

# Kids, No Phones at the Dinner Table: Analyzing the People’s Republic of China’s Proposed “Minor Mode” Regulation and an International Right to the Internet

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## Abstract

*Around the world, governments are contemplating taking steps to reverse or mitigate the negative health and developmental effects that come from the increasing amount of time children are spending online and using screens. In 2023, the People’s Republic of China (PRC) released a draft regulation restricting minors’ screen time and internet use, which imposes a significant burden not only on children, but also on technology and internet companies that wish to continue operating in the country. However, the PRC’s proposed minor mode regulation is neither an extreme departure from the types of restrictions neighboring countries in East Asia have imposed on children’s screen time and internet use, nor its own previous regulations in this area. As such, the proposed regulation is unlikely to have violated a norm of customary international law against restricting children’s internet use. Similarly, although international instruments like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights guarantee a universal right of expression, which arguably includes an implied right to the internet, the proposed Chinese regulation is not likely to be deemed violative of either of these instruments because of ambiguities within them as to how states are meant to weigh children’s rights against their protection. This conclusion is bolstered by the competing provisions of the Convention on the Rights of the Child about protecting children’s fundamental rights while also ensuring their health and wellbeing. As such, the PRC’s Draft Minor Mode Guidelines are likely to pass without facing significant legal challenges domestically or internationally.*

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## I. INTRODUCTION

Medical bodies like the American Academy of Pediatrics recommend no media use by children under two years old, and “no more than one or two hours a day” for older children.<sup>1</sup> Even before the COVID-19 pandemic, children’s average daily use of phones, computers, televisions, and other electronic devices was increasing in a way that worried scientists and policymakers around the world.<sup>2</sup> This trend has only worsened. Both during and since the pandemic, the daily screen time for children has risen above pre-pandemic levels,<sup>3</sup> with one study showing that for children between four- and twelve-years-old, screen time increased by 1.75 hours from the already high, pre-pandemic average of 4.4 hours per day.<sup>4</sup> This amount of screen time is correlated with negative physical, social,

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<sup>1</sup> Jill Christensen, *Children and Screen Time: How Much is Too Much?*, MAYO CLINIC HEALTH SYS. (May 28, 2021), <https://perma.cc/VGJ5-7Z2F>.

<sup>2</sup> *Study Shows Screen Time for Kids Spiked Within the Past Decade*, ABC 11 NEWS (Feb. 18, 2019), <https://perma.cc/C3PN-H9H9> (explaining that screen time for children under two years old had increased from just over an hour of screen time per day in 1997 to more than three hours in 2014); see, e.g., Société Canadienne de Pédiatrie, *Les Repercussions de L’usage des Medias sur les Enfants et les Adolescents* [The Repercussions of the Use of Media on Children and Adolescents], 8 PAEDIATRICS & CHILD HEALTH 311, 314 (2003) (warning parents and health providers that “long periods at the computer can promote obesity, the non-development of social abilities and a certain form of addiction”); *Efectos de Internet en Nuestros Niños y Adolescentes* [The Effects of the Internet on Our Children and Adolescents], ALCANZA CENTRO DE DESARROLLO INFANTIL [ALCANZA CENTER OF CHILDHOOD DEVELOPMENT] (Nov. 15, 2019), <https://perma.cc/3SPJ-YLFP> (cautioning just before the pandemic that despite the potential benefits of the internet, it also poses “great risks, and it will be a big challenge for parents to teach their children to make responsible and appropriate use of it as such a tool.”); Joan-Carles Suris et al., *Is Internet Use Unhealthy? A Cross-Sectional Study of Adolescent Internet Overuse*, 144 SWISS MEDICAL WKLY. 1, 1 (2014) (concluding from a study of just over three-thousand Swiss French eighth graders that “problematic internet users report health problems more frequently,” and advising healthcare providers “to screen for excessive internet use their patients complaining of sleep-related problems, back or musculoskeletal pain or overweight”).

<sup>3</sup> See Monique M. Hedderson et al., *Trends in Screen Time Use Among Children During the COVID-19 Pandemic, July 2019 Through August 2021*, 6 JAWA NETWORK OPEN (Feb. 1, 2023) (finding that the mean total screen time for children aged four to twelve increased by 1.75 and 1.11 hours during the first and second pandemic periods, respectively); Iyeon Kim et al., *Effects of Screen Time on Problematic Behavior in Children During the COVID-19 Pandemic in South Korea*, 34 J. KOR. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 175 (2023), <https://perma.cc/8V9S-WMXU> (studying the effects of pandemic-era screen time increases on child behavior, with similar results as studies from the Netherlands, Germany, and Canada, the latter of which reportedly experienced an eighty-seven percent increase in kids’ screen time during the pandemic); Mehtap Akbayin et al., *Screen Exposure Time of Children Under 6 Years Old: A French Cross-Sectional Survey in General Practices in the Auvergne-Rhône-Alpes Region*, BMC PRIMARY CARE, Mar. 2023, at 1 (finding that French children under six are on screens more than recommended).

<sup>4</sup> Arianna Prothero, *Kids’ Screen Time Rose During the Pandemic and Stayed High. That’s a Problem*, EDUC. WEEK (Feb. 28, 2023), <https://perma.cc/9QVS-A7YH>.

and developmental outcomes for children including: obesity, irregular sleep, behavioral problems, impaired academic performance, and violence.<sup>5</sup>

Given the possible negative effects on child health and development, governments that wish to mitigate the risk of such negative outcomes for their children have taken a variety of approaches to reducing daily screen time. Some like Taiwan have imposed limits on use of any electronic products, with fines for parents in the case of noncompliance.<sup>6</sup> Others like South Korea have passed and then repealed laws prohibiting consuming a specific medium of online content during certain hours.<sup>7</sup> However, the most recent attempt at reducing children's use of electronic devices comes from the People's Republic of China (PRC). On August 2, 2023, the PRC released a draft for public comment of a proposed regulation (the "Draft Minor Mode Guidelines"). The regulation will require smartphone companies to create and promulgate a so-called "minor mode," which when installed automatically cuts off internet access once an allotted amount of time has passed based on the age of the user.<sup>8</sup>

The primary purpose of the Draft Minor Mode Guidelines is to "cultivate a better internet environment" and "prevent . . . the problem of minor internet addiction" by "guid[ing] minors to form good internet use habits."<sup>9</sup> While this appears to be responsive to the negative health and developmental effects internet overuse might have on children, there is also a concern that this type of restriction infringes fundamental rights. Today, the internet is the network through which

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<sup>5</sup> Christensen, *supra* note 1; see also Kristen Rogers, *Screen Time Linked with Developmental Delays in Toddlerhood, Study Finds*, CNN (Aug. 21, 2023), <https://perma.cc/WTA5-V3YV> (describing a study which found a correlation between any screen time over one hour for one-year-olds and "developmental delays in communication, fine motor, problem-solving and personal and social skills by age 2."). *But see* Łukasz Tomczyk & Elma Selmanagic Lizde, *Is Real Screen Time a Determinant of Problematic Smartphone and Social Network Use Among Young People?* 82 *TELEMATICS & INFORMATICS* 1, 1 (2023) (arguing that screen time is not a good predictor of problematic internet use, which is another term for internet addiction).

