. In the 21st century, it is necessary for the civil law studies to establish a clearer and more precise notion of efficiency, to conduct more direct and accurate evaluations on civil laws' incentives on people's behaviors and their socio-economic effects, so as to reduce the cost of social interactions and promote deeper cooperation and win-win outcome among individuals.

Keywords: Chinese civil law scholarship, individual autonomy, notion of efficiency, notion of fairness, the principle of proportionality

Issues and Methodology

"As long as human societies exist, human beings, as a species, share anthropological and biological commonality, as well as similar general core values" (Xie, 2014b). The unremitting pursuit of economic efficiency is one such core value. To a great extent, the history of human society is the history of constantly pursuing and promoting the efficiency of social organizations

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and production in society. From hunting to farming, then to industrialized mass production and now the Information Age, the evolvement itself demonstrates human's natural tendency to pursue efficiency and promote social welfare. The pursuit of efficiency is also embedded in the mindset and behavioral tendencies of an individual in one's life course: one competes for higher scores at school, and strives for better appraisal at work, and endeavors to achieve excellence. As such tendencies are part of people's daily life and are even their inherent properties, they are not necessarily expressed in idioms and terms later constructed, such as "*shiban gongbei*" (accomplishing twice the result with half the effort) and "economic efficiency".

As observed by Professor Sun Guohua, one of the founders of contemporary Chinese jurisprudence, "generally speaking, people tend to take notions and behaviors that maximize social utilities... as just and fair" (Sun, 2009). Like our natural tendency to appreciate beauty, we prefer notions and behaviors that increase utility, and consider them as the choices of rightness. The same is reflected in the short history of contemporary Chinese civil law, not only in the functional understanding of basic principles, especially individual autonomy, in civil law studies (for example, to "allocate labor and capitals where they make the greatest production"), but also in the great debates over the establishment of modern civil law system at the beginning of reform and opening up. As I will illustrate, the longing for efficient economic production is the primary driver that breeds contemporary Chinese civil law.

Nonetheless, the primitive notion of economic efficiency in the early years has been inherited merely in an unexamined and subconscious manner. Even today, such a notion has never been systematically elaborated on in contemporary civil law scholarship. Rather, it has often been diluted or replaced by civil law doctrines, moral notions, inertial thinking of the planned economy or the will of the leader, over more than three decades. Thus, when it comes to social complexity, lawyers may misapprehend or even ignore the economic effects of legal rules.

In my view, it is high time to reiterate and reinforce the primitive notion of efficiency established at the beginning of China's civil law scholarship when the forms of social organization and transactional structure are getting growingly complicated as they are today. In both legislation and adjudication, it is necessary to shift from subconscious understanding towards conscious assessment of legal rules in civil law. By doing so, we are able to systematically evaluate and improve their incentive effects and to better facilitate economic production and transactions. For the above purpose, this paper will first re-present the notion of efficiency as established at the beginning of Chinese civil law, and will then explain the situation and problems of the notion of efficiency in the current civil law studies. Moreover, this paper will examine the barriers for contemporary lawyers to having a clear notion of efficiency in their daily discourse. This paper will then clarify the common misconceptions of economic efficiency and conclude this article with my suggestions to establish a clear and precise notion of efficiency.

Longing for Efficiency as the Driving Force for Contemporary Chinese Civil Law

In more than one hundred years, especially during the forty-odd years since reform and opening

up, a brand new set of civil law institutions and doctrines has been established in China after an extensive succession of foreign civil laws systems (Liang, 2006; Sun, 2006). Academic theories on individual autonomy and its boundaries abound, with sometimes dazzling variety and complexity. Yet if we look back to the starting point of contemporary Chinese civil law, we will find that things were far simpler.

Contemporary Chinese civil law was born as a twin to China's economic reforms since the 1970s and is even the fruit of the latter. The planned economy in China back then failed to "bring prosperity to" its people, and poverty motivated eighteen families of farmers in Xiaogang Village, Fengyang County to sign the "contract" that distributed collectively farmed lands to each household in 1978. This bottom-up reform ushered in the national project of reform and opening up, leading to an overall reform of the land system and the whole economic system in China, a prelude to a decades-long economic growth. From the national perspective, the transformation from a planned economy to a commodity economy was to improve the economic efficiency of social production and exchanges, or in the expression at that time, to "invigorate the economy". Compared with the planned economy that is based on central planning and directives, the commodity economy based on the law of value not only endorsed the free transactions of commodities among equal individuals, but also stressed the exchange of commodities at fair prices. This is proved to be more efficient than the planned economy. Correspondingly, the system of civil law was established to facilitate the construction of China's commodity economy. "Invigorating the economy is the essence of the reform, the centrality of China's socialistic civil law construction, and the reason for the legislation of the General Principles of Civil Law in 1986"(Wang et al., 1987, p. 13). At that time, the economic reform project aimed at a significant goal. A large number of workers and managers of enterprises were expected to show keen awareness of input and output, of market, of competition and of efficiency in their economic activities. Civil law is exactly the legal instrument of law that serves this purpose" (Jiang et al., 1988, p. 19). "The civil law honors the principles of equality and fair exchange, which are essential to promote economic production and commodity exchange in a socialist society, and to improve the profitability of our enterprises and the living standard of the people" (Tong, 1986, p. 12). Moreover, plenty of civil law rules, like those of legal persons, of bankruptcy, and of land contractual management rights, "all centered on invigorating the economy" (Wang et al., 1987, pp. 21-23).

In hindsight, there were indeed obvious limitations in civil law scholars' understandings of the bearing of civil law on economic efficiency at that time. On the one hand, scholars' understandings of civil law and the commodity economy that it applies to was still constrained by the general framework of the planned economy. Although civil law scholars widely recognized the function of civil law to facilitate commodity transactions and invigorate the economy, the civil law theory at that time generally regarded civil law, including contract law, as a measure to implement national plans, and as a component of public law, rather than an independent field of private law (Tong, 1986, p. 8). That was why the core principle of civil law at that time was "the principle of obedience to the guidance of the national economic plan" (Tong, Jin & Zhao, 1983, pp. 14-15) or "the principle of combining guidance

and free business operation" (Wang et al.,1987, pp. 40-42) in lieu of individual autonomy. While the civil law studies were aware of the function of civil law to invigorate the economy, they did not appreciate well enough the internal mechanism for civil law to help achieve that function. Literature that civil law scholars often cited in support of their theoretical arguments for the construction of civil law system was not micro- or macro-economics, but legal systems and doctrines in traditional civil law countries, such as Roman Law, Napoleonic Code, Civil Code of Germany, etc (Tong, Jin & Zhao, 1983, pp. 1-5).

Despite the limitations mentioned above, "since the reform and opening up in 1978, the development of socialist commodity production and exchange has brought opportunities for the incubation and development of Chinese civil law scholarship" (Wang & Yao, 2010). It is safe to say that the constant pursuit for efficient social organization and production is the major driver for the birth of civil law in the People's Republic of China. Though the Chinese civil law studies had a very weak foundation at its early age, the doctrines on the protection of individual autonomy in classical civil law scholarship were not alien. However, the principle of individual autonomy itself was not the fundamental concern for Chinese civil law scholarship of that time. Instead, it was the property of that principle to promote efficient production that it really pursued. Had the planned economy sustained efficient social production and distribution, and provided the people with sufficient food and clothing, it would have been unnecessary for China to adopt a commodity economy, or a market economy as it is known today, not to mention the civil law system whose origination and development always goes hand in hand with the market economy. What really took place was that when national economy was on the brink of collapse, both political deliberation and legal discourse pointed to an economic and legal system that was more efficient than the planned economy. Improving economic efficiency via economic and legal reforms was the very consensus of society then, which gave birth to the General Principles of the Civil Law in 1986 and to contemporary Chinese civil law scholarship.

