Chapter 3 - III

Constitutional Design for Education Platforms

: Is Mechagodzilla a friend of mankind?

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Unless you're a Godzilla fan, you may have never heard of Mechagodzilla. Everyone knows that Godzilla is a superstar of the monster world. Mechagodzilla is a robot built to resemble Godzilla. It first appeared in the 1974 film *Godzilla vs. Mechagodzilla*, and the high praise it earned there led to its rapid reappearance the following year in *Terror of Mechagodzilla*. This is the only film in the Godzilla series whose title is solely the name of a monster other than Godzilla. However, Mechagodzilla ended up causing significant damage not only to Godzilla but also to Toho, the company that owns it. Sluggish audience numbers for the movie forced Toho to put the entire Godzilla series on hiatus for nearly ten years. Mechagodzilla would be permitted to make a return in the 1993 film *Godzilla vs. Mechagodzilla II*, which was released to commemorate the 40th anniversary of the franchise (the movie was also the 20th film in the series). After making this magnificent comeback, Mechagodzilla would go on to appear in several more Godzilla movies.

While there have been many fanciful monsters in the series, Mechagodzilla is rare in that it's hard to tell whether it's a friend or foe to the human race. I was born in 1987, so my first encounter with Mechagodzilla was in the 1993 movie *Godzilla vs. Mechagodzilla II*. In that film, Mechagodzilla was built by humans (at the U.N. Godzilla Countermeasures Center) as a next-gen weapon to use against Godzilla. In this sense, it's surely an ally of humans. But for fans of the Godzilla series, it is easy to misinterpret a monster that attacks the titular character as an enemy. This illusion is reinforced by the fact that, in this movie, Godzilla tries frantically to protect a Baby Godzilla. Another problem is that the Mechagodzilla which appears in the 1974 film *Godzilla vs. Mechagodzilla* was created by aliens from the Third Planet of the Black Hole as a weapon for invading Earth, which makes it an enemy of humans for sure. So, it's not so easy to accept it as an ally. Therefore, it is extremely difficult to ascertain whether the robot known as Mechagodzilla is a friend or foe of humankind[1].

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1 The website of the Tsuburaya Eiji Museum (https://s-tette.jp/museum/information/entry/006989.html) has the following special note regarding the Mechagodzilla in the 1974 film and that in the 1993 film (the latter would combine with the Garuda gunship to form "Super-Mechagodzilla"): We get a lot of questions from visitors about the difference between Mechagodzilla and Super-Mechagodzilla. Mechagodzilla is an enemy of humanity created by aliens from the Third Planet of the Black Hole to invade Earth,

Finally, we arrive at the point of this lengthy preamble: There has been much discussion lately about whether information technologies such as artificial intelligence are our allies or our enemies. One of these technologies is "EdTech" (Education + Technology), the subject of this article. Many expect that EdTech will be a secret weapon for resolving all of the long-standing problems in formal education at once. But there is also a strong sense that it could destroy the functionality of the educational system developed thus far by humans. In this article, we will therefore consider the positive and negative effects of EdTech on formal education—in other words, whether it is our friend or foe—from the perspective of my field of study, constitutional law[2].

EdTech can mean a lot of different things. Since platforms are the theme of this "Influence and Legality of Monstrous Platforms" series, this article mainly considers "digital education platforms." Different authors have somewhat different ideas of what a digital education platform is, but for the sake of this discussion, let's define it broadly as "any digital space where education or learning takes place." Specific examples include (in no particular order) content-delivery platforms like MOOC, Khan Academy, and Study Sapuri; learning management systems (LMS) such as Moodle and Google Classroom; the Ministry of Education, Culture, Sports, Science, and Technology's computer-based testing (CBT) system called MEXCBT; and the various e-learning portals that serve as hubs for connecting to EdTech.

