

**REGULATIONS ON JAPANESE VIDEO GAMES FOR PROTECTION OF CHILDREN
IN JAPAN**

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In Japan, video games are generally regulated by self-imposed control and voluntary ratings by third parties, rather than by law. There is no special statute tailored to regulate video game software. Some people criticize this absence of law as being too lenient when it comes to protecting children. There are few studies published in English that are written by Japanese legal scholars that review regulations intended to protect children in Japan.

Using a comparative law approach, comparing Japanese law with U.S. law, this paper contends that there are several tools to control and regulate video games for the purpose of protecting children. The use of legal devices is simply one of several means to achieve this goal. Even if legal regulations are enacted, they may not be very effective. Moreover, they could even have negative impacts on the freedom of expression that is protected under the Constitution of Japan.

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I. RATING IN JAPAN

In Japan, the video game rating system is not regulated by statute passed in the parliament (Diet).¹ Instead, self-imposed regulations, which lack legally binding power, control and regulate video games. Video game makers voluntarily established these regulations. Within this rating system, violent, sexual, and anti-social expressions are controlled by guidelines. The rating system classifies games into several categories by player age.

1. Analytical Perspective, Laws, and Norms

This paper presents law as one of several tools, such as social norms, the market, and architecture, that regulate and control human behavior in society. However, this paper acknowledges that legal regulation cannot resolve all of society's problems.²

For example, gamification is a concept in which the ideas, designs, and mechanics of games are used to develop social activities and services beyond the game industry. For instance, at universities, games are used to enhance student's motivations to learn.³ By understanding the effect of law generally, we can uncover better tools for influencing human behavior in specific ways.⁴ For example, harsh criminal sanctions may not be the most effective measure for reducing crime, as those faced with those sanctions may choose to ignore the law because regulators lack the human, time, and financial resources to actually regulate and impose those sanctions.⁵ In effect, such legal sanctions may not only fail to achieve their purpose but may also cause unintended side effects.

¹ Nihonkoku Kenpo [Kenpo][Constitution], art. 41 (Jp.). For law making power in Japan, see Yuichiro Tsuji, *Law Making Power in Japan - Legislative Assessment in Japan*, 10(1) Korean Legislation Research 173,191 (2016).(Korea).

² Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996). LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books 2000).

YUICHIRO TSUJI, *THE FREEDOM OF ESPRESSION IN THE INFORMATION ORIENTED SOCIETY* (Nihon hyouronsha 2011).

³ Yoshihiro Kishimoto, *Report, About effectiveness of university education utilizing Gamification*, Journal of Digital Game Research (2013), available at http://www.omurice.com/kissygame/130304DiGRA/gu_essay.pdf (last visited on Sept. 8, 2017).

⁴ TSUJI, *supra* note 2, at 22.

Yuichiro Tsuji, Internet, SASAKI AND SHISHIDO, GENDAISHAKAI TO KENPO GAKU [Modern Society and Constitutional studies] 17 (Kobundo 2015).

⁵ The government might not regulate violator because of insufficient resource of human, time and finance. In environmental law, this is called slippage. Daniel Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999).

2. Review of the Rating System in Japan

Before uniform voluntary regulations arose, game makers used several guidelines with various rating standards. Due to the fact that more young players are joining the gaming scene, the progress of game technologies generates a greater variety in video game content as well as effects.

In 2002, the computer entertainment rating system organization (CERO) was established as a non-profit organization (NPO).⁶ In Japan, there is no specific statute for rating regulation, and NPOs used to be regulated under former Civil Code Article 34,⁷ which was incorporated in the public interest corporation system. In the prior system, establishing corporations and reviewing public interests were responsibilities of the regulating ministry. Today, the Act to Promote Specified Non-profit Activities⁸ controls NPOs as special public interest corporations. This Act was established after the Great Hanshin Awaji Earthquake in 1995, because there was no statute to coordinate, regulate, and manage NPOs when large earthquakes occurred.

In the new system, non-profit organizations may be established by registration only. The committees that review the registration to ensure the public interest of the NPOs comprise specialists in public sectors. Each prefecture, where the NPO is located, has a regulatory agency.

In order to maintain a fair rating system, the CERO management is independent of a specific company or organization. The scope of the ratings covers in-home video games available in Japan. The rating system reviews all the content of video games, including hidden content available by inputting special commands while playing. The members who rate the video games are recruited from the general public; they range in age from 20 to 60 years old and are from various occupations. Before rating, they receive some training, learning how to register and classify the games by content. The composition of rating members is fairly non-biased as certain relatives of game makers are prohibited from becoming rating members.

In the rating process, the game maker submits software to CERO in order for its content to be reviewed and rated by several CERO members. There are twenty-four items that are reviewed for video game expression, and each item has a maximum ceiling. If the game

⁶ Computer Entertainment Rating System Organization (CERO), *available at* <http://www.cero.gr.jp/rating.html> (last visited on Sept. 8, 2017).

Although this paper focuses on CERO, Ethics Organization of Computer Software is also rating organization for computer game for adult.

Japan contents Review Center, *available at* <http://www.sofurin.org/> (last visited on Sept. 8, 2017).

⁷ MINPOU [Civil Code], Law no. 89 April 27, 1896, art. 34 (Jp.).

