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RESEARCH ARTICLE

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Understanding the cases of dilemma of administrative enforcement in China

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Abstract Due to lack of effective, and adequate communication on the standpoint of the government and the attitudes of civil society in legislative process, this has led to tension between the government and the general public. Within the context of law enforcement, the government sticks to "problem-based strategies" and "campaign-based enforcement", who believe in the power of coercive force. As a way out of the dilemma in law enforcement, it is required that in the process of rule-making, the government should communicate effectively with the civil society in the institutionalized system, focusing on learning, reflection, and strategic adjustment.

Keywords administrative enforcement, government standpoints, attitudes of civil society, law-based life

摘要 在立法过程中，政府立场与民间态度缺乏有效和充分沟通, 导致政府立场与民间态度的紧张；在执法过程中，政府奉行一种"问题化策略"和"运动式执法"，过分迷信强制和制裁的力量。走出执法困境，要求在规则制定过程中政府立场与民间态度通过制度化机制进行富有成效的交涉；在执法过程中，应注重搏弈过程中的学习、反思和策略调整。

关键词 行政执法，政府立场，民间态度，法律生活

1 Introduction: Present the dilemma in law enforcement

In a world where people have established numerous legal rules in pursuit and for maintenance of the order of life, there is always a possibility for the existence of

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the status of life with "more law and less order" (Ellickson, 2003). Furthermore, the institutional legal arrangement may even trigger the "institutionalized evasion of institutions"[1] (Merton, 2001). This is an awkward issue for a theorist who firmly believes in official legal rules and systems, however, it is also a very interesting phenomenon. In view of "law in action" centering on life and action-based legal rules, this is a vital issue that cannot be avoided.

This issue is of more direct relevance with the construction of rule of law in China. On the one hand, in the tradition of constructing and maintaining the order of social life with focus on "government (state) standpoint," the regulation or guidance of social life via legal rules as the standpoint of the government is the basic idea for the legal construction of China;[2] and legal rules have witnessed rapidly wide and deep expansion for the regulation of social life, hence the situation of "inflation" of the quantity of legislation[3] (Yang, 1996). On the other hand, while "declaring" the standpoint of the government (state), legal rules have encountered the situation of the deficiency of enforcement, ignorance, evasion, or even nihilation of different extents in the world of real life. The "dilemma of administrative enforcement" herein is a subject put forth in such context, as proposed to discuss herein. The "dilemma of administrative enforcement" is expressed as the following dilemma: the government (state) has declared some standpoint by legal rules, while such legal rules have met the ignorance, evasion, or even rejection in practice due to the corresponding behavioral strategies of the

[1] The "institutionalized evasion of institutions" is a concept put forth by Robert Merton, a famous US sociologist. He pointed out that the resistance against institutional rules, when falling in the following circumstance, will be institutionalized: being pretty clear category of behaviors; adopted by the majority of people but not merely accepted privately by members distributed in various places; in organizational structure, having pretty perfect social mechanism, composed of participants of secret cooperation, including enforcers in the society; rarely sanctioned, and mostly symbolic if sanctioned, mainly for the purposes of reiterating the dignity of rules. He further believes that the occurrence of institutionalized evasion is due to the actual crisis before a community that requires for the adoption of the target orientation or adaptive behaviors that are different from the norms of long existence; or due to the contradictions between the newly proposed norms (the most obvious new legislations) and the social customs and sentiments of long existence. The institutionalized evasion of institutions reflects the disaccord between the norms and the wide social demands.

[2] The author does not simply oppose the adjustment of social life by legislation, and in fact, at the initial stage of Chinese legal construction from the vacancy of law to the government by law, the legislation may be a basic work. However, two points are worthy of our retrospection: first, it is not true that all the issues will be "solved" simply by legislation; second, legislation is not necessarily equal to law. The legislation is only the expression of the standpoints of some interest groups by use of the public power, which does not necessarily represent the real demands in the world of life.

[3] For example, some researchers have pointed out the issue of "legislative inflation" and analyzed its negative effects from the retrospection of the concept of the legislative orientation of China.

enforcers or the individual stakeholders (or a combination of both), hence resulting in a "dilemma": loss (retreat) of the authoritative resources of the government and law due to blatant challenges against the standpoint of the government and legal rules, or unbearable economic and social cost of law enforcement (progress) due to the use by the government of various enforcement methods and resources for law enforcement. In short, with respect to a legal expression (rule) that declares the standpoint of the government, the government encounters the dilemma of "weak power for progress and incapable for retreat" relating to its behavioral strategies in the practices (enforcement) of such legal expression.

This paper tries to differentiate the "dilemma of enforcement" from the "deficiency of enforcement" discussed through a general meaning. The latter usually refers to the lower performance of the enforcement of legal rules due to the subjective or objective reasons of the enforcers, where neither the government nor the civil society has any doubt about the standpoint represented by the legal rules. For example, at the level of legal expression, there may be no substantial controversy between the standpoints of the government and the society as represented by the legal rules of environmental protection concerning the protection of water resources and air protection. Owing to the enforcement system and the subjective interest drive of the enforcers and the serious shortage of the objective allotment of the enforcement resources, those legal rules are hard to implement at the level of practice, which is called the ineffectiveness of enforcement. In case of ineffective enforcement, since the government and the society hold a basically common sense in terms of the legal rules themselves that declare the standpoint of the government, the choice is clear in the behavioral strategies, that is, all the effective resources should be used for strengthening the enforcement, and there is no dilemma in the choice of strategies. Such ineffective enforcement is similar to the "law enforcement discount"[4] (Davis, 1971; Landes and Posner, 1975) as discussed by some scholars. The "dilemma of enforcement" to be discussed also refers to the following circumstance: whereby the situations of ignorance, evasion, or rejection of legal rules at the level of

[4] Based on empirical observation and general analysis, it is not hard for us to find the inconsistence between legal expression and legal practices to different extents, which is the so-called enforcement discount. The occurrence of the enforcement discount is mainly due to the reasons at the two links of legislation and enforcement. At the link of legislation, the economic theories and general observation have indicated that legal rules may be overinclusive, that is, the legal rules may include the contents not originally conceived by the legislators due to the limits of diction, such as some prohibitive rules that may contain the content that the legislators did not intend to include. The more specific the pursuit of legislative language, the more likely the loopholes in the legislative language. At the link of enforcement, the wide discretionary power owned by the enforcers, especially the discretion for omission and selective enforcement, is of decisive influence on the practices of legal rules.

practice cannot be solved simply by strengthening the enforcement since a number of social members (and even some enforcers) have insufficient recognition of the standpoint of the government represented by those legal rules. "Ironhanded" enforcement is constrained by the limited resources, and on one hand this may lead to the serious opposition and even conflicts between the government and the society. This paper has discovered that in such situations, the government is in an awkward dilemma: if the enforcement is strengthened, then gigantic and even unbearable direct and indirect cost will occur; and if the violation of rules is not restricted at the practice level, the authoritativeness of the government will be lost (feeling ashamed). In the enforcement practice of China, we can see that in front of the dilemma of enforcement, the government usually adopts the strategy of "turning a blind eye," called "the conspiracy between the government and the civil society"[5] by some writers, supplemented with a "task-force," "movement-style," and "typical" enforcement strategy, hence reiterating the dignity of rules, and the author tentatively calls it "intermittent and selective enforcement"[6] (Davis, 1971).

This paper does not intend to discuss the issue of ineffective enforcement in the general meaning, but analyzes the issue of the dilemma of enforcement. In view of the administrative enforcement of China, the current striking situations of

[5] The typical cases of this situation are expressed in the context of prohibitions from gambling, civil fund raising and lending, and private collection of debts. For example, the prohibition of being prostitutes or visiting prostitutes is the unswerving standpoint of the government, the legal rules of which cover the fields of criminal law and administrative law; however, the prostitute-related phenomenon still exists popularly. On the one hand, the government strongly prohibits such practices, and on the other hand, the reality is a "popular practice in secret," which is clear to the government, the enforcers, and ordinary social members in reality. At this point, the government and the civil society have actually reached some tacit agreement, that is, provided that a bottom line is not exceeded (such as open business of prostitute-related practices), the government may "turn a blind eye" to the aberrant behaviors. A pertinent example is that for the purpose of preventing the proliferation of sexual diseases and AIDs, the government of some places has started to require clearly that the workers of the entertainment sites shall "completely use the condoms," which is in reality an expression of the opening of the tacit agreement between the government and the civil society.