<sup>6</sup> See Ertong ji Shaonian Fuli yu Quanyi Baozhangfa (兒童及少年福利與權益保障法) [The Protection of Children and Youths Welfare Act], arts. 43, 91 (Taiwan) *translated in* Law & Regulations Database of the Republic of China (Taiwan), <https://perma.cc/6YQJ-M8ZM> [hereinafter Taiwan Child Protection Act].

<sup>7</sup> See South Korean Youth Protection Act, arts. 25–26 (2011) (repealed 2021) (S. Kor.) *translated in* Korea Legislation Research Institute, <https://perma.cc/KQ27-2R4M>.

<sup>8</sup> Guojia Hulianwang Xinxu Bangongshi yu "Yidong Hulianwang Weichengnianren Moshi Jianshe Zhinan (Zhengqiu Yijian Gao)" Gongkai Zhengqiu Yijian de Tongzhi (国家互联网信息办公室关于《移动互联网未成年人模式建设指南（征求意见稿）》公开征求意见的通知) [The Cyberspace Administration of China's Public Notice Requesting Suggestion on 《Guidance for Building Mobile Internet Minor Mode (Draft Requesting Comment)》], ZHONGGUO HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [Cyberspace Administration of China] (Aug. 02, 2023), <https://perma.cc/2CNQ-SBLT> [hereinafter PRC Draft Minor Mode Guidelines].

<sup>9</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 1 (Note: all translations are the author's unless otherwise stated.).

many rights are exercised, and when a state attempts to regulate access to that network, rights to free expression, speech, privacy, etc. will be affected.<sup>10</sup>

This Comment attempts to analyze how the Draft Minor Mode Guidelines interact with those rights in the current landscape of Chinese domestic law. Furthermore, this Comment will compare the Chinese approach to that of other countries in East Asia, before shifting its focus to answer the more general question of whether there is an internationally recognized right to access the internet, and whether the Draft Minor Mode Guidelines run afoul of any such right.

As acknowledged within the Draft Minor Mode Guidelines, new technological developments would need to be made in order to create an operating system capable of meeting the regulation's stringent requirements. Given the universality of the concern over the detrimental effects of internet use on children, once minor mode technology is made available to the rest of the world, other countries may begin to contemplate implementing regulations or laws that similarly restrict children's screen time. The European Union's General Data Protection Regulation (GDPR) is a good example of how a regulatory scheme can have ripple effects outside of its original jurisdiction. Even though the GDPR is limited to the EU, companies "scrambled to comply [with the regulation] and started to enact privacy changes for all of their users everywhere."<sup>11</sup> Similarly, once minor mode is technologically available and required in China, smartphone and internet companies may offer these features independent of government action. In either case, there would need to be a determination about whether, and to what extent, the perceived need to protect children outweighs children's fundamental speech and privacy rights from the perspective of international law.

To that end, Part II of this Comment will analyze different approaches other countries have taken to regulate children's screen time, specifically focusing on other states in East Asia in order to establish a baseline of how the PRC's neighbors are attempting to tackle the problem of internet overuse by children. Part III will describe and analyze the Chinese Draft Minor Mode Guidelines, as well as a previous 2019 restriction on the use of gaming and social media apps by

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<sup>10</sup> See, e.g., Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC. CHANGE 663 (2019) (arguing that imposing internet restrictions on sex offenders who were not convicted of crimes related to the internet as a condition of their release, and internet restrictions generally, restrict fundamental rights like speech and privacy).

<sup>11</sup> Emily Stewart, *Why Every Website Wants You to Accept Its Cookies*, VOX (Dec. 10, 2019), <https://perma.cc/QEP2-VXF4>. But see Matt Growcoot, *Korean Smartphones Have Mandatory Shutter Sounds, 8 in 10 Want It Muted*, PETAPIXEL (Nov. 6, 2023), <https://perma.cc/5XAZ-KPCY> ("Japan and South Korea are among the only countries in the world to regulate camera shutter noises on mobile phones." The South Korean regulatory scheme requires that phone providers permanently enable the shutter sound on cellphone cameras in order to prevent men from taking photos under women's skirts, a phenomenon known as "upskirting." Despite this technological innovation, the rest of the world has not capitalized on its availability, perhaps due to a lack of pervasive upskirting.).

children. Also included in this Part will be a discussion of whether there is any right to the internet grounded in Chinese law, and whether the Draft Minor Mode Guidelines represent an evolution in China's domestic approach to internet regulation for children. Part IV will first directly compare the PRC's Draft Minor Mode Guidelines to the internet regulations in Taiwan, South Korea, and Japan in order to determine whether China's proposed regulation could be violative of any norm of customary international law. Then, Part IV will introduce international treaties like the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR) in order to ascertain whether there is an implicit right to access the internet in general, as well as with respect to children, specifically. Subsequently, this Part will also determine whether or not China's proposed regulation is violative, or conversely supportive, of any of these treaties to which China is a party. Based on this analysis, this Comment will conclude that although children's rights to expression and access to information are implicated by the Draft Minor Mode Guidelines, the proposed Chinese regulation does not violate any well-established rules of domestic or international law. Furthermore, this Comment will propose that as internet use regulations become more common, international interpretive bodies will need to more thoroughly confront the issue of balancing children's rights against their protection in the context of the internet.

## II. EAST ASIAN APPROACHES TO REGULATING INTERNET USE BY MINORS

In addition to the PRC, three of the other major players in East Asia have passed some type of regulation that limits the amount of time children are able to use the internet. South Korea and the Republic of China (Taiwan), have passed national legislation regarding this topic,<sup>12</sup> while in Japan only one prefecture has passed similar legislation.<sup>13</sup> Both the Japanese and South Korean laws impose time limits on children consuming a single type of content, gaming, and thus are more similar to prior regulations passed in the PRC in 2019 limiting the amount of time minors could use gaming and social media apps like Douyin, China's version of TikTok.<sup>14</sup> In contrast, the Taiwanese legislation is more comprehensive as a

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<sup>12</sup> See generally South Korean Youth Protection Act, *supra* note 7; Taiwan Child Protection Act, *supra* note 6, art. 43, para. 1(5).