⁸ Tokutei hi eiri houjin katsudo sokusin hou [The Act to Promote Specified Non-profit Activities], Law no. 70 of 2016.(Jp.).

content goes beyond this ceiling, no rating is provided and the software is automatically prohibited. After rating, the age category for the software is determined. Then, the game makers inform the consumers about the rating by placing a rating sticker on the game cover. For example, the famous video game, “Biohazard” for Nintendo DS is rated “D,” indicating that this game is for people over 17 years old. Those rated “Z” are for people over 18 years old, and “Ultra Street Fighter II” for Nintendo Switch is rated “B”—appropriate for people over 12 years old.⁹

This rating system in Japan is constitutional. The CERO is established by law and not censored by the government as the Japanese Constitution clearly prohibits censorship.¹⁰ The NPO Act is not specially tailored for CERO—it covers NPOs generally and respects the NPOs’ organizational autonomy. Because it is easy to establish NPOs, governmental management and intervention is not preventive, rather it is *ex post facto*. Furthermore, NPOs may be challenged by diverted funds.

CERO’s voluntary rating system improves the credibility of software and enhances players’ awareness in the market. Through this rating system, the purchase decision is left to young consumers’ parents. Unlike former non-uniform standards, this uniform rating system is helpful for users as it is easy to understand. In addition, because there is only one guideline to prepare and advertise, this system reduces cost.

One problem of this system is that it does not apply to games created for use on the internet. Moreover, self-control regulations, created by systems like CERO, may not be effective due to the lack of incentive to observe the guideline. The ability to implement the CERO rating system and the usefulness of the ratings are clearly subject to the game makers’ observance.

3. The United States Rating System

Compared with other countries’ rating systems, the Japanese rating system is not unique. In the United States Constitution, as in the Japanese Constitution, the First Amendment guarantees the freedom of speech and strictly prohibits government censorship. The U.S. rating system is managed by a private organization called, the Entertainment Software Rating Board (“ESRB”).¹¹ Game makers submit games to ESRB, and a committee comprised of at least three members review the game before it goes to the market. Game makers first answer a questionnaire prepared by ESRB that asks the game maker about the game’s context as well as the presence of violence, sexual content, language, controlled substances, and gambling.

⁹ CERO, *supra* note 6.

¹⁰ Nihonkoku Kenpo [Kenpo][Constitution], art. 21(2).(Jp).

¹¹ Entertainment Software Rating Board (ESRB). Available at <http://www.esrb.org/> (last visited on Sept. 8, 2017).

The ESRB receives games and reviews whether or not the ratings are correct.¹² The ESRB covers games that are available to download from the internet. However, the U.S. ESRB rating system faces the same problem faced by the Japanese CERO rating system—it does not cover games distributed on the internet by private citizens. One distinct difference between the two systems is that the categories used to classify software are different. Overall, it is clear, in both Japan and the U.S., the interest of children is constitutionally protected by the countries' respective constitutions.¹³

4. Regulatory Approach through Legislation to Protect Children

The Japanese Constitution obligates parents to provide education for their children.¹⁴ In addition, parents are responsible for raising their children.¹⁵ Thus, protecting children with respect to video game content may not require legally-binding regulations because, as previously stated, parents who purchase the game can make informed decisions based on the CERO rating sticker.

In addition to the CERO rating system, game companies participate in another regulation that is not legally binding called filtering. Parents may choose to activate installed filtering software for their children. The Nintendo DS has filtering software that allows parents to choose whether or not to activate it. This regulation must not violate the constitutional right of the adult to receive information in the name of protection of children under Article 21 of the Japanese Constitution.¹⁶

Though different from gaming, children may engage with computers via a writing program. Such writing computer programs are constitutionally protected under the freedom of expression, and any regulations related to them must survive several constitutional tests such as censorship and prior restraint.¹⁷ In Japan, children are playing games and becoming game programmers at a very young age.¹⁸ By 2020, programming education will start at the elementary school level. The number of cases that minors creates computer virus and distribute will increase.¹⁹ Pursuant to the Criminal Code, it is clear that video game makers

¹² *Id.*

¹³ Nihonkoku Kenpo [Kenpo][Constitution], art. 27(2)(Jp.).

¹⁴ *Id.* art.26. See also, Kumiko Fukuoka, *Jidou gyakutai ni kansuru kenpou gakuteki siron* [Child Abuse and Constitution] 53(3&4) Osaka Law Review 1043(2003).

¹⁵ MINPOU [Civil Code], Law no. 89 April 27, 1896, art. 714 (Jp.). Parents with legal obligation to supervise children without capacity to assume liability shall be liable to compensate for damages that parents without capacity to assume liability has inflicted on a third party.

¹⁶ Nihonkoku Kenpo [Kenpo][Constitution], art. 21(Jp.).

¹⁷ *Id.*; see, Tsuji, *supra* note 2, at 204.

¹⁸ The Ministry of Internal Affairs and Communications, *purograming jinsai ikusei no arikata ni kansuru chousa kenkyu* [Research on cultivation of human resource development for programming] (June 6, 2015). Available at http://www.soumu.go.jp/main_content/000361430.pdf (last visited on Sept. 8, 2017).

¹⁹ Tokyo Shimbun, Uxirus Sakusei Nouryoku Misetsuke [Minor created computer virus to shows off](Aug. 18, 2017). Available at <http://www.tokyo-np.co.jp/article/national/list/201708/CK2017081802000243.html> (last

do not have the right to make and distribute viruses.²⁰

There are several statutes relevant to game playing regulations. In 2016, for example, the Act on Protection of Personal Information²¹ was amended to grapple with the big data era. It is important to protect data of young players as they may unintentionally give their data to a third party without thinking of the risk related to that data usage.²²

As the number of smartphone users increase, players sometimes purchase items by cards to make game play easier. Some addicted players spend a lot of money to get rare items. Within this system, whether a player can obtain game items depends on probability—thus, arousing interest in gambling. Truly addicted players continue paying money simply to collect a completed list of items—this technique is referred to as “Gacha.”