Four decades into the reform and opening up, China is now drafting its first Civil Code. I argue that it becomes vital for us to reiterate the notion of efficiency which has given birth to contemporary Chinese civil law scholarship, and to examine its status in today's legal theories and institutional designs of civil law. This is not because I believe in historical determinism, but because the short history of contemporary Chinese civil law proves that to honor "the notion of efficiency" is vital to the improvement of social well-being. Such well-being includes far more than the economic interactions and benefits that this article mainly addresses. Even in marriage, for families and other fields with strong moral and ethical features, after setting a common moral or ethical goal, it is still necessary to contemplate institutional options that can minimize the overall social costs.

It shall be further noticed that the necessity to reiterate the notion of efficiency in civil law scholarship does not mean that "efficiency" shall be constructed as a basic civil law principle paralleling principles of individual autonomy, fairness, good faith, and public order and good morality. There are dimensional differences between the notion of efficiency in civil law scholarship and the basic principles of civil law (Zheng, 2016). To emphasize efficiency in the civil law studies is to

ensure that the pursuit of efficiency, a mindset and behavioral tendency that the human-beings prefer, is well embodied in the lawyers' legal thinking of civil law. No matter in the interpretation of the basic principles of the civil law, or for the construction of the civil law system, there is a necessity to pursue economic efficiency.

The Notion of Efficiency in Current Civil Law Scholarship in China

As I have mentioned above, the notion of efficiency at the beginning of reform and opening up was primitive. The pursuit of economic efficiency was much derived from instincts then. By contrast, the notion of efficiency in today's Chinese civil law scholarship is much clearer, which is not only reflected in scholars' functional understanding of the basic principles of the civil law, but is also expressed in the terms they use in daily discussions on specific institutional design. For instance, a typical textbook on Chinese civil law often describes the individual law autonomy, the core principle of civil law, in the following way:

"One empirical rule indicated by the history of social development is that, the system which ensures personal autonomy and free decision-making is in accordance with humanity, and is regarded as the most vigorous system. Another empirical rule proposed by the history of economic development is that 'autonomous decision-making can allocate labor and capitals where they make the greatest production" (Wang, 2010).

Moreover, in both legislative debates and academic commentaries on civil law rules, the frequent usage of certain terms, such as "encouraging contract-based transactions", "maintaining transactional security", "protecting transactional expectations", and "balancing interests", represents the scholars' concern for efficiency in civil law institutions. At least, the theoretical discussions on these terms clearly display the scholars' attention to and pursuit of efficiency on a rather abstract level. However, this current notion of efficiency in Chinese civil law studies still shows two weaknesses, which in turn creates certain barriers for the pursuit of efficiency as well.

Diluted and Even Totally Neglected Notion of Efficiency

Current civil law theories tend to emphasize the function of "individual autonomy" in achieving efficiency and often equate individuals' autonomous decision-making with economic maximization. Civil law doctrines are also phrased like individual autonomy, juristic acts, manifestation of intention, and other formalistic descriptions, without directly addressing (at least without assessing in a detailed way) the economic consequences these formalistic doctrines would bring about. Even when some scholars raise the question of the incentive effects and economic consequences of civil law institutions, few are accustomed to responding to it directly (Liu et al., 2016).

Indeed, constructing civil law doctrines centering on formalistic terms like individual autonomy and juristic acts has several merits and is also a tradition of the civil law family. First, everyone desires free expression and decision, in order to fully experience the sense of independent personality

and peer recognition. Autonomous decision-making itself benefits the welfare of everyone. Second, autonomous decision-making is often a rational decision of one's situation, making people proactively cooperate with other members of society and maximize their benefits through selecting partners, matters and degree of such cooperation. In this sense, ensuring autonomous decision-making usually brings about economic efficiency. Third, the law is only enforceable when it focuses on people's behavior, by offering them incentives in pursuit of desirable results. With an existing social goal, the more accurately understood the regular pattern of people's behavioral choices is the more targeted the design of rules can be, thus making it easier to achieve that goal.

However, when constructing the theoretical system of the civil law around these formalistic terms, some scholars unconsciously show a decreased concern for or even total neglect of the result of people's behavior.

Some civil law scholars simply assume that, as long as a person could make decisions autonomously, maximization will be achieved, and thus there is no need to pay special attention to the efficiency of the results of one's behavior. In particular, to redress the extreme tendency to prioritize society over individuals under the highly centralized economy, Chinese civil law scholars have for long been striving to establish and advocate individualist and rights-oriented legal doctrines. Yet they have also emphasized too much the static enjoyment and protection of existing private rights, ignoring the dynamic mechanisms through which private rights emerge, and thus ignoring the cooperation aspect in private social life and private law, i.e., the process of collaboration between individuals. Granted, most civil law scholars have recognized the necessity to restrict some freedoms (or individuals' autonomous decision-making), regarding reasonable restrictions on freedom as an approach to ensure greater freedom on a larger basis. Yet they usually put their theoretical understandings under guiding concepts such as "public interests" that may have been too abstract, without understanding more thoroughly "the concrete mechanisms of the barriers to realizing public interests". Practically, people usually manage to cooperate with each other spontaneously and achieve comparatively good results under the framework of private law, obtaining benefits to the need of each party. However, often, even when there is a promising prospect for cooperation in line with mutual benefits, such cooperation may still be thwarted by transaction costs. Such circumstances indicate that, to promote a more efficient social organization and life pattern, when advocating individual autonomy, the civil law shall, when possible, clarify the potential intentions of cooperation among people as well as their goals and obstacles, and incentivize all parties to adopt behaviors that promote cooperation and win-win results through institutional designs (Xiong, 2014; Jiang, 2016).

Some other civil law scholars have nearly neglected the incentive and economic effects of civil law rules when constructing formalistic doctrines. Form and function are two basic dimensions of the law (Xiong, 2017). A great number of academic studies on civil law rules prioritize the form, and think little of incentive effects and the economic effects brought by different formalistic interpretations. For example, on discussing the legal effect of unauthorized disposal in the name of the owner (in which case the unauthorized owner pretends to be the owner), the majority of scholars paid attention

to whether such pretense falls into unauthorized disposal in real right law or unauthorized agency in contract law, and whether the rules for acquisition of stolen goods in good faith or apparent agency is applicable to the case. Such discussions are more about formalistic aesthetics, without substantively considering issues such as "which kind of system can prevent unauthorized disposal in the name of the owner to the greatest extent possible and with proper costs" (Ran, 2015). Current analysis often takes a static perspective, lacking the "forward-looking" mindset. In other words, it is not concerned with the incentive effects legal institutions will bring to future behaviors. Clarifying the economic effects of institutions is sometimes marginalized in civil law scholarship, or even seen as unorthodox.

Oversimplification of Economic Analysis

Since the majority of scholars with serious concerns for efficiency seldom systematically attend to basic issues such as "what is efficiency-oriented" and "how to be efficiency-oriented", their understanding of efficiency sometimes tends to be oversimplified, their concerns for economic efficiency of civil law rules being neither specific nor precise. Thus, they tend to make efficiency judgments that are in fact not efficient when facing complicated contexts. When confronted with apparently uneconomical propositions, they also lack clear and convincing arguments to back up their positions.