But educational platforms are not limited to those of the digital variety. Traditional school buildings are "analog" education platforms because they are physical spaces where different educational and learning activities take place[3]. Digital education platforms can either complement or replace those school environments. Thus, we should probably reexamine the value and limitations of physical school spaces as we consider the significance and risks of digital education platforms. This article will therefore discuss educational platforms in general, unrestricted to the digital realm.

In section 1, we will explore the value and limitations of analog educational platforms (physical school buildings). After analyzing the significance of digital education platforms that could complement or replace those analog platforms in section 2, we will then look at some of the risks of digital education platforms in section 3, all from the perspective of constitutional law. Finally, in the conclusion, we will revisit the question

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while Super-Mechagodzilla is an ally of humans built by the U.N. Godzilla Countermeasures Center to defeat Godzilla.

2 In this series, the country of Japan is often compared to the Leviathan, while digital platforms are compared to the Behemoth (the first to draw this metaphor was Tatsuhiko Yamamoto in "Digital Platforms in Modern Sovereign Nations: Leviathan And Behemoth", in Hajime Yamamoto ed., Basic Constitutional Theory (Shinzansha Publisher, 2022), pp.147–181. But there were two reasons why a new monster, Mechagodzilla, was selected to appear in this article. The first is that the Behemoth allegory refers to the companies like GAFAM that offer digital platforms, while this article aims to focus on the digital education platform space itself. And the second is that even if we focused on the companies themselves rather than the space, the boards of education that manage educational administration for local municipalities are not nearly influential enough to be called Leviathans, and the majority of companies offering digital education platforms in Japan are small- and medium-sized businesses that could hardly be seen as Behemoths.

3 Mark West, An ed-tech Tragedy?: Educational Technologies and School Closures in the time of COVID-19 (UNESCO, 2023), p.463. And although the context differs somewhat, a consideration of the "school platform" concept utilized by the Japanese government can be found in Noriko Yamano, School Platforms: Fighting Child Poverty Through Education, Welfare, and Community Outreach (Yuhikaku Publishing, 2018).

we started with: Are digital education platforms an ally or an enemy of the human race?

1 School buildings are analog education platforms

(1) Value of a school building

Recently, there was a temporary closing of school buildings around the world due to the COVID-19 pandemic. Unable to attend school, children were receiving instruction through online methods for quite some time. This caused people everywhere to fully realize the importance of school buildings, which they had took for granted.

For example, the following statement appears in the report "An ed-tech Tragedy?" published in 2023 by UNESCO:

> "The pandemic also reminded societies that schools provide benefits ed-tech cannot; schools are places where young people learn to socialize with others, navigate differences and cultivate empathy beyond the sterilized distance of a screen…Educational experiences during the pandemic also illustrate the extent to which in-person schools consolidate an array of community services that stretch well beyond academic learning. Numerous activities take place at schools that enhance well-being, from providing students with nutrition, physical activity and social interaction to serving as hubs for cultural and artistic expression, technical and vocational training, adult education and community engagement"[4].

And at the 50th meeting of the United Nations Human Rights Council in 2022, it was pointed out that schools are places where students, teachers, parents, guardians, family members, and other members of the educational community can interact, and that they provide other services (meals, medical services, protection from violence, etc.) needed for people to exercise their right to receive an education, so there are risks involved in replacing an in-person education with remote online learning[5].

This is even more true in Japan, where the classroom has come to be the cornerstone of educational activities as it fills many different roles. A report published in January 2021 by the Central Council for Education contained the following statement: "The problems and concerns arising from the temporary school closures have reminded us that schools not only ensure people have the chance to learn and improve their knowledge, but they also play a welfare role as places where people can interact peacefully and safely as well as that of a safety net that helps people stay mentally and physically healthy. We must keep in mind that one of the strengths of the Japanese educational system is this welfare role that schools play as a safety net and a place

4 West, supra note 3, p.459. The reason this report spells it "ed-tech" rather than "EdTech" is to maintain a certain degree of separation between education and technology by way of the hyphen, with the lowercase letters ensuring that no special significance or reverence is injected into the term (p.32).

