

New legislation or new interpretation on cyber-crime: on the analysis of online obscene live streaming in China^[1]

I. BACKGROUND AND INTRODUCTION

As Internet information technology evolves, so too do the modern lifestyles and forms of cybercrime. While dealing with, or coping with, the challenges of the new way of conventional crimes, different countries or international integrations would prefer the legislation as the primary and proactive strategy. Due to the hysteresis of law, previous law is often unable to respond quickly and effectively to new forms of crime. Here is the case that the different countries have to make a choice of policies between enacting new regulations based on contemporary statutes to achieve the result of controlling the new forms of crime, and by way of legal or judicial, or both, interpretation or analysis of the legislative intent, of the existing ordinance to incorporate the new forms of crimes into criminal justice system in the present. In other words, *New Legislation or New Interpretation*.

On September 18, 2019, Finland, the presidency of the Council of the European Union, presented a revised 88-page proposal to the delegations on the Regulation on Privacy and Electronic Communications (Directive 2002/58/EC). It refers to the *Processing of electronic communications data for the purpose of detecting, deleting, and reporting material constituting child pornography*. Adult pornography might be legally protected within the realm of free speech in many countries, but child pornography is forbidden with culpability and responsibility all over the world. All the states arguably criminalize online or offline child pornography. However, in China, because of the broad and sweeping attitude against obscenity, both adult and child pornography are criminalized without any exceptions. Whether in legislation, law enforcement, or legal practice, China singled out pornography as the predominant target of cybercrime to combat. Applying the filtering technology and approaches, building the Great Firewall of China, and aggravating the criminal penalty as to pornography have been employed, the number of

[1] The study was made under the scope of the Ministry of Justice's programs on aiming the strengthening of the quality of legal education.

pornography web-user however, increased year by year.^[2] Recently, a new form of accessible media technology makes it easier to access to online pornography and increasingly attract more attention to that, the online obscene live streaming.

Online live streaming is not a new technology in the world. Many media stations applied this for broadcasting the news, sports, and events. However, it turns to be out of control with the development of extensive use of the mobile terminal. Nowadays, it is convenient to build a platform for online live streaming by Apps in the App Store. Then the online lives could be different from the previous style by which traditional media companies controlled and escape the supervision of government easily. Some criminals would utilize the features aforementioned to make profits or get some other achievements by broadcasting or transiting illegal materials in the form of online lives. Pornography is an example. Generally, in most other states, if both the audience and hosts are adults, the online obscene live streaming would not be illegal. Only when participants, either audience or hosts, are minors, this conduct might bear the culpability or responsibility. Because it belongs to two different kinds of behaviors, one is child pornography, and the other is transiting pornography to minors. So, when some relative occurrences appeal to law enforcement or courts, the officials should distinguish the different circumstances first, and then give it responses.

This is not the case in China, cause all the obscenity is forbidden. Furthermore, according to the unique context of China, a vast user base, and ban without exceptions, it is somewhat interactive to deal with or cope with this issue. As of the first half of 2019, the scale of users of online live streaming in China has the potential to surpass 500 million. In addition, by application of the technology of 5G becoming gradually prevalent in China, the online live streaming industry is to keep stable development in the near future.^[3] As for the statistics beforehand, there is no accurate calculation of the proportion of the minors amongst the users. Nevertheless, we could make a hypothesis that the percentage of juveniles in the users of online live streaming could be arguably significant by the feature of cyberspace, which is more attractive to young people^[4], and more than 70% adolescents in China have their own cell-phones.^[5] So, the potential victims of online obscene live streaming in China, whether in the global context or just in China, are endangering the high risks. The Chinese government has already recognized this problem and employed a series of measures to eradicate online obscene live streaming. However, in practice, there are a lot of questions when responding to online obscene lives. There is a controversial debate amongst the legal practice that, on the one hand, contemporary law could not solve all the problems of online obscene lives, there is a strong demand for new legislation to

[2] Liang - Lu, 2012, 111-130.

[3] iiMedia Research Center, 2019.

[4] Marcum - Higgins - Ricketts, 2014, 68-78.

[5] Ji, W. - Shen - Yang - Ji, L., 2018.

tackle the issue, and before the new legislation, with the consideration of *Nullum Crimen Sine Lege, Nulla Poena Sine Lege (Legality)*, the whole society should tolerate this phenomenon; on the other hand, some scholars oppose that new technology updates the cybercrime every day, it could not solely rely upon the legislation but by way of new interpretation of existed law to deal with the new problems, though reality is the demand of new legislation. Here comes this paper on how to balance the actual needs for combatting the modern cybercrime with the persistence of the principle of legality.

This paper will firstly introduce the “CleanNet 2019” campaign in China, which is aiming at eradicating illegal materials online under Chinese law and penalizing the criminals involved. At the same time, this paper will focus on some cases from the “CleanNet 2019,” which related to the online obscene live streaming. Secondly, this paper will enumerate some debatable, but not cover all, difficulties and problems in the legal practices which encompass the application of criminal law, evidence law, and criminal procedure law. Thirdly, this paper will discuss the questions in the second part with both comparative methods and *legal dogmatics*. In the end, this paper will conclude all the discussions with a response to the preliminary question of this paper. New Legislation or New Interpretation.