In simple social interactions, institutional arrangements based on intuitive understanding of efficiency can usually be economical. For example, the early years of reform and opening up witnessed huge room for improvement in terms of economic efficiency. In fact, production at the final years of the planned economy era (especially in the period of the People's Commune featuring extreme egalitarian practice) was so inefficient that the instinct to survive could spark an efficiency improvement plan. The "contract" signed by the villagers in Xiaogang Village, Fengyang County, was an illustration of this. Even daily experiences such as "attendance without making efforts" could help us understand how to improve the social organization economically. At that time, once legal scholars kept a basic awareness of economic efficiency, their institutional proposals would not deviate too much from the basic requirement for good economy, even if they adopted analytical tools that were not directly related to (or even not related at all to) efficiency (such as borrowing legal theories from other market economies).

However, when China's market reforms go deeper, the once huge room for improvement of efficiency such as a "transition from the planned economy to the market economy" is becoming rare, and the improvement on the social economic effects becomes less easy than before. Therefore, what we need today is to seek incremental improvements on efficiency in wider ranges of issues through more refined institutional designs. Particularly, as the social production and transaction structures become more professional, on a larger scale and more complicated basis with a greater influence from the internet, more factors are now influencing the economic efficiency of production and transactions. In order to achieve better results in adjusting the economy, institutional designs shall accordingly take into account interests of the relevant social groups and provide more targeted and

effective institutional incentives. Oversimplified efficiency analysis has the risk of becoming biased, and institutions designed with the good intention to pursue efficiency may not necessarily conform to economic principles. Moreover, it will also be harder to learn from other jurisdictions and to introduce their doctrinal scholasticism in the hope of improving China's own economic efficiency, as the Chinese society is now confronted with an increasing number of scenarios that have never appeared or have never been properly dealt with elsewhere (e.g. the large number of platform-based economic models).

In the recent decade, the tendency of "oversimplification" has been shown in the discussions on "transaction security" and "transaction cost" by more than a few scholars. For example, the rule of "leasing contracts not affected by change of ownership", as provided in Article 229 of the Contract Law of the People's Republic of China, has been a focus of debating in both judicial practice and the drafting of China's Civil Code. An issue frequently occurring in practice is that, when a third party, like a house buyer or an external creditor of the house owner applies for the enforcement on the house, a long-term lessee suddenly appears and insists on legal protection to his/her tenancy. This long-term lease is possibly fabricated afterwards by the enforcee, but it is hard to prove it (Lu, 2013). Such a moral hazard greatly dilutes transactional security for the third party, which will incentivize the potential third party to pay a high cost to verify the title of the house. Hence, some scholars suggest making "lease registration" as the requisite for lessee's adverse claim, where a lessee without the lease registration shall never claim that his/her lease must not be affected by the change of ownership. But some others hold that the indiscriminate requirement of lease registrations only increases the transaction cost, because the house leasing registration system in China is far from fully digitalized and convenient, and that there are a huge number of short-term lessees in the housing market. Thus, the legislative organ once proposed a reform plan that attempted to reconcile different views. The proposal goes that "any change of ownership to the leased item does not affect the validity of the leasing contract when said leased item is possessed by the lessee in accordance with said leasing contract". Stipulating "possession" as the requisite for the lessee's adverse claim, to some extent, might mitigate the moral hazard of the enforcee. Yet it is foreseeable that a new problem may arise as to how to prove the lessee's "actual possession of the leased item", giving rise to the same moral hazard of "fabrication". A second thought may lead to a more efficient rule, where a long-term (such as over 3 years) lessee shall only be allowed to claim for the validity of the leasing contract with the lease registration while the short-term lessee shall be allowed to make the claim with or without it. Such an option has two merits. On the one hand, the long-term lease which is often for commercial trade often has a long contracting process. Under this circumstance, lease registration is relatively less costly, and will make the transaction more secure for the lessee by preventing the moral hazard when the lessee applies for enforcement. On the other hand, even though the short-term lessee can claim for the validity of the leasing contract without a lease registration, the enforcee is less motivated in preventing a leasing relationship. After all, the benefits obtained from this fabrication are limited, and the enforcee still needs to pay damages to the applicant for such enforcement (especially the house

buyer). Even if they fabricate a short-term leasing relationship, it will not cause great losses to the applicant for the enforcement[①].

When it comes to the economic costs related to transactional security, it is necessary for us to insist on a more precise notion of efficiency, systematically explore and compare the differences among alternative institutions in terms of their incentive effects for behavior and their social economic results. Only then can the most economical system be found out.

Barriers to A Clear Notion of Efficiency

In this section, I will look into the reasons for "diluted, totally neglected, and oversimplified notion of efficiency" and to figure out the factors that hinder the establishment and practice of efficiency in contemporary Chinese civil law. As far as this article is concerned, the factors are as follows:

The Inertial Thinking of the Planned Economy

Human history proves that economic efficiency can never be separated from the idea of "*si*" (private or personal). Property rights (not necessarily fully private ownership) incentivize people to make investments and work hard, and subsequently result in efficient economic production and social organization. However, in the period of the planned economy, especially during the Cultural Revolution, the Chinese society regarded "*si*" as a major obstacle to social development and justice, and academic debates regarding "*si*" were also forbidden, due to rigid ideological constraints. From the very beginning, the notion of efficiency in Chinese civil law scholarship was ideologically prevented from developing and being expressed in a refined manner. "In the period of the reform and opening up after the Cultural Revolution, almost all economic and social sectors throughout China carried out an ideological campaign to set things right *(boluan fanzheng)*, but there was no such serious campaign in legal academia" (Yang, 2016). The inertial thinking that conflicted with market economic rules still remained, and continued to influence lawyers' academic discourse, legislative debates and judicial reasoning (Yang, 2016). "Some inappropriate legal schemes under the General Principles of the Civil Law that had derived from an outdated economic system and ideology are still very much alive today" (Zhu, 2014). Particularly, in todays' civil law studies, more than a few scholars still show strong "nostalgia" towards government planning and regulations when it comes to their relationship with individual autonomy. They "tend to overestimate the advantages of governmental regulation". Facing emerging challenges in market exchanges, they are accustomed to attributing them to "market failures"and call for governmental interference(Coase, 1960). Their mindset fails to appreciate the logic behind the behavioral choices of relevant market players, and the market's self-adjustment capability. They never realize the real cause of what they saw as "market failures". Nor do they pay

① The problem of fabrication essentially points to ways of title verification, a process that will incur informational costs. For recent research on informational costs of property rights to prospect dealers, please refer to Thomas W. Merrill, & Henry E. Smith, 2000, and their seminal theoretical framework in this regard. For modification of the framework in terms of its mode for calculation of the costs, see Henry Hansmann, &ReinierKraakman, 2002.

attention to possible "government failures" in an equivalent manner (Williamson, 2016, p. 201).