5 Koumbou Boly Barry, Impact of the Digitalization of Education on the Right to education: Report of the Special Rapporteur on the Right to Education (United Nations, 2022), p.14.

for ensuring that children achieve overall personal development and growth"[6].

The "Japanese educational system" referenced here is Japan's unique style of education that involves "teachers providing educational and life guidance based on a holistic understanding of each child from a variety of perspectives, thus playing a critical role in their physical, intellectual, and moral development"[7]. For example, the Japanese educational system emphasizes "fully developing the individual character" (article 1 of the Basic Act on Education) and focuses on life guidance just as much as education through team-building school activities such as school lunch, cleaning duties, after-school clubs, and athletic competitions[8].

The physical space of a school building is indispensable for achieving this sort of Japanese education. Online might be fine if we were only concerned about the transmission of knowledge, but the aforementioned team-building activities require that children experience student life within the same physical space. And this is precisely why the closure of all primary and secondary schools for more than two months, from the start of March to the middle of May in the year 2020, had such a dramatic effect on formal education in Japan. As a result, more attention is now being given to whether the "right to attend a school" is part of the right to receive an education[9].

(2) Limitations of physical school spaces

As we have seen, school buildings in Japan are essential for preserving people's right to receive an education (article 26 of the Constitution). They have educational value because they cultivate knowledge, wisdom, and health among children, and they have social value as a safety net and a place where children can assemble safely. On the other hand, we cannot ignore the reality that these physical school spaces have sometimes caused children to suffer and thus harmed their right to receive an education. Japan's schools (particularly the idea of the "class," which forms the core of student life) are characterized by strong communal living and active personal development, so they tend to be oppressive and sometimes even lead to truancy issues.

When considering the history of the school class in Japan, Haruo Yanagi compared its suffocating nature to a tour package. According to him, the school class and a tour package "both result in the discomfort of not being able to freely choose your path" but that "unlike a tour package, where the entire group of participants wants to have fun on the trip, participation in the school class is mandatory whether you want to study or not, and the class contains only children of the same age." In addition, "competition is always fierce, and it's difficult to tell who is your friend or foe." To Yanagi, the school class is like a "compulsory tour package[10]. In other words, "The school class is like someone forcing you to go on a years-long trip where you will

6 Central Council for Education, "Building a Japanese-style Educational System for the Reiwa Era: Collaborative Learning Optimized to Unlock the Potential of All Children" (January 26, 2021), p.7.

7 Central Council for Education, supra note 6, p.5.

8 For the evolutionary history of Japanese formal education, see Haruo Yanagi, History of the School Class: Doubt the Space that Was Never Doubted (Kodansha, 2005), chapter 5.

9 Goro Horiguchi, "Impact on the Right to an Education: Does Constitutional Law Guarantee the Right to Go to School and the Right to Receive an Education Without Going to School?", in Keigo Obayashi ed., Constitutional Law and the Coronavirus Pandemic (Koubundou, 2021) pp.195–196 etc.

10 Yanagi, supra note 8, p.13.

encounter nothing but strangers, which is something that even adults couldn't bear, much less children"[11].

The Central Council for Education report cited earlier also states: "Some have noted that there is an excessive demand on children to 'do the same things in the same way as everyone else' at school, and there has been an increase in the number of children who feel peer pressure to conform within their school lives. As society has grown more diverse, the fact that our school culture is ruled by conformity and uniformity has become more apparent. People have noted that this can make student life a challenge due to problems like bullying, a doctrine of hard work and illogical idealism, education that focuses on memorization rather than understanding, and other factors that can lead to a negative feedback loop. Moreover, parents and teachers are also subject to this peer pressure"[12].

Compulsory public schools in particular force a bunch of kids with almost nothing in common except their age and municipality to show up according to a schedule determined by someone else and engage in cooperative activities while being instructed to "do the same things in the same way as everyone else". These limitations of school learning are becoming ever more apparent as the children who attend school become more diverse and the schools themselves grapple with novel challenges.