II. “CLEANNET 2019” CAMPAIGN AND RECENT CASES IN CHINA

1. SHDF National Office and “CleanNet 2019” Campaign

For dealing with the rampant social and criminal problems arising from pornography, prostitution, and illegal publication, the Chinese government had founded a working group specialized in controlling and governing the aforementioned problems by which named national anti-pornography and illegal publication working group (SaoHuangDaFei Working Group in Chinese) in 2000. It consists of 26 official departments that contained the governmental departments and organs of the Communist Party of China. Its standing office, National Anti-pornography-and-illegal publication, which usually called *Sao Huang Da Fei* National Office (hereinafter SHDF National Office) in Chinese, affiliates to the Central Propaganda Department of the Communist Party of China.^[6]

Since economic reform from the 1980s, Chinese society has experienced a great challenge of the ascending rates of crimes. Whether the administrative requirements or real social needs, they both demand the government to control the crimes in an effective way to ensure social harmony and safety. Under this rigorous political assignment, the Chinese government is used to pick up the

[6] SHDF National Office. (2019a). *About us*. Retrieved October 20, 2019, from <http://www.shdf.gov.cn/shdf/contents/749/236131.html>

severe strike campaign to deal with particular or general criminals involving in the target crimes. Though the effectiveness of the severe strike campaign as a strategy of crime control has been questioned, the campaign-style crime control reserves the strong inertia effect in policy-making.^[7] The Chinese government prefers the staged attack in the form of the campaign in every crime control, so too does the governance of pornography.^[8] In this context, SHDF National Office employed the “CleanNet” campaign to suppress online obscenity in cyberspace. CleanNet campaign is one of the consisted action applied by the SHDF National Office every year. It aims at recreating and rehabilitate the online environment by sweeping indecent materials that existed in web pages, cloud storage, instant communications, mobile applications, and so on. As routine actions, SHDF National Office deployed the “CleanNet” campaign once again in 2019, referred to as “CleanNet 2019”. According to the reported news on the website of SHDF National Office, “CleanNet 2019” will insist from April to November. Compared with the same theme campaign previous, “CleanNet 2019” has some unique features that it not only aims at online pornography in the traditional area mentioned above but also turns to the online live streaming platform. The SHDF National Office requires the legal enforcement agencies at different levels to keep supervising the unlawful online live streaming platform, relentlessly striking the criminals engaged in disseminating online indecent materials or organizing an online obscene live show, and resolutely shut down the relative software or mobile applications.^[9] As of now, “CleanNet 2019” has been drawing to a close. There are some representative cases as the achievements of the campaign reported to the SHDF National Office during the period. In the next part, this paper is going to select some cross-sectional cases as to online obscene live streaming to introduce and discuss.

2. Representative Cases on online obscene lives in CleanNet 2019

As a result of ongoing within the “CleanNet 2019” campaign till now in China, the overall statistics of the case amount, criminals’ situation, victims’ distribution, and other information as to this campaign could not elaborate at this time. However, by way of the gradual implementation, the website of the SHDF National Office has reported some critical cases by which the local legal enforcement agency submitted and, therefore, as the achievements of their reasonable diligence in this campaign. This paper selects 4 cases from the web page of the SHDF National Office that are typical to tailor-make the complicated circumstances of the contemporary realities of online obscene lives in China.

[7] Liang, 2005, 387-399.

[8] Liang – Lu, 2012.

[9] SHDF National Office. (2019e). SHDF National Office deployed the “CleanNet 2019”, “NursingSeedling 2019” and “AutumnWind 2019” Special Action. Retrieved March 04, 2019, from <http://www.shdf.gov.cn/shdf/contents/767/394202.html>

a) Guangxi Nanning Case^[10]

In June 2019, Xixiangtang District Court of Nanning city of Guangxi Province heard a case which prosecuted that *Li Mouhua*, the perpetrator, arranged four persons to do online obscene live shows for many times by online live streaming software during a two-day period from July 18, 2018, to July 20, 2018. On July 20, 2018, the Xi Xiang Tang Bureau of Public Security found the clues of the online obscene live shows organized by *Li Mouhua* when they were generally patrolling the cybersecurity situation in this district. Then, on July 24, 2018, the Xi Xiang Tang Bureau of Public Security detained the perpetrator. According to the litigation and evidence submitted by the prosecutors, the Court sentenced *Li Mouhua* one-year imprisonment and a 2,000-yuan fine by citing Article 365^[11] of Criminal Law of P. R. China.^[12]

As the case was adjudicated after the start of the “CleanNet 2019” campaign, the Court reported the case to the SHDF National Office to show their endeavor of implementing the order, which harsh strike the online obscene live streaming, of the “CleanNet 2019” issued by the SHDF National Office through punishing the arrangement of a two-day online obscene live show with one-year imprisonment and fines.

b) Zhejiang Jiaxing Case

In June 2019, Nanhu District Court of Jiaxing City of Zhejiang Province announced a case of criminal securing profits by broadcasting online pornographic live shows through an online live streaming platform, Nebula Platform. There were 7 perpetrators involved in this case. The court respectively sentenced two of the defendants, *Yue Mou* and *Liu Mou*, imprisonment with 3-year-and-6-month and 3-year-and-3-month periods, and fine with 50,000 yuan and 45,000 yuan. The other five defendants, *Yang Mou*, *Luo Mou*, *Zhao Mou Tian*, *Jiang Mou Na*, and *Zhao Mou*, were sentenced commensurate with their scenarios in the crime. According to the facts part of the judgment, the court found that from August 2017 to December 2017, *Yue Mou* and *Liu Mou* directly bought Nebula Live Streaming Platform from others and arranged amounts of female hosts to perform online obscene live shows. *Yang Mou* funded the platform technical maintenance. *Luo Mou* was

[10] As multi-perpetrators involved in part of the selected five cases, this paper would like to use the formula of “Province+City (the location of the cases brought to trial) +Case,” to name the five cases for convenience.

[11] *Criminal Law of P. R. China*, Article 365: “[W]hoever arranges for pornographic performances shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also be fined; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall also be fined.”