For example, after the emergence of online ride-hailing platforms, major ride-hailing platforms introduced a surge pricing mechanism during peak hours. The price rises as the demand increases, which is distinguished from the previous dominant set-price mechanism at peak time. Some scholars argue that "the surge pricing mechanism of ride-hailing apps breaches the fair-price obligation of mandatory contracting in taxi's carrier service. Besides, as some people are not familiar with the technology of mobile internet, they would be excluded from having equal access to taxicab services. Surge pricing business model violates the legislative purpose of mandatory contracting of transport service to protect passengers" (Shan, 2014). These scholars hence advocated that the government should step in the pricing process and prohibit the surge pricing mechanism during rush hours. There is no doubt these scholars aim at protecting passengers' interest, but they ignore the basic logic of transport market. Rush hours in metropolitan areas usually mean congestion, during which time drivers' basic cost of providing carrier service (i.e. the cost of petrol and time when driving at a lower speed) will increase substantially. Economically, the charge from such service may not even cover the cost under the set-price mechanism. The more severe the congestion, the more typical this situation will be. That is why many professional taxi drivers choose to stop providing service all together, or to avoid driving into congested roads during peak hours. And nonprofessional taxi drivers may choose to stop taking ride orders on ride-hailing platforms and to provide off-line, unlicensed service to passengers who are willing to pay extra fee. Even if many professional taxi drivers choose to follow the set-price mechanism during peak hours, they are unlikely to provide friendly services to passengers.

Thus, simply asking the government to prohibit surge pricing ignores the severe insufficiency in ride supply that had appeared long before digital, ride-hailing platforms emerged. The prohibition of surge pricing can hardly help passengers get a ride more easily in mega cities as well. As to the argument that people with a stronger affordability will find it easier to get a ride under the surge pricing mechanism, it is worth pointing out that, for one thing, travelling by taxi is not the daily transportation option but a supplementary way of travelling for urban citizens. In other words, taxi service is not a sort of necessary public good that has to be provided by the state. which stands in stark contrast with public goods such as public transportation, healthcare and basic education. For another, the difficulty in getting a ride in mega cities like Beijing and Shanghai is largely rooted in rigid quantity control of taxis licenses. A more effective approach to resolving this difficulty is not to follow the inertia mindset of the planned economy: letting the government set the price for the market. Instead, the right thing to do is calling the government to change its rigid quantity control of taxi licenses so that taxi service providers can compete with each other, to develop public transportation and to encourage carpooling, etc (Xiong, 2016). Of course, completely relying on the market force may also bring problems. If surge pricing ever evolves from a mechanism to encourage ride supply into platforms' market monopoly strategy, regardless of supply, regulatory authorities should step in and decide whether this commercial model infringes upon the interests of consumers by, for instance,

"intentionally forcing up prices".

Either way, it is necessary to abandon the two extreme mindsets and avoid simply regarding either the government or the market as a more capable and fair institution for social organization when discussing the relationship between individual autonomy and governmental regulation. We should avoid talking about balancing between individual autonomy and governmental regulation from a totally abstract perspective. Nor should we resort to the inertial thinking that "market freedom prevails in principle" or that "government regulation prevails in principle". We need to patiently analyze the causes of emerging problems considering their complicated contexts and specific situations, and compare the potential incentives to behaviors and the social economic effects of various options (either relying on the market or regulation). Only by doing so can a more effective policy option be reached (Coase, 1960, p. 18).

The Constraints of Moral Notions

In a diverse system of social norms, moral notions serve as one important source of social organization. Different from legal norms, moral norms are established in a gradual and piecemeal manner throughout social evolution. For example, as one simple story about respecting the aged and loving the young gets told repeatedly and therefore inherited from generation to generation, the conception of respecting the aged and loving the young is generally internalized as a kind of faith and code of conduct to be obeyed and insisted upon. This process of socialization also means that moral norms can only be generated over a long time and will become a highly stabilized constraint on behaviors once generated.

Behind the long generational process of moral notions lies the crystallization of the universal life experiences of the public and the reflection of their intuitive understanding of and preferences for certain ways of social organization and living. Under such circumstances, the code of conduct by such morality can improve the general social welfare. In other words, it conforms to economic principles and therefore is sometimes necessary to be upgraded to general national legislation (Kaplow & Shavell, 2001). One typical example is respecting the aged and loving the young. Since everyone would experience childhood and aged life, people expect good education in childhood and warm supports in aged life. However, we cannot teach or take care of ourselves all on our own and therefore can only expect the cooperation between people from different ages in order to enjoy a complete and joyful life. To put it in a more modern way, this morality reflects the logic of future contracts, with today's pension system for urban residents as the best evidence. That may also be the reason why both China's Constitution and Marriage Law provide that parents are obligated to raise and educate their minor children, and that the adult offspring are obligated to support their parents.

However, the fact that moral norms take long time to develop with their basis on daily life experiences also indicates that they can only take effect in a society with slow evolutions. As observed by Professor Fei Xiaotong, whose works helped lay the foundation for China's sociological and anthropological studies, experiences may not serve as our guidance in many occasions in a

society like China, with all of its rapid development and changes, because the social condition is now different from those that once generated those experiences and their lessons. "In the midst of rapid changes, habits are obstacles to adaption, and experiences are equivalent to stubbornness and out-datedness"(Fei, 2008, p. 84). Directly setting simple moral norms as legal ones would encourage some people to behave in a way detrimental to socioeconomic order, such as resorting to opportunism and rip-offs.

China's legislation of civil laws since the reform and opening up is largely based on empiricism, to the extent that many laws are made out of existing ones and judicial experiences. Some civil laws made in this way were "limited to the result of practical experiences, and usually are of little use when dealing with new situations and new problems" (Zhu, 2014). One typical example is the academic debate on "the defaulting party's right to terminate the contract" in the drafting of the current Civil Code. One article in the Part of Contract Law of the Civil Code (Expert Proposal) drafted by the Chinese Civil Law Society proposed that "the legal right to terminate the contract shall be enjoyed by the non-defaulting party in principle, while the defaulting party shall also have the right to terminate the contract when maintaining the validity thereof will improperly increase the burden of the defaulting party." In multiple academic discussions, more than a few scholars criticized this article and argued that "it violates the principle of *pacta sunt servanda*", that "it is a tradition for the non-defaulting party alone to have the right to terminate the contract", and that "it is unbelievable for the defaulting party to have the right to terminate the contract when breaching the contract is immoral and dishonest" (Sun, 2006). Indeed, this kind of statements, based on intuitive moral conceptions, is economical in ordinary contract-breaching cases. If one party can easily breach the contract without fully compensating the counterparty for their expected interests, it will trigger people to behave in an opportunistic manner and "jump out of" the contract whenever there is a better transaction opportunity. It will also beat the counterparty's contract expectations, so seriously that it may encourage the counterparty to resort to preventive measures, leading to an increase of transaction cost in vain.

In other cases, however, there is a significant change of circumstances. This "change" may not be so serious as to constitute "force majeure", or that renders the contacting party "unable to perform in law or in fact", but the economic burden on one party for actual performance will exceed the expected interests of both parties. Such circumstances could be encountered by both the lessee and the lessor in a long-term lease contract for land, housing, oil tanks, containers, etc. In such cases, if the expected interest of non-defaulting can be defined in a relatively accurate manner, and that the full or slightly higher compensation for the non-defaulting can be guaranteed, allowing the defaulting to terminate the contract would promote a "win-win" situation. In economics, this scenario constitutes an "efficient breach" (an economic theory that is frequently misunderstood by legal scholars and that will be further discussed later). Consequently, it is now easy to admit that "the defaulting party's right to terminate the contract" is not simply a moral issue, but a practical one concerning "the full compensation for and the accurate determination of the non-defaulting party's expected interests".