[6] The forms of the discretionary powers in the two dimensions of time and space during the intermittent and selective enforcement, the former of which includes various forms of "concentrated rectification," whereby during the rectification period, various resources are used for the purpose of enforcement and the enforcement will end after such periods as "porn sweeping month," and "storm of prohibition of gambling." The latter is the selective enforcement conducted by the enforcers against the aberrant behaviors and the target actors, such as the sanctions by the policemen against the aberrant behaviors within some entertainment site while turning a blind eye to other entertainment sites. The author is of the opinion that the intermittent enforcement is an expression of the political orientation of law while the selective enforcement results from the limits of the enforcement resources or the abuse of the discretionary powers to a big extent.

the dilemma of enforcement include, the enforcement in the fields of prohibition of gambling, prohibition of debt collection by "private remedies" in the civil society, prohibition of civil fund raising, prohibition of viewing porn sites, and prohibition of setting off fireworks. For the purposes of discussion on the issue of the dilemma of enforcement, this paper tries and attempts to propose a framework for interpreting, analyzing, and solving the dilemma of administrative enforcement by use of the analytic tools relating to sociology of law and game theory and in the perspective of case understanding. The main analytic path of this paper is as follows: start from the "case" of a specific dilemma of enforcement, analyze the specific factors for the formation of the dilemma, observe the strategic choice and behavioral logic of the actors in the dilemma in a micro-view, and proceed to propose an interpretation and analytic framework applicable to a general dilemma of enforcement.

2 A description of dilemma of enforcement: Take the enforcement of the "prohibition of setting off fireworks" as example

Based on the description above, there are many situations in the enforcement in China that conform to the "dilemma of enforcement" referred to in this paper. In such situations, the author selects the enforcement of the case of "prohibition of setting off fireworks" (also referred to as "prohibition of fireworks") as an example for conduct of the analysis in this paper. Such a case is selected for the following considerations: First, the legal expression of the "prohibition of fireworks" is pretty general in China, and there are sources showing that from 1993, 282 cities throughout the country have formulated and implemented the provisions on the "prohibition of fireworks".[7] Secondly, during the enforcement of the "prohibition of fireworks," (though the government highlighted its standpoint) put in gigantic enforcement resources. The enforcement practice of the government has encountered a great challenge, which has gradually evolved to a typical status of "dilemma" of the government during law enforcement. Furthermore, since the provision of the "prohibition of fireworks" involves the tense relationship of the recognition of law, traditional cultures, civil customs,

[7] As reported by the People's Daily, according to the statistics from the relevant department, more than 10 years, 282 cities, including Beijing, Shanghai, Nanjing, Guangzhou, and Wuhan, have prohibited setting off of fireworks, but in the recent years, with more and more calls from the public for setting off of fireworks, the policies on prohibition of fireworks of various places have been relaxed. In the Spring Festival this year, 106 cities have adjusted their full prohibition of fireworks to restricted setting off of fireworks at designated sites and designated times. Sources from http://www.morningpost.com.cn/Article View/2005-2-9/Article-View-14980. Htm, latest access on 14 March 2005.

folklores and civil values. Also the "prohibition of fireworks" has become an issue of concern in such disciplines of sociology, folklore, cultural anthropology, and legal science, and has roused wide controversies among social members. Finally, this paper, while selecting the "prohibition of fireworks" as the research case, has considered another special factor. Since the physical attributes of the fireworks, and the setting off of the fireworks, which is easily perceptive to the public and the government, is making the dilemma and awkwardness of the government more obvious and more dramatic during the enforcement.

For thousands of years, "A year passes by in the sound of fireworks" has always been an important custom for the Chinese people to celebrate the traditional Spring Festival; however, a large-sized and concentrated setting off of fireworks may also bring forth some problems, such as air pollution, noise, personal injury, and fire incidents. In 1993, Beijing Municipal People's Congress formulated the first piece of local regulation on prohibiting the setting off of fireworks throughout the country,[8] which thoroughly prohibits the setting off of fireworks. That regulation has prescribed strict regulatory provision on such links as the production, transportation, storage, and sales of fireworks, and imposed administrative sanctions with the actor who sets off fireworks in violation of law, including administrative detention, fine no more than RMB 2,000 with a unit and no more than 500 with an individual, and warnings.[9] Under the influence of "exemplary effects" of Capital Beijing, many cities have consecutively passed regulations on prohibiting the setting off of fireworks throughout the country. All of a sudden, the "prohibition of fireworks" has been fully expressed in legislation as a standpoint of the government. At the same time, considering that the setting off of fireworks is an important component of the social ritual activities in China, it is very hard to prohibit it, and the government has also put in great amount of resources in enforcement. Materials have indicated that only on the first eve and the Spring Festival upon the implementation of the regulation of Beijing Municipality on the "prohibition of fireworks," the government mobilized approximately 800,000 people to participate in its enforcement with direct and indirect input in the enforcement up to RMB 10 million.[10] The rigidity of the

[8] On 12 October 1993, the *Provisions of Beijing Municipality on Prohibiting the Setting off of Fireworks* was enacted at the 6th session of the 10th Standing Committee of the People's Congress of Beijing Municipality, which was implemented as of 1 December 1993.

[9] Though this paper does not intend to discuss the legitimacy of the rules themselves, it is necessary to point out that those sanctions prescribed in the regulation on the "prohibition of fireworks" of Beijing Municipality involve the issue of the legitimacy in legislation and application, since the administrative punishment law has provided that the restriction of the freedom of a person may only be prescribed by law, and local regulations are not authorized to create the sanction of administrative detention.

[10] Cases in the *Prohibition of Fireworks in Beijing Municipality*, http://jpkc.ecnu.edu.cn/ggzcgl/shoukejiaoan/jueceanli/d5.doc, latest access on 14 March 2005.

standpoint of the government and the strength of the social mobilization were rare in history. With the "enforcement campaign" of wide mobilization and no effort reserved had achieved incredible results. It was reported that on the eve of 1993 and the Spring Festival of 1994, "all is silent in the air of Beijing municipality".[11] However, such a miracle has disappeared very quickly. In the following three years, the setting off of fireworks had gradually "bounced" back, which has consequentially become rampant. By the eve of the last year (2004) and the Spring Festival this year, though it was reported that Beijing Municipal Government had put in 130,000 people for enforcement, the setting off of fireworks had gone beyond control in fact.[12] In other cities that implement the "prohibition of fireworks," the order has encountered the same and even more severe evasion from the civil society. The enforcement of the "prohibition of fireworks" has not only rendered to the government to undertake direct cost but also resulted in some social cost, such as the tension between the standpoint of the government and the attitudes of the civil society. As a result, some cities that have previously participated in the "prohibiting alliance" have to withdraw from such "alliance." By the end of 2004, 106 cities had declared to waive the full "prohibition of fireworks" and turned to a standpoint of "conditionally restricted setting off."[13]

In the scenario of the enforcement of the "prohibition of fireworks" described above, we have clearly observed a pretty typical "dilemma of enforcement": first, legal rules have clearly declared some standpoint of the government (prohibition). Secondly, the government has (with great amount of resources even with no effort reserved), tried to reiterate and reinforce such standpoint through the enforcement. Thirdly, though the civil society has not expressed nonconforming attitudes toward the standpoint of the government,[14] there are doubts beyond the expression

[11] "Great success for prohibition of fireworks in Beijing in the Spring Festival of 1994," source from http://jpkc.ecnu.edu.cn/ggzcgl/shoukejiaoan/jueceanli/d5.doc, latest access on 14 March 2005.