<sup>13</sup> Ben Hooley & Hikari Hida, *A Government in Japan Limited Video Game Time. This Boy Is Fighting Back.*, N.Y. TIMES (June 12, 2020), <https://perma.cc/ZG6W-9PZ8>. A prefecture is the regional governmental unit that rests right under the national government of Japan, which is run by popularly elected governors and legislators, and which "operate their own police forces, maintain networks of prefectural roads, and carry out various other urban and rural planning functions." *The Prefectures of Japan*, NIPPON.COM (Apr. 13, 2023), <https://perma.cc/35SX-C6ZU>.

<sup>14</sup> See *infra* Part III.

restriction on general internet use, which is more directly comparable to the PRC’s Draft Minor Mode Guidelines. These three examples from regional comparators establish the baseline which will be used in Part III to determine whether and to what extent the PRC’s Draft Minor Mode Guidelines diverge from the mechanisms peer nations have used to address the problem of internet addiction and overuse by minors.

#### A. Kagawa Prefecture’s “Internet and Game Addiction Countermeasures Ordinance”

In 2020, “Kagawa became the first jurisdiction in Japan to enact regulations intended to address addiction to video gaming” by passing its Internet and Game Addiction Countermeasures Ordinance (the “Gaming Ordinance”).<sup>15</sup> The stated purpose of the Gaming Ordinance was to prevent “the deterioration of academic ability” and “physical problems” that the Kagawa prefectural government feared would result from excessive video game playing.<sup>16</sup>

The Gaming Ordinance imposes a duty on both parents and children, directing the former group to “limit the playing time of children under the age of eighteen to sixty minutes a day on weekdays and ninety minutes a day on holidays,”<sup>17</sup> and requiring the latter group to not use smartphones after 9:00 p.m. or 10:00 p.m., with the cutoff time depending on whether the child in question had completed their compulsory education.<sup>18</sup> However, the Gaming Ordinance does not impose any penalties on failure to comply, instead relying on residents “to make a sincere effort” to comply with its requirements.<sup>19</sup>

While this law has yet to be nationalized, having only been adopted outside Kagawa in the city of Odate in Akita Prefecture,<sup>20</sup> a seventeen-year-old high school student sued the Kagawa prefectural government shortly after the law was

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<sup>15</sup> Hooley & Hida, *supra* note 13; Kagawa ken netto gēmu isonshō taisaku jōrei (香川県ネット・ゲーム依存症対策条例) [Kagawa Prefecture Internet and Game Addiction Countermeasures Ordinance], Ordinance No. 24 of 2020 (Japan).

<sup>16</sup> Daiki Imazato, Kagawa ken no `gēmu jōrei’ o meguru saiban no hanketsu ga iwatasa reru. Hanketsu wa seikyū kikyaku, ken-gawa no shuchō ga tōtta kakkō ni (香川県の「ゲーム条例」をめぐる裁判の判決が言い渡される。判決は請求棄却、県側の主張が通った格好に) [The Verdict in the Court Case Regarding Kagawa Prefecture’s “Gaming Ordinance” Will Be Handed Down. The Judgment Dismissed the Claim, Supporting the Prefecture’s Argument] AUTOMATON (Aug. 8, 2022), <https://perma.cc/N69R-HK3> (translation by Google Translate).

<sup>17</sup> *Id.*

<sup>18</sup> Daiki Imazato & Marco Farinaccia, *Japan’s Local Ordinance That Limits Gaming Time for Children Ruled Not Unconstitutional*, AUTOMATON (Aug. 30, 2022), <https://perma.cc/G3W3-LZFQ>.

<sup>19</sup> *Id.*

<sup>20</sup> *But see* Hooley & Hida, *supra* note 13 (noting that Odate had suspended the regulation in light of the legal challenge to Kagawa’s ordinance); discussed *infra* notes 20–26 and accompanying text.

enacted in 2020, alleging that the Gaming Ordinance was unconstitutional.<sup>21</sup> Specifically, the plaintiff claimed that the Gaming Ordinance deprived him of the rights guaranteed under Article 13 of the Japanese Constitution,<sup>22</sup> which declares that all individuals’ “right to life, liberty, and the pursuit of happiness shall . . . be the supreme consideration in legislation and in other governmental affairs.”<sup>23</sup>

At the time of instituting the suit, the plaintiff’s lawyer, Tomoshi Sakka, was confident that “his odds of winning [were] good,” because of his belief that “Kagawa’s regulations . . . violate[d] the constitutional rights to freedom of expression and limits on the government’s authority.”<sup>24</sup> Despite this initial confidence, the road to trial was less than smooth: in March 2022, the plaintiff’s lawyers attempted to withdraw the complaint since they had not heard from the plaintiff since the beginning of the year.<sup>25</sup> This withdrawal request was denied by the prefecture, and the Takamatsu District Court rendered judgment against the plaintiff, holding that the Gaming Ordinance had not violated the Constitution.<sup>26</sup> In support of this conclusion, that court pointed to the fact that because the Gaming Ordinance only mandates effort on the part of parents and children with no enforcement or penalty mechanism for noncompliance, the Gaming Ordinance “is not something that can impose specific restrictions on one’s rights.”<sup>27</sup>

Since district courts in Japan are courts of first instance in civil cases, parties who are dissatisfied with the opinion have a right to file a *koiso* appeal to the High Court.<sup>28</sup> However, this right must be exercised within two weeks of the original judgment.<sup>29</sup> And since the plaintiff here did not file for such an appeal in the required time period, this case will not make its way to either the relevant High Court or the Japanese Supreme Court.

It is nonetheless possible that further challenges will crop up across Japan if other prefectures or the national parliament adopt similar gaming ordinances. In 2018, “[t]he World Health Organization (WHO) added ‘gaming disorder’ to a list of officially recognized diseases,” and members of the political action group that successfully lobbied for the Kagawa Gaming Ordinance “hope[] to nationalize

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<sup>21</sup> *Id.*

<sup>22</sup> Imazato & Farinaccia, *supra* note 18.

<sup>23</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (Japan), *translated in The Constitution of Japan* PRIME MINISTER OF JAPAN AND HIS CABINET, <https://perma.cc/TVZ8-3RWL>.