[12] SHDF National Office. (2019b). Guang Xi Province: The city of Nan Ning rendered a judgment about online obscene live streaming Retrieved June 19, 2019, from <http://www.shdf.gov.cn/shdf/contents/11420/401368.html>

employed to manage the Nebula Platform. *Zhao Mou Tian*, *Jiang Mou Na*, and *Zhao Mou* were responsible for the management of female hosts pertained to them as patriarchs. As of the case was reported on December 12, 2017, the Nebula Platform accumulated criminal profits of more than 800,000 yuan, and the record of member registration was over 60,000 pieces.^[13]

This case has the same situation with the *Guangxi Nanning Case* above, so it was reported to the SHDF National Office. (The trial took place after the CleanNet 2019 began.) however, this case has some unique features that need to be mentioned. First is the perpetrators involved in this case belongs to the circumstance of multi-perpetrators. It is a joint crime with principals and accomplices. Second, it is an organized crime committed by a gang of 7 members. Amongst the crime, each of the perpetrators contains a clear division of labor cooperations and thus indicates the complexity of the issue of online obscene live streaming. It is not a simple cybercrime at all in some situations, but instead, to some extent, an intricate cybercrime with the characteristics of organized crime committed by gangs.

c) Jiangxi Jiujiang Case

In June 2018, the SHDF Office of De An Country of Jiujiang received some clues from the masses about which an online live streaming platform called “You Jiang” has female hosts performed pornographic live shows and made criminal profits by the reward gifts from the audience. Furthermore, the platform did pimp for their audience at the same time. After received whistle-blowing, the SHDF Office of De’an Country coordinated and organized the local law enforcement agencies for a special working group, “6.05” working group, instantly. After the preliminary technical investigation and fixing evidence, the “6.05” working group started formal investigation on June 19, 2018. Upon the investigation, the working group found that the platform took advantage of different fake names to escape investigation, and, at the same time, it convened hundreds of female hosts across the China mainland to engage in the online obscene live shows. This platform has a stringent organizational hierarchy. All the hosts on this platform had their own group, which manipulated by a group leader. The group leader facilitated the hosts to withdraw money from the platform and promoted the communication between the platform manager and hosts. With further evidence securing, the working group locked on two female hosts, *Song Moumou* and *Zhan Moumou*, on the platform and arrested them separately in Ningbo city of Zhejiang Province and Xingzi city of Jiangxi Province on August 18, 2018. By the interrogation of two hosts thereinto, they confessed two group leaders, *Wei Moumou* and *Zhi Moumou*. On September 18, 2018, the working group arrested six group leaders located in

[13] SHDF National Office. (2019f). Zhe Jiang: The court in the city of Ja Xing adjudicated a case of making criminal profits by disseminating online pornography through the Nebula Platform. Retrieved June 17, 2019, from <http://www.shdf.gov.cn/shdf/contents/11420/399777.html>

six different provinces in China mainland, namely Yunnan, Shaanxi, Shandong, Guangdong, Hainan, and Anhui Province. During the next interrogation, the working group found another group leader in Hainan province and arrested him finally. On July 29, 2019, after trial by the De'an County Court, 9 perpetrators in total were sentenced to fixed-term imprisonment ranging from five months to one year, and the total amount of fines and penalties was more than 257,000 yuan.^[14]

This case is a typical case related to online obscene live streaming with some peculiarities. First, though many perpetrators involved in this case, it is not a gang crime compared with the *Zhejiang Jiaxing Case*. All the perpetrators committed the same crime separately but used the same platform. Second, in this case, the platform applied a stringent organizational hierarchy to achieve effective and relatively safe management for the general operation. Third, the platform, in this case, had formed a fairly mature industrial chain to some extent. The well-designed process of money withdrawing, hosts enrolling, and communication, to a degree, ensure the secrecy of the management behind the platform and the “security” (not realized by law enforcement agencies) of the platform itself. The last, this case involved many geographical areas showing the trend of the cross-regional feature (even though the regions, in this case, are all in China mainland) of online obscene live streaming.

d) Hubei Macheng Case

On April 30, 2019, the Public Security department of Macheng city of Hubei Province successfully arrested and repatriated the principals, *Hong Moumou* and *Li Mou*, who absconded from Mongolia to Philippine after reported to law enforcement agency, of the case of disseminating pornography materials online; thoroughly destroyed a criminal gang of committing cybercrime cross-national under the guise of online-game company; closed down 6 domestic online obscene live streaming platform; arrested another 20 members of the criminal gang aforementioned with support of the Bureau of International Cooperation of the Ministry of Public Security of China and the law enforcement agencies of Philippine, under the instruction of Ministry of Public Security of China and Office of the “CleanNet 2019” campaign of Provincial Bureau of Public Security of Hubei Province.

In March 2018, the police of public security in the city of Macheng of Hubei got a clue from the whistle-blower, and in the early investigation, found that there were some users distributed QR (Quick Respond) code for downloading an App software for online obscene live streaming called “Huahua Platform.” The users should download and install the App on their mobile terminal and register in by verifying the phone numbers. When entering into the platform, the users

[14] SHDF National Office. (2019d). Jiang Xi: The court in the city of Jiu Jiang sentenced the ‘.6.05’ case of gaining criminal profits by disseminating online pornography through an online live streaming platform. Retrieved September 19, 2019, from <http://www.shdf.gov.cn/shdf/contents/11419/405296.html>

could find many broadcast room of obscene live shows. By sending the hosts reward gifts ranging from 0.5 yuan to 1888 yuan, the users could require the host to do different kinds of indecent conducts, even intercourses. On further investigation, the law enforcement found that this platform had a stringent organizational hierarchy of which contained boss, operation and maintenance, advertising promotion, customer service management, payment and settlement, group leader, hosts. Furthermore, the criminal gang had changed the server and shell of the platform many times to escape the whistle-blowing and investigation. The criminal gang employed particular employees to maintain the server abroad in Mongolia and utilized the foreign bank account to do the money laundering. During the operation of this platform from November 2017 to March 2018, in five months, the platform had had over 90,000 registered members and made criminal profits over 16 million yuan. The law enforcement arrested 18 members of the criminal gang in China mainland and another two principals, *Hong Moumou* and *Li Mou*, which got the information of the investigation, escaped from Mongolia to Philippine via South Korea, and kept doing the same criminal business in Philippine by a new-built platform called “Jinnezza” App Platform, were arrested in the end as referred above.