[12] It was reported that on the eve of 2004, Beijing Municipal Government had organized 130,000 enforcers from the authorities of public security, industry, and commerce, administrative supervision and taxation in examining by night the "prohibition of fireworks" and imposed sanctions with the violators. However, more citizens had conducted "violations against the task force enforcement" than previous years. Source from http://www.morningpost.com.cn/Article View/2005-2-9/Article-View-14980.Htm, Access on 4 March 2005.

[13] See the *Prohibition of Fireworks in Beijing Municipality: Game of Ten Years Between the Legal System and the Traditional Customs*, source from http://news.sina.com.cn/c/2004-06-23/16533501869.shtml, latest access on 15 March 2005.

[14] In the sociological theories, the "nonconforming behaviors" are different from the "aberrant behaviors." Merton has pointed out that the former openly declared their different opinions in general, while the latter tried to evade the public attention; the former clearly challenged against the norms they did not agree on, while the latter made efforts to find some excuse or reasons for their violations; the former aimed at benefits for others, while the latter usually adopted

of popular will, more or less, about the appropriateness of the standpoint of the government, and in fact, wide non-cooperation actions (expressed as large-size setting off in violation of regulations) have been adopted. Fourthly, such noncooperation actions (or rather violations) are wide and continuous, rendering it hard to realize the standpoint of the government at the level of legal practices. The combination of those factors have led to the unavoidable dilemma before the government in law enforcement: since the violations may have the characteristics of popularity and continuity with some supports of traditions, culture, customs, and the cost of enforcement of the government (including the direct cost and the social cost of the enforcement) is extremely high and even unbearable, and then the government has to choose the "laissez-affaire" strategies. However, if the government ignored such violations, the authoritativeness of the government and the dignity of the legal rules will be damaged, which will in fact encourage more people to select the strategies of violation, hence resulting in an even harder situation for the enforcement of the rules.

3 The standpoint of the government and its legal expression: Political and life orientation of law

At the intuitive level, the dilemma of enforcement is expressed as the evasion and rejection of the rules by the actors. The causes of the issue are usually traced back to the standpoint represented by such rules, the extent of the coordination, the desire in the world of real life, and the attitudes of the civil society toward the standpoint of the government.

Why does the government prohibit the setting off of fireworks? It seems pretty simple. In appearance, the reasons for the "prohibition of fireworks" include, among other things: the setting off of fireworks may pollute the air environment, generate noise, cause personal injuries or damages to properties, and waste resources.[15] However, after further exploration, it may be found that it is not so

[14] *Continued*
actions for some specific private interests; the former aimed at changing the norms they refused in practices, while the latter mainly aimed at evading some specific norms as possible. Merton, Supra Note [2], p. 82. in this sense, the "nonconforming behaviors" are similar to the "civil disobedience" or "non-violence non-cooperation" in politics, while the civil attitudes in the "dilemma of enforcement" discussed herein mainly belong to the "aberrant behaviors," not approaching the extent of the "nonconforming behaviors."

[15] The reasons put forth by the People's Congress of Beijing Municipality when discussing the necessity and aims for formulating the regulation on the "prohibition of fireworks." Source from http://jpkc.ecnu.edu.cn/ggzcgl/shouke-jiaoan/jueceanli/d5.doc, latest access on 14 March 2005.

simple. For instance, people may well bring forth doubts about such reasons from the logical angle of simple analogy: motor vehicle causes pollution to the air more severely than the setting off of fireworks, and why not prohibit it or restrict it? Motor vehicles generate more severe and more lasting noises than the setting off of fireworks, which is of no significance in the sense of beauty, and why not prohibit it? The accidents of motor vehicles have also caused even more severe personal and property losses than those caused by the setting off of fireworks, and why not prohibit it? As for taking the waste of resources as the reasons for the "prohibition of fireworks," it seems ridiculous. It is a private choice for a person to decide the usages of the resources they possess, such as purchase of clothes or fireworks with RMB 100, and there is no way to judge it as "waste of resources" or not based on the standards of the government (or public standards). It is justified to prohibit the setting off of fireworks by use of public funds based on the reason of waste of resources. Those simple interrogations have demonstrated the weakness of the theoretic basis for the standpoint on the issue of prohibition of fireworks.

Then, can it be thought that the government has any problems on its intellectual or recognition capability for the "deficiency" of its standpoint? It is not so simple because in view of the analysis in this paper, the problems above concerning the standpoint of the government may be easily found by simple analogy, and furthermore, it is even easier to find such problems by the legislative procedures. We may further inquire: if the government has realized the "deficiency" of its standpoint at rule making, why should it have strongly supported its standpoint and declared it by a legal way? Based on the institutional factors and experiences of the administrative process of China, we may interpret in two aspects the impulse of the government in many of its expressions of "doing what that could not have been done obviously." First, in view of the institutional factors of public administration, we may find that the basic objectives of many public administrations do not aim at the "realization" of some specific targets, but at the "declaration" of specific regulatory standpoint because in the administration system of China, the "declaration of the standpoint" may by itself become a part of the "administrative performance" of the government and the officials, which is a "showcase." Furthermore, the declaration of a standpoint may at least facilitate the "varnishing" of some social problems in appearance. For instance, in the case of the legislation of the "prohibition of fireworks," if the setting off of fireworks had caused fire or personal injuries or death, the government may at least say that "we have adopted administrative measures but the actors have ignored the provisions of the government and the law," and hence, the accountability of the government (especially the responsibilities of the principal leader) may naturally be weakened, and many problems in practice may be "smoothed" by rule-based standpoints. Such analysis is highly capable for interpreting the expression of the

standpoint of the government in many dilemmas of enforcement, which may be used to interpret the impulse in the expression of the government. Secondly, in view of the factors of experiences in public administration of China, the government has, as the regulator, appeared as an "omnipotent," wise and strong person for a long period, which, to a big extent rendered the government to have a mindset of excessive self-confidence in its regulatory capacity, hence losing the patience in coordination and compromise with the attitudes of civil society that it should have. Such factors may lead to the situation that legal rules tend to be full of arrogance and pride of self-complacency. The empirical observance demonstrates that one of the most important sources of the mindset of "excessive self-confidence" is the resource of wide and severe compulsory power owned by the government.[16] For instance, in the case of the "prohibition of fireworks," though the government may realize the deficiency of its standpoint, including the conflicts between the prohibition of fireworks and the civil attitudes in tradition, culture, customs, and folklores, it still believes or wishes to strengthen and maintain the rule-based standpoints through severe sanction-based rules (detention and high amount of fines) and wide social mobilization.[17]

In short, in light of the regulatory target of "nonissue smoothing" and the occupation of the wide power of resources, the government may achieve certain targets and values by "political" means based on legal rules, and in such occasions, legal rules are endowed not only with regulatory functions but also with strong "educational" functions. In this view, the dilemma of enforcement is not unique during law enforcement of China. The prohibition movement from the 19th

[16] However, ironically, excessive reliance on compulsory powers in public administration may well demonstrate the psychological status of no confidence of the regulator, as well as the shortage of resources owned by the regulator, just like what is said in a kidding: "I am too poor only with money."