In the beginning, several game makers tried to manage game regulations by themselves, first by setting a ceiling on how much money users may use as well as an age verification filter for minor users. Subsequently, the Consumer Affairs Agency (CAA) administratively advised²³ that Gacha should be abolished, announcing that this game technique infringes on the Act against Unjustifiable Premiums and Misleading Representations.²⁴ Accordingly, the Ministry of Internal Affairs and Communications (MIC) made a public announcement interpreting that the Act against Unjustifiable Premiums and Misleading Representations was intended to prevent addicted persons from being billed excessively.²⁵

The central government has regulated activities relevant to arcade games, taking care not to regulate content to avoid violations of free speech. Thus, one statute intended to protect minors is the Act on Control and Improvement of Amusement Business (ACIAB) that prohibits minors under 16 years old from entering amusement arcade after 18:00.²⁶ If they are under 18 years old, they may not enter it after 22:00.

The Japanese Constitution allows local governments to pass ordinances.²⁷ Most ordinances impose stricter sanction than statutes passed by the central government.²⁸ In this

visited on Sept. 8, 2017).

²⁰ Keihou [Japanese Penal Code], Law no. 45 (1907) (Amended 2011), art. 168-2, 168-3.

²¹ Kojin jouhou hogo hou [Act on Protection of Personal Information], Law no. 57 of _date_ 2003, as last amended by Law no. 51 of 2016 (did not find the exact law no. for the amended version).

²² Ministry of Internal Affairs and Communications, (6) Youth’s Internet Use, part 2, section 3, White paper on information and Communication (2014).

Available at <http://www.soumu.go.jp/johotsusintokei/whitepaper/ja/h26/html/nc253360.html> (last visited on Sept. 8, 2017).

²³ Administrative advice is that administrative agency gives advice to a party with no ground of statute, Gyousei tetsuduki hou [Administrative Procedure Act], Law of 88 of November 12, 1993, art. 2.

²⁴ Futou keihin oyobi futou hyouji boushi hou [Act against Unjustifiable Premiums and Misleading Representations], Law no. 134 of May 15, 1962, art.3.

²⁵ Consumer Affairs Agency in MIC, Onrain ge-mu no konpu gacha to keihin hyouji hou no keihin kisei ni tsuite [Public notice of Regulation of complete gacha of online game and Act against Act against Unjustifiable Premiums and Misleading Representations] (May 18, 2012. Partly revised on April 1, 2016).

Mitsubishi Research Institute, *Trend of smartphone game*, in MIC report.

²⁶ Fuzoku eigyou tou no kisei oyobi gyoumu no tekiseika touni kansuru hou [Act on Control and Improvement of Amusement Business, etc.], Law no. 122 of 1948.

²⁷ Nihonkoku Kenpo [Kenpo][Constitution], art. 94 (Japan).

²⁸ Saiko Saibansho [Sup. Ct] Sept. 10, 1975, Showa 48(A?) no.910, 529 Saiko Saibansho Keiji Hanreishu

case, the Supreme Court explained that in judging conflicts between statutes and ordinances, courts review purpose, effect, contents, and meaning of both the statute and ordinance. Thus, minor children may not enter if the ordinance prohibits, as the purpose is to protect children in the late evening. Before its amendment in 2016, children could not enter after the designated time even if their parents accompanied them.

When reviewing the constitutionality of a regulation with respect to free speech, the time, manner, and place of the regulation is checked by lenient review rather than by content regulation.²⁹

Another regulation is the Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People. This Act obligates cellphone companies to provide a filtering service for parents with children under 18 years old, unless the parents clearly reject such filtering service.³⁰ It also obligates internet service providers to provide a filtering service. These obligations involve no criminal sanction, instead the internet server administrator must comply with the duty of preventing minors from being exposed to harmful content. The MIC has jurisdiction over this matter—it promotes research on and investigation of filtering software.

II. ROLE OF JUDICIARY IN VIDEO GAMES

1. The Judicial Review and Constitutional Right

For the purpose of protecting children, courts review statutes in concrete cases to ensure that the government is not unconstitutionally intervening on individuals' freedom.³¹ Under strict judicial review, the government is obligated to show that its regulation is constitutional by presenting evidence.³² In Japanese judicial review, the court only reviews matters of law in concrete cases.³³ The freedom to play video games is protected by the term "Pursuit of Happiness" in Article 13.³⁴ If the right to play a video game is for entertainment or fun, not individual autonomy, it could be easily regulated. If the game manufacturer insists that playing a video game is at the core of individual human autonomy, then the government must

[Keishu] 489 (Japan.). (Tokushima public security ordinance case).

²⁹ Koji Sato, *Kenpo [On Constitution]* 254 (Seibundo) (1st ed. 2011) [hereinafter *KOJI SATO*].

¹ Toshihiko Nonaka, Mutsuo Nakamura, Kazuyuki Takahashi, and Katsutoshi Takami, *Kenpo [Constitution]* 355-56 (Yuhikaku) (5th ed. 2012) [hereinafter *NONAKA ET ALI*].

³⁰ Seishounen ga anzen ni anshin shite inta-netto wo riyou dekiru kankyouno seibi ni kansuru hou [Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People], Law no. 79 of 2008, as last amended by Law no. 71 of 2009.

³¹ Nihonkoku Kenpo [Kenpo][Constitution], art. 21(2). (Japan).

³² KOJI SATO, *supra* note 29, at 271; NONAKA ET ALI, *supra* note 29, at 387.

³³ Saibansho hou [Court Act], Law No. 59 of 1947, art. 3; Yuichiro Tsuji, *Constitutional Law Court in Japan*, 66 TSUKUBA JOURNAL OF LAW AND POLITICS [TSUKUBA J.L.Pol.] 65 (2016).