During the interrogation, law enforcement knew that the suspect *Hong Moumou* had a company named “Shanghai Tingyu Network Technology co., LTD” in Shanghai, China, specializing in the development of online games. Because of the depression of business and, therefore, the difficulty of maintaining the company, *Hong Moumou* organized his shareholders and employees to engage in the pornographic live streaming business. The case is still under trial now in the Macheng Court of Hubei Province.^[15]

This case is relatively complicated when compared with all the examples above, for it encompassed all the features of online obscene live streaming aforementioned, such as multi-perpetrators, labor cooperation, organizational hierarchy, and cross-regional perpetration. However, this case has its own uniqueness to be discussed. First, each process of the operation of the platform referred to an independent crime, for example, financial accounting with money laundering, product promotion with false advertising, and so on. Second, the remote manipulation of the platform and the aboard server location reveal the transnational feature of the new trend of online obscene live streaming, which calls for international judicial cooperation. Third, the transformation from an online game company to a criminal gang reflects the high-profit margin and the lack of supervision in the online broadcast industry so as to stimulate more professional and organizational subjects, e.g., legal person, to engage in the online obscene live streaming business.

[15] SHDF National Office. (2019c). Hu Bei: The police knocked out the transnational criminal gang of online obscene live streaming. The illegal gains were 16 million, and 20 people were arrested. Retrieved May 30, 2019, from <http://www.shdf.gov.cn/shdf/contents/11419/400064.html>

III. COPING WITH ONLINE OBSCENE LIVE STREAMING IN CHINA

1. Substantial Regulations on Online Obscene Live Streaming

Substantial regulations on online obscene live streaming compose of different hierarchical regulations, such as law, administrative regulations, and departmental acts. Furthermore, the judicial interpretation of the law casts a significant role in the criminal justice system. This section will predominantly focus on criminal law and its judicial interpretations.

In the Criminal Law of China, there are no articles specialized in online obscene live streaming. The regulations are general stipulate all types of pornography or obscenity. There is an independent section in regulating pornography, namely Article 363, which focuses on making criminal profits from producing, duplicating, publishing, selling, disseminating pornographic or obscene materials, and offering book numbers for publication of pornographic books and journals; Article 364, which focuses on the general disseminating of pornography and obscenity, and organizing and playing obscene or pornographic audio/video materials; Article 365, which focuses on the organizing the pornographic or obscene shows; Article 366, which focuses on the legal person's culpability when committing the crimes of this section; and Article 367, which offers the definition of pornographic or obscene materials in these articles. There is another article that needs to be mentioned here is that Article 301, which focuses on group-sexual behaviors. Some scholars hold the view that the broadcaster of obscene live shows violated Article 301 at the same time.^[16]

In spite of the Criminal Law, there are four documents related to the online obscene live streaming of which one is the decision, and the other three are judicial interpretations. With the consideration of online disseminating pornography, the Standing Committee of National People's Congress of China made a decision on governing this kind of problem in 2000. This decision, at first, was not to focus on the online obscene live streaming but general rules on regulating the increasingly rampant online disseminating pornography.^[17] Later in 2004 and 2010, the Supreme People's Court and the Supreme People's Procuratorate enacted a judicial interpretation detailed the application of the Criminal Law on pornography in cyberspace.^[18] In the meanwhile, the Supreme People's Procuratorate and Ministry

[16] See, Mei, 2017; Teng, 2018.

[17] See, Article 3 (5) of the *Decision of the Standing Committee of the National People's Congress on Preserving Computer Network Security*, which is first enacted in 2000 and revised in 2009.

[18] See, Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Concrete Application of Law in the Handling of Criminal Cases of Making, Reproducing, Publishing, Selling and Spreading Pornographic Electronic Information by Means of the Internet, Terminal of Mobile Communications and Sound Message Stations (06 September 2004), (hereinafter, *Obscenity Judicial Interpretation (I)*); and Interpretation (II) of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues on the Specific Application of Law in the Handling of Criminal Cases about Producing, Reproducing, Publishing, Selling and Disseminating Pornographic Electronic Information via the Internet, Mobile Communication Terminals and Sound Message Stations (04 February 2010), (hereinafter, *Obscenity Judicial Interpretation (II)*).

of Public Security promulgated another judicial interpretation which focuses on the specific rules and standards of filing a case related in law enforcement agencies.^[19]

2. Procedural and Evidential Regulations

The crime of online obscene live streaming is a kind of cybercrime in nature. The evidential and investigatory laws and rules applied to the online obscene live streaming, ultimately are those applied to the cybercrime. “A number of countries outside of Europe do not admit electronic evidence at all, making the prosecution of cybercrime, and any other crime evidenced by electronic information, unfeasible.”^[20] However, China has already admitted the status of the electronic data produced in the process of online activities as the legal form of evidence in establishing the facts relevant to guilt or innocence of an individual at trial by Article 50 of the Criminal Procedure Law of China.^[21] Due to the particularity of cybercrimes involving electronic data, the Criminal Procedure Law of China^[22] and the Ministry of Public Security^[23] also stipulate that electronic data can be obtained by means of Technical Investigation Measures. Technical Investigation Measures commonly refer to as Digital Forensics. It existed in the process of investigation and manipulated by law enforcement agencies, the Public Security Organs in China. After obtained the electronic data, in general, both Procuratorate and Court would scrutinize the authenticity, legality, and relevance of the evidence. To further standardize the collection and examination of electronic data as evidence, the Ministry of Public Security, Supreme People’s Procuratorate, and Supreme People’s Court have formulated two judicial interpretations^[24] respectively to guide relevant work.

[19] See. *Provisions (I) of the Supreme People’s Procuratorate and the Ministry of Public Security on the Standards for Filing Criminal Cases under the Jurisdiction of the Public Security Organs for Investigation and Prosecution* (25 June 2008).

[20] United Nations, 2013, p. xxiv.

[21] Article 50 of *Criminal Procedure Law of P. R. China*: “All materials that may be used to prove the facts of a case are evidence. Evidence includes: [...] (8) audio-visual recordings and electronic data.”