[17] There is a material that conducts researches by taking the "prohibition of fireworks" in Beijing Municipality as the case relating to public administrative science, which may indicate that the government has in fact adequately estimated the difficulty in the enforcement of the "prohibition of fireworks." It was introduced by such a case material that: at that time, the Municipal CPC Commission, the Municipal Government, and the public security organ in charge of the enforcement had sufficiently estimated the difficulty in the enforcement, and they believed that only with the full understanding and support of the massive citizens could this regulation achieve a success. Therefore, the Municipal CPC Commission and the Municipal Government had adopted a number of measures, including strengthening the publicity and education, setting up the setting off and publicity sites, the participation of the municipal leaders in the activities of the publicity day of prohibition of fireworks. In Beijing, there has so far not been any piece of law of regulations for which such gigantic mobilization works had been done prior to its implementation, which has just demonstrated that the government has pretty recognition of its weakness in its standpoint of the "prohibition of fireworks." The source is from http://jpkc.ecnu.edu. Cn/ggzcgl/shoukejiaoan/jueceanli/d5.doc, latest access on 14 March 2005.

century to the beginning of the 20th century in the US is a typical foreign case of the dilemma of enforcement. With respect to the force for the promotion of prohibition, moral education and religious ideals, are the main objectives from the very beginning to the end: "Prohibition is not only a personal moral issue but also the sole method available for maintaining the Puritanism ideals in the US" (Mauroy, 1977). The calls of moral and religious ideals have rendered the prohibition of alcohol as part of the amendment to Article 18 of the US Constitution of 1919. But the implementation of such an amendment upon its enactment has shown that it is an amendment beyond enforcement, and there have occurred large-scale massive violation of the prohibition order for which the enforcement of the government is essentially powerless. Faced with such large number of violations, though the amendment to Article 18 of the US Constitution has not been revealed expressly, it has been automatically terminated in practice, so that the US persons have almost forgotten it when writing the history of the US Constitution (Mauroy, 1977). In the case of the "prohibition of fireworks" in China, 106 cities that previously declared the "prohibition of fireworks" have declared to waive or amend their former standpoints, which may also be understood as a reflection of the standpoint of the government faced with the attitudes and behaviors of the civil society. Assume that we agree, to a big extent, the formation of the dilemma of enforcement of the government results from the inconsistence between the standpoint of the government and the attitudes of the civil society as expressed by legal rules and the conflicts with the real demands in the world of real life. We may naturally further inquire: during the formation of the standpoint of the government and the making of legal rules, why can't it be that an effective coordination be achieved between the targets of the legal rules, the real demands, and between the standpoint of the government and the attitudes of the civil society through a frank and effective dialog and communication mechanism? In my opinion, this inquiry has approached close to the core crux of all the issues on law enforcement, including the dilemma of enforcement.

The basic theories of democratic politics and the principles of the justice and democracy of legislation have revealed the significance of public participation in legislation and administration, which will not be deliberated specifically in this paper. As far as the aims of this paper are concerned, the author holds that the most important and the most interesting are that: if the public has demonstrated the clear and popular nonrecognition of the specific standpoints of the government at the level of public actions (a fact that has been evidenced by the popular aberrant behaviors), why have they not effectively expressed their own attitudes and requirements in the formation of the legal rules that represent the standpoint of the government? Are they not willing or capable? Or has the government ignored or not responded to their attitudes?

In theory, China has always stuck to the mass path in legislation, and at the level of rules, there are also some provisions on encouraging the government and the legislative organs to exchange and communicate with the public. In recent years, the provision that the legislation must assimilate popular will and that the public is encouraged to participate in the legislation of rules, have become the "spotlight" of the procedural reforms of the legislation.[18] For example, the "legislative hearing" has become a key word in the construction by rule of law in China. In such a view, it seems that we have no reason to doubt about the possibility for the government to deal and communicate with the civil society in rule making. Take the formulation of the provision on the "prohibition of fireworks" in Beijing Municipality as example, a dramatic fact is that the enactment of such provision is just the result of wide solicitation by the government of popular will, and at least in form, the process of its legislation is more "democratic" than that of other legislations. Materials reported that "in 1993 there were 45 bills from the Municipal People's Congress and the Municipal Political Consultative Conference had proposed to prohibit the setting off of fireworks, and at the same time, the Municipal CPC Commission, the Municipal People's Congress and the Municipal Government had received more than 200 letters from the mass that requested to prohibit the setting off of fireworks as soon as possible. The Municipal People's Congress had held 36 interview talks and discussions with people from all walks of life in the eight districts that prohibited the setting off of fireworks. They also issued 83,985 questionnaires for soliciting popular will to 52 streets, 21 towns, and 29 enterprises and institutional units and mass communities at the response rate of 95.9%, among which 84.6% had agreed to prohibit the setting off of fireworks. On the first day when the solicitation for opinions of the civilians is published, 166 civilians called, most of which agreed with the prohibition of fireworks. In October 1993, on the basis of sufficient solicitation of the mass opinions, the *Provisions of Beijing Municipality on Prohibiting the Setting off of Fireworks* was enacted unanimously at the 6th session of the 10th Standing Committee of the People's Congress of Beijing Municipality.[19] Hence, it seemed that we found a

[18] For example, many official documents and central and local laws and regulations have taken to recognize the significance of civil participation in the legislation and decision-making processes, and have prescribed many provisions on encouraging the public participation. For example, the legislation law has prescribed that during the legislation, hearings, discussions, interview talks, and other similar forms may be adopted to solicit public opinion. The price law has prescribed that the pricing of the industries and productions under state monopoly shall adopt official hearings and the procedures for the formulation of the administrative regulations of the state council have provided that during the formulation of administrative regulations, public opinions shall be solicited. Though the effects of the enforcement of those regulations remain to be observed, the standpoints and attitudes at the level of rules are demonstrated at least.

[19] Source: http://jpkc.ecnu.edu.cn/shoukejiaoan/jueceanli/dt.doc, latest access on 14 March 2005.

classic picture of the democracy for the legislation of China: the representatives of popular will proposes legislative motion, the government conducts further poll and publishes the draft for review by the public, and the bill is enacted unanimously. However, the legislative process in front of us that has sufficiently assimilated popular will has more strongly set off our unavoidable puzzle: if the popular will has been sufficiently expressed and combined with the standpoint of the government to form the legal rules, how can we interpret the large amount of continuous aberrant behaviors that occurred consequently during the enforcement of such rules?

Unless we assume that the popular will is not reliable or there has occurred the "collective personality fission" with the public, we can only interpret such puzzles through the analysis on the gap between the form and the effectiveness of the essence of the expression of popular will. An obvious judgment in experiences is that the form of the public participation is a different concept from the effectiveness of the participation. Sometimes, the legislative process may completely display a large size public participation in appearance. The decision on rules may be totally free from the influence of the public opinions because the effectiveness of public participation depends on the frank and adequate information disclosure of the government and the parties concerned, organization-based interest, institutionalized procedure rules, rationality and accountable discussion, and response mechanism. Without those necessary conditions, the participation in form cannot provide justified and rational supports for the results. From the analysis in this way of thinking, we have pretty good reasons to have doubts about the effectiveness of the essence of the public participation in the legislation of the "prohibition of fireworks" in the Beijing Municipality. For instance, which reasons have been elucidated by the 200 people who have written to request the government to ban fireworks for the "prohibition of fireworks"? What considerations have been taken by the government in deciding to submit the "prohibition of fireworks" to the agenda of legislation? What people have participated in the interview talks and discussions held by the government during the legislation process? What attitudes have been expressed? On what standpoints is there any controversy? Has the government disclosed to the public the important information including the controversy on the standpoints in the legislation? I have put forth those problems not for airing any trivial criticism against the legislation of the "prohibition of fireworks" but for the intention of pointing out the simple and easy-to-forget fact: popular will and public participation cannot be used for decorating the façades of shops merely with some "selective facts." The public participation without substantive effectiveness may endanger the trust of the public with the government, hence leading to the sense of failure of the public in psychology and increasing the cost for the future cooperation between the government and the public.

Unfortunately, though the public participation in the process of rule making and ideas, has won more and more recognition. It has also not acquired earnest

treatment at the level of practice. By comparison with the explorations of this paper on the basic elements of the effectiveness of public participation, we may find that though there exists various possible ways of the expression of popular will and public participation in the process of the expression of the legislative rules and the standpoint of the government in China, the truthfulness of the expression of popular will and the effectiveness of public participation always triggers doubts. Also the practices of assimilating popular will and enhancing the justice of legislative and decision-making democracy by such means as "hearing," "interview talks," "discussions," and even legislative "announcement-reviews" adopted by some places on trial basis are accompanied by "false prosperity". Beyond which we may face and undertake the results of institutional deformation: popular will has been packed, the honesty of the government has been doubted, the enthusiasm of the public has been frustrated, and the base of popular will for rules and decision-making has been eroded—all those may trigger a general psychological resentment from the public against the standpoint of the government, which may transform into the behavioral logic through specific conditions.