The introduction of a digital education platform aims to tackle various educational constraints. In January 2022, the Digital Agency, Ministry of Education, Culture, Sports, Science and Technology, and Ministry of Economy, Trade, and Industry published the "Education Data Utilization Roadmap". This document highlights challenges in current education settings such as "the presence of students with diverse backgrounds and cognitive profiles, including non-attending students, those with special support needs, and children with exceptional talents in specific fields, as well as the varied school contexts, such as small-scale schools in remote or island areas". It further posits that these challenges "cannot be adequately addressed within the conventional basic framework of the education, which is predicated on the teaching "simultaneously" "the same content" to "all students in the same age" "by teachers" "on the same speed" "at school"[13].

2 The significance of digital education platforms

(1) They complement brick-and-mortar schools

Now then, how can a digital education platform complement a physical school? The primary benefits of a digital education platform as imagined by the Japanese government can be summarized by referring to the Roadmap on the Utilization of Data in Education mentioned earlier.

First, it achieves "personally optimized learning" through the use of learning analytics[14] for educational data like study logs. The data from educational and learning activities conducted on a digital education

11 Yanagi, supra note 8, p.18.

12 Central Council for Education, supra note 6, p.8.

13 Digital Agency, MIC, MEXT, METI, "Roadmap on the Utilization of Data in Education" (January 7, 2022), p.46.

14 For a simple guide to learning analyses, see Masako Furukawa et al., The Educational Compass: Learning Analytics (Maruzen, 2020).

platform can be automatically recorded. If we collect large amounts of educational data from diverse sources then analyze it with artificial intelligence and other tools, we may discover patterns or correlations related to learning. Applying those patterns and correlations to the learning data of all primary- and secondary-school students should then allow us to provide education that is tailored to the capabilities and characteristics of each child.

Second, it can fill gaps in social welfare. If the board of education can consolidate and analyze all the data (attendance records, academic and athletic ability, home environment, public assistance, payment of taxes, etc.) connected to things like poverty and child abuse which have traditionally been managed by separate entities, we should be able to respond to neglected cases that need our help.

Third, it reduces the burden on teachers. If we can transmit knowledge through educational activities on a digital education platform, such as through the distribution of video lessons and self-study features like A.I.-based practice drills, we can decrease teacher workloads. This should improve the busy working environments of teachers and fill in some educational gaps by allowing teachers to focus their efforts on the collaborative learning that is only possible within a physical school setting[15].

Fourth, it promotes evidence-based policy making (EBPM) within the field of education. Traditionally, the policies that govern formal education have been strongly influenced by the personal experiences and subjective opinions of policymakers, because sufficient quantities of the right types of data had not been collected in a suitable format[16]. But accumulating huge amounts of diverse data on a digital education platform then analyzing it with A.I. and other tools could provide evidence for how to achieve various educational results, which would encourage EBPM in education.

(2) In place of physical schools

Digital education platforms can not only supplement physical school spaces, but even serve in place of them (the online instruction provided during the temporary school closures of the coronavirus pandemic was one example of this). This is because digital education platforms transcend the limitations of time and space to provide educational content to people of all ages, whether at school, home, or somewhere else. Children who don't perform well in brick-and-mortar schools and adults that have already entered society can therefore receive an education through digital education platforms instead of traditional school settings.

The Roadmap on the Utilization of Data in Education also paints an idealized picture of implementing digital education platforms and educational DX to achieve learning that can be done "anytime, anywhere, by anyone, in their own way"[17]. Moreover, a report[18]18 from the Ministry of Education, Culture, Sports, Science, and Technology (MEXT) has stated that "more thought will be given to how to utilize digital

15 See Daisuke Asano, Building the Classrooms of the Future with Educational DX: Can Schools Be Reborn under the GIGA School Concept? (Gakuyo Shobo, 2021), pp.20–21.