<sup>24</sup> Hooley & Hida, *supra* note 13.

<sup>25</sup> Imazato & Farinaccia, *supra* note 18.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *The Japanese Judicial System*, JAPANESE FED’N OF BAR ASS’NS, <https://perma.cc/6N4H-ZW68>.

<sup>29</sup> *Id.*



[their] efforts.”<sup>30</sup> This lobbying, along with the national media attention paid to this first challenge, indicates that this may only be the beginning of the legal battle over whether limiting children’s online activities infringes any of their constitutional rights in Japan.

However, even if such a challenge makes its way to the Japanese Supreme Court, it is unlikely to succeed in striking down any such law due to the Court’s extreme hesitancy to exercise its judicial review power.<sup>31</sup> Despite the fact that the Supreme Court has the constitutionally enumerated power to “determine the constitutionality of any law, order, regulation or official act,”<sup>32</sup> it has only “held statutes enacted by parliament to be unconstitutional in . . . ten cases since its establishment in 1947.”<sup>33</sup> That fifty percent of these decisions were passed down since 2002 might indicate an increase in the Court’s interest in exercising judicial review.<sup>34</sup> When that rate is converted to real numbers, however, with only five statutes having been struck down in just over twenty years, the chance of any legislation being held to be unconstitutional, let alone legislation without any enforcement mechanism like the Kagawa Gaming Ordinance, is low.

## B. South Korea’s “Shutdown Law” and Its Repeal

Earlier than the COVID-era Kagawa Gaming Ordinance and Chinese Draft Minor Mode Guidelines, South Korea’s National Assembly passed a series of amendments to the Youth Protection Act (the “2011 Act”),<sup>35</sup> known collectively as the “Shutdown Law,”<sup>36</sup> which restricted the amount of time children could use video game services. Article 26, Chapter III of the 2011 Act, entitled “Prevention of Juveniles’ Addiction to Internet Games,” requires that “[n]o provider of an Internet game shall provide the Internet game to juveniles under the age of 16

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<sup>30</sup> Hooley & Hida, *supra* note 13 (noting that Ichiro Oyama, former chairman of the Kagawa Prefectural Assembly, was a part of this political action group and played a large role in lobbying for the Gaming Ordinance. Oyama “is an ultraconservative who has worked to change public perceptions about Japan’s wartime atrocities and has advocated reintroducing traditional values into the country’s educational system,” an ideological bent reflected in the language of the Gaming Ordinance, which “describes video games as a threat to Japanese families.”).

<sup>31</sup> See Yasuo Hasebe, *The Supreme Court of Japan, One Step Forward (But Only Discreetly)*, 16 I-CON 672, 672 (2018) (“Japanese courts have not been particularly active in exercising their power of constitutional review.”).

<sup>32</sup> NIHONKOKU KENPŌ [KENPŌ], art. 81 (Japan) *translated in* THE PRIME MINISTER OF JAPAN AND HIS CABINET, <https://perma.cc/TVZ8-3RWL>.

<sup>33</sup> Hasebe, *supra* note 31, at 672.

<sup>34</sup> *Id.*

<sup>35</sup> South Korean Youth Protection Act, *supra* note 7, ch. III.

<sup>36</sup> Jiyeon Lee, *South Korea Pulls Plug on Late-night Adolescent Online Gamers*, CNN (Nov. 22, 2011), <https://perma.cc/WM95-AFCP>.

between 12 midnight and 6 A.M.”<sup>37</sup> What’s more, unlike the Kagawa Gaming Ordinance, South Korea’s Shutdown Law, in Article 59 of the 2011 Act, penalizes any “person who provides an Internet game to juveniles under the age of 16 late at night”<sup>38</sup> in one of two ways: by (1) “imprisonment with prison labor for not more than two years,” or (2) a fine that can be as high as 20 million won (just under \$15,300 USD at the current exchange rate).<sup>39</sup> When children, or anyone else, login to play a game online, they must register with their national I.D. numbers, and anyone who is under the age of sixteen will be automatically logged out once the clock strikes midnight.<sup>40</sup>

As with the Kagawa Gaming Ordinance, the Shutdown Law was challenged in court. In 2014, the South Korean Constitutional Court held that the law did not excessively violate minors’ constitutional rights.<sup>41</sup> However, even as it came to this ultimate conclusion, the Constitutional Court did find that the prohibition and penalty clauses of Articles 26 and 59 at least implicated a number of constitutional rights. Specifically, the Shutdown Law restricted minors’ right to freedom of action and free expression, which is part of the constitutionally enumerated right to pursue happiness.<sup>42</sup> The Constitutional Court also recognized that the prohibitions restrict the right of parents to plan their children’s education and rearing, which the Constitutional Court had previously recognized as implicit to the rights associated with family and marriage, also fundamental to the pursuit of happiness guaranteed by Article 10 of the South Korean Constitution.<sup>43</sup> And finally, the Constitutional Court acknowledged that the right of internet game providers to choose their occupations was restricted.<sup>44</sup>

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<sup>37</sup> South Korean Youth Protection Act, *supra* note 7, art. 26, para. 1.

<sup>38</sup> *Id.* art. 59, para. 5.

<sup>39</sup> *Id.* art. 59.

<sup>40</sup> Min-Jeong Lee, *South Korea Eases Rules on Kids’ Late Night Gaming*, WALL STREET J. (Sept. 2, 2014), <https://perma.cc/97DT-MNL2> (drawing the same comparison to Cinderella that gave the Shutdown Law its other colloquial name, the Cinderella Law).

<sup>41</sup> Dominik Damian Mielewicz, *Korean Regulation of the Shutdown Law (셧다운제), and the Issue of Minors Using Electronic Games and Social Media*, 2022 GDÁNSK E. ASIAN STUD. 149, 163.

<sup>42</sup> HEONBEOBJAEPANSO [CONST. CT.], Apr. 24, 2014, 2011 Heonma 659 (consol.) (Hunjip 176, 189) (S. Kor.) (auto-translated with Google Translate) (Full Korean case title: 2011 헌마 659 등 (2011 헌마 659, 2011 헌마 683) 청소년보호법 제 23 조의 3 등 위헌확인 (심야시간대 청소년의 인터넷게임 이용금지 강제적 셧다운제 사건)).

<sup>43</sup> *Id.*; see also DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 10 (S. Kor.) translated in Korea Legislation Research Institute’s online database, <https://perma.cc/QSK7-4EL9> (“All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”).