The false prosperity of the expression of popular will during the expression of the standpoint of the government depends first on psychological attitudes toward the institutional strong position and the subjectively excessive self-confidence of the government as analyzed above. The institutional strong position and the subjectively excessive self-confidence may easily render the government to acquire a kind of thinking inertia, that is, the preset standpoint and targets of the government cannot be easily discarded, and then, the process of the expression of popular will may become merely a form and symbol. For example, in recent years, the hearings in the context of pricing adjustment have fallen into a kind of "hearing on the rise of price." In many cases, people may find that hearing is only a symbol, a package similar to the "new clothes of the emperor": though data has indicated that the majority of popular will opposes the rise of price, and though the public has expressed their objection to the standpoint of the rise of price by various means, and all the hearings in the fields of pricing adjustment has by far ended up with the full expression of the standpoint of the government (and the interest beyond). In fact, the issue does not completely rest with the results of "to rise or not to rise" but with whether the popular will has been earnestly listened and responded to, whether the public has been properly respected and whether it is possible for the rationality and the sincere communication.[20] Secondly, the false prosperity of the expression of popular will also traces back to the shortage of the effective mechanism of institutionalized public participation. Though there are

[20] In some cases of hearings, there exist some circumstances of clear domination and even "manipulation" of the standpoint of the government. See the relevant materials reported: *Doubts on the Hearings of Pricing of World-wide Heritage Sites and the Development and Reform Commission Refused Re-interpretation*, http://www.ctn.com.cn/2290/2297/2005128-37783.html, latest access on 14 March 2005.

various opportunities for the expression of popular will at the level of rules, the asymmetrical possession of information in reality,[21] the imbalance of the interest organization[22] (Landies, 1938; Stewart, 1975), the shortage of procedure justice[23] (Mashaw, 1981) and the vacancy of the response and rule mechanism[24] have all constituted obstacles for true and effective expression of popular will.

In short, the obstacles of the dealing and communication between the standpoint of the government and the attitudes of civil society during the making of rules have rendered it hard for the standpoint of the government to acquire the real feeling and actual demands from the civil society at the time of its expression. In some cases, the public may be deprived of the opportunities for substantive participation and expression. The government may lose the chance for understanding and balancing different preferences of values and removing the barriers between the standpoint of rules and the demands of real life, hence losing an important

[21] The relationship between the effectiveness of participation and the information is self-evident. Information is power by itself, and the power of participants' saying depends on the quantity and quality of the information possessed.

[22] Participation is a game of multiparty interests, whereby if some interests boast very high degree of organization and resources and other interests are scattered like a pile of sand, the interest groups of higher degree of organization with more information possessed would dominate the process and results of the participation, and even "capture" the governmental authorities as the regulators. The dominating position of the organized interests and the reasons of the "capture theory" and its formation mechanism during the process of regulation may involve many factors, and generally, an important reason is: large-sized enterprises as the object of regulation have pretty strong powers in resources, technologies, and information through the organization of interests, and hence in psychology and organization, it is very hard for the administrative regulatory authorities to conduct the regulatory activities in a posture opposite to the enterprises. Furthermore, the bureaucratic system usually tends to realize the routine procedures for administrative management, which is possible only in case tense conflicts may be avoided, and hence a compromise may be reached between the regulatory authority and powerful interest groups.

[23] In the procedural justice of participation, the most important aspects include the equal treatment and respect of the participants, the fair choice mechanism of the participant representatives, the relative neutrality of the controllers of the procedures, and the opening of the participation procedures. In practice, the dilemmas in the process of expression of popular will (especially various formal hearings) has demonstrated the significance of the due procedures focused on the respect of the individual participation for the "subjective justice" and results in the social psychological meanings. For example, in the relevant research by Jerry Mashaw, a US scholar of administrative law on the public participation in administrative process, it was pointed out that too much public participation may perhaps not result in rational administration; however, we could not take it to negate the significance of public participation. In terms of safeguarding and realizing individual "dignity" and the basic sense of justice, the participation is vital to the administrative process.

[24] The vacancy of the response mechanism of the government during the process of expression of popular reflects the "conceit" and arrogant mindset of the government to some extent, the results of which may directly damage the enthusiasm of the participant and the public, hence damaging the trust of the public toward the sincerity of the government.

"dovetailing point"[25] (Sheldon, 1971) for the opening and the innovation of the administrative process. This results in the endowment of the standpoint of rules with "political" and ideal colors, and internal disaccord with the actual demands of the public. All this indicates that the sources of many enforcement issues may need to trace back the legislative link for the government involved in the dilemma of enforcement. A retrospective standpoint may be in more need rather than an arrogant and proud mindset that firmly reinforces the standpoint of rules.

Therefore, it must be reiterated that the making of rules shall embody the efforts to pursue the coordination between the standpoint of the government and the attitudes of civil society. The appearance and existence of the dilemma of enforcement has indicated that in China, since the legal rules that represent the standpoint of the government has been endowed with the expectations of the functions for political "education," reforming the value preference of the public, and even the transformation of the traditions. They are also involved in a dilemma during the legal practices. As for the case of the "prohibition of fireworks" discussed in this paper, if the government can determine the standpoint of the "prohibition of fireworks" consider the coordination relationship between the rules and the demands of life in view of the coordination between the standpoints of rules, the traditional customs and the cultural and psychological demands of Chinese people inherited in the traditional customs of thousands of years, it may become more prudential: whether the public need such rule? If not, whether the government may impose such rule on them? If imposing such rule, whether the government is capable of ensuring the enforcement of the rule? Whether the economic and social costs incurred are hard to bear? After all, the standpoint of rules does not represent the demands of life, whereby human behaviors are hard to change to some extent[26] (Wacquant, 1998). The pursuit of the coordination

[25] Some scholars especially emphasized that: the most important significance of public participation lies in making the administrative system of the government open, and hence providing the possibility for the continuous "evolution" of the basic system, so that all people may enter and exert influence on the government administration, hence enhancing the justice of the government administration.

[26] Can legal rules change the behaviors of people? If so, to what extent? Those issues are basic to law sciences and important issues discussed in institutional and behavioral economics. From the focuses of the analysis of this paper, the author intends only to point out that the legal rules that deviate from the demands of people in specific time and space can rarely convert into legal practices. That does not mean that rules cannot "affect" behaviors (for example, evasion is also a kind of impact of general rules on behaviors), but such impacts may be inconsistent with the targets of the rules to a big extent. Therefore, legal practices pay much attention to the expression of standpoints. Certainly, even if not implemented, some legal rules may be of significance. For instance, the rules such as "No spitting and otherwise fine will be imposed" are hard to enforce in practices, which, however, has expressed the orientation of the specific standpoints of the government, encouraging the specific behaviors of people. By contrast with the "symbolic

between the standpoint of the government and the attitudes of the civil society ultimately requires the legal rules to respond to the actual demands of life, which has become a part of the content and way of life.

4 Why prohibition, not work?—Actors and their strategies during law enforcement process

Once the standpoint of the government is expressed by legal rules, the fate of such rule-based standpoint in real life ultimately depends on the behavioral strategies that may be taken by various actors and their game.[27] In view of the game theory, the law enforcement process can be understood as a repetitive game process between the government, law enforcer, and numerous individuals under the influence of rules, the equilibrium of which determines its own result. Calling the government, law enforcer and the doer as the "actors," this paper tries to analyze the behavioral strategies they may take in face of rules. Based on that, it attempts to explain why the legal rules extremely inconsistent with the real needs of people in the actual world of life will end up in the dilemma of law enforcement.