[22] See. Article 150 of *Criminal Procedure Law of P. R. China*: “After filing a case regarding a crime of compromising national security, a crime of terrorist activities, an organized crime of gangland nature, a significant drug crime, or any other crime seriously endangering the society, a public security authority may, as needed for criminal investigation, take technical investigation measures after undergoing strict approval formalities.”

[23] See. Article 254 of *Provisions on the Procedures for Handling Criminal Cases by Public Security Organs* (01 January 2013): “After the case is filed, the public security organ may, according to the needs of investigating crimes, take technical investigation measures against the following criminal cases that seriously endanger the society: [...] (4) major criminal cases committed through telecommunications, computer networks, delivery channels, etc., as well as major criminal cases committed against computer networks.”

[24] *Provisions on Several Issues concerning the Collection, Taking, Examination, and Judgment of Electronic Data in the Handling of Criminal Cases* (01 October 2016), issued by Supreme People’s Court, Supreme People’s Procuratorate, and Ministry of Public Security; *Rules of Obtainment of Electronic Data as Evidence by Public Security Authorities in Handling Criminal Cases* (01 February 2019), issued by Ministry of Public Security.

IV. DISCUSSIONS: PROBLEMS IDENTIFIED AND STRATEGY CHOICES

1. Online obscene live streaming and Sexting

“Sexting, the portmanteau of Sex and Texting, has become a hot topic of debate between the legislators, researchers, educators, parents, and teens.”^[25] Generally, sexting refers to receiving and sending sexually explicit materials through electronic means, especially among cell phones.^[26] Marcum et al.^[27] and Hasinoff^[28] held the view that sexually explicit materials just included personal photos and texts. However, in light of the development of technology, the scope of sexually explicit materials should expand to include videos, audio messages, and some other forms of materials.^[29]

When looking back at online obscene live streaming, the host[s] or broadcaster[s] would broadcast obscene shows including but not limit in sexual intercourse, masturbation, and other materials arising prurient interests. Online obscene live streaming, in nature, is disseminating the pornography or obscenity by online live streaming or webcast, whether voluntarily or for other purposes, such as self-display, satisfying sex addiction^[30], or gaining criminal profits. It has some similarities to sexting. In this paper, it is considered that it belongs to one of several forms of sexting.

Though welcome is the sexting among the teenagers according to some researches^[31], then it is hard to say that, under circumstance of China’s situation of the large users’ group of online obscene live streaming which could be inferred from the 4 example cases, minors or teenagers are not involved in, and in fact, there are some cases in China have already shown the minors or teenagers engaged in, and merely, there are no statistics to show the proportion of minors participating. When both audience and broadcasters of online obscene live streaming are minors, it refers to the sexting in the context of previous researches out of China. Usually, outside of China, if pornography does not involve minors or children, then it will be protected under the protection of free speech.^[32] Therefore, to distinguish the different types of obscenity (mainly to see the production, duplication, or dissemination of the whole process of involved material and whether the content itself contains children or minors) is the first task to deal with sexting or obscenity.

[25] See. Jaishankar, 2009, 21-25; Ngo - Jaishankar - Agustina, 2017, 161-168.

[26] Crimmins - Seigfried-Spellar, 2017, 169-182.

[27] Marcum - Higgins - Ricketts, 2014.

[28] Hasinoff, 2017, 202-217.

[29] See. Hasinoff, 2017; Morelli - Bianchi - Baiocco - Pezzuti - Chirumbolo, 2017, 113-121; Sweeny - Slack, 2017, 246-260.

[30] See. Ballester-Arnal - Castro Calvo - Gil-Llario - Gil-Julia, 2017, 567-585; Kvaalem - Træen - Iantaffi, 2016, 522-540; Seigfried-Spellar, 2013, 141-154; Sirianni - Vishwanath, 2016, 21.

[31] See. Marcum - Higgins - Ricketts, 2014; Marganski, 2017, 183-201; Martinez-Prather - Vandiver, 2014, 21-35.

[32] Steinberg, 2019, 909-938

In addition, according to the unique feature of forbidding obscenity unexceptionally in China, the research of online obscene live streaming is a little different from sexting. Nevertheless, the harmfulness, extensive participation of teenagers or minors, and other reasons for criminalization of sexting, which had been testified and demonstrated in the sexting research, could be learned for the study of online obscene live streaming in the context of China. Notably, so too is of cybercrime, the problems of criminalization, investigation, prosecution, and adjudication existed in sexting are the general issues in online obscene live streaming as well.

2. Problems Identified in General and particular in China

To summarize the aforementioned sections and to begin this section, it is clear that online obscene live streaming is illegal in China with a broad and sweeping attitude against all kinds of pornography. The existing regulations, whatever legislations or judicial interpretations, provide the justification for the criminal justice system to cope with or deal with this arising problem in cyberspace with huge users' group. The "CleanNet 2019" campaign, carried out by the SHDF National Office, is merely to speed up the centralized rectification of this problem in a specific period, with the purpose of accurately cracking down, strictly controlling or even eliminating, the result of which is often accompanied by the more massive application of penalties. However, is the approach of China on combatting the online obscene live streaming unquestionable? The answer to this question is definitely no. After all, like Case, Johnson, Manlow, Smith, and Williams had written in their book, "[R]ecognition that there is no ideal is an important aspect of life and justice."^[33]

a) Problems in General: Proactive Investigation and Crime Prevention

As discussed above, cases of cybercrime are more likely to be reported by victims, though the low rate is the report of an individual or corporate victim for fear of shame, embarrassment, and detrimental evaluations. In re cases of online obscene live streaming, arguably victimless crime in most situations without minors or children involved, are enduring lower report rate of the audience for consistent needs dwelling on accessing to obscenity.