³⁴ NIHONKOKU KENPO [KENPO][CONSTITUTION], art. 13 (Japan).

justify the regulation. The level of judicial review is subject to argument by a party.³⁵

Programming software is also constitutionally protected under the freedom of business in Article 22.³⁶ To regulate matters concerning the freedom of business, companies bear the burden to prove that the regulation is unconstitutional. To do so, these companies could show that certain potential business avenues in video gaming, including gamification and a rehabilitation tool for nursing homes, would be unnecessarily restricted by regulation and that such regulations would inhibit future development such that the freedom of business is violated. Under judicial review, the restriction of freedom of speech is more strictly reviewed than that of freedom of business. Thus, if a company showed that a regulation relating to freedom of business eliminated the right of occupation itself and denied individual dignity, the court would carefully review the regulation.

In Japan, legally binding regulation is stricter than self-imposed regulation. In addition, unlike the U.S. Supreme Court, it is rare that Japanese court strikes down regulations restricting freedom of speech.³⁷ The 2007 Supreme Court decision illustrates such a rarity, allowing the court to employ a narrow interpretation in order to rescue the ordinance when the text triggers a suspicion of unconstitutionality.

In this case, Hiroshima City passed an ordinance to target young motorcycle gangs. The defendants argued that the definition in the ordinance, regarding what a motor bike gang meant, was overbroad as the ordinance equates the wearing of motorcycle jackets as signally membership in a motorcycle gang, even if the person is not driving recklessly.

The Supreme Court excluded this interpretation by using other provisions of the city ordinance, focusing on the fact that the regulation pertained only to young members who intimidate the general public. Essentially, the city ordinance regulated only persons who rejected the cease and exclusion order. The young motorcycle gang members are plainly recognizable by their flag, cloth, and gestures.

2. Judicial Review in Practice

According to Japanese Constitutional studies, the government may restrict business freedom in the name of social or economic policy. In such instances, the court would review the regulation more leniently than it does freedom of expression regulations as such regulations can only be overcome if a citizen shows that the regulation is unconstitutional.

The purpose of the regulation of economic freedom is divided into two: negative and positive regulation. The negative regulation is derived from the police state—that the

³⁵ TSUJI, *supra* note 2.

³⁶ NIHONKOKU KENPO [KENPO][CONSTITUTION], art. 22 (Japan).

³⁷ Saikō Saibansho [Sup.Ct.] Sept. 18, 2007, Heisei 17(a) no. 1819, 61(6) SAIKO SAIBANSHO KEIJI HANREISHŪ [KEISHU] 601 (Hiroshima motorcycle gang ordinance case).

governmental mission is to protect life, health, and safety. The positive purpose is derived from the welfare state—that the government is obligated to help indigent people. The fact that the Japanese Supreme Court has followed this dichotomy has been controversial.

Recently, the three-step review used by German courts has been incorporated in Japanese constitutional law studies.³⁸ Under this review process, the judiciary determines the scope of protection of the fundamental right. The scope of protection is the defense right from government intrusion. Obscenity or defamation is defined by the scope of protection. Governmental restrictions or interventions on fundamental rights are presumed unconstitutional if they restrict defense rights. Consent is a defense to such an unconstitutional presumption. This process, which the Japanese Supreme Court adopted, remains controversial among Japanese constitutional scholars, who argue between the applicability of the German or the U.S. judicial review.³⁹

Judicial review of restriction or intervention involves a determination of whether a ground for the statute exists. That is, if the text of the statute is clear, the restriction is tailored to the purpose, the means to achieve the aim are necessary, no less restrictive alternative exists, and the gained interest outweighs the lost interest, and gained interest and lost interest are balanced. In addition, the Japanese courts use the proportionality test.

The Japanese judiciary uses concrete judicial review if a dispute arises.⁴⁰ Under concrete judicial review in Japan, as in the U.S., the court does not render a decision without a dispute of law. This judicial power reviews statutes regulating freedom of expression or economic freedom for video games.

Today, the Japanese legislature does not provide a video game rating system statute. However, outside of a rating system, there are several other statutes whose purpose is to protect children.

Japanese courts review the purpose of regulations respectively. For example, suppose the regulation on video games for elderly rehabilitation would require certain safety standards. The purpose the regulation would be to provide health and maintain the safety of the elderly. Public subsidies for video games may be perceived as a positive regulation. And, if video games were medical devices, the medical device or general device regulation would apply.⁴¹

³⁸ Jan Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, 9 German L.J. 1267 (2008); TSUYOSHI KOYAMA, *KENPOU JOU NO KENRI NO SAHYOU* [MANNER OF CONSTITUTIONAL RIGHTS] (2012); KENJI ISHIKAWA, *JYU TO TOKKEN NO KYORI-KARL SHUMITT SEIDOTAIHOSHOURON SAIKOU* [PRIVILEG ZWISCHEN FREIHEIT UND PRIVILEGE, KARL SCHIMITT INSTITUTIONELLE GARANTIE] (2007); JOJI SHISHIDO, *KENPO KAISHAKURON NO OUYOUTO TENKAI* [DEVELOPMENT AND APPLICATION OF CONSTITUTIONAL INTERPRETATION] (2nd ed. 2014).

³⁹ Tsuji, *supra* note 33, *Constitutional Law Court in Japan*. There are several cases that the Supreme Court didn't use negative and positive purpose, but reasonableness and necessity test. *See also* Saikō Saibansho [Sup.Ct.] April 22, 1987, Showa 59(o) no. 805, 41(3) SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 408 (Forest Act case); Saikō Saibansho [Sup.Ct.] Feb. 13, 2002, Heisei 12(o) no. 1965, 56(2) SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 331 (Securities and Exchange Law case).

⁴⁰ NIHONKOKU KENPO [KENPO][CONSTITUTION], art. 76 and art. 81 (Japan).

⁴¹ Yuichiro Tsuji, *Safety of medical device robot in Japan* (forthcoming, 2018).

Obscenity prohibited by the Criminal Code⁴² applies to video games. For criminal sanction, due process of law under Article 31⁴³ of Japanese Constitution requires that the text of the statute should be clear, not overbroad. In 1999, the Act on Punishment of Activities Relating to Child Prostitution and Child Pornography and the Protection of Children⁴⁴ prohibited the possession of child pornography with intent to sell and distribute. In 2014, this special statute was amended to cover self-possession. It is still controversial whether the definition of child pornography is overbroad, although the Japanese Supreme Court offered and relied on a similar definition of obscenity⁴⁵, and in the U.S., the Supreme Court upheld a New York state law prohibiting child pornography in *N.Y. v. Ferber*.⁴⁶

It is no question that it is strictly prohibited for video games to exhibit child pornography. However, a controversy arises when pseudo child pornography arises—that is, the use of drawings or computer-generated graphics depicting child pornography. The purpose of prohibiting child pornography is to protect children from abuse; thus, when the child pornography does not depict real minor children, there is not harm to a child. Accordingly, the government would not have a viable regulatory reason to disallow it.

In 2016, the Tokyo district court⁴⁷ found guilty a person who made pseudo child pornography based on a book of photographs of real minor girls. The court noted that if a reasonable person regards the image as a real one drawn from a real picture, the computer-generated image constitutes prohibited child pornography. Even though the computer image was made from many parts of several real human pictures, the court stated that it was still prohibited. The defendant argued that the computer image was made from a drawing, not a picture of the book, but the court rejected this argument.

In 2008, in *U.S. v. Williams*, the U.S. Supreme Court held a federal law⁴⁸ that prohibited the pandering of child pornography constitutional.⁴⁹ In this decision, the Supreme Court held that pseudo child pornography is excluded by interpretation.⁵⁰

This decision is similar to Japanese legislative effort, and the CERO in Japan would not allow games including pseudo child pornography. The amendment prohibiting self-possession encourages video game maker to control more strongly before legal sanction

⁴² Keihou [Japanese Penal Code], Law no. 45 (1907), art. 175.(Jp.)

⁴³ Nihonkoku Kenpo [Kenpo][Constitution], art. 31.(Jp.).

⁴⁴ Jidou baishun, jidou poruno ni kakaru kouji tou no shobatu oyobi jidou nohogo touni kansuru hou[Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children], Law no. 52 of 1999 (revised Law no. 79 of 2014).(Jp.).

⁴⁵ Saiko Saibansho [Sup.Ct]March 13, 1957, Showa 28(a) no.1713, 11(3) Saiko Saibansho Keiji Hanreishu [Keishu] 997.[Lady Chatterley's Lover case].

⁴⁶ *N.Y. v. Ferber*; 458 U.S. 747, 765-66 (1982).

⁴⁷ Tokyo Chiho Saibansho [Tokyo Dist.Ct.] March 15, 2016, Showa 34 (tokuwa) no.6, 1952, 367,368, 89 Hanrei Taimuz [Hanta] 79 (Jp.).

⁴⁸ 18 U.S.C. § 2252A(a)(3)(B).

⁴⁹ *United States v. Williams*, 553 U.S. 285, 307-08 (2008).

⁵⁰ *Id.*

works.

Nowadays with regard to the internet, another constitutional issue has arisen when a video game is produced not only by a company but also by an individual programmer.

The extent and protection of individual free speech is the same as that of a game maker. The problem in Japanese constitutional law is law enforcement. Police may not use implemented criminal statutes so strictly⁵¹ due to the free speech protections of Article 21 of the Japanese Constitution. The government does not arrest persons in question whose speech may be in the boundaries of protected speech. For example, the Tokyo district court decision will be reviewed by Japanese public law researchers because Souter's dissenting opinion in *U.S. v. Williams* noted that pseudo child pornography is not protected speech,⁵² as video games produced by game maker companies must, first, pass the rating system.

3. Freedom of Expression and Decisions

Video game makers enjoy the freedom of expression as well as economic freedoms. The Constitution cannot force certain values or perspectives on people's lives. Generally, strict judicial review works for regulations of freedom of expression. Article 21 of Constitution prohibits censorship and severely restricts prior restraint. In 1984,⁵³ the Supreme Court defined censorship as:

it has, as a special quality, the prohibition of publication of what are judged inappropriate, after the administrative authorities as the main organ, for the purpose of prohibition of publication as a whole or a part, covering the matters of expression of substance of thought, etc., conduct the comprehensive and general examination of the above specific matters of expression prior to its publication.

The Court approved the local government's ordinance to protect minors by restricting shopping in automatic vending machines that sell books that are harmful to minors.⁵⁴ Through these vending machines, minors can purchase books more easily than they can face-to-face in book stores. The automatic vending machine showcase is dark and black in daytime. In the evening, it lightens up to make books inside viewable. Defendants argued that the ordinance restricting book purchases for minors lacked clarity under the due process of law under Article 31⁵⁵ of Constitution, led to unequal⁵⁶ regulation beyond the local

⁵¹ Keihou [Japanese Penal Code], Law no. 45 (1907), art. 175 (Jp.).

⁵² *Williams*, 553 U.S. at 310 (Souter J., dissenting.).

⁵³ Saiko Saibansho [Sup. Ct] December 12, 1984, Showa 57(gyo tsu) no.156, 38(12) Saiko Saibansho Minji Hanreishu [Minshu] 1308 (Jp.).[Sapporo Custom case].

⁵⁴ Saiko Saibansho [Sup. Ct] September 9, 1989, Showa 62(a) no.1462, 43(8) Saiko Saibansho Keiji Hanreishu [Keishu] 785 (Jp.).[Gifu minor protection ordinance case].

⁵⁵ Nihonkoku Kenpo [Kenpo][Constitution], art. 31.(Jp).

⁵⁶ *Id* art. 14.

government's jurisdiction, and infringed on the freedom of expression.⁵⁷ The Court noted that the governor might designate books that were sexually harmful as they could damage or inhibit the healthy growth of children. Then, in the designation process, a public hearing for the protection of children shall be convened. The governor had a power to establish regulations in advance for materials that were clearly sexual expression. The public notice by the local government detailed the restricted pictures. Subsequently, the designated books were prohibited from being available in the automatic vending machines. The Court held that these particular means to achieve the protection of minors from harmful books was reasonable.

Rating by CERO applies a similar approach. The rating committee is recruited from the general public. Game makers may reject the rating and sell the video game on the market because ratings do not involve criminal sanctions. Both the Japanese rating system and ordinances to restrict vending machine sales observe due process of law. Thus, the defendant and game maker are given an opportunity to rebut the decision of the local government or CERO.

Although this Supreme Court decision was determined in 1989, the Tokyo metropolitan parliament amended its ordinance for the protection of minors in 2010. The amendment added a controversial restriction of contents that wrongly praise or exaggerate sexual actions or similar actions that are against social norms. The controversy centers on whether this restriction is too overbroad.⁵⁸ This ordinance regulates magazines as well.

In 1984, in the Hoppo Journal case,⁵⁹ the Supreme Court allowed prior restraint to seek a court injunction when a candidate for governor of Hokkaido was severely criticized and brought a suit for injunction. In this case, the Supreme Court held that the candidate could ask of an injunction via his personal right under the Constitution; if first, it was clear that the article in question lacks public purpose or was factually untrue, and second, the person in article was likely to suffer significant and unrecoverable damage. The Supreme Court noted that when an injunction was reviewed, the author or publisher must be given an opportunity to rebut the allegations and evidence.

Suppose that the rating system is not complete enough to control video games which might be harmful for children, the legislature may pass a statute to regulate video games. The statute regulating video games must be able to survive strict prohibition of censorship and the requirements for prior restraint. The Hoppo Journal case required an injunction to provide an opportunity for the regulated party to submit opinions under the due process of law. However,

⁵⁷ *Id.* art. 21.

⁵⁸ Japan Federation of Publishing Workers' Union, Announcement against Tokyo metropolitan ordinance (Mar. 12, 2010). Available at <http://www.syuppan.net/modules/news/article.php?storyid=93> (last visited on September 8, 2017).

⁵⁹ Saiko Saibansho [Sup. Ct] June 11, 1986, Showa 56(o) no.609, 40(4) Saiko Saibansho Minji Hanreishu [Minshu] 872 (Jp.).[Hoppo journal case].

unlike the Hoppo Journal case, with regard to the rating system, video makers voluntarily submit video games to CERO for rating review. In the Hoppo Journal case, the Court held that notice and a hearing procedure should be guaranteed in prior restraint. Unlike censorship by an administrative power, prior restraints can be conducted by the government, which includes the courts.

4. Balancing Test in Japan

The judiciary sets out the boundary of acceptable restrictions of freedom of speech through its decisions. One of the interpretations is the balancing test. We must be vigilant to ensure that the protection of children will be a valid reason to restrict freedom of speech.

The Hakata Station Television case⁶⁰ demonstrates the use of the balancing test, which is helpful to review the validity of a restriction of free speech with regard to video games. In this case, in 1968 when a nuclear-powered aircraft carrier came to Sasebo Harbor, the All-Japan Federation Students of Self-Governing Association collided with riot police and police from the nearby Hakata station. A fight broke out because police inspected the facility. Four resisting students were arrested and prosecuted.

In this case, the Association for the Protection of the Constitution complained to the authorities that the activities conducted by riot police violated Articles 194 (Abuse of Authority by Special Public Officers) and 195 (Assault and Cruelty by Special Public Officers) of the Criminal Code.⁶¹ The district prosecutor dropped the prosecution. The Association requested judge-accompanying claim is provided under the Criminal Procedure Act.⁶² It is an exception in Japanese criminal procedure that the prosecutor has exclusive power to prosecute. A person who is dissatisfied with the disposition not to institute prosecution made by a public prosecutor may request district court that public prosecutor bring to the court. In judge accompanying claim, a committee comprised of citizens examines whether the prosecution was valid. The Fukuoka district court requested broadcasting companies to submit the recorded video of the clash between the police and the students.

The Supreme Court held that the freedom of broadcast was protected under Article 21 of Constitution; however, this freedom was restricted. The Court applied a test to review the validity of the court order to request submission of evidence; the test considered: the character of the crime, gravity of the evidence acquired by collecting materials for broadcast, necessity for fair criminal trial, and interest lost by the court order. The problem the court faced in this decision was determining which factors were significant.

Sato argues that the balancing test was defective, and that with respect to free speech, the

⁶⁰ Saiko Saibansho [Sup. Ct] Nov. 26, 1969, Showa 44(si) no.68, 23(11) Saiko Saibansho Keiji Hanreishu [Keishu] 1490 (Jp.).[Hakata station television case]

⁶¹ Keiho [Penal Code], Law no. 45 of 1907, art.194 and 195 (Jp.).

⁶² Keiji soshou hou [Criminal Procedure Act], Law no. 131 of 1948, art. 262-269 (Jp.).

court should show an objective standard. It is possible to request that the judiciary use an objective standard for foreseeability and establish a legal principle for admissibility of evidence.⁶³

In Japan's Supreme Court, unlike in the U.S. Supreme Court, there have been only ten decisions that found certain regulations to be unconstitutional since the current Constitution was established in 1947. Regarding free speech, the Japanese Supreme Court has rarely rendered a regulation unconstitutional. Thus, it might be difficult to expect the judiciary to protect free speech in the court.

III. DISADVANTAGE OF LEGAL REGULATION

1. Compromised Statute

Ideally, laws will achieve their purpose through the means provided in the Diet. However, an interest group may compromise the statutes. In Japan, as in Art.1 of the U.S Constitution vesting Congress law making power, the Diet is vested with law making power under Article 41 of the Constitution,⁶⁴ and the members of the two houses are expected to deliberate to draft a statute for the Japanese people.⁶⁵ Statutes are passed in the plenary session, but, in general, the committee takes the leading role in drafting statutes. The members of the Diet must participate in the committee, and during the committee, there is substantial deliberation.

Although it is noted that some members of the Diet work to draft statutes for the Japanese people pursuant to the Constitution, in some cases, the deliberations of the committee may fail in that regard. Even though the purpose provision might be ideally crafted, the means to achieve the goal may be too overbroad because of pressure of an interest group such as a parent group. This may occur because, in Japan, members of the Diet may lack training and knowledge when it comes to drafting legal statutes.

The Cabinet Legislation Bureau (CLB) under the Cabinet, that comprise bureaucracies from ministries, works diligently to draft bills. The CLB helps mainly members of the ruling party because it is housed under the Cabinet. Per the Constitution,⁶⁶ the Cabinet may submit a bill to the Diet, without infringing on the law-making power of the Diet. If the CLB-drafted bill is criticized for failing to follow democratic procedures, then a resolution shall be made by the members of the two houses of the Diet, which reflects the opinions of constituents. The House of Legislation under the Diet and the National Library assists members of the Diet. The abilities of members of the Diet are smaller than those of the ruling party assisted by the CLB. Without sufficient deliberation, the ruling party legislation has the potential to be rather

⁶³ KOJI SATO, *supra* note 29, at 280.

⁶⁴ Nihonkoku Kenpo [Kenpo][Constitution], art. 41.(Jp.).

⁶⁵ *Id.* art. 43.

⁶⁶ *Id.* art.72.

one-sided or biased.

For game regulation in Japan, the legislative committee may reach a consensus in order to protect children from illegal matters, such as defamation, privacy infringement, and obscenity. However, the purpose provision may be too abstract, and the means to achieve those aims may be overbroad, lacking clarity in the text of the statute.

Although some members of the legislative committee may actually work for the Japanese people, others may work in the interest of special interest groups. These groups are well-organized with plenty of human and financial resources and can easily pressure members of the committee to draft a certain bill with certain provisions. Even though game companies advocate to protect the interest of the children-players, the drafted bill might have a chilling effect on programming both hardware and software of games. In Japanese constitutional law research, the power of lobbying has not received significant attention. This mechanism is connected with the political process.

To illustrate the bias that sometimes appears in the legislative committee, the bill of Measure for Environment to Protect Young People from Harmful Materials⁶⁷ was discarded. This bill was drafted several times by the ruling party, the Liberal Democratic Party. Japan Magazine Publishers Association (JMPA), Japan Book Publishers Association, and Japan Library Association made a public denunciation of this bill. The largest opposing party submitted an alternative bill in 2008, which included the obligation to provide a filter.

The failure of the original bill explains why the Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People in 2009, added the filtering obligation. This Act defines the term “content harmful to young people” as

used in this Act shall mean information provided for public viewing (including looking and listening; the same shall apply hereinafter) via the Internet that considerably impedes the sound growth of young people. . .

(4) Content harmful to young people set forth in the preceding paragraph shall be exemplified as follows:

(i) Information in which the provider thereof directly and expressly offers to undertake or mediate, or induces, a crime or an act that violates criminal laws and regulations, or information that directly and expressly induces a suicide;

(ii) Obscene depiction of sexual conduct or genitals, etc. of

⁶⁷ Seishounen yugai shakai kankyou taisaku houan [The bill of Measure for Environment to Protect Young People from Harmful Materials], no. 159, Sangiin no, 12.

Available at http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g15902012.htm (last visited on Sept. 8, 2017).

humans or any other information that considerably excites or stimulates sexual desire;

(iii) Grisly depiction of a scene of murder, execution, abuse, etc. or any other information having extremely cruel content.

The Movements for Internet Active Users and other organizations publicly denounced this Act.

2. Causation Between Regulated Games and Children

Under the judicial review process discussed above, the losing parties, like a game maker, would bring a suit against the government. Under such circumstances, the judiciary may fear that judiciary would then become the second political stage upon which the interested parties would battle, instead of the venue of a real dispute in the law.⁶⁸

If a legislature drafts a bill to protect children from harmful contents, the purpose is not to regulate free speech.⁶⁹ This bill would typically define harmful contents, but, may then, be criticized as overbroad as a side effect. One of the criticisms is that it is difficult to show causation between harmful contents and illegal criminal activities. When reviewing a regulation of free speech, the judiciary places the burden of evidence on the government for causation between the harmful materials and illegal activities.

This also explains why the bill of Measure for Environment to Protect Young People from Harmful Materials failed in the 2000s. Today, the advanced technology of video games makes it possible to draw motions and characters similar to reality. Now, it may be getting more difficult to distinguish reality from the virtual video game than it was in the 2000s. Although the government bears the burden of proof of governmental purpose to restrict contents of speech, the video game makers might be required to prepare more serious constitutional litigation, which takes a long time. The development of video game technology does not wait for the simultaneous development of law, as this might result in lost profits.⁷⁰

In other words, the judiciary in Japan, even under concrete review, is questioned if it shapes policy and methods for the development of video games in the future.

3. Legislature and Game Programmers

Game programmers in software game companies are certainly in favor of protecting children in Japan. For them, the means to achieve this goal may be better served by a

⁶⁸ KATSUMI CHIBA, *IKEN SINSÄ* [Judicial review] ii-iii, 47-76 (Yuhikaku 2017).
Former Justice Chiba of Japanese Supreme Court might be afraid that judiciary would be second political battle after legislature.

⁶⁹ *Id.*

⁷⁰ TSUJI, *supra* note 2, *THE FREEDOM OF ESPRESSION IN THE INFORMATION ORIENTED SOCIETY*.

non-legal regulation because some legal regulations tend to be too overbroad, covering beyond the original purpose. If legal regulations were on the horizon, the game company would have to engage in political activities in the legislature, through financial contribution and technical advice (as legislators lack sufficient knowledge about rapid developments in video game technology). Game makers would need to argue, at the committee level, that in their expert opinion the interest of protecting children would likely be an excuse that could result in the infringement of rights of adults.

In the court, as a litigant, the software company would argue that playing video games is constitutionally protected by demonstrating potential interest in video games. In this regard, the court would hesitate to judge future policy analysis because the court reviews only disputes in law.⁷¹

One means to achieve the goal is education at the university level. The significance of video games would continue to grow because universities, as research institutes, tend to work together with software companies.⁷² Since the Japanese government suppressed universities during the Meiji Constitution era, academic freedom is now protected in Article 23 of the Japanese Constitution.⁷³ Article 23 was drafted because under the Meiji Constitution, the freedom of academics at the university was infringed by militarism. The current constitution supports the concept of universities being the place where diversity is cultivated, societal experiments are conducted—as they are miniature societies themselves—and the next generation is created.⁷⁴

Game companies would argue that to protect children and create the next generation the regulation—in the name of child protection—should be eliminated because a less restrictive alternative measure, like a rating system, would be more effective.

The court would hesitate to shape the path of the future development of the video game industry. The legislature would be in a better position to handle the development of video games if it could be flexible and could reflect of the voice of interest groups. The game companies would be sensitive to the voices of children and parents to ensure the protection of children. In some cases, a legal regulation would be supported by insufficient knowledge about software and hysterical reactions. Thus, the self-imposed control would be a preventative measure that game makers could use as a defense.

The problem is that ratings do not cover companies that do not belong to a rating association, like, games produced over the internet, for instance. In addition, the voluntary restraint cannot mandate criminal sanctions. Moreover, self-imposed regulations may be

⁷¹ Saibansho hou [Court Act], Law no. 59 of 1947, art.3(Jp.).

⁷² Toru Fujimoto, *Ge-mu gakushu no aratana tenkai* [New development of game learning] 12 Studies of Broadcasting and Media 235 (2015).

⁷³ Nihonkoku Kenpo [Kenpo][Constitution], art. 23.(Jp.).

⁷⁴ KOJI SATO, *supra* note 29, at 240-41. NONAKA ET AL.I, *supra* note 29, at 336-39.

KENJI ISHIKAWA, *GAKUMON/SEIJI/KENPO* [Academics/politics/constitution] (Iwanamishoten 2014).

selfishly motivated—the product of the interest groups—which may not reflect the desires of opinions of general users.

CONCLUSION

The current video game rating system in Japan is a self-regulatory process that is established to protect software companies. Since it does not mandate criminal sanctions, its effectiveness depends on self-discipline of the rating system. As the Japanese Constitution prohibits government censorship, setting forth ratings via private organization is one approach that passes constitutional scrutiny. The legislature is likely to pass statutes if it thinks that voluntary regulations are less effective. However, it could overreact in its efforts to protect children, and, moreover, the statute might be the product of compromises made among interest groups. Such statutes might include overbroad definitions to be sure they cover the targeted content. The due process of law would strike down such overbroad text.

Software companies would need to send a message regarding the significance of their constitutional rights to the legislature, to overcome the low estimation of gaming's value in society. For instance, video games are now being used in several realms of society, including in the realm of medical treatments. Furthermore, in constitutional litigation, game companies would argue that playing video games is protected under the Constitution as a part of personal rights. Though if the judiciary finds that playing video games is protected only for entertainment purposes, then the regulation would be easily sustained. In court, the game companies would argue that the regulation limits the future development of one industry and is too political for the judiciary. Judiciary would follow the precedent of the Pharmacy Act case and exercise strict review if the regulation would deprive of right of business itself under Article 22 of the Japanese Constitution.

Some regulations may be positive, like subsidizing a video game when used for rehabilitative purposes in a nursing home. However, if video games are used for medical treatment, the purpose of a regulation would be for the protection of lives and health—and the regulation would be negative. This dichotomy, as established in Japanese Supreme Court decisions, is still controversial.

Courts would overturn a regulation in question under strict review even though it looks like a policy matter if its terms are overbroad or if it fixes the development of the software in the future. The interest of protecting children is universal, but it is necessary to keep in mind that the regulation may be motivated by overreaction. Even though national or local governments pass statutes or ordinances, the legal sanction needs to pass several principles of free speech under judicial review first: prohibition of censorship, void on vagueness, and overbroad. Moreover, their regulations might lose their effectiveness due to a lack of human, financial, and time resources.

A judicial decision about the Prefectural Ordinance of Juvenile Protection is one example. In this case local government prohibited shopping in automatic vending machines that sell books that are harmful to minors.

In Japan, the Supreme Court has not often struck down regulations in the realm of free speech. The Child Pornography Protection Act even involves some constitutional implications because computer generated images do not actually involve victim children.

Legal regulation sets only minimum standard and potential measures for regulating, which are not intended to be perfect tools to solve all relevant problems.

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