In fact, contracting parties can usually solve these problems on their own by contract arrangements beforehand or re-negotiation afterwards. In practice, a large quantity of contracts may include conditional clauses for future circumstances that may impact contract performance. When such special circumstance occurs, many contracting parties would negotiate to terminate the contract after reasonably compensating the non-defaulting party (the compensation amount usually exceeds the non-defaulting party's expected interests). However, both the arrangements beforehand and the renegotiation afterwards incur costs, and may brew hindrance to efficiently terminating the contract (Shavell, 2004). These negotiations may fail to achieve a win-win situation especially when one party is confronted with a major economic burden while being ripped off by the non-defaulting party. One typical case in this regard is *Xinyu Company v. Feng Yumei over Store Sale Contract*. A large mall developed by Xinyu Company, the plaintiff, was making a business innovation due to poor management. This caused excessively high costs for the plaintiff's continuing performance of a store sale contract with Feng Yumei, the defendant. When the majority of storeowners in the mall accepted to terminate their own contracts by negotiation, Ms. Feng proposed an abnormally high compensation requirement, which could far exceed the expected interest for the defendant upon actual performance of the contract. Rip-offs like this are not so different from the act of holdouts (colloquially called "nail houses" in China) when their houses were taken and demolished for further development. Both can hinder more efficient ways to use property and make transactions. In the above case, as long as the compensation amount can ensure that Ms. Feng have her expected interest satisfied after terminating the contract, it is only fair and efficient to provide the defaulting party with the right to terminate the contract. As for the legislative draft, it is therefore advisable to add an extra rule in the proposed article by the Chinese Civil Law Society that "the defaulting party should not undermine the expected interest of the non-defaulting party when terminating the contract".

The risk of distortion of inter-discipline knowledge

As the discipline of legal studies have for a long time been isolated from other disciplines, many civil law scholars choose to stick to "unique" legal methodology without paying close attention to interdisciplinary knowledge like economics, even though they frequently use economics terms such as "transaction security" and "transaction cost" in their daily academic discourse. On the other hand, as more civil law scholars are seen using the knowledge of other disciplines to address legal problems[①], they may take some interdisciplinary knowledge for granted because they lack the necessary academic "immunity" (Wang, 2006). They may also apply or criticize such interdisciplinary knowledge before reading about it and understanding it thoroughly or even read and cite it selectively for decorating. These problems can easily cause misunderstanding and deepen the intuitive prejudice and resistance of some legal scholars to all interdisciplinary knowledge, especially economics. They

① This is particularly true for scholarship in common law, as more scholars introduce into legal studies external knowledge including but not limited to political, economic, and cognitive sciences. For one example, please see Henry. E. Smith, 2012, and 2015.

may even approach the wisdom of economics as if with their filters on (Yang, 2000, pp. 4-5). As a result, it becomes even more difficult to systematically focus on and precisely express the notion of efficiency. The most typical illustration of this are civil law scholars' two serious misunderstandings about the theory of "efficient breach of contract".

One misunderstanding is that "efficient breach of contract" is a theory that focuses on efficiency but ignores equity. It equates "efficiency" simply with the defaulting party's unilateral efficiency (or calculates it solely on unilateral costs and benefits), or at least gives the impression that it does. Following this, the theory of "efficient breach of contract" is reduced to the arguments that "breach of contract shall be encouraged when the defaulting party's benefit of breaching exceeds that of actual performance" or that "a party shall be encouraged to breach the contract if the defaulting party's benefit from such breach exceeds the non-defaulting party's expected benefit from actual performance, and if the damages are only to be paid to the extent of such expected benefit"(Wang, 2013, p. 151). For many jurists, such theoretical propositions are clearly a departure from their intuition and common sense, since this misreading of the notion of efficiency fails to consider the harms that the breach brings to the entire social economic order. After all, "what is efficient for the defaulting party is not necessarily efficient for the non-defaulting one" (Xie, 2014a, p. 472).

The problem, however, is that this misreading of the "efficient breach of contract" theory has hardly appeared in the classic literature of economists, and it is merely a strawman argument that legal scholars have made, whether intentionally or unintentionally, when translating and introducing knowledge from other disciplines. The efficiency in the "efficient breach of contract" theory is not the unilateral efficiency of the defaulting party and the amount of damages is not limited to the expected benefits of the defaulting party either. The theory of efficient breach of contract is first of all a descriptive one. It intends to describe the patterns for behavioral choices in contract transactions and even the entire social life, but not to encourage contracting parties to breach (Tang, 2008). The theory contains three major arguments. First, the parties conclude a contract because they anticipate, at the time of the conclusion of the contract, that the future performance of contractual obligations would benefit both parties. However, this "win-win" prospect is premised on the contracting parties' prediction of the social conditions for that future performance. Second, neither of the contracting parties, when concluding the contract, can predict and negotiate on every single condition that may have a substantial impact on the cost and benefit of actual performance. Yet some of these conditions may bring so greater an impact than predicted when concluding that not performing contractual obligations for one party will bring a reduction to the cost (in other words, the benefit of non-performance) greater than the non-defaulting party's benefit from actual performance. Finally, in this case, it will benefit both parties to relieve one party's burden of actual performance (i.e. allow that party to "breach") and to have that party provide the non-defaulting with a compensation no less than its expected benefit (Shavell, 2004, pp. 368-377).

However, does it follow that economists proposing the "efficient breach of contract" theory also advocate that a contracting party can easily choose to jump out from contracted obligations? This

involves the second common misunderstanding about "efficient breach" theory, the idea that "efficient breach" is a theoretical proposition that encourages "a contracting party to easily jump out of the contractual restrictions"(Xu, 2008, p. 188). As mentioned above, "efficient breach" is not a moral question, but one concerning "the full compensation for and the accurate determination on the non-defaulting party's expected benefits from actual performance". After discussing "full compensation", it is worth analyzing "accurate determination" here. The above discussion on "efficient breach" is based on the premises that "the reduction of cost for one party from the breach of contract" and "the expected benefit of the non-defaulting party" can be determined approximately. In theory, if the judge can be informed of these two amounts accurately afterwards, not only can the judge determine whether a specific breach is efficient, he can also make a judgment that benefits both parties when it is. In reality, however, few people know these two pieces of economic information better than the contracting parties themselves. When a dispute occurs, both parties could turn opportunistic. "The buyer may exaggerate the expected value and the seller may exaggerate the extent of the increase in the cost, which are both obstacles to determining the amount of damages"(Xu, 2008, pp. 188-189). Whether the judge overestimates or underestimates these two amounts, it may have a negative effect. While an overestimation of the non-defaulting party's expected benefit may prevent efficient breaches from happening, an underestimation thereof would encourage opportunists' inefficient breaches, as one contracting party can easily have the opportunity to jump out. In fact, economists are consciously aware of judges' informational asymmetry problem and agree that actual performance is generally more conducive to a "win-win" situation between the parties (Shavell, 2004, pp. 352-353). Consequently, judges should not support a claim of efficient breaches except in cases like *Xinyu Company v. Feng Yumei*, where there are obvious rip-offs and situations that significantly and improperly increase the burden of the defaulting party. Even in such cases, procedural requirements, such as one providing that the defaulting party can only "terminate the contract by litigation or arbitration", can be attached to prevent the right to terminate from being abused.

Certainly, this does not mean that "efficient breach" cannot take place outside litigation or arbitration procedures. Quite the opposite, as mentioned above, if there is no chance for rip-offs, the parties usually have a chance to achieve a win-win situation by adapting the existing contract through voluntary negotiation afterwards (including by terminating the contract after negotiation). In *Xinyu Company v. Feng Yumei*, for instance, if the subject matter in dispute had been a long-term leasehold of a small store on a street instead of a store in a large shopping mall, and if a third party proposed a higher bid to Xinyu Company, the seller could have chosen to fully compensate Ms. Feng, the buyer, in exchange for termination of the contract. In addition, Ms. Feng may have claimed for damages higher than her expected benefits from actual performance, but would likely have limited them to a moderate amount. Because if the claimed damages were too high, Xinyu Company would choose actual performance and give up on that possible lease to the third party. This would mean loss rather than gain for Ms. Feng.