<sup>44</sup> 2011 Heonma 659, *supra* note 42, at 190; see also DAEHANMINKUK HUNBEOB [HUNBEOB] art. 15 (S. Kor.) translated in Korea Legislation Research Institute’s online database, <https://perma.cc/QSK7-4EL9> (“All citizens shall enjoy freedom of occupation.”).

Despite these findings, the Constitutional Court pointed to another constitutional provision to justify its holding that the Shutdown Law was not unconstitutional. Article 34 of the South Korean Constitution imposes on the national government “the duty to implement policies for enhancing the welfare of senior citizens and the young.”<sup>45</sup> With this constitutional mandate in mind, the Constitutional Court held that the government’s prevention of the negative effects of excessive gaming may have on children’s personal development, as well as on their economic utility for the nation, outweighed these minor restrictions on the rights of youth, parents, and internet game providers.<sup>46</sup> A dissent from Justices Kim Chang-jong and Cho Yong-ho vehemently disagreed, believing instead that “the problem of Internet game overindulgence and addiction is a problem that must be resolved autonomously through the self-rescue efforts of families and Internet providers.”<sup>47</sup>

Perhaps in response to the dissent’s concerns over government intrusion on the rights of parents to control their children’s upbringing, the South Korean government announced an amendment to the Shutdown Law in September 2014, only a few months after the opinion discussed above was handed down.<sup>48</sup> This amendment created a parental exception where parents could opt out of the late-night gaming restrictions for their children.<sup>49</sup> At the time that this exception was announced, it was implied that further exceptions might come later, with the stated reason for its implementation being “to increase the pool of adolescents that are able to have sensible control over their gaming hours without parental guidance.”<sup>50</sup>

Instead of further amendment, however, the South Korean National Assembly decided in 2021 to ultimately repeal the Shutdown Law altogether.<sup>51</sup> Government organs claimed that “future policies will be more focused on giving greater flexibility and control to children and parents rather than applying forcible, unilateral measures.”<sup>52</sup> While this claim most likely informed the decision, another major contributing factor for the repeal was the decreased effectiveness of the law

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<sup>45</sup> DAEHANMINKUK HUNBEOB [HUNBEOB] art. 34, para. 4 (S. Kor.) *translated in* Korea Legislation Research Institute, <https://perma.cc/QSK7-4EL9>.

<sup>46</sup> 2011 Heonma 659, *supra* note 42, at 191.

<sup>47</sup> *Id.* at 196 (Kim, J., dissenting).

<sup>48</sup> Lee, *supra* note 40.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (internal quotation marks omitted) (quoting Shon Ae-lee, director of the Youth Policy Bureau at South Korea’s Ministry of Gender Equality and Family at the time of this development).

<sup>51</sup> Bahk Eun-ji, *Korea to Lift Game Curfew for Children*, KOREA TIMES (Aug. 26, 2021), <https://perma.cc/K9UW-XB75> (noting that the official repeal would take place later once the relevant amendment processes had been completed).

<sup>52</sup> *Id.*

as children begin to shift towards games on mobile apps and other media platforms, which were not governed by the Shutdown Law.<sup>53</sup>

As such, there is potential for further legislation in this area as children's internet use continues to increase. Still in effect is another regulation that requires "entities providing services that enable the public to use gaming products via a telecommunications network"<sup>54</sup> to "prevent excessive immersion or addiction to games by users of game products."<sup>55</sup> The requirements of this law are less forceful than the Shutdown Law, with several provisions only going into effect at the request of a juvenile's legal representative.<sup>56</sup> However, if children's internet use increases, it is possible that the current legislation could be modified, or new legislation passed, that attempts to restrict that use in a way that is more restrictive than the current regime but less restrictive than the now-repealed Shutdown Law, particularly if minor mode technology is made available in the coming years.

### C. Taiwan's 2015 Amendments to its Children and Youth Welfare Act

In 2015, Taiwan amended its Protection of Children and Youths Welfare and Rights Act<sup>57</sup> (the "Child Protection Act") to limit the amount of time children spend using the internet.<sup>58</sup> Unlike the South Korean Shutdown Law and the Kagawa Prefecture Gaming Ordinance, Article 43 of Taiwan's Child Protection Act does not merely prohibit accessing certain types of content, e.g., gaming, but instead provides that "[c]hildren and youth shall not . . . [c]ontinue using electronic products for an unreasonable amount of time."<sup>59</sup> This blanket mandate covers the use of any electronic product and is not limited to a specific type of content, though what counts as an electronic product is undefined in the statute.<sup>60</sup> Through this amendment, overuse of electronic products is listed along with smoking, drinking, and doing drugs as an activity which will "caus[e] harm to [children's] mental and physical health."<sup>61</sup> Further diverging from its South

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<sup>53</sup> *Id.*

<sup>54</sup> Mielewczyk, *supra* note 41, at 161.

<sup>55</sup> Game Industry Promotion Act, *amended* by Act No. 15378, Feb. 21, 2018, art. 12-3 (S. Kor.), *translated* in Korea Legislation Research Institute, <https://perma.cc/7W8L-8ERG>.

<sup>56</sup> *See, e.g., id.* art. 12-3, para. 3 (mandating game providers to place "restriction[s] on method of using game products, time for using game products, etc. when juveniles themselves or their legal representatives request [them]").

<sup>57</sup> Taiwan Child Protection Act, *supra* note 6, art. 43.

<sup>58</sup> Melissa Locker, *This Place Just Made It Illegal to Give Kids Too Much Screen Time*, TIME (Jan. 26, 2015), <https://perma.cc/2ZM2-DB3Q>.

<sup>59</sup> Taiwan Child Protection Act, *supra* note 6, art. 43, para. 1(5).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* art. 43, paras. 1–2.