On the other hand, because of the particularity of transmission of obscenity or pornography at an online live streaming platform, such as there is no physical material existed, and all the information transmitted will be deleted soon after shutting down the live streaming, the cross-regional or transnational feature, and the convenience of accessing to online obscene lives generated by popular uses of mobile termination, the mobile phone Apps, it is problematic for law enforcement agencies to enact proactive investigation measures. Traditional investigatory actions by which law enforcement agencies take, such as data interception,

[33] Case - Johnson - Manlow - Smith - Williams, 2017, 82-106.

metadata analysis, sensitive words recognition, and other measures recommended by AÇAR^[34] in his paper, on one side, are based on the cooperation of Internet companies or platforms, however, as discussed above, the online platform specializing in disseminating obscenity prong not to assist and cooperate with the law enforcement agencies to fulfill the investigation, in general, they are trying to escape it. On the other side, these measures belong to methods of detection *ex post facto*, in other words, the application of these measures happened after the crime had been reported to law enforcement agencies rather than providently employed thereby preventing the crimes. In addition, even if these investigation methods are adopted after reporting, it is impossible to guarantee that these crimes can be adequately detected due to the difficulty in the investigation of cybercrimes and the secrecy of the online obscene live streaming platform, let alone the effectiveness and sufficiency of these methods as crime prevention.

Then, by putting the low report rate and the after feature, effectiveness, and sufficiency of measures of cybercrime detection together into the examination of situational crime prevention theory, which is “[b]ased on a range of theories about the process leading to the commission of crime described as ‘opportunity theories’^[35], consisting of ‘the rational choice perspective, the routine activity approach, and crime pattern theory’^[36]”, it could be found that the features of online obscene live streaming platform as generalized before, such as easy to build a live streaming platform, high reward rate, expansive engagement of users, convenience provided by mobile phone Apps, and uneasy to be discovered and investigated, totally hinder the function of crime prevention within the theory of situational crime prevention which calls on “reducing opportunity, creating inhibitor, and creating more considerable uncertainty as to the outcomes of crime (greater risk/lower rewards).”^[37] As such, proactive crime prevention of online obscene live streaming seems to be invalid under these circumstances. However, this is not the problem just exists in China, but all around the world in dealing with cybercrime.

b) Problems particular in China: Definition of Obscenity and Principle of Legality

In the Criminal Law of China, crimes of obscenity, besides the crime of organizing an obscene performance in Article 365, incorporate a terminology of Obscene Material. Article 367 affords the definition of Obscene Material:

“[O]bscene materials mentioned in this law refer to erotic books, magazines, motion-pictures, videotapes, audiotapes, pictures, and other

[34] Açar, 2017, 98-109.

[35] Clarke - Bowers, 2017.

[36] Smith - Clarke, 2012.

[37] Case - Manlow - Williams, 2017, 618.

obscene materials that graphically describe sexual intercourse or explicitly publicize pornography. [...]"

By analyzing Article 367, we could find an essential requirement of the obscene materials, which is of physical form thereof. Though the expansion of other obscene materials is made to embrace the electronic forms thereof with electronic information^[38], the physical form requirement still exists, since the electronic materials or information should appear in the physical storage to have the probative value which backed up by Article 50 of the Criminal Procedure Law of China (Electronic Data as Evidence):

"[T]he 'other obscene materials' as prescribed in paragraph 1 of Article 367 of the Criminal Law shall include pornographic video documents, audio documents, electronic publications, pictures, articles, short messages, which accurately describe sexual acts or openly blazon forth pornography and other electronic information of internet and terminal of mobile communications and sound message of sound message stations. [...]"

Here is the case. According to the Criminal Law of China, both organizers and broadcasters of online obscene live streaming should bear culpability, whether applied Article 365 or other articles contained obscene materials. Article 365 of organizing an obscene performance is relatively clear and easy to apply for there is no requirement of the form of obscene performance; in other words, as to obscene performance, the law does not require it to exist in physical form. The logical barycenter is performance. So, combining with the five example cases, in the legal practice of China, when the prosecutor accused of perpetrators and the court heard a case involved online obscene live streaming, they prong to focus on organizers, and impeached and sentenced the suspects of organizers by Article 365, and so the fact is.

The broadcaster of online obscene live streaming locates in an awkward position. They were either ignored by prosecutors or the judges or charged with various crimes. Through a simple search on *Chinese Judgements Online* with "online obscene live streaming" as a keyword, it could be found that some suspects of such crimes are convicted by Article 363, and some are convicted by Article 364. Furthermore, in the case where the suspect is convicted, how could the obscene material, which is a component element of the crime, be fixed as evidence in the live streaming?

First, according to the distinction between a general web page or social communication platform and an online live streaming platform, it is far from easy to confirm the click number as the extent of proliferation online which is the standard of criminalization of utilizing the chat room, instant communication software, and other forms of ICTs to disseminating the obscenity, and backed

[38] Article 9 of *Obscenity Judicial Interpretation (I)*, (06 September 2004).

up by a judicial interpretation. In the case of disseminating obscenity materials for seeking rewards, the requirement of click numbers for criminalization should surpass 10,000^[39], and in the case of disseminating obscenity materials not for seeking rewards, the requirement of that number doubled, i.e., 20,000^[40]. In the context of online live streaming, people would arguably pay more attention to, in one webcasting room, the number of simultaneous viewers rather than the number of clicks. The number of simultaneous viewers is distinct from the number of clicks. The user might just click and get into the webcasting room, but not stay for long to watch the obscene performance, or even at that time, the obscene performance had not started. So, the number of simultaneous viewers is more significant in the criminalization after the case was filed. However, both in criminal law and relevant judicial interpretations, there are no regulations specialized in stipulating the number of simultaneous viewers, though the new form of spreading obscenity, online obscene live streaming, might have already taken into consideration of the legislators or judicial practitioners. In practice, the prosecutors and judges prefer to take the number of clicks as the standard of criminalization. If a suspect's obscene webcast room clicked by more than 20,000 times, but the most significant number of simultaneous viewers is tiny, for example, 1,000, then, strictly, the criminal punishment to the suspect would arguably comply with the principle of legality superficially and rigidly.