There is a common concern that the defaulting party may not be able to determine whether a

breach is efficient, as the defaulting party is seldom informed of the expected benefit of the non-defaulting party and therefore is unlikely to be able to decide whether the bid by the third party is higher than that by the non-defaulting party. Indeed, no one knows better than the parties involved how to value a particular item. Yet when deciding "how much 'compensation for the non-defaulting party's expected benefits" should be paid by the defaulting party to satisfy the counterparty", the contracting parties usually choose to renegotiate not based on a one-time offer but through multiple rounds of bargaining, during which the defaulting party will be able to roughly estimate the expected benefits of the non-defaulting party based on the amount of compensation that they are willing to accept. Normally, the accepted amount of compensation would be higher than the non-defaulting party's expected benefits from actual performance (Sun & Shan, 2010).

Comparison and learning as quick fixes

Since the reform and opening up, China's civil law and civil law studies, once developed from scratch, have been ever more prosperous. This, to a great extent, benefits from the high-quality comparative studies of the civil law culture in advanced jurisdictions. And such learning process is far from over (Sun, 2006). However, for quite a long time, much of these comparisons and learning in civil law studies were equivalent to a simple translation and introduction of foreign legal rules and doctrines, or a direct "import" of them, without understanding their underlying principles and without paying due attention to China's domestic contexts. Comparative legal studies often become the comparative studies of foreign law in books, and legal scholars "are still most interested in studying the form and characteristics of mature legal systems"(Shang, 2015). It is fair to say that different jurisdictions do share similar social contexts and value judgments, as relations and forms in civil society are universal in many aspects. For these aspects, direct translation, introduction and application of sound foreign civil law system and doctrines is normally sufficient to establish a sound social order in domestic contexts. This is indeed true for some comparative studies by civil law scholars since reform and opening up. Such an approach not only helps establish a civil law system and its doctrines in a rather rapid way, it also reduces the cost of legal experiments and construction.

However, this is also where the problem comes in. Year after year, the approach of comparative studies, as extensive as it is, may evolve into a kind of quick fixes. The first reaction when a new problem occurs is to borrow legal schemes from advanced jurisdictions, subconsciously presuming that there is a quick fix in foreign jurisdictions that can be used to solve China's domestic problems. In such a knowledge production process, we probably have not looked deeply into the Chinese context and have not given due attention to the incentives that different legal options may have to domestic players, not to mention their socio-economic consequences. Yet for a rapidly transforming jurisdiction as China, it is remarkably important to look into its specific historical context and recognize the specific time and situations when certain laws are enacted (Pan, 2016).

A typical example is the long-lasting dispute, both in academic debates and judicial decisions, over whether a person that knowingly buys defective goods (hereinafter referred to as "buying-

fake-while-knowing-it") is entitled to punitive damages. In more than a decade of debate, civil law in China generally evaluate this issue from three perspectives. The first relies on the simple moral notions, as mentioned earlier. It is argued that buying-fake-while-knowing-it for the purpose of compensation violates the public morality of good faith and honesty. Such acts are regarded as of "reaping without sowing", "engaging in opportunism and speculation", or "an eye for an eye". The second strand of arguments is formalistic reasoning, attempting to analyze in a logical way based on such forms as legal concepts and their legal contexts. For example, a common way of analyzing "buying-fake-while-knowing-it" focuses on the elements required to claim punitive damages under Article 148 of the Food Safety Law of the People's Republic of China and the logical relationship that article has with Article 55 of the Law of the People's Republic of China on the Protection of Rights and Interests of Consumers. The frequent employment of this method of formalistic analysis is largely a consequence of regarding legal doctrines from other jurisdictions as quick fixes in the last three decades. For emerging issues with strong Chinese characteristics, such as the phenomenon of "buying-fake-while-knowing-it", their causes, variations, and social effect are all deeply influenced and further complicated by local contexts. Efforts to translate these complex practical problems into formal ones often do not hold water. In particular, when adopting formalistic logic analysis, we can come up with two opposite sets of arguments, one that supports "buying-fake-while-knowing-it" and the other against it. Yet formalistic reasoning alone cannot be relied on to decide between these two conflicting arguments. A third line of argument is functional analysis, by assessing the social effects of supporting or opposing "buying-fake-while-knowing-it". However, as mentioned earlier, relying too much on comparative studies as quick fixes, some scholars are not accustomed to and capable of accurately and systematically evaluating the economic effects of different institutional options. Even scholars who observe "buying-fake-while-knowing-it" from a functional perspective often fall into extremes and choose to "support it unreservedly because it can prevent merchants from fraudulent acts", or to "oppose it all because it is too often reduced to mere carping". By contrast, an effect-based analysis that is precise may conclude that judges should strictly distinguish between claims for punitive damages that are benign (e.g. claims brought against food with substantial safety problems or other commodities that mislead consumer decisions) and claims that are malignant (e.g. claims brought against goods with merely minor labeling flaws). The two camps of claims should be treated differently as well. This will be the optimal option for society as a whole, as illegal production and management can be curbed, welfare of consumers increased, and opportunistic and speculative claims for punitive damages regulated. Empirical research of judicial decisions has also shown that the courts in Beijing and several other regions have taken such a dual practice in trials.

Applying the Notion of Efficiency in Civil Law Studies

The cases mentioned so far, while demonstrating the current barriers facing China's civil law studies in pursuit of efficiency, also show how to improve such notion in civil law studies, a topic to be further explored in this chapter. The notion of efficiency can be practiced in civil law studies in at least two dimensions, i.e., the establishment of a body of civil law doctrines and the construction of a corresponding legal doctrines. This article intends to focus on the latter.

Construction of legal doctrines, is in and of itself a manifestation of efficiency. The law in modern society is nothing but a management of social complexity by encoding various human associations and social organizations. By generalizing from diverse social situations before producing a set of formal concepts, terms, systems, and structural arrangements, the modern law establishes a foundation for efficient communication among people (especially lawyers), sparing them the trouble of having to discuss every single problem from the scratch. These formal terms and structures become legal doctrines through legal scholars' social encoding projects. The same then gets learned and disseminated through legal education and become "jargons" or "stock language" within the legal community. As a result, when a legal scholar talks about a legal term and its corresponding doctrines, other legal scholars can immediately understand what he means. This will not only help to improve the efficiency of communication within legal community and reduce the communication costs, it will also help to enhance the stability of legal norms and social order. This is why "every law gets analyzed by doctrinal scholasticism", as the saying in civil law studies goes. Such "doctrines", or legal theories, constructed by civil law scholars, will be even easier for the legal community to understand, master and spread if they get more symmetrical formally and more systemized structurally. In other words, they will be more efficient.