4.1 Actors and strategies

4.1.1 Government

The government herein refers to the power system commissioned with law enforcement authority and functions in the public power structure. Once rules are formally expressed through public power, the standpoint of rules can be usually deemed as that of the government. The government also has the functions and is under the responsibilities of implementing such standpoints. Assume that the government is strongly driven by some interests (such as public and departmental interests, administrative accountability mechanism, and political responsibilities)

[26] *Continued*
violence" put forth by some scholars, we may propose the concept of "legal rules as symbols," and it may be said that the "law as symbols" is also of some significance. See *Wacquant, Practices and Reflexion—An Invitation to Reflexive Sociology*, translated by Li Meng and Li Kang, Central Compilation & Translation Press, 1998, p. 186 and below, and p. 319 and below.

[27] It shall be noted that herein we know to differentiate between authorizing, affirmative, and prohibitive rules. The authorizing and affirmative rules do not involve the direct prohibition by the government of individual behaviors and hence their implementation usually does not need the direct sanctions by the government against the aberrant behaviors. Unless otherwise specified, the discussions in this paper only refer to prohibitive rules.

to implement rules[28] (Mashaw, 2000), then, under those incentives or pressures, what kinds of behavioral strategies may the government take? First, through large-scale social mobilization and "education," guide the public to behave toward the standpoint of rules for the end of promoting the implementation of rules in practice. We can call this a "guiding strategy." Secondly, guide the behaviors of the public through institutional and routine sanctions of violations. We can call this a "sanction strategy." Thirdly, we call the combination of those above "mixed strategies".[29]

4.1.2 Law enforcers as actors

The practice of legal rules is to a big extent affected by individual law enforcers, which has not only been observed by law scholars, but also confirmed by the researches on economics (Schmid, 2002). We found that during the specific law enforcement process, law enforcers, as individuals, cannot be simply equated to their superior power system (government). In other words, law enforcers are not the machines controlled and manipulated by the law enforcement system. They are not only subject to the influence of rules, but also subject to the influence of individual interests, individual values and moral recognition, personal experiences, sentiments, sense of fulfillment, and even other psychological factors to a big extent[30] (Walter, 1961). Because of the wide existence of discretion of enforcement in rules and in reality, these "individual" factors may make their way into legal practices in the name of law enforcement[31] (Wang, 2002). It is uncertain that in face of specific legal rules, law enforcers can take individual actions inconsistent with the standpoint (interest) of the government based on computation of costs and revenues in different occasions, including cooperation or non-cooperation

[28] In fact, in view of public choice theory, the administrative system as a component of the enforcement institution has actually been taken as a party to the participation of the choice and to the game. The view from public choice has put forth a strong doubt on the abstract assumption that the "government is the representative of public interests," which is more powerful in interpreting the government actions during the administrative enforcement.

[29] The "mixed strategies" herein are different from the mixed strategic game discussed in the game theory, which only refer to the "mobilization plus sanction" mode that may be adopted by the government.

[30] The research on the process of enforcement from the angle of psychological and sentimental factors have indicated that all those activities with discretionary factors may be subject to the impacts of the view of individual values and intuition; and all the value judgments will ultimately be subject to the impact of individual sentiments, while in some circumstances, intuition may even exclude the full consideration on some values.

[31] The impact of the discretionary power owned and exercised by the enforcers as individuals on enforcement is a general fact during the administrative enforcement.

with the government.[32] In short, the standpoint of the government is not equal to the standpoint of the individual law enforcers. During law enforcement, there are not only games between law enforcers and individuals under the regulation of legal rules, but also games between law enforcers as individuals and the governments as a group.

4.1.3 Individuals subject to rules

When legal rules attempt to limit people's behaviors, whether or not individuals will take cooperative actions (compliance of law) depends on many factors. These factors cannot be covered by the abstract and empty "legal consciousness," mainly including but not limited to: quantifiable analysis of costs and revenues, recognition of morality and value of rules, and recognition of the justice of procedures made by rules[33] (Zhu, 2001). It also must be considered that individual behavioral strategies will be subject to strong influence of actions of the government, law enforcer, and even other individuals, forming a dynamic game process. For example, if a person decides to adopt actions in complying with rules only based on computation of costs and revenues at the rule level, they find that the punishments of violators by the government is almost incredible in practice. They also find the acts of violation are general (based on the "learning process") and they will possibly adjust their behavioral strategies[34] (Schmid, 2002)

4.2 Action and logic

During the enforcement of rules, every actor participating in the process has a set of behavioral strategies, and what actions will they take in practice. This will be affected not only by rules but also by the mutual actions between participants to a big extent. Because of the limitation of the space of this paper and the knowledge of the author, this paper does not attempt to adopt the strict game theory analysis tools to explain the game process of actors. It rather focuses on the subject of the dilemma of law enforcement under discussion by this paper and tries to explain

[32] For instance, omissions, turning a blind eye to the aberrant behaviors, and even the conspiracy with the violators are all the non-cooperative behaviors that may be taken by the enforcers against the power system of the government.

[33] For the analysis on the impacts of legal rules on the behaviors of people and the motives of compliance of law, there exist interest theory, deterrence theory, customs theory, moral theory, and legitimacy theory.

[34] "Learning" is an important link of the game process, whereby the actors may acquire new knowledge from experiences and adjust their behaviors on the basis of such knowledge. Using the evolution concept in biology and extending it, the learning process may induce selective perception (variation), competition and social evolution.

why legal rules are involved in the situation where repetitive prohibitions do not work.

If legal rules are inconsistent with the demands in the world of real life, and the perspective of individuals subject to rules, it can be predicated that they have the strong impulse (revenues) to violate rules based on the demands of interests and sentiments. When the calculable or perceptive revenue overweighs the cost to be paid, it is logical for them to take actions. Take the rule of "prohibit fireworks" as the example. Setting off fireworks during "Spring Festival"[35] is generally a lasting and irreplaceable cultural need for Chinese people immersed in the Chinese "New Year Culture" of several thousand years. An authoritative figure of Chinese folklore pointed out that "I repeatedly express my view that fireworks are irreplaceable".[36]. The behaviors prohibited by rules are of lasting and general needs in reality, and the satisfaction of the needs becomes the persistent source of impulses for violation of rules. However, impulse does not necessarily transform into acts because the acts of violation may be imposed with sanctions (payment of revenues) by the government or law enforcers. Whether the sanction is severe and real will be of big bearing on the behavioral strategies taken by individuals. If the sanction is severe and real, the actors may adopt the strategies that temporarily inhibit the impulse of needs. This can be used to explain why "law enforcement storm" in the form of "movements" through social mobilization can usually result in a short-term effect. Unfortunately, given the limitation of law enforcement resources, large-scale social mobilization and movement-style law enforcement is often political than institutional, which implies that under normal circumstances, the severe and universal sanctions declared by rules are indeed incredible. The realization of sanctions depends on information, but the game between violators and law enforcers during the law enforcement process is a typical imperfect information game. The information acquisition by law enforcers is always passive and lagged behind, and even the most basic information on the existence of acts of violation is hard to obtain. For example, assume an actor sets off fireworks and then enjoys it aside, even if law enforcers rush to the site, to implement sanctions still has to overcome the huge barrier of information and evidences, not to mention that in most cases law enforcers are always slow to come or do not appear at all.

[35] Certainly, the creation of a happy atmosphere by setting off fireworks in various festival and ceremonial activities is a demand based on the traditional Chinese culture, which, however, is mainly individualized. The setting off of fireworks at the cross of the New Year, a special traditional festival, has become a kind of general public psychological demand, and the main reasons for the making of the rules on the "prohibition of fireworks" are in fact mainly designated to the general setting off of fireworks at the cross of the New Year.

[36] At an interview with Oriental Outlook on the issue of the "prohibition of fireworks," Professor Wu Bing'an, Vice President of Chinese Folklore Society, emphasized that: "For more than ten years, journalists have chased and asked me the same questions year by year, and I reiterate my opinion that fireworks are not replaceable." See Orient Outlook, Issue 9, 2005.