Korean and Japanese counterparts, the Taiwanese Child Protection Act imposes a duty, not on providers of electronics products, but on “[p]arents, guardians, or other people looking after children” to “prohibit children . . . from behaving in the ways listed” in Article 43.<sup>62</sup>

As noted in Part II.B, the South Korean Shutdown Law’s penalty clause was fairly harsh, with noncompliance punishable by up to two years in prison or a maximum fine of approximately \$15,000 USD,<sup>63</sup> while the Kagawa Gaming Ordinance lacked an enforcement mechanism altogether.<sup>64</sup> Taiwan’s Child Protection Act, by contrast, splits the difference by imposing on “parents, guardians, or other people looking after children and youth who seriously violate the [Article 43] regulation” a fine of “no less than NT\$10,000 and no more than NT\$50,000.”<sup>65</sup> With the maximum fine imposed on violators of Article 43 equaling just around \$1,550 USD, there is not as much threat of disproportionate punishment for noncompliance, which was one of the major constitutional questions asked by the Korean Constitutional Court when it reviewed the Shutdown Law.<sup>66</sup>

However, while there is this lower financial cost on parents for noncompliance, there are two provisions of the Child Protection Act that impose potentially severe consequences on children who violate the law. First, Article 52 provides a mechanism for authorized municipal and county agencies to, with consent of a child’s parent or guardian, “arrange for proper institutions to assist, guide, or place children and youth” who have violated the Article 43 prohibitions on excessive smoking, drinking, drug use, or excessive use of electronics despite “parents . . . try[ing] the utmost to prohibit [their children] from doing so.”<sup>67</sup> Second, in the case of adopted children, Article 20 of the Child Protection Act allows for “interested parties or authorized agencies” to appeal to the court to declare a termination of the adoption if the adoptive parents “[v]iolate the regulations of Paragraph 2, Article 43.”<sup>68</sup> It is unclear whether these two provisions are holdovers from the previous version of the Child Protection Act, before excessive electronics use was added in 2015, in which case enforcement of these fairly harsh penalties in response to overuse of the internet may never have

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<sup>62</sup> *Id.* art. 43

<sup>63</sup> *See supra* notes 37–40 and accompanying text.

<sup>64</sup> *See supra* note 19 and accompanying text.

<sup>65</sup> Taiwan Child Protection Act, *supra* note 6, art. 91.

<sup>66</sup> *See generally, supra* Part II.B.

<sup>67</sup> Taiwan Child Protection Act, *supra* note 6, art. 52, para. 1 (The statute doesn’t define “proper institutions” or what it means to “assist, guide, or place children and youth,” but it appears that there may be at least some degree of institutionalization as paragraph 2 of article 52 provides that parents and guardians “shall assume any necessary living expenditure, health care fees, tuition and miscellaneous fees” associated with these programs.).

<sup>68</sup> *Id.* art. 20, para. 1(2).

been the legislature's intention. But without clear legislative history to the contrary, there is no justification to read into the law an exemption to these penalty provisions for excessive electronics use as opposed to, say, drug addiction, a circumstance where these harsher penalties might appear to be more reasonable.

Given the wide-sweeping implications of these secondary penalty provisions, combined with the fact that the Child Protection Act leaves undefined what constitutes "unreasonable" use of electronic products in violation of the Act, one might expect a challenge to its constitutionality as was seen in South Korea and Japan. However, despite early opposition to the law,<sup>69</sup> there has not been a major legal challenge to it. Perhaps this lack of constitutional challenge is because Taiwan's constitution explicitly requires the national government to "carry out a policy for the promotion of the welfare of women and children,"<sup>70</sup> while the only mention of children in the Japanese and South Korean constitutions is in relation to child labor and education.<sup>71</sup>

For the purposes of this Comment, Taiwan and its Child Protection Act is merely a comparator to the PRC's Draft Minor Mode Guidelines. As such, this Comment does not attempt to provide a complete or definitive explanation for why Taiwan diverges from Japan and South Korea with respect to challenging the law. However, there appears to be one likely explanation: general legal and popular support for the Taiwanese Child Protection Act.

Unlike Japan, Taiwan's Constitutional Court is not reluctant to declare legislation unconstitutional. Since the death of dictator Chiang Kai-shek and Taiwan's subsequent democratization, the Judicial Yuan "has moved into a high equilibrium of judicial review" that "now regularly challenges administrative action and legislation."<sup>72</sup> With inactivity of Taiwan's Constitutional Court eliminated as a possible explanation for the lack of constitutional challenge, Taiwan's constitution itself offers some evidence. Unlike Japan or South Korea's constitutions, which only mention children in relation to child labor and

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<sup>69</sup> See Locker, *supra* note 58 ("[S]o far the response to the legislation has been negative...with Taiwanese citizens citing privacy concerns.").

<sup>70</sup> ZHONGHUA MINGUO XIANFA [CONSTITUTION], art. 156 (1947) (Taiwan).

<sup>71</sup> See NIHONKOKU KENPŌ [KENPŌ], art. 27, para. 3 (Japan) *translated in* Constitute Project, <https://perma.cc/TVZ8-3RWL> ("Children shall not be exploited."). DAEHANMINKUK HUNBEOB [HUNBEOB] art. 32, para. 5 (S. Kor.) *translated in* Korea Legislation Research Institute, <https://perma.cc/QSK7-4EL9> ("Special protection shall be accorded to working children.").

<sup>72</sup> TOM GINSBURG, *Confucian Constitutionalism? The Grand Justices of the Republic of China*, in JUDICIAL REVIEW IN NEW DEMOCRACIES 106, 157 (2001) (arguing that the Judicial Yuan was able to do this in large part because of its gradual assumption of power within the authoritarian constitutional scheme that existed before 1986).

education,<sup>73</sup> Taiwan’s constitution explicitly requires the national government to “carry out a policy for the promotion of the welfare of women and children.”<sup>74</sup> The 2015 amendments to the Child Protection Act were not the only child-focused legal change in Taiwan at the time. Notably, just three months before these amendments were passed, the Taiwanese Legislative Yuan enacted the Implementation Act of the Convention on the Rights of the Child (the “Implementation Act”).<sup>75</sup> Perhaps, the timing of this official enactment of the requirements of the Convention on the Rights of the Child (CRC), combined with the constitutional requirement of adopting laws that protect the welfare of children, led to a general consensus that even if the law infringed on the freedoms of minors and their parents, that infringement was at an acceptable level.<sup>76</sup> Alternatively, it is possible that most parents simply agreed with the legislation despite some discontent since the government now provided “a little help prying their children’s eyes off screens.”<sup>77</sup> Of course, popular consensus does not fully explain the lack of a constitutional challenge in the absence of unanimous support. Citizens discontented by the law must have been otherwise dissuaded to not bring a challenge; for example, the cost of litigation might have been too high, or would-be plaintiffs might have felt they had a low likelihood of success.<sup>78</sup>

Whatever the reason, Taiwan’s Child Protection Act remains good law, and serves as the strongest comparator for the Chinese Draft Minor Mode Guidelines discussed in Part III. Unlike the Kagawa Gaming Ordinance and South Korean Shutdown Law, the Taiwan Child Protection Act prohibits the general use of electronics instead of using certain types of programs (e.g., gaming apps), which

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<sup>73</sup> See NIHONKOKU KENPŌ [KENPŌ], art. 27, para. 3 (Japan) *translated in* Constitute Project, <https://perma.cc/TVZ8-3RWL> (“Children shall not be exploited.”). DAEHANMINKUK HUNBEOB [HUNBEOB] art. 32, para. 5 (S. Kor.) *translated in* Korea Legislation Research Institute, <https://perma.cc/QSK7-4EL9> (“Special protection shall be accorded to working children.”).