Such notion of efficiency is even more significant for the latter dimension, as the civil laws influenced by dogmatic scholasticism will directly become the restraints and incentives for people's behavior in civil society. Whether civil law scholars acknowledge them or not, these restraints and incentives are an objective existence. Different institutional designs, as influenced by various legal doctrines, may provide incentives very different in their direction and intensity, which will bring different social costs to the parties concerned. This requires legal scholars, when constructing civil law doctrines, to conduct a thorough assessment of the objects, effects and consequences of the incentives as provided by the institutional designs and to make a comprehensive comparison of the various options in order to determine the most economical option. This is a point extensively demonstrated throughout the cases mentioned so far. It has been demonstrated in the macro transition from relying on state directives to depending on a system of civil law and the changes in the General Principles of the Civil Law. It is also manifested by practical issues of lease registration as a requisite for lessee to claim the validity of the leasing contract upon change of ownership, the defaulting party's right to terminate the contract, the surge pricing mechanism of ride-hailing apps and the right to claim for punitive damages in "buying-fake-while-knowing-it" cases. Sound legal

doctrines should reflect the notion of efficiency, by systematically providing economic reasons for recommending one institutional design over another and their corresponding principles in morality and political philosophy in order to avoid making uneconomical judgments. A careful evaluation of such institutional designs based on the notion of efficiency will in turn help improve their underlying doctrines.

To develop the notion of efficiency in civil law scholarship, in addition to establishing the operational essentials as mentioned above, it is also necessary to make two extra points. First, in the framework of efficiency analysis, the role of models and quantitative analysis in economic analysis should be accurately understood in order to avoid rejecting efficiency analysis due to misunderstanding. Second, outside the framework of efficiency analysis, the relations between "pursuing efficiency" and "pursuing fairness" should be treated rationally to avoid being stuck in invented contradictions and toying with inevitable economic effects after selecting certain institutional designs.

Efficiency Analysis and the Application of Models

Some legal scholars choose not to apply economic efficiency analysis because they equate it with mathematical model analysis that is not familiar to them (Ye, 1997, p. 36). Indeed, a large amount of modern economic studies today uses models that seem complicated to laymen. Briefly, "the model is the simplicity of things, which represents how a specific mechanism runs by removing interference factors"(Rodrik, 2017, p. 14). In situations involving complicated contexts, it is helpful to simplify, and code into a model those factors that will have a significant impact on the choices and consequences of people's behavior, so as to demonstrate and comprehend interactions and changes between different factors (or "variables") in a more straightforward and accurate way. Parabolic lines, for example, which do not exactly match the actual trajectory of the tossed object, can help to visualize the parabolic trajectory, making it easier for us to understand how fast an object is moving at different positions on the trajectory. As other examples, "a plastic model of the respiratory system shows only the details of the lungs, ignoring other parts of the body; an architect may create a model to reflect the landscape around a house, or to show the layout of the house; economists' models are similar, but not physical, they are symbolically expressed in language and mathematics instead" (Rodrik, 2017, pp. 14-15).

It would be wrong to assume that all economic models are complex, or that we cannot understand economic efficiency without resorting to mathematical models. Quite the opposite, mathematical models are merely an auxiliary tool for understanding socio-economic rules. Much of the economic knowledge is so clear and simple that jurists can fully comprehend it simply through sincere communication, with no need for models' assistance. This can be proved by the above economic efficiency analysis on many civil law cases at the macro, medium and micro levels. In fact, influential and groundbreaking economic theories and principles in history were rarely presented through complex mathematical models. Instead, most of them are based on life experiences that can be

perceived universally. *The Wealth of Nations* by Adam Smith and *The Problem of Social Cost* by Ronald H. Coase are two typical examples. This is mainly because the accuracy of understanding economic efficiency in alternative institutional designs is a matter of degree[①]. Our pursuit of such accuracy should go no further than the extent to which it can help make comparisons and choices among these institutional designs. After all, economic efficiency analysis itself is not free, and the costs will rise higher as the analysis becomes more microcosmic and precise. "Theories are better when they are cost-efficient. A more precise theory also means a higher cost and it is not necessarily a bad deal for a theory to sacrifice its accuracy in exchange for a lower knowledge threshold. Therefore, in terms of the function of a theory, its accuracy is not a must, but a choice under various constraints (Ji et al., 2016). In particular, there is a huge difference between the work of legal scholars and that of professional economists, since the former have to make timely evaluations on all kinds of practical problems (disputes). Even if jurists are capable of applying models to analyze the economics of legal systems, the precision of their analysis of the systems' economic effects is meant to be limited. At least, in most cases, it is difficult (and unnecessary) to resort to complex analytical models.

In recent years, more and more civil law scholars have been paying special attention to incentive effects when analyzing the civil law system (Zhu, 2016). A good deal of literature also provides in-depth studies on the incentive effects of certain rules of civil law and relies on simple statistical models to evaluate the economic advantages and disadvantages among various institutional options (Zhang, 2016). Other academic literature borrows the current popular "proportionality" theory in administrative law scholarship to introduce the basic idea of economic efficiency to civil law scholarship (Ji, 2016), and has put it into application in some studies of certain rules of civil law (Xu, 2016). Nevertheless, more than a few civil law scholars fail to accurately understand the functions of "statistical models" in efficiency analysis. They apply statistical models without considering whether it is necessary or whether the targeted audience is able to comprehend or accept such a method. Therefore, they end up sending a confusing signal to those legal scholars who do not have a clear understanding of efficiency. Either way, it is safe to say that models have to be used carefully by legal scholars in civil law studies.

Efficiency Analysis and the Quantification of Costs

As emphasized above, analysis of different institutional designs requires that their economic costs for the relevant parties and society as a whole be carefully assessed and compared. Yet how should civil law scholars make such assessments and comparisons? Does each cost need to be quantified separately? This is also a point where efficiency analysis is easily misunderstood. To understand this accurately, it is necessary to discuss the purpose of finding out transaction costs.

While transaction cost is a popular concept, even in the eyes of economists, "how to measure

① I thank Professor Henry Smith for his helpful comment in this regard during our talk on the bus in Jan 2013 in Geneva when we were there for the GHRS conference.

transaction costs is a problem that is devilishly hard to solve" (Williamson, 2016, p.4). Besides, even when it can be accurately measured, it would be meaningless to know only the transaction costs of a single institutional design. The whole process is only meaningful when we start to compare the transaction cost caused by different designs and examine their advantages and disadvantages from a comparative perspective. Therefore, "the comparison of transaction costs of the various alternative system schemes is the golden key to the problem" (Williamson, 2016, p.4). To make this comparison, we do not need to quantify all the transaction costs to be compared one by one. On the contrary, all we need is a conscious awareness that alternative designs can be comprehended through the incentives and socio-economic impact they bring and an analytical habit to observe the logic behind people's behavior based on real-life experiences.

Here, the debate over planned economy and commodity economy made by the early generation of scholars in Chinese civil laws is a convenient example. Another example is Article 16 of the Company Law of the People's Republic of China, which suggests that guarantee be made upon resolution. If Article 16 is regarded as a mandatory provision on validity, a creditor will be encouraged to verify whether the company has made a resolution for guarantee when accepting it. If, on the other hand, the said article is to be seen as a mandatory provision for administrative purposes, directors or shareholders of the company, who usually work separately, will be encouraged to take measures on a daily basis to prevent the company's legal representative or other capable persons from tendering guarantees *ultra vires*. Obviously, it is less costly to have the creditor bear the cost of a formalistic examination on whether "the company has made a resolution for guarantee," rather than have the dispersed directors or shareholders prevent the company's legal representative from tendering guarantees *ultra vires*. Therefore, it is a more efficient option to categorize Article 16 as a mandatory provision on validity.