For law enforcers, imperfect transfer or even absence of information means it is merely probable to discover and give sanctions to the violators during the law enforcement process and as the number of violators increases. The probability of the discovery and the sanction against the acts of violation will decrease, which will further reduce the cost of the acts of violation and encourage even more violations. This can also explain why a law enforcement process that mainly relies on the strategies of enforcement and sanction will finally end up in failure. Even if the sanctions established by rules are credible, it is found that the motives for people to abide by the law are not derived from the usually thought out sanction and punishment, but rather from moral recognition. For example, the empirical study named "why people abide by law" conducted by Taylor in the 1990s in the United States pointed out that in comparison with instrumental sanction and deterrence, normative factors were important and decisive factors in the compliance of law, and with regard to the observance of legal rules, the most important normative factor for compliance of law is the judgment people made according to their moral concepts (Tyler, 1990). Enforcement and deterrence are of influence on the implementation of rules indeed, but it cannot be denied that the influence is limited, and there is a certain "saturation point." Once the saturation point is exceeded, life will become unbearable and the role of deterrence will decrease considerably because life can be no worse[37] (Friedman, 1975). In this dimension, if rules are devoid of moral recognition in essence and the procedural legitimacy in public opinions, the violations of rules by people will not disappear due to the deterrence of sanction. It can be seen from the analysis on the "prohibit fireworks" case that the weakness and even absence of moralism of rules have certainly strengthened the strategies for the actor to adopt aberrant behaviors to a certain extent.[38]

Based on the above-mentioned observation, it seems that we have few reasons to expect a legal rule far away from real needs and without moral foundations to be abided by generally and spontaneously, even if such rule often employs severe sanctions as deterrence. Once the general violations become actions, the sanctions established by rules will be more difficult to implement, therefore, the further deprived of deterrence, which will encourage more acts of violation and thwart the

[37] The way and limits of the deterrent roles may usually be expressed by the deterrence curve.

[38] For example, on the eve of 2004, according to the materials from the Firework Prohibition Office of Beijing Municipality, nine persons had been imposed with administrative detention for setting off of fireworks by violation of the prohibitive rules, who have spent their Spring Festival in the detention center. From the eve to the third day of the New Year, total 522 persons had been imposed with sanctions of warnings. All those detained believed that they had not violated law, "we have just set off some fireworks, and though detained in the detention center, we have not committed stealing or robbery, we do not feel ashamed even when the information on our detention has been distributed." Source: Chinese Herald (Comprehensive reports): Prohibition of Fireworks: Awkward Game between Traditional and Modern Orders, 17 February 2005.

sense of achievement of law enforcers. The costs of violation and law enforcement will be locked in a 'seesaw' situation and enter into another cycle. With the dynamic and repetitive games between the government, law enforcers, and individuals subject to rules, a dilemma will be unavoidable unless the participants withdraw from the game[39] (Pan, 2004).

4.3 Alternative solution of actions: "Nonconforming behaviors"

In view of the behaviors and logic of the actors, and the fate of the rules, which are disconnected from the actual demands, has been described above in a framework as the following: i.e. though the government put much emphasis on the practice of rules, due to such reasons as resources, information, and demands, the incessant and effective enforcement of rules by the government is impossible in reality. Although the actors, as individuals, did not openly challenge the morality, equality, and reasonableness of the rules, they have expressed their attitudes through aberrant behaviors in widespread and incessant ways. Under this circumstance, behaviors have become another expression of discourse, thus a deadlock comes into shape. In line with it, from the eyes of individual actors, we may further put forth and observe the issue of possible alternative behavior solutions, or in short, apart from the adoption of aberrant behaviors, is there any other option?

If people do not recognize the substantive value or legitimate justice of an established legal rule, their transgression behaviors against the rules will not rouse much surprise. However, the theoretic research and observation of sociology have shown that transgression behavior may be (and needs to be) classified into nonconforming behavior and aberrant behavior, of which the former refers to the behavior that the actors openly challenge the value and legitimacy of the rules and put them into practice. Whereas the latter refers to the random and concealed behavior that the actors have adopted based on the individual interest and value recognition (Merton, 2001). Looking into the "dilemma of enforcement" in China, we can find that, while being faced with the rules which they do not want to observe, the behavior solution adopted by almost all the individuals is the individualized and concealed aberrant behavior, and why they have all given up the solution of nonconforming behavior.

In my opinion, the answer and explanation of the issue can be analyzed from the interrelated cost of behavior and cost of system. First, facing a legal rule, if the actors challenge the legitimacy and justice of the rules in an open and organized

[39] In fact, in the game model discussed in the game theory, there exists the so-called "who rides on a tiger is afraid to dismount" game, in which it is hard to the actor to advance or to retreat. Once involved in such a game model, early retreat is a wise choice, which is usually hard for the competent authority.

way, they will pay much direct cost, while others may take a free riding, and thus, although many people believe that the rule should be altered, generally they do not want to bear the cost thereof. Comparatively speaking, the cost of aberrant behavior is much lower. Secondly, if an individual person challenges the rules openly by adopting nonconforming behaviors, the government may easily define them as "an issue" and adopt some corresponding measures, which mean that the person may bear the real and tremendous risks of sanctions, which is especially obvious in a society where all the rules and issues are politics. Thirdly, even if the actors are willing to stand all the costs and risks thereof, the effectiveness of the nonconforming behaviors also depends on the actors' capabilities and the relevant system environment. If there are no efficient and smooth approaches for political dialog and expression of public will, all the open challenges against the rules (no matter in what name) will result in "the juice of self-injury" doomed to failure. Lastly, the effectiveness of the strategy of nonconforming behaviors ultimately depends on the rational actions of the government and the supports of social conscience, which, however, are generally uncertain. Based on the above-mentioned analysis, we can estimate that the individual aberrant behavior will still be the first and paramount behavioral strategy of the actors.

But we have to note that in the serious "dilemma of enforcement" troubled with individual aberrant behaviors of large scale, nonconforming behaviors may be a more efficient behavioral strategy as to the governmental enforcement, and even the saving of resources of the whole society. Because through nonconforming behavior the issues between the government standpoint and the attitudes of civil society can be expressed in a clear and direct way. In a perfect game of information, the government may determine the optimal behavioral strategy more efficiently, and thus, starting from the reforms of internal administrative procedures and external environment. It is necessary to reduce the cost and risk for the adoption of nonconforming behaviors by the actors so that the choice of this strategy may become a possible alternative behavioral solution.

5 Faced the dilemma: Possibility and solutions for the wayout

The distance from the governance ideal of "strict enforcement of orders and prohibitions" to the enforcement reality of "prohibitions that do not work" may be a gap between the legal expressions and legal practices. In a society involved in rapid social transformations with more and more diversification of values and interests, fission between traditions and modernity, and co-existence of native and international trends, the tense relations between legal expressions and legal practices may be more apparent. In this sense, the gap between legal expressions and legal practices does not deserve any panic or surprise, and the government, the

enforcer, and the public shall have certain mental preparation to face and even tolerate the existence of aberrant behaviors[40] (Merton, 2001).

But different from the "deficiency of enforcement" and "enforcement discount" in the general meaning, the description and analysis of the dilemma of enforcement may present another picture, in which the standpoint of the government is extremely out of line with the attitudes of the civil society, and legal expressions are a far cry from legal practices. If we believe that the rule of law is not only a label or a symbol, but also more importantly a possible life style, we shall have no reason to turn a blind eye to the dilemma of enforcement. Once the dilemma of enforcement arises, as for the government, its authority will lose constantly, the resources of enforcement will be wasted in the repeated games of "cat catching mouse," and the authoritativeness of the government standpoint and legal rules will be eroded in a continuous and widespread way. As for the individuals and the public regulated by the rules, their real demands will be constrained, their value recognition will be excluded, and their transaction costs for adoption of behaviors will be increased sharply, etc. From such an analysis and observation, it seems that no one can benefit from the dilemma of enforcement, and the resources are used up in the process. Thus the dilemma of enforcement is a "lose-lose" game for all the participants in reality and it may be believed that if the dilemma of enforcement forms and lasts, the whole society has to "pay the bill" ultimately.