16 This is a long-standing problem within the fields of education economics and sociology of education. For example, see Makiko Nakamuro, The Economics of Scholarship (Discover 21, 2015).

17 Digital Agency et al., supra note 13, p.47.

18 Director of MEXT's Elementary and Secondary Education Bureau, "How to Support Truant Schoolchildren (Notice)" (October 25, 2019).

solutions to support the children who want to attend school but can't, based on the idea of 'leaving no child behind.'" As an example of this, it states that "school principals could count truant children as present in school if they meet certain requirements by completing learning activities through the use of ICT etc. within their own homes"[19]. 19 Thus, using digital education platforms to provide formal education to children who cannot physically attend school would essentially result in the "right to receive an education without traveling to a school building"[20] .

Also, a general comment released by the U.N.'s Committee on the Rights of the Child in 2021 noted that remote learning using EdTech is essential for children who are not physically attending school and for those who live in remote areas or in disadvantaged or vulnerable situations, and that governments should ensure there is proper infrastructure in place to enable access to distance learning for all children[21].

3 Digital education platforms and privacy rights

(1) Routine data collection and profiling

As discussed above, digital education platforms have the potential to greatly transform the landscape of school education and overcome the limitations of physical school spaces. But powerful tools always come with substantial risk, and digital education platforms are no exception. While many such legal risks have been identified, here we will narrow our discussion down to the issues involving important privacy rights (article 13 of the Japanese Constitution)[22].

There is always a risk of privacy issues with any digital platform, but educational platforms have a particularly severe structural problem. The problem is that children, whose right to privacy should be especially protected due to their immature judgmental capacity, are routinely subjected to the collection of a large amount and variety of personal information, including highly sensitive information, as well as profiling of such information to infer their inner feelings and other sensitive information.

In the "Child Development System" of Minoh, a city in Osaka Prefecture, various datasets connected to poverty among children (such as their academic and athletic results; the results of investigations into their living situations; their daily behavior and attire; the results of school or preschool medical exams; reports of abuse and the responses to them; whether they receive various subsidies or public assistance such as the child support allowance; their reported household income when calculating the daycare fee; whether they are behind on their school-lunch payments; and whether they receive tuition assistance) are consolidated into a single database controlled by the Child Development Office within the board of education. Algorithms

19 Digital Agency et al., supra note 13, p.48.

20 See Horiguchi, supra note 9, pp.196–197.

21 United Nations Committee on the Rights of the Child, "General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment" (2021), p.17.

22 For other issues, see Goro Horiguchi, "AI and Educational Systems", in Tatsuhiko Yamamoto ed., AI and Constitutional Law (Nikkei Business Publications, 2018), pp.253–283; Goro Horiguchi, "EdTech and Constitutional Law", Educational law review No. 52 (2023), pp.90–98.

within the system are then used to calculate an "Overall Child Score" consisting of three assessments: the amount of poverty in the child's life, their academic ability, and their soft skills[23]. And in the Shiga city of Higashiomi, MEXT's Project Promoting the Use of Educational Data and Advanced Technology with a Focus on Next-Generation Schools and Places of Learning is "supporting the continual improvement of the instruction provided by teachers through the acquisition and analysis of data about the emotions of children as detected through cameras on their GIGA devices (things like heart rate, pupil movement, and other information that has been scientifically proven to reflect a person's mental state) then using that to show teachers how well students are concentrating in class, how interested they are in the lesson, etc"[24].

If this sort of profiling that predicts sensitive information produces a true result, then that's the same as if the sensitive information had actually been acquired; and if the prediction is wrong, then the education we provide to each individual might be based on a mistaken conception of who they are. Above all, there are fears that the profiling of children "could influence their decision-making through nudges and behavioral predictions, restricting their potential self-development as young children, adolescents, and even adults"[25]. Furthermore, A.I. can monitor children for far longer than their teachers, then automatically analyze that data, share it with other people, and use it for a variety of purposes. This could result in the "panopticon effect," where children act differently because they know that someone might be observing or assessing them[26].