<sup>74</sup> ZHONGHUA MINGUO XIANFA art. 156 (1947) (Taiwan).

<sup>75</sup> *Child Rights Unite*, CRC ZIXUNWANG, <https://perma.cc/X8CD-BNWU>.

<sup>76</sup> Cf. Rory Daniels, *Taiwan’s Unlikely Path to Public Trust Provides Lessons for the US*, BROOKINGS (Sept. 15, 2020), <https://perma.cc/2USB-9K4C> (“Taiwan was suffering from extremely low public trust in government when President Tsai Ing-Wen came to power in 2016,” and political action from as early as 2014, right as both the Implementation Act and the amendments to the Child Protection Act were enacted, “gave new energy to citizen participation in politics.” The lack of concerted public effort to protest the 2015 amendments to the Child Protection Act during this time of political action lend support to the conclusion that the general public at the very least did not oppose the changes contained therein.).

<sup>77</sup> Locker, *supra* note 58.

<sup>78</sup> See, e.g., Chien-Chih Lin, *The Pros and Cons of Taiwan’s Constitutional Court Procedure Act*, U.S.-ASIA L. INST. (Apr. 7, 2022), <https://perma.cc/BKR9-W23R> (describing how despite the Constitutional Court’s willingness to hold legislation unconstitutional, “[i]t has often been criticized as inefficient, rendering on average fewer than fifteen decisions a year,” which can largely be explained by a two-thirds supermajority “apply[ing] to each and every sentence of the holding of a constitutional decision”).

is more similar to the PRC's Draft Minor Mode Guidelines, which, as will be discussed, are equally comprehensive with respect to both time and content restrictions. In a similar vein, like the PRC's Draft Minor Mode Guidelines, Taiwan's Child Protection Act is national-level legislation; the Kagawa Gaming Ordinance, by contrast, is only local in effect, and the South Korean Shutdown Law is no longer in effect, being repealed in 2021. That the PRC and Taiwan have a closely-linked socio-political and cultural history makes the comparison between their legislation even more apt.

### III. THE PRC'S EFFORTS TO REDUCE MINORS' SCREEN TIME

With a baseline of different types of legislation tackling the same issue as the PRC's Draft Minor Mode Guidelines now established, this Part will outline how the Draft Minor Mode Guidelines are similar to, and different from, the regulations of Japan, South Korea, and Taiwan. Before delving into the details of these Draft Minor Mode Guidelines, Part III.A will describe the evolution of China's efforts to curb "internet addiction" in order to understand the Draft Minor Mode Guidelines in the particular context of the PRC. Furthering the aim of contextualizing the Chinese Draft Minor Mode Guidelines, Part III.B will explore the substantive provisions of the Draft Minor Mode Guidelines before then proceeding to ground the Guidelines within the context of current Chinese law. Consequently, this Part concludes that the Draft Minor Mode Guidelines do not run afoul of any serious domestic legal barrier.

#### A. 2008–2022: Chinese Efforts to Combat Internet Addiction

In 2008, the PRC became the first country to release diagnostic criteria for internet addiction as a psychological disorder.<sup>79</sup> In order to be diagnosed with internet addiction under the Chinese diagnostic model, eight symptoms must be assessed: "salience, tolerance, withdrawal symptoms, mood alteration, exclusiveness, relapse, hiding, and conflict."<sup>80</sup> Implicit in this diagnostic model is a difference between American and Chinese conceptualizations of addiction. Both Chinese and American models of addiction feature the notion of strong habitual behavior.<sup>81</sup> However, the latter treats addiction as "tightly linked to chemical dependency on alcohol or drugs," while the former recognizes physiological elements of addiction, but ultimately sees it as "a freely chosen behavior."<sup>82</sup>

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<sup>79</sup> Rachel Williams, *China Recognises Internet Addiction as New Disease*, THE GUARDIAN (Nov. 11, 2008), <https://perma.cc/5NL9-XDNJ>.

<sup>80</sup> Qiaolei Jiang, *Development and Effects of Internet Addiction in China*, OXFORD RSCH. ENCYCLOPEDIA at 6 (Sept. 15, 2022) (citing Tao et al., *Proposed Diagnostic Criteria for Internet Addiction*, 105 ADDICTION 556 (2010)).

<sup>81</sup> *Id.* at 2.

<sup>82</sup> *Id.*



Perhaps reflecting these divergent characterizations of internet addiction, “[i]n the Chinese context, Internet addiction has . . . come to be regarded as a technology-driven social risk or problem,” colloquially being compared to opium or heroin addiction, which can lead to stigmatization of internet use and gaming.<sup>83</sup>

The Chinese government has not stayed silent on this topic. Since before 2008, when internet addiction was first added to the Chinese diagnostic manual, the Chinese government has included internet addiction in its Law on the Protection of Minors (the “Minor Protection Law”).<sup>84</sup> In the early days of combatting this disorder, the Chinese government took a multi-pronged approach: “bann[ing] Internet cafés and game labs within 200 meters of schools; . . . impos[ing] strict licensing procedures, control of business hours, and restrictions of minors’ entry into Internet cafés; and . . . mandat[ing] installation of . . . anti-addiction system, and anti-fatigue software.”<sup>85</sup>

In addition to this earlier regulation, the Chinese government has more recently implemented two legal mechanisms to help slow the increase in the number of those afflicted by internet addiction: the 2019 Online Gaming Regulations<sup>86</sup> and the 2021 amendments to the PRC’s Minor Protection Law.<sup>87</sup> Both are similar to the Kagawa Gaming Ordinance and South Korean Shutdown Law as they aim to reduce the amount of time Chinese children and teens spend gaming online.

In October 2019, the PRC’s National Press and Publication Administration issued a notice that announced the arrival of new internet-use restrictions, which would take effect in November of that year.<sup>88</sup> In a relatively short statement, the government announced that internet users under eighteen could not play games

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<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.* at 9; see *Zhonghua Renmin Gongheguo Weichengnianren Baohufa* (中华人民共和国未成年人保护法) [Law of the People’s Republic of China on the Protection of Minors] (promulgated by Standing Comm. Nat’l People’s Cong., Sept. 4, 1991, rev’d Oct. 17, 2020, effective June 1, 2021), ch. V., *translated in* National People’s Congress’s online database, <https://perma.cc/M44V-DT7P> [hereinafter PRC Minor Protection Law].