Second, the legality of the criminalization for the broadcasters of online obscene live streaming itself should bear the questioning. The expansion of electronic information of obscene materials have been made by judicial interpretations in China, notwithstanding when combining the relevant regulations in judicial interpretations and the evidence stipulations in the Criminal Procedure Law of China, we could find that it is out of legality to criminalize the broadcasters engaged in obscene lives. Here we should review the relationship amongst obscene online performance, electronic information, and electronic data. It might be in this paradigm that obscene online performance is a kind of electronic information related to other obscene materials underpinned by electronic data during the process. So, if we want to form the evidence of obscene online performance, we

[39] See. Article 1(4) of *Obscenity Judicial Interpretation (I)*, (06 September 2004): "In case anyone who makes, reproduces, publishes, sells or spreads pornographic electronic information for seeking profits by means of the internet or terminal of mobile communications, and has any of the following circumstances, he shall be convicted and punished as the crime of making, reproducing, publishing, selling and spreading pornographic articles for seeking profits in accordance with the provisions of paragraph 1 of Article 363 of the Criminal Law: [...] (4) The pornographic electronic information made, copied, published, sold or spread by him is clicked for more than 10 thousand times[.]"

[40] See. Article 3(1) of *Obscenity Judicial Interpretation (I)*, (06 September 2004): "If anyone spreads pornographic electronic information by means of the internet or terminal of mobile communications not for seeking profits, and has any of the following circumstances, he shall be convicted and punished as the crime of spreading pornographic articles in accordance with the provisions of paragraph 1 of Article 346 of the Criminal Law: (1) The quantity has reached to two times the standards as prescribed in Item (1) to (5) of paragraph 1 of Article 1 or more[.]"

should first collect the electronic data for it is the legal form of evidence, then we organize, analyze, present, and construe them in a particular context. With these processes, the electronic information consists of electronic data by logically own the probative value in criminal justice. However, due to the feature of live streaming that the electronic data only exist when the broadcaster is doing the live streaming, and after he/she closed down the live streaming, there will be no traces of the activities only if the platform stored the data, apparently, for the purpose of escaping investigation, the platform specializing in obscene online performances would not do this, then, these give rise to the handicap of investigation which focuses on the evidence gathering in the criminal justice process. In practice, in response to this difficulty, some modifications have been made. For example, during the reporting process, the victim will provide some of their own recorded pornographic videos that exist on the reported platform at a specific time. However, though trusting in the authenticity of the video, the form of evidence changed from electronic data to video, another type of evidence in China. What criminal law purports to punish is obscene electronic information, which could only compose of electronic data. There are two solutions to cope with this paradox that, in the context of contemporary legislation of China, either admits the probative value of form changed evidence, then violate the principle of legality, or comply with the principle of legality and make new interpretations to deal with this problem, then, during a reasonable period, tolerate online obscene live streaming.

3. Strategy Choices

Based on the above discussion, we seem to have entered a dilemma. On the one hand, according to the norms of criminal law, online obscene live streaming needs to be criminalized and imposed; on the other hand, the principle of legality always binds police, prosecutors, and judges to handle crime control by handling relevant cases. Some Chinese scholars believe that it is possible to break through the predicament by exploring the purpose of the legislation and expanding the interpretation of criminal law in judicial practice.^[41] This view has particular practical significance. It shows that in the face of changes in the criminal situation caused by advances in science and technology, a relatively radical attitude and method is adopted to realize the social security function of criminal law. Online obscene live streaming, at its root, is a cybercrime. The attitude of criminal justice to it, to a certain extent, reflects the attitude towards cybercrime.

In the context of China, the development of new judicial interpretations can be seen as New Legislation. The New Interpretation, under the above premise, should be the extensive explanation of criminal law in the judicial practice mentioned

[41] See. Cai, 2016, 24-26+30; Mei, 2017; Pang – Sun, 2018, 40-43; Teng, 2018; Wang, 2018, 52-57; Zhao, 2017.

above. From a future perspective, the new legislation is, of course, the best way to solve problems in judicial practice. If we only insist on this point in general, then the proposition, New Legislation or New Interpretation, proposed in this paper has no practical significance. Therefore, the strategic choice of New Legislation or New Interpretation discussed in this paper should be either the extensive explanation of contemporary criminal law by legal practice for the purpose of achieving the requirements of crime control or crime prevention, or following the principle of legality strictly with tolerant and prudent attitude to relevant crimes with the view of fulfilling the functions of human rights protection of criminal law before the enactment of New Legislation. This paper prongs to stand by the choice of New Legislation.

Criminal Law is always chasing the crime. In terms of crime, it subjects to many factors of society, such as the development of technology. Cybercrime is a product by the emergence of ICTs, so is the online obscene live streaming. Unduly restraint might arguably restrict the development of technology itself. For example, in the case of online live streaming, China has enacted many rules governing the industry of online live streaming. There is a regulation in the Provisions on the Administration of Internet Live-Streaming Services requiring the live streaming service providers to back up all the materials at their platform within at least a 60-day period for the purpose of facilitating the investigation in case some crimes are reported of the platform. In addition, there is a good question about who should pay the costs of any higher burdens imposed. In a UK case^[42] that refers to the online infringement of copyrights, the court held the view that “[it] considered it perfectly reasonable for ISPs to pay the costs associated with blocking access to sites where infringing content has been made available.” The court also held the viewpoint that “[t]he ISPs profit from services that the operators of the relevant Web sites use to infringe the Intellectual Property rights concerned, and the costs of implementing any order by it to block access could be regarded as an average overhead of carrying on ISP’s business.”^[43] In China, enterprises should bear the cost by themselves. Some companies with a small-scale platform could not reach the requirement for a lack of technologies or money, and then they will be excluded from the market. Only some big companies with a big-scale platform which have abundant money and sophisticated technologies could be left in the market, as time passes, monopoly generated. So, when dealing with cybercrime, the development of technology and the improvement of the relevant industry should be taken into account with a tolerate and prudent attitude.