For this reason, the countries of the world have tended to place severe restrictions on the profiling of children. The E.U. privacy law known as the GDPR, for instance, places a clear restriction on profiling (article 22), offering special protections to personal data that is used "for the purpose of creating profiles of their personality or individuality," since children might not fully understand the risks of having their data processed in such a way (page 38 of the previous source)[27]. Analyzing the mental states of children in schools has also tended to be very restricted. For example, the A.I. Act passed by the European Union in May 2024 prohibits the use of artificial intelligence to infer the emotions of natural persons in educational institutions due to the risk of the subjects being unable to provide consent[28].

In addition, biometric data like fingerprints, voiceprints, veins, and facial features are a very powerful

23 Administrative Reform of the Government website (https://www.gyoukaku.go.jp/review/aki/R03/img/5_6sankou_minou.pdf). This case also included data that isn't directly related to education, so it's probably best to look at it as the usage of "children's data." See the Children and Families Agency, "Guidelines for Linking to Children's Data (Draft)" (March 2024).

24 Techno Horizon Co. Ltd., "Explanation of MEXT's Project Promoting the Use of Educational Data and Advanced Technology with a Focus on Next-Generation Schools and Places of Learning" (January 17, 2023).

25 Joseph A. Cannataci, Artificial Intelligence and Privacy, and Children's Privacy: Report of the Special Rapporteur on the Right to Privacy (United Nations, 2021), p.14.

26 Wayne Holmes et al., Artificial Intelligence and Education: A Critical View through the Lens of Human Rights, Democracy and the Rule of Law (Council of Europe, 2022), p.55. It also notes the effects on children's freedom to form an ideology. See Chihiro Moriguchi, "Constitutional Problems with Using Educational Data: Especially from the Perspective of Freedom of Mind," Monthly Jichiken No. 770 (2023), p.53.

27 For more on the requirements to conduct learning analyses under the GDPR, see Thashmee Karunaratne, "For Learning Analytics to Be Sustainable under GDPR: Consequences and Way Forward", Sustainability Vol.13 No. 20 (2021), pp.1–19.

28 For more on topics such as the E.U.'s General Data Protection Regulation and Artificial Intelligence Act, see Tatsuhiko Yamamoto et al. eds., Global Map of Data Protection: The Future of Privacy via Constitutional and Legislative Mechanisms (Koubundou, 2024), chapter 9.1 (Goro Horiguchi).

way to identify specific individuals. And since such features cannot be changed at will, that data should be handled with more care than "simple data" such as names and addresses. In the E.U.'s GDPR as well as in Convention 108 +, which is a privacy treaty established by the Council of Europe, biometric data that can uniquely identify a natural person is considered a "special category of data" deserving of stricter controls on its processing. In addition to specifying that educational data should not be the subject of routine processing within educational institutions, the Convention 108 + guidelines state that the processing of certain physical or behavioral data for the purposes of monitoring or affecting the behavior of children should be treated the same as handling biometric data, even if it is not done to uniquely identify specific individuals[29].

In contrast, In contrast, Japan's Personal Information Protection Act does not explicitly regulate profiling, does not provide special protection for children's privacy rights[30], and does not include biometric information in the category of "sensitive personal information" (article 2.3 of the Act). Under this legal framework, educational institutions in Japan are actively conducting large-scale profiling on children, even going so far as to analyze their emotions through the use of exceedingly risky biometric data.

(2) Children forced to consent

But of course, it is not the case that there is zero awareness of children's privacy rights within Japan's academic environments. Consent is often obtained from children or their parents[31] when collecting or analyzing their personal data, and it isn't unusual to seek consent just in case, even when the Act on the Protection of Personal Information doesn't require it.