By looking at the enforcement process in China, we may see that many dilemmas have lasted for years and some dilemmas have just appeared as a clue. For example, the prohibitions from view of porn books and websites, gambling, civil lending, private collection of debts and the prohibition from letting off fireworks as discussed in this paper, all have formed or are forming the dilemmas of enforcement to different extents. When faced with such dilemmas of enforcement, what are the possibilities and solutions for the way out?

In my view, the fundamental crux in the occurrence of the dilemmas of enforcement lies in the disaccord between the real demands of the civil society and the government standpoint and legal rules, and though such disaccord does not necessarily imply or mean that the standpoint of the government is not moral or is illegal, it must indicate the existence of tense relations between such standpoints and the real demands, and thus the ultimate solution to such issues has to focus on the adjustment of the standpoint. Since the resources owned by the government and the government enforcement are very limited, (while in pursuit of the targets of legal rules) they have to pay attention to other relevant political goals (such as

[40] Especially in view of the combination of the sociology and the nature of the legal regulation, the aberrant behaviors not only are unavoidable but also may be of an "anti-function" significance, which, sometimes, even constitutes the orientation and expectation of the social transformation. See Supra Note [2 Merton, p. 99 and below].

social stability and avoidance of conflicts, etc.), the resolution to the dilemma has to depend on the adjustment, and even alteration of the government standpoints.

In a short period, when the dilemma of enforcement appears, the government and the violators can still adopt their own strategies, respectively, to keep the status quo, whereby the government will, more likely, stick to its standpoint expressly, and have resorts to the intermittent movement of law enforcement to strengthen and reiterate its standpoints, i.e. the game of "cat catching mouse," in which both sides seek their various demands. However, it should be recognized that the maintenance of such a situation means a gigantic cost to both the government and individuals. As for the government, its standpoint is not put into practice in reality but a huge enforcement cost has to be paid, which means a waste of the limited enforcement resources. Moreover, because the enforcement is carried out intermittently and selectively, the enforcers will in fact acquire a big power of discretion, which may further lead to the issue of "comparative justice"[41] (Davis, 1969; Balyes, 1997), and may encourage the enforcers to utilize the power for rent seeking. As for individuals, although their demands can be met through aberrant behaviors, the costs paid out are much higher than that in case of shortage of rules, and they have to bear some risks and uncertainties. Therefore, such situation is not a stable and sustainable status, and the dilemma still exists and lasts.

If the existence of aberrant behaviors of large scale constitutes a fact, and such behaviors are basically free from sanctions, then that fact will become "common sense" very quickly, and through the learning process, the participants' aberrant behaviors will spread in a larger scale of time and space. In this circumstance, we can presume that the government and the civil society has reached a "conspiracy," i.e. though the government still sticks to its standpoints in appearance, in fact, beyond such appearance, it may approach to give up that standpoint[42] (Xu, 2004). On the other hand, the continuance and general existence of the aberrant behaviors

[41] For example, if the enforcers take X as a typical violator and impose him with treatment while turning a blind eye to Y, who has the same aberrant behaviors; or with respect to X and Y who have the same circumstances of violation, the enforcers impose X with heavier sanctions and Y with lesser sanctions, all those situations fall in the range of discretion in form, but X may feel the existence of a kind of "nonjustice" simply by comparison.

[42] For example, some scholars have thorough analysis on the private remedies prohibited by the state, especially the prohibition of private collection of debts suggested that though the state nominally prohibits the private collection of debts, the essential aim thereof might not be so: provided that "issue orientation" does not occur during the private collection of debts, which will not exceed the boundary set up by the state standpoint (such as use of violence), the state has in fact agreed tacitly on the private collection of debts. That is the so-called "conspiracy." The analysis in this paper benefits from such idea.

may make the standpoint of the rules impractical, and the resulting symbolic sanctions of the government against the aberrant behaviors also may create an "institutionalized evasion of institutionalized rules". Thus a kind of informal institution (hidden rules) comes into being, and replaces the formal institution, and the formal rules or institution only exists in name but relinquishes in reality. The "Prohibition Order" in the US has just vanished this way.

Of course, once the existence of the dilemma is confirmed, the adjustment, even the abandoning of the original standpoint by the government is the release strategy with minimum cost, because it avoids the meaningless investment of enforcement resources, it rectifies the government standpoint that has deviated from the attitudes of the civil society and the actual demands, it reestablishes the authoritativeness and dignity of legal rules, and it enhances the justice and efficiency of law enforcement through the process of trial-and-error and learning. Difficulty lies in that almost all the parties concerned are lost in the dilemma. However, from the case of the "prohibition of fireworks," we can see that all the 106 cities in the alliance of prohibition have declared to adjust or even give up their original standpoints, which can be regarded as a great improvement of the Chinese law enforcement concept and strategy, and it reveals profound encouragement and wisdom of local governments.

6 Conclusions: Framework of analysis and its significance

Because of the limits of the perceptive ability of human beings and the impulse to change the world and human beings itself, the rules of life possibly deviate from life itself, and the institutional and procedural defects in the process of rule making have promoted this kind of possibility. Thus, we find that disaccord always exists between the rules expressed through public power and the real demands of life. Then, surrounding the enforcement of rules, the repeated games among the government, the enforcers, and the individuals subject to the rules may create an enforcement dilemma. In the process of law enforcement in China, the dilemma of enforcement is a kind of "nonperformance of law enforcement," which is different from the "deficiency of law enforcement".

The concept and analysis framework of the dilemma of enforcement put forth in this paper are pretty powerful and beneficial to the explanation on the existence of a great number of phenomenon of "nonperformance of law enforcement". The reasons and the path of solutions thereof during the law enforcement of China, which are applicable not only to the specific case of the "prohibition of fireworks" analyzed herein but also, with some adjustment, to the explanation and analysis on other dilemmas of enforcement. This framework is mainly explanatory in nature, which is, however, of some constructive and regulatory significance.

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References

Balyes M D (1997). Procedural Justice: Allocating to Individuals. London: Kluwer Academic Publishers, 92–94

Bourdieu P, Wacquant L J D eds. Practices and Reflexion—An Invitation to Reflexive Sociology (trans. Li Meng and Li Kang). Beijing: The Central Compilation & Translation Press, 1998, 186, 319

Davis K C (1971). Discretionary Justice: A Preliminary Inquiry. Champaign: University of Illinois Press

Davis K C (1969). Discretionary Justice—A Preliminary Inquiry. Champaign: University of Illinois Press, 167–68

Ellickson R C (1991). *Order without Law: How Neighbors Settle Disputes (in Chinese, trans. Su Li)*. Beijing: CUPL Press, 2003, 354

Landes W M, Posner R (1975). The private enforcement of law. Journal of Legal Studies, 4: 1

Landies J (1938). The Administrative Process. New Haven: Yale University Press, 75

Mashaw J (1981). Administrative due process: the quest for a dignitary theory. Boston Univ. Law Review, 61: 885

Mashaw J (2000). Greed, Chaos, and Governance: Improving Public Law Through Public Choice. New Haven: Yale University Press

Mauroy A (1977). American History. Shanghai: Shanghai People's Press, 120

Merton R (1951). Social Research and Social Policies (trans. Li Juren). Beijing: San Lian Bookstore, 2001, 82, 86, 99

Pan Tianqun (2004). Understanding the Games of Social Phenomenon. Beijing: Central Compilation & Translation Press, 25

Schmid A A (2002). Institutional & Behavioral Economics. Beijing: China Renmin University Press, 342

Sheldon K P (1971). Public Interest Law: A step toward social balance. Ariz L Rev, 13: 818–819

Stewart R B (1975). The reformation of American Administrative Law. Harvard Law Review, (8): 1685–1687

Tyler T (1990). Why People Obey the Law. New Haven: Yale University Press, 1990

Wang Xixin (2002). Discretion and administrative justice: Reading of Davis justice of Discretionary Justice. Beijing: Peking University Law Journal, (1): 114–123

Walter (1961). Critique of Religion and Philosophy. Cambridge: Harvard University Press, 410

Zhu Jingwen (2001). Framework and Methods of Comparative Legal Sociology-Legalization, Localization and Internationalization. Beijing: China Renmin University Press, 536

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