<sup>85</sup> Jiang, *supra* note 80, at 10; see also Louisa Lim, *Gamers Find Gaps in China’s Anti-Addiction Efforts*, NPR (Aug. 28, 2007), <https://perma.cc/4SZ5-XCQA> (Anti-addiction systems and anti-fatigue software had to be installed on the computers at internet cafes, and they constituted flashing warnings whenever a user had been playing video games: at three hours of play, the user would be notified that they needed to go and get some exercise, and at five hours of uninterrupted play, any points gained in the game would be “wiped out.”).

<sup>86</sup> Guojia Xinwen Chubanshu Guanyu Fangzhi Weichengnianren Chenmi Wangluo Youxi de Tongzhi (国家新闻出版署关于防止未成年人沉迷网络游戏的通知) [Notice from the National Press and Publication Administration on Preventing Minors’ Addiction to Online Video Games] (Oct. 25, 2019, effective Nov. 11, 2019), <https://perma.cc/T8RG-7GTC> [hereinafter 2019 Online Gaming Regulations].

<sup>87</sup> PRC Minor Protection Law, *supra* note 84, art. 67.

<sup>88</sup> 2019 Online Gaming Regulations, *supra* note 86.

from 10:00 p.m. to 8:00 a.m., and outside of those times, users could play for no “more than 90 minutes on weekdays and three hours on weekends and holidays.”<sup>89</sup> Under these rules, children would also “be required to use real names and identification numbers when they logged on to play,”<sup>90</sup> a requirement identical to that of South Korea’s now-defunct Shutdown Law.

It is unclear from the official announcement of the regulation how the restrictions were to be enforced. However, in addition to curbing internet addiction and the associated health effects, the utility of the 2019 Regulations may have been largely political. These regulations came as a part of President Xi Jinping’s “more forceful approach in regulating large technology companies and pushing them to help spread [approved] cultural values.”<sup>91</sup> Whatever the true motivation behind these regulations, they signaled a new wave of internet use restrictions in the age of new media.

The 2021 amendments to the PRC’s Minor Protection Law constitute the most impactful change to internet use regulation prior to the 2023 Draft Minor Mode Guidelines discussed below. First, the new amendments created a whole new chapter of the Minor Protection Law, entitled “Online Protections.”<sup>92</sup> In it, there are a number of provisions ranging from those describing the state’s duties in preventing internet addiction, or how schools are to approach minor safety online, to those requiring parents to “effectively prevent minors’ addiction to the internet by installing software for the online protection of minors.”<sup>93</sup> This latter duty articulates a specific requirement that falls under the umbrella of an prior provision in the unamended version of the Minor Protection Law, which prohibits parents from “[a]llowing minors to become addicted to the internet.”<sup>94</sup> Second, the 2021 amendments formalized the 2019 Regulations by incorporating the gaming restrictions into the Minor Protection Law.<sup>95</sup> For example, Article 75 of the amended Minor Protection Law requires online game providers to take affirmative steps to confirm minors’ identities and monitor game content to ensure appropriateness for minors.<sup>96</sup> Additionally, the same Article mandates that

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<sup>89</sup> Javier C. Hernández & Albee Zhang, *90 Minutes a Day, Until 10 P.M.: China Sets Rules for Young Gamers*, N.Y. TIMES (Nov. 8, 2019), <https://perma.cc/TW9D-QKDX>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *China Makes Amendments in Laws to Protect Minors Online*, DIGWATCH (Oct. 19, 2020), <https://perma.cc/5XS2-64Z5>; PRC Minor Protection Law, *supra* note 84, ch. V.

<sup>93</sup> PRC Minor Protection Law, *supra* note 84, art. 71, para. 2.

<sup>94</sup> *Id.* art. 17(6).

<sup>95</sup> *Id.* art. 75.

<sup>96</sup> *Id.*

“[o]nline gaming service providers . . . not provide online gaming services to minors in any form between 10:00 P.M. and 8:00 A.M. the next day.”<sup>97</sup>

Mere months after these amendments were enacted, the National Press and Publication Administration released an updated version of the 2019 regulation that differed from the newly passed 2021 amendments.<sup>98</sup> These updated regulations were more restrictive than the codified version of the 2019 Regulations made effective in June 2021.<sup>99</sup> According to the administration, “[p]arents had complained that [the old rules were] too generous and had been laxly enforced.”<sup>100</sup> As such, the new version of the regulations prohibited any online gaming for children on weekdays, and only allowed one hour a day on weekends and holidays from 8:00 to 9:00 p.m.<sup>101</sup>

In addition to this ramping up of restriction through official government policies combatting internet addiction, tech companies like ByteDance, the China-based owner of Douyin, the Chinese version of TikTok, have contributed to the cause *sua sponte*.<sup>102</sup> Around the same time as the second version of the National Press and Publication Administration’s gaming restrictions, ByteDance announced that users under age fourteen will be limited to forty minutes a day on Douyin, and that the app “will be unavailable to those users between 10 p.m. and 6 a.m.”<sup>103</sup> This type of self-imposed restriction is likely designed “to get ahead of potential regulation,” according to analysts at Citigroup Global Markets.<sup>104</sup> This was a move that Chinese video game companies like Tencent had attempted from as early as 2017, in order to mitigate the financial impact of the type of regulation that came down in 2019 and 2021.<sup>105</sup>

Unlike in Japan, South Korea, and Taiwan, Chinese courts do not possess a robust power of judicial review.<sup>106</sup> Constitutional review is vested solely in the legislature, and while actions of the executive are reviewable by Chinese courts, in performing that role they “are expected not to scrutinise the reasonableness and proportionality of [certain administrative agency policies] and cannot strike down

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<sup>97</sup> *Id.*

<sup>98</sup> Chris Buckley, *China Tightens Limits for Young Online Gamers and Bans School Night Play*, N.Y. TIMES (Aug. 30, 2021), <https://perma.cc/LBB9-4ZGX> (last updated Oct. 1, 2021).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Diksha Madhok, *The Chinese Version of TikTok Is Limiting Kids to 40 Minutes a Day*, CNN BUS. (Sept. 20, 2021), <https://perma.cc/T6SE-HH79>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Buckley, *supra* note 98.

<sup>106</sup> See generally Shiling Xiao & Yang Lin, *Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power*, 17 J. COMP. L. 1 (2022).

invalid [policies].”<sup>107</sup> As such, there cannot be the kind of constitutional challenge to any of these regulations or statutory