Obtaining a person's consent is certainly an effective way to protect their privacy rights. But when it comes to using educational data, getting the individual to formally consent doesn't necessarily reduce the risk of their rights being infringed. This is because children are still developing their decision-making capabilities, which makes it difficult for them to imagine how their personal data might be used and what such usage could result in. And although their parents have mature decision-making powers, their interests are not always aligned with those of their children, so their opinions don't necessarily lead to the maximum benefit for the children[32]. There is also a power imbalance between the child and the school, which could force the child to give their consent if they think that failing to do so will prevent them from receiving a satisfactory

29 Council of Europe, Children's Data Protection in an Educational Setting Guidelines (2020), pp. 35–36. Also, Holmes et al., supra note 26, pp.35–36 notes that the personal data protection laws defines biometric data with a focus on the identification of individuals. This is a problem because they don't address data processing that aims to affect the behavior of individuals. The main fear is that using biometric data for the purpose of affecting the behavior of children who are still growing and developing will greatly impact the development of their brains and cognition.

30 But Japan is not alone in lacking special legal protections for the privacy rights of children. Many other countries are in the same situation. Right to Education Initiative, Paper commissioned for the 2023 Global Education Monitoring Report: Technology in Education (UNESCO, 2023), pp.19-20.

31 The consenting subject is generally the child themselves, although "consent must be obtained from a legal guardian or representative in cases where a minor does not have the ability to make decisions for themselves etc." (Personal Information Protection Commission's "Guidelines for the Act on the Protection of Personal Information [General Rules]" (2023 Revision), p.28). According to the website of the Personal Information Protection Commission (https://www.ppc.go.jp/all_faq_index/faq1-q1-62/), "the specific ages of children for which consent from a legal guardian etc. must be obtained should be determined on a case-by-case basis depending on the type of personal data and the nature of the project", but that this was "generally no older than 12 to 15 years of age".

32 Cannataci, supra note 25, p.19.

education.33 For these reasons, the effectiveness of consent is weakened when it comes to the utilization of educational data.

Regarding this, article 4 of the E.U.'s GDPR clearly defines the consent of a data subject as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"[33]. And as conditions for consent, article 7 lists things like the controller being able to demonstrate that the data subject has provided their consent and that the data subject can easily withdraw their consent at any time. Additionally, the European Data Protection Board guidelines[34] related to GDPR consent provide detailed interpretations of the various conditions included in the definition of consent. For the condition of being "freely given," for example, the guidelines mention components such as "imbalance of power," "conditionality," "granularity," and "detriment," citing an example in which a public school asks students for consent to use their photographs in a printed student magazine. In such a case, consent would be effective because the students could refuse the use of their photographs without being denied education or services and without any detriment to themselves.

In contrast, Japan's Personal Information Protection Act does not provide a definition or requirements for consent. Perhaps because of this, there seems to be a widespread misunderstanding in Japanese schools that simply obtaining the individual's consent will resolve any issues regarding privacy rights, resulting in a situation in which children are "forced to consent."

On top of this, the parties to the terms-of-service agreements for digital education platforms are often school administrators on the board of education or at incorporated educational institutions, not children and their parents. With the e-learning portals that have come to serve as hubs for various EdTech solutions, details about the educational data that can be used and for what purposes depend on their individual service agreements[35], but the parties to those agreements are the boards of education and incorporated educational institutions. Moreover, these boards of education and incorporated educational institutions that enter into agreements with companies that offer digital education platforms typically provide the personal data of children to those companies in the form of "contract work" that does not require the data owner's consent[36]. This means that children are almost completely incapable of participating in the handling of their own data, so all they can do is hope that these entities are properly protecting their personal data by establishing agreements and supervising the work of their contractors (articles 25 and 66 of the Act on the Protection of Personal Information)[37].