Efficiency Analysis and the Goal for Fairness

Some legal scholars underestimate the function of efficiency analysis because they tend to set efficiency and fairness against each other at an abstract level. Yet this is nothing but a common myth in the legal community, especially after Richard Allen Posner' ambiguous representation of mainstream economics got passed around among legal scholars in America[①]. Now the same thing is happening again. In fact, mainstream economists pay much attention to fairness and are keenly aware

① Legal scholars in China are greatly influenced by Richard Allen Posner in terms of economics and the latter is often regarded as an authority of the discipline of economics. Indeed, Posner once played an important role in the law and economics approach. In particular, he was the first to introduce the knowledge of economics to the legal community, and he set himself as an example and insisted on applying it in trials and in academic research. Yet economics, or the law and economics approach, is an obvious weakness of Posner compared with his insight into jurisprudence. Like some legal scholars who pick up economics halfway into their careers, Posner never learned the subject systematically. From the very beginning, he misunderstood some key issues in economics and passed such misunderstanding around. This set up some false targets for legal scholars to go against, leaving economics as a subject deeply misunderstood and even intuitively opposed by legal scholars. An example is Posner' s misconception about wealth maximization in his early years. See Louis Kaplow, & Steven Shavell, 2001, p: 996. Another example is his early misconception about "zero transaction cost". See Oliver E. Williamson, 1994, p: 201 and pp: 201–203. In fact, since the 1970s, some graduates with professional economic education (and some at the same time are trained in law as well) have flocked to law schools, developing and teaching the law and economics approach. They have become a major force in in this approach.

of the price of inequality (Stiglitz, 2013, pp: Ⅷ - Ⅸ (preface); Sen, 2002). They are also devoted to studying practical problems, such as whether it is possible to achieve a specific social equity goal and how to do it more efficiently. To economists, "an efficient market economy should be a laws-based economy founded on morality that is related to fairness and justice, not a disorderly one full of selfish desires and deceptions, with people benefiting themselves by harming others " (Yang, 2000, p.47).

Economists usually make a strict distinction between what it ought to be, or judgments based on the idea of fairness, and what it actually is, or judgments based on objective facts (in other words, the problem of value judgment and the problem of factual description). However, mainstream economic research focuses on the latter, so it is mainly a descriptive or explanatory science which focuses on objectively describing the differences in incentive effects and social consequences among alternative system schemes. In other words, it explains the deep causes for various socio-economic phenomena (Friedman, 2001, p. 4). This has left some legal scholars with a wrong impression that economists "only pursue efficiency, not fairness". However, many economists are never indifferent to the former. They simply believe that questions of value need to be answered through serious discussions of political or moral philosophy (Mankiw, 2007, pp.30-36).

Notice that this is not to say that the descriptive analysis on the economic effects of alternative institutional designs is not important for answering the questions of value judgments at all. On the contrary, it is very important, especially for civil law. On one hand, we generally assume that civil subjects have equal capability to engage in negotiations and transactions and therefore have interchangeable social status. As a result, institutional designs that are efficient for the entire civil community are also efficient and beneficial for every single individual. This point, so universally accepted as it is in the civil law studies, often gets neglected. On the other hand, even in situations where there is a need to protect vulnerable groups, i.e., situations where there is a clear goal for fairness or a coefficient for such fairness, we still need to devise system schemes that can achieve this goal in a more efficient way (Adler, 2013). The above discussion of "buying-fake-while-knowing-it" is a typical example.

In addition, the accurate understanding of an institutional design's economic effects will in turn influence our value judgments (Friedman, 2001, p.4), which will help to evaluate the possibility of achieving the proposed fairness goal and thus avoid being obsessed about how "legal norms should always be observed simply because they are authoritative" (Xue, 2012). Indeed, value pluralism and the reconciliation among different values are the basic characteristics of this era (Xie, 2014b). However, in many debates, the disputes over values among legal scholars are only apparent, behind which are divergent factual judgments of the social-economic effects caused by the same system scheme. If they can honestly and patiently analyze the underlying factual issue, they will eventually realize that they have no disputes over values after all.

The reality, however, is that some scholars are not accustomed to analyzing the economic effects of a given institutional option. Nor are they patient enough to do so. Instead, they tend to directly resort to values, rather conveniently, when discussing practical problems. This way of thinking and

debating is not so hard to account for. "It is often easier to question a man's motives than to answer his arguments. By treating those who hold different views as 'bad' people who want to achieve 'bad' goals we can shorten the arduous process of analyzing and gathering evidence and at the same time win over public indignation and moral fervor to support our views" (Friedman, 2001, p. 6). The issue of surge pricing during peak hours discussed above is a typical example. For another example, in the academic discussions on the automatic renewal of the right to use construction land for residential houses in recent years, civil law scholars have had a fierce debate on whether to pay a renewal fee for the automatic renewal. Out of the good intention of protecting citizens' property rights, some civil law scholars propose that the right to use construction land for residential houses shall be renewed free of charge. Well-intended as such a proposal is, it fails to consider "the differences between residential houses for basic standard of living and residential houses for investment". It also fails to address the problem of "how to guarantee the basic standard of living for people without housing after a universal free-of-charge renewal". A policy proposal like this, based only on an unexamined idea of fairness, often does not bring fair results. By contrast, it would be more feasible and more likely to achieve fairness if a dual renewal fee is determined separately for "residential houses for basic standard of living" and "residential houses for investment" after considering the relevant public utility cost that is necessary (Sun, 2016).

In conclusion, in order to promote the notion of efficiency in civil law studies, it is of great significance to clarify the relation between efficiency and fairness in practice, and to find the accurate perspective and extent for conducting efficiency analysis in civil law studies (Li, 2017).

Conclusion

This article expounds the significance of the notion of efficiency, as a commonly preferred mindset of human beings, in civil law scholarship by tracing the historical development of China's contemporary civil law and reviews the present situation and problems of this notion in Chinese civil law scholarship. This article investigates into the reasons that have hindered the establishment of a clear and precise notion of efficiency in civil law scholarship and reflects on how to develop a more clear and precise notion of efficiency in civil law scholarship of China. In fact, in recent years, some scholars have made good efforts in this aspect, such as trying to introduce "the principle of proportionality", an instrument to express efficiency that is widely used by public law scholars, to promote the notion of efficiency in civil law studies. They also begin to consciously assess the economics of various institutional options in a large number of studies on institutional designs. This article aims to further reveal and elaborate the notion of efficiency as indirectly expressed through "the principle of proportionality" and hopes to meaningfully add to the theoretical progress on it.

It needs to be reiterated that, both proportionality and economics, as emphasized by the principle of proportionality and the notion of efficiency respectively, focus on the more diverse transactions than monetary and physical ones and point to much more exchange scenarios in market economy

as well. The pursuit of efficiency, as a behavioral tendency rationally chosen by people, can be widely applied to various economic and non-economic social interaction activities. In addition to the property transaction scenarios between equal subjects, it includes other civil activities with obvious characteristics of fair distribution such as consumption contracts and labor contracts while also covering interpersonal relations with strong moral and ethical dimension, such as those of personality, marriage and family. In these scenarios, on one hand, a comprehensive and precise assessment of various alternative system schemes in terms of their potential behavioral incentive effects and social-economic effects helps to examine whether their purposed goals of fair distribution and moral ethics are feasible and appropriate. On the other hand, even if such feasibility and appropriateness are determined in the level of political philosophy and moral philosophy, it is also necessary to use rational thinking and select those schemes that are conducive to achieving the goals while also being able to minimize the cost. In this regard, this article only involves a few issues such as consumption contracts. Many other issues are worthy of further exploration.

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