The realization of human rights protection through strict adherence to the principle of legality is an essential component of the rule of law. There are four separate requirements in the principle of *Nulla Poena Sine Lege* (*part of Legality*)

[42] *Cartier Int’l AG & Others v. British Sky Broadcasting Ltd & Others*, EWCA Civ 658 [2016].

[43] *See. Grassie*, 2017, 3-9.

that *Nulla poena sine lege praevia*, which prohibits the retroactive application of criminal law, *Nulla poena sine lege scripta*, which refers to no penalty without written law, *Nulla poena sine lege certa*, which refers to no penalty without well-defined law, and *Nulla poena sine lege stricta*, which prohibits the application by analogy of statutory provisions in criminal law.^[44] All these requirements are under the principle of legality. When re-scrutinize the problems of the application of Criminal Law and Criminal Procedure Law on online obscene live streaming in China with the principle of legality, it could find that the vagueness of the definition of electronic information, the blanked regulations on changing the form of evidence from electronic data to the other types, and the conviction of same conduct by various crimes do all violate the principle of legality, to some extent. Though criminal policy of coping with online obscene live streaming instructed by the SHDF National Office through the “CleanNet 2019” campaign demands harsh crack-down, it should subject the investigation, prosecution, and adjudication to the principle of legality, as *Lisztshes Trennung*, conceptualized by Claus Roxin, depicted that “*Das Strafrecht ist die unübersetzbare Schranke der Kriminalpolitik* (Criminal law is the untranslatable barrier of criminal policy).”^[45] It could also be understandable, in other words, that the principle of legality is the untranslatable barrier of criminal policy. Although it had been criticized by Prof. Roxin, the *Lisztshes Trennung* still has its value of preventing criminal policy overriding the principle of legality of criminal law, especially in the context of coping with cybercrime. In short, adhere to the principle of legality is helpful to the judicial practitioners in the popularity of criminal law superstition stay awake. This is not conservative, but virtue of tolerance and prudence.

V. SUMMARY AS CONCLUSION

The unique feature of against the obscenity with a broad and sweeping attitude in China has made more distinction of coping with or dealing with online obscenity or pornography of China from other countries around the world. The new form of disseminating obscenity online, the online obscene live streaming with particular features itself or of the perpetrators and users involved, attracted more attention from the SHDF National Office in China and was treated as the primary target of the “CleanNet 2019” campaign. Cases reported by the SHDF National Office have shown the Chinese legal practice of the criminal justice system in coping with or dealing with online obscene live streaming. The crime of online obscene live streaming, at its root, is a type of cybercrimes. By comparing with some analogical cybercrime researches about sexting and case study of the five example cases, general and particular problems had been selectively identified. Due to the

[44] See. Boot, 2002; Wikipedia contributors. (24 September 2019). *Nulla Poena Sine Lege*. Retrieved October 27, 2019, from https://en.wikipedia.org/w/index.php?title=Nulla_poena_sine_lege&oldid=917569730

[45] See. Roxin, 1973.

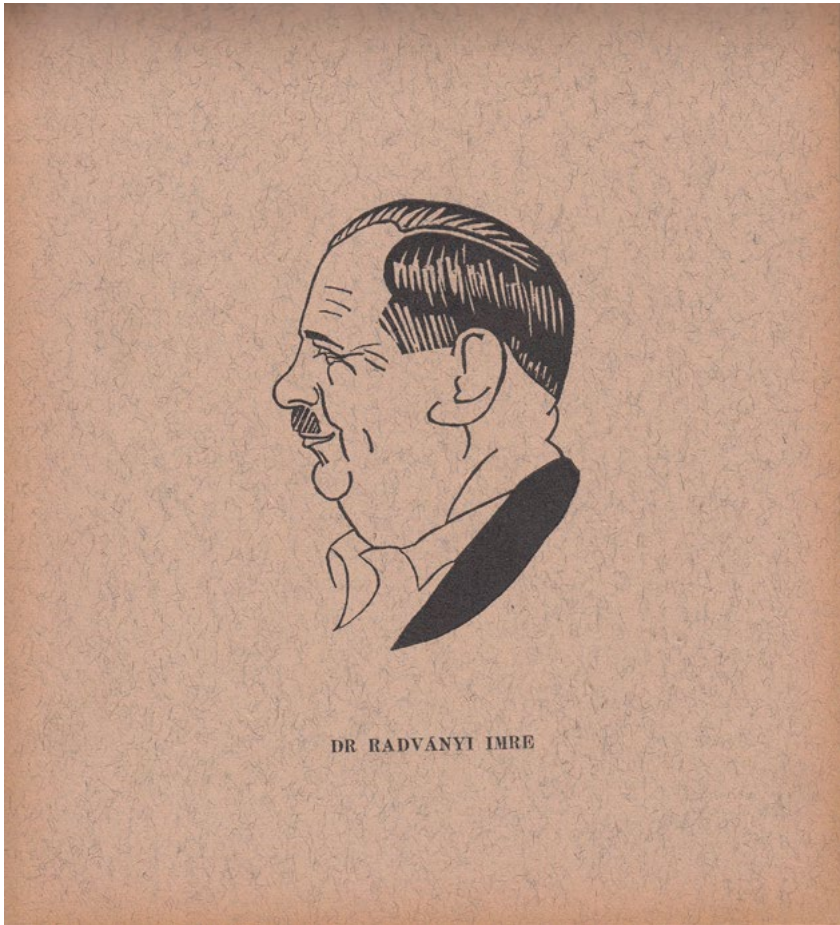
particular situation of China, the feasible solutions, which are not only for the crime of online obscene live streaming but also for other cybercrimes under similar circumstances, call for the different strategic choices: new legislation or new interpretations. With full consideration of the principle of legality (both in *legal dogmatics* of criminal law and dialectic relationship between criminal law and criminal policy) and the prudence and tolerance underlying the criminal law, this paper stands by the choice of new legislation which requires to follow the principle of legality strictly with tolerant and prudent attitude to relevant cybercrimes with the view of fulfilling the functions of human rights protection of criminal law before the enactment of New Legislation.

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