33 Borhene Chakroun et al., Minding the Data: Protecting Learners' Privacy and Security (UNESCO, 2022), p.16.

34 European Data Protection Board, Guidelines 05/2020 on Consent under Regulation 2016/679, Version 1.1 (13 May, 2020).

35 ICT CONNECT 21, "E-Learning Portal Standard Model Ver. 4.00" (March 29, 2024), p.95.

36 Digital Agency et al., supra note 13, p.37.

37 The safety-control measures that article 66 of the Act on the Protection of Personal Information requires of government agencies etc. include oversight of subcontractors. Personal Information Protection Commission, "Guidelines for the Act on the Protection of Personal Information (Government Agency Edition)" (2023), p. 24.

Conclusion

As we have seen, digital education platforms have the potential to overcome the limitations of brick-and-mortar schools while greatly improving formal education, but they also present serious risks such as violating the privacy rights of children. Therefore, when asked whether digital education platforms are friends or foes of humanity, we have no choice but to answer that they can be both. This uninteresting answer, however, leads to the next important question: If digital education platforms can be both friends and foes, how can we make them our allies?

Here, Mechagodzilla can provide us with a hint. Mechagodzilla was not a monster born from the natural world. It was a robotic monster that was developed by someone with a specific design and for a specific purpose. Thus, whether Mechagodzilla is a friend or foe to humans depends on who designs it, and for what purpose. In fact, the first Mechagodzilla in the 1974 film was created by aliens from the Third Planet of the Black Hole as a weapon for invading Earth, but the Mechagodzilla that returned in 1993 was built by humans to help them defeat Godzilla.

Similarly, whether digital education platforms will be allies that contribute to establishing the right to receive an education or enemies that infringe upon our privacy will depend on how they are designed (see article 25 of the GDPR for more on this sort of "privacy by design"). Put simply, digital education platforms should become our allies if we can give them "constitutional designs" that reduce the risk of human-rights violations. Many of the digital platforms that have already been established are difficult to regulate by law because the main aspects of their design are already established and the companies that develop them have enormous power that surpasses that of nations[38]. However, digital education platforms are characterized by a multilayered construction across a variety of other platforms[39], and although their infrastructure in the cloud etc. is provided by giant multinational corporations like GAFAM[40], start-ups and other small- and medium-sized businesses in Japan form the core of individual educational services. Digital education platforms are also still in the process of being developed, and there is some variability in their design. Therefore, we still have a good chance to at least incorporate some "constitutional design" into our digital education platforms.

But what should those designs look like, exactly? Answering this question will require cooperation between corporations, engineers, data scientists, pedagogists, legal experts, educators, and more while sufficiently respecting the opinions of children, parents, and guardians. Here, however, I'd like to provide a rough guess of how these platforms are connected to privacy rights, from the viewpoint of constitutional law.

First, as external legislative restrictions on design, we could establish special protections for the privacy

38 Regarding this issue, definitely see Yamamoto, supra note 2.

39 Mathias Decuypere et al., "Introduction: Critical Studies of Digital Education Platforms", Critical Studies in Education Vol. 62 No.1 (2021), pp.4-5.

40 It has been pointed out, for example, that Amazon Web Service (AWS) restricts the features and services that companies can provide to educational institutions, effectively "reigning over" the EdTech industry. Ben Williamson et al., "Amazon and the New Global Connective Architectures of Education Governance", Harvard Educational Review Vol. 92 No. 2 (2022), p.245.

rights of children and create strict requirements for the use of profiling, particularly in the case of minors. Especially, emotional analyses and other high-risk profiling techniques should be outright banned or else severely restricted, regardless of whether the child has provided their consent. Regarding the management of digital education platforms, when asking for consent we must provide children and parents with very plain explanations of what data will be used, how it will be used, and what the advantages and risks are. Collecting and analyzing people's personal data in a way that does not disadvantage them if they refuse will ensure that they have the opportunity for alternative forms of education. The design of digital education platforms themselves should not place too much emphasis on the consent of children who are less able to make decisions, but should be safe enough that consent is not required.