

Virtual Child Pornography, Human Trafficking and Japanese Law: Pop Culture, Harm and Legal Restraints*

1. Introduction

This paper addresses whether virtual child pornography, that is, fictitious depictions of child-like characters in erotic comics, games or animation, could fall under the definition of human trafficking and be criminally banned in Japan. If that is the case, this paper seeks to answer under what circumstances could virtual child pornography (also known as *lolicon*) be criminally prohibited in Japan without breaching other legally protected rights such as freedom of expression.

For this purpose, there is a brief overview of human trafficking based on international law and an analysis of how Japanese law regulates child pornography and obscenity. After, there is a literature overview on whether virtual child pornography could indeed cause any harm and whether international law establishes a clear prohibition of digital images of minors engaging in sexual practices. Finally, this paper addresses whether virtual child pornography could be prohibited in Japan in ways that it could be framed as human trafficking.

The importance of naming certain criminal actions as human trafficking is threefold. First, it might provide further reasons for more severe criminal sentences. Second, it can send a message to the world that Japan is seriously addressing the global problem of human trafficking. Finally, labelling certain actions as human trafficking can foster domestic debates on trafficking and ways to protect victims and punish criminals. The conclusion is that Japan could follow the United State's approach criminalizing virtual child pornography when images are indistinguishable from real children. Japan could go further and criminalize the production, distribution, and possession of these kind of realistic images as human trafficking. Moreover, showing any form of *lolicon* to minors or to people regardless of age but against their own volition could be criminally prohibited as human trafficking regardless of the realistic aspect of such images.

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2. Human Trafficking and Japan

A complex form of modern-day slavery (Cullen-DuPont 2009; Caraway 2006), human trafficking happens in a variety of forms; it adapts to cultural practices and is structured on inequality and institutional weaknesses (Segrave et al. 2009; Shelley 2010). Moreover, the practice of human trafficking gives rise to a number of human rights violations such as forced prostitution of adult women, child prostitution, child sex tourism, brokered or forced marriages, trafficking in infants, forced labour and the use of child soldiers (Cullen-DuPont, 2009).

Initially, academic writings focussed on sexual exploitation in developing and developed states, and more recently studies have also looked at the issue of forced labour (Samarasinghe 2008; Perrin 2010; Anker & van Liempt 2012). The European Court of Human Rights has rendered decisions on human trafficking.¹ Feminist studies have analyzed this inequality driven international exploitation system (Hua 2011). Furthermore, scholars have analyzed mechanisms for preventing human trafficking within the regional organizations of South and South-East Asia (Emmers et al. 2006). Although there are high numbers of human trafficking victims from East Asia, there is little academic work analysing human trafficking within the region; including Japan (Lee 2005; Dean 2008; Moen 2012). Accordingly, this paper seeks to contribute to the literature by analysing certain aspects of human trafficking in Japan.

Japan is a destination, source and transit state for victims subjected to forced labour and sex trafficking (Loring et al. 2011). Although the 2016 United States Trafficking in Persons Report (2016, 218) affirmed that Japan “does not fully comply with the minimum standards for the elimination of trafficking”, the current Report (2019) asserts that Japan does indeed meet the minimum standards. However, both Reports (2016 and 2019) spell out aspects Japan needs to address in order to better regulate human trafficking, prosecute violators and protect victims. According to some estimates, 100,000 foreign women are trafficked to Japan every year (Lee 2005). Japan has made significant legislative and policy progress in addressing human trafficking, including criminalizing the possession of child pornography in 2014 (Kondo 2011; Act No. 52 of 1999, Amendment Act No. 79 of 2014). However, according to the American Department of State, Japan “did not have a comprehensive anti-trafficking statute that included definitions in line with international standards” (*US Trafficking in Persons Report 2019*, 262).

¹ *Rantsev v Cyprus and Russia*, No. 25965/04, [2010] ECHR (Sect 1).

A problem that could arguably be close related to human trafficking in Japan is the increasing market focusing on virtual child pornography (also called *lolicon* in Japan), that is, on materials (*e.g.*: animation, video-games and comics/*manga*) that depicts fictitious – non-real – characters (drawings or digitally produced images) in sexual or erotic situations. A Report from the United Nations (2016, 5), for example, asserts that Japan has been “singled out as major producer of sexually exploitative representations” of virtual child pornography.² This is a controversial claim in light of the complex perceptions of reality and fantasy (*see* Tamaki 2013). Some academics, for example, argue that virtual child pornography is not about the representation of actual objects of desire which exist in reality (Tamaki 2013). They point to a lack of evidence that *lolicon* encourages criminal acts (Galbraith 2011; Hinton 2014). However, the United Nations Report (2016, 8) states that virtual child pornography breaches international human rights norms, which prohibit any pornographic representation of a child, regardless of whether the child is real or fictitious.

Views in favour of criminalization argue that virtual depictions of children constitute harm and foster social tolerance towards exploitative acts (U.N. Report 2016). Moreover, these representations might contribute to the formation of a subculture of child abuse and encourage children to participate in such acts (U.N. Report 2016). On a gendered perspective, women are the dominant consumers of boys’ love (BL or *yaoi*) *manga*, games and *anime*, which in the words of McLelland and Yoo (2007, 94) comprise “highly sexualized depictions of male homosexual relationships between good-looking young men and boys”. The Japanese Government has asserted that the U.N Report is inaccurate, non-objective, contains insufficient information and lacks understanding of Japan and its culture.³ The Government has affirmed that the U.S. Trafficking in Persons Report embodies the United States’ own assessments and as such is not capable of providing any legal standard of human rights protection [Government Comments U.N. 2016]. Moreover, the Japanese Government (2016) stressed that the UN Special Rapporteur’s arguments regarding virtual child pornography represent her personal opinion on the issue. In the Government’s view (2016), child pornography as defined in the Optional Protocol to the Convention on the Rights of the

² *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography on her visit to Japan, Human Rights Council thirty-first session, 3 March 2016 A/HRC/ 31/58/Add.1, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. [hereinafter U.N. Report 2016].*

³ *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography on her Visit to Japan – Addendum – Comments by the Government of Japan on the Report of the Special Rapporteur Regarding her Mission to Japan. 7 March 2016, Human Rights Council Thirty-first session A/HRC/31/58/Ass.3, p. 2 [hereinafter Government Comments U.N].*

Child does not include virtual children. In support of its position, the Government points to the lack of decisions from international adjudicative bodies holding that virtual child pornography is in fact child pornography. In order to understand the Government's arguments, it is important to analyze how Japanese law criminalizes child pornography and obscenity.

3. Japanese Regulation of Virtual Child Pornography

The Japanese Constitution, which entered into force in 1947, established that the basic structure of Japan's legal system is rooted in democracy and human rights (Matsui 2011). Within the list of basic rights and freedoms, the Constitution secures freedom of expression in Article 21 and prohibits any form of censorship. However, Japan's Criminal Code from the Meiji Era criminalizes obscene materials in Article 175, which spells out that:

A person who distributes, sells or displays in public an obscene document, drawing or other objects shall be punished by imprisonment with work for not more than 2 years, a fine of not more than 2,500,000 yen or a petty fine. The same shall apply to a person who possesses the same for the purpose of sale.

Consequently, although the Constitution enshrines the right to freedom of expression without any censorship, the Criminal Code provides for a limitation on this right when the expression is categorized as obscene. However, the provision failed to define obscenity. The task, then, fell into the hands of judges. In the court decision known as Lady Chatterley's Lover Case (*Koyama v. Japan* 1957), the Japanese Supreme Court held that to be obscene, a material needed fill three requirements. First, it has to be sexually arousing and stimulating in an overwhelming way. Moreover, it must violate the sexual sense of shame on an average person. Finally, it must be against decent concepts of morals. Obscenity was then defined as something against the moral feeling of shame (Kim 1975; Trager and Obata 2004). The concept of obscenity is content independent, that is, it is an objective definition not centered on context or intent of the person facing obscenity charges (Galbraith 2017). Under current legal interpretation, materials can avoid the label of obscene if it prevents any clear exposition of male or female genital (Allison 2006).

The basic legal reasoning established in Lady Chatterley's Lover Case was mainly followed by subsequent case laws (*e.g.*: *Japan v. Oshima et al.* 1980; *Sato et al v. Japan* 1980; and *Yojōhan Fusumano Shitabari Case* 1980; and *Matsue v. Hakodate Customs Director et al.* 1984). One small change came in Mapplethorpe (*Asai v Japan* 2008) when the

Supreme Court decided that pictures with artistic merit not directly representing sex acts do not harm public morality and, consequently, can be protected under freedom of expression. Moreover, the Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children from 1999 provides the definition of child pornography on Article 2, paragraph 3 as the following:

The term "Child Pornography" as used in this Act means photographs, recording medium containing electronic or magnetic records... or any of the following medium which depicts the image of a Child, in a form recognizable by the sense of sight: (i) any image of sexual intercourse or any conduct similar to sexual intercourse with a Child or between Children; (ii) any image of a Child having the Genital Organs, etc. touched by another person or of a Child touching another person's Genital Organs, etc. which arouses or stimulates sexual desire; or (iii) any image of a Child wholly or partially naked, in which sexual body parts of the Child (genital organs or the parts around them, buttocks or chest) are exhibited or emphasized and arouses or stimulates sexual desire.⁴

This definition enshrined in the provision does not include virtual child pornography or *lolicon*, that is, purely fictional drawings or computer-generated images of children (Kato 2008; Takeuchi 2015). Indeed, the 2014 amendment to this legislation criminalized the possession of child pornography not previously part of this law, but did not prohibit virtual child pornography or *lolicon*. Accordingly, both Japanese legislation and courts have not criminalized virtual child pornography. Courts have mentioned the potential harmful effects of *lolicon* in manga but again focused the debate on whether depictions of genitals were visible instead of whether drawings of children could be illegal under the Criminal Code (*Japan v. Kishi* 2008; West 2011)

On the international plane, Japan has ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁵ Furthermore, in 2017, Japan acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter "Palermo Protocol").⁶

4 Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children from 1999, accessed September 9, 2019, <http://www.japaneselawtranslation.go.jp/law/detail/?id=2895&vm=04&re=02>

5 United Nations Treaty Collection, Human Rights: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography [hereinafter "Additional Protocol"], accessed September 9, 2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en

6 UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Crime, 15 November 2000

The question is then whether international law can justify the criminal prohibition of virtual child pornography and whether it could be envisaged as a form of human trafficking.

4. Is there Any Harm in *Lolicon*? Could it be a Prohibited under International Law?

In broad terms, human trafficking can be defined as an action taken through the use of various means for the objective of exploiting someone (*see* Perrin 2010; Shelley 2010). The Palermo Protocol defines human trafficking as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age.

Accordingly, human trafficking happens when an individual recruits, transfers, transports, harbours or receives people by means of deception, fraud, coercion, abuse of power, payment to others in control of the victim, use of force, threat to use force, or abduction for the purpose of forced labour, sexual exploitation, removal of organs, servitude and slavery or practices similar to slavery (Perrin 2010). The treaty also establishes that there is no need to show that any of the “means” spelled out in this provision have been used to facilitate exploitation if the victim is under the age of eighteen (Perrin 2010). Moreover, there is no informed or free consent when the person has been deceived, coerced, defrauded, threatened, forced, abducted or controlled by another person (Perrin 2010). The definition of human trafficking is thus based on three aspects: action, means, and purpose.

(also known as the Palermo Protocol), accessed September 9, 2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en

The question is then whether virtual child pornography can or to what extent it can be part of human trafficking, that is, whether drawings or computer generated images depicting sexual intercourse of young-looking characters can be used as an instrument to sexually exploit real people, including children. For someone under the age of eighteen, as mentioned, there is no requirement to demonstrate that the “means” spelled out in the Palermo Protocol have actually been used. The threshold is, therefore, much lower. The purpose here would be to demonstrate that *lolicon* could be used to lure and deceive victims in order to abuse them. This action could then arguably be framed as part of human trafficking.

Another question is whether children are or could be harmed by virtual child pornography in ways it could justify framing this behaviour as human trafficking. Nakasatomi (2009), for example, argues that children are indeed subjected to various forms of torture, abuse, and exploitation in the virtual world. His argument is that if fictitious characters in *lolicon* portray children, such materials necessarily fall under the definition of child pornography and should then be illegal under criminal law (Nakasatomi 2009). Furthermore, he asserts that pornography, especially sexually deviant materials such as rape and *lolicon*, can lead part of the general population into committing sex offenses (Nakasatomi 2009). In his view, research clearly indicates the harmful impact of pornography on viewers and this harm can be extended to virtual forms of pornography as well (Nakasatomi 2009). Furthermore, he believes that drawings or computer-generated images, characters can be easily modified to show extreme forms of violence that, according to Nakasatomi (2009), can make this type of pornography particularly harmful.

Following a similar reasoning, Mathews (2011, 172) believes that virtual child pornography can indeed “sanction and even encourage sexual interest in children”. In his view, this approval or encouragement undermines the “condemnation of pedophilic activity or interest” (Mathews 2011, 172). This disapproval, according to him, “deters pedophilic activity and makes anyone susceptible to such desires aware of the unacceptability of their interest” (Mathews 2011, 172). *Lolicon*, serving as “a proxy for sexual interaction with real children”, significantly undermines “the force of this taboo, as it requires that we abandon the idea that it is not morally healthy to be sexually interested in minors” (Mathews 2011, 172).

Focusing on the protection against pornography and prostitution, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography defines child pornography as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes” (Additional Protocol 2000, Article 2 (c)).

This provision is of difficult interpretation. It is arguably connected with Article 34 of the Convention on the Rights of the Child, which establishes that the

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials (Convention on the Rights of the Child 1989, Article 34).

Article 34 of the Convention on the Rights of the Child is, to some extent, vague when it provides that states need to prevent “all forms of sexual exploitation”. This lack of precision might include *lolicon* as one of the means of sexual exploitation (Takeuchi 2015). The Additional Protocol, furthermore, might be able to provide more information to whether the depiction of children in drawings and digital images is prohibited. Article 2 of the Additional Protocol by using the words “any representation” and “by whatever means” might be vague enough to be construed as including fictitious depictions of children. Indeed, Takeuchi (2015, 224) asserts that the intention to include virtual child pornography in the Additional Protocol is “evident”. To Takeuchi, therefore, Article 2 clearly includes drawings and computer-generated images of children being a complement to Article 34 of the Convention leaving no room for questioning. Takeuchi’s views are in line with those from that of the Special Rapporteurs of the United Nations. In 2016, the Report of the Special Rapporteur on the sale of children, child prostitution and child pornography specifically focusing on Japan addressed the criminalization of fictitious drawings or digital images of children asserting that based on international human rights law “any pornographic representation of a child, regardless of whether the depicted child is real or virtual, constitutes child pornography”.⁷ Furthermore, the Rapporteur (Maud de Boer-Buquicchi) added that the objective of this prohibition is to:

[P]rovide protection against behaviour that, while not necessarily doing harm to the child depicted in the material, might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture that favours child abuse....The ultimate goal is to achieve a society that does not tolerate acts that turn children into sexual objects of desire, which is a violation of the rights of the child (2016 report 2016, para. 24).

⁷ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography on her visit to Japan (by Maud de Boer-Buquicchi), Human Rights Council thirty-first session, 3 March 2016 A/HRC/31/58/Add.1, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development [hereinafter “2016 Report”].

The Rapporteur echoes the reasoning of scholars such as Nakasatomi (2009) who argues that the lack of regulation on virtual child pornography allows these materials to circulate on the Internet placing children in danger of abuse, torture and exploitation. Following a similar reasoning, Takeuchi (2015) argues that the Convention on the Rights of the Child in Article 34, especially interpreted in accordance with Article 2 of the Additional Protocol to this same Convention, prohibits virtual child pornography as a “grooming argument”. Takeuchi affirms that:

[T]he harmful effects of child pornography extend not only to children abused in its production, but also to child pornography's use as a tool of seduction and blackmail – a tool that may effectuate physical abuse of actual, identifiable children. This process, known as "grooming," entails exposing a potential victim to images of children engaged in sexual acts in an effort to normalize sexual imagery, desensitize the victim, and lower his or her inhibitions. The wide availability of Lolicon enhances its potential for abuse in grooming processes (Takeuchi 2015, 223).

These arguments seek to justify the criminal prohibition of *lolicon* grounded on harm or a risk of harm to children. They are two different types of arguments. The first is that domestic criminal law or international law may prohibit virtual child pornography because it causes harm to children by influencing and pushing people into committing child abuse (direct harm theory). The second argument, the grooming theory, provides that although *lolicon* might not necessarily cause harm to children, it can “be used to encourage or seduce children into participating in such acts” (2016 report 2016, para. 24). Accordingly, both the direct harm and the grooming arguments assert that *lolicon* has the potential to cause harm by influencing children or encouraging people to harm children.

It is necessary to analyze whether the direct harm and the grooming theories demonstrate beyond reasonable doubt that *lolicon* can necessarily cause harm to anyone. Some scholars affirm that pedophilia and sexual offenses against children are not synonymous (Seto 2004; Hansen 2016). Whereas pedophilia is when a person has recurrent sexual fantasies with children, child offender is who has sexually abused a child (Seto 2004; Hansen 2016). Research has shown that while some pedophiles do not act on their sexual desires, some child sex offenders act on opportunity without being particularly attracted to children (Seto 2004; Malamuth and Huppín 2007). Moreover, studies have also shown that child pornography materials may be used for other aims than to promote abusive behaviours such as a masturbatory aid (Seto, Cantor and Blanchard 2006; Malamuth and Huppín 2007).

Another study focused on a sample of 561 sex offenders of which 181 had offended against children (Langevin and Suzanne Cumoe 2004). Of this pool, 17% (seventeen) have used pornography during their crimes and, within that subgroup, 55% (fifty-three) have shown pornography to children as part of the grooming process, mostly heterosexual adult pornography (Langevin and Cumoe 2004; Malamuth and Huppin 2007). Moreover, this research also showed that thirteen percent of the people used pornography as a stimulant prior to the crime (Langevin and Cumoe 2004). Furthermore, in a different study, of the 91 child-sex offenders interviewed, twenty-one percent of them acknowledged that they have used pornography to decrease their inhibitions before abusing children (Browne and Kilcoyne 1995).

Accordingly, although a considerable minority of sex offenders against children report to have used some kind of pornographic material to influence their criminal behaviour, the type of pornography is not necessarily or exclusively child pornography as it may also include adult pornography (Malamuth and Huppin 2007). In another study, researchers were able to get access to the credit card numbers of many consumers in the Swiss canton of Lucerne after police arrested the owners of an international provider of child pornography (Frei at al. 2005; Malamuth and Huppin 2007). With this information, researchers were able to examine thirty-three such consumers and, of those, only one had a relevant criminal record (Frei at al. 2005). Accordingly, Malamuth and Huppin (2007, 820) affirm that “evidence does not support the proposition that there is a strong connection between being a child pornography offender and committing sexual molestation”.

Pornography, including violent and virtual, can be framed as a potential for harm, that is, in certain cases and circumstances it might entice people into committing child abuse or be used in the grooming process. However, the potential for harm is not the same as harm. Person A can potentially punch person B because A likes to randomly fight with people, has a clinched fist and is a black belt in martial arts. These facts, however, do not alone justify criminally prosecuting A for the possibility of one day punching B. Moreover, the fact that people who practice martial arts might eventually fight and harm people on the streets cannot justify by itself a criminal legislation prohibiting martial arts altogether.

5. Prohibiting VCP in Japan and Human Trafficking

The grooming argument, as it stands, is simply too vague. Who is potentially harmed? Any children who happens to live in a specific location? Who is committing the wrongdoing?

Anyone who potentially buys or looks at *lolicon* material? How to clearly establish a connection between the harmed and the one harming? In other words, how to clearly, beyond a reasonable doubt, prove that buying, producing, selling or looking at *lolicon* would indeed cause harm to an determinate number of children in a specific jurisdiction?

As previously mentioned, there is evidence that some child abusers are pedophiles and, within that group, a minority use child pornography or any pornography at all to groom children (Malamuth and Huppin 2007). The call for prohibition based on grooming is then grounded on a statistical probability that certain people who have *lolicon* materials might use it to groom children. This view might not by itself support the argument for an overall criminalization of virtual child pornography. If that is the case, that is, if the prohibition of *lolicon* is grounded on the possibility that adults might show it to children, the criminalization should then not be the production, sell, possession or purchase of virtual child pornography but rather to show it to people under a specific age or to show to people regardless of age but against their will.

This possibility, that is, the criminalization of showing *lolicon* to children or to people in general when shown against their own volition could then arguably fit into the definition of human trafficking. It would comprise someone acting in order to deceive a real child or any victim into sexual exploitation with the use of drawings or computer-generated images. The criminalization here is to show something to someone for a specific end. The purpose would be sexual exploitation, and virtual child pornography would work as a facilitator, which, would barely be a necessary requirement as an evidence for human trafficking if the victim is a minor and, therefore, the “means” stipulated in the Palermo Protocol would not be a crucial aspect. However, this could be important in practice. Police and prosecutors could build a stronger case for human trafficking if they show that the victim was lured or deceived with the use of *lolicon* – regardless of the age of the victim – and that would, consequently, add to the materials demonstrating a human trafficking case.

A different question is whether the grooming argument could fit into the definition of human trafficking as set in the Palermo Protocol in order to support a general prohibition of *lolicon*. Catherine MacKinnon (2005, 999), for example, argues pornography in general is trafficking because it “creates demand for women and children to be supplied for sexual use to make it, many of whom are trafficked to fill that demand”. Her view is that pornography requires and reinforces relationships which would be one of the “means” described in the Palermo Protocol (MacKinnon 2005). This claim is controversial as the research on the detrimental effects of pornography is at best inconclusive (*see* Dworkin 1996). Furthermore,

there is even uncertainty that child pornography or virtual child pornography would be used in the grooming process (see Malamuth and Huppin 2007). Moreover, claims for banning pornography, and by extension virtual child pornography, could face constitutional challenges as it could be envisaged as a breach on freedom of speech (Dworkin 1996). This is also particularly true for Japan, as its domestic law provides ample room for visual production as long as it does not portray sexual intercourse with real minors and genitalia is covered.

Proving that *lolicon* or any type of pornography causes violence and therefore should be prohibited is a difficult claim to make. Japan, however, could follow the approach of the United States. In *Ashcroft vs Free Speech Coalition*, the Supreme Court of the United States, established a precise difference between child pornography and virtual child pornography holding that the latter was protected under the First Amendment (*Ashcroft vs Free Speech Coalition* 2002; Liu 2007). The Court held that virtual child pornography does not necessarily lead to criminal behavior; that pedophiles can use different devices such as candy and games to groom children; that a tendency of a speech to encourage illegal acts is not a sufficient reason for banning it; and, finally, that it is implausible that virtual images could promote the trafficking in works produced based on the exploitation of actual children (*Ashcroft vs Free Speech Coalition* 2002; Liu 2007).

However, a new legislation, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), sought to address the prohibition of virtual child pornography taking into account the Supreme Court decision in *Ashcroft*. This Act prohibits virtual child pornography when digital image "is indistinguishable" from "that of a minor engaging in sexually explicit conduct" (The PROTECT Act 2003). The justification for this regulation was quite procedural: people charged under the child pornography law could claim that the images were digital and not real, which would place a heavy burden on prosecutors and the police on identifying either the child depicted or the origin of the image (Kornegay 2006). Furthermore, according to Congress, it might be difficult even for experts to establish beyond reasonable doubt that certain images depict real children (Kornegay 2006). However, the American Congress clarified this stipulation did not include "depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults" (18 U.S.C.A. § 2256(11); Kornegay 2006).

Accordingly, Japan could arguably follow a similar approach. It could amend the Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children to criminalize virtual, that is, digital images of children engaging in sexual conducts when these depictions are indistinguishable from a real minor.

This rule would exclude *manga* and animation, which would appease artists, and would arguably not place a great limitation on freedom of expression enshrined in the Japanese Constitution. Accordingly, both, showing virtual child pornography of any kind, and creating, possessing and distributing virtual pornography when digital images are indistinguishable from a real child could be prosecuted under the label of human trafficking. This label could arguably justify severe penalties and send a message to the public that these acts are unacceptable in society.

6. Conclusion

Japanese law does not prohibit any drawings or computer generated images of minors engaging in sex as long as there is no real child and such images do not depict genitalia (Kato 2008). The obscenity law in Japan has been applied using a content-free reasoning, that is, judges focused on what an image or text was showing or should not show (genitalia) instead of an underlying message that such expressions could carry. Accordingly, a prohibition of *lolicon* could be rendered unconstitutional under domestic law even if Japan adopts the approach that international law indeed prohibits virtual child pornography or *lolicon*.

It is also unsure whether there is a general prohibition of virtual child pornography under international law. Moreover, it is also uncertain whether this form of pornography can even cause any harm at all or whether it is commonly used as a method to groom children. Nonetheless, there is room to consider virtual child pornography as part of the definition of human trafficking if it is used as a means to deceit or coerce; or if these pornographic images are indistinguishable from real minors, which then could arguably hinder arrest and prosecution of actual child abusers. These two forms of criminalization of virtual child pornography would arguably not clash with Japan's protection of freedom of expression and would reinforce the message that human trafficking is a serious crime that needs to be severely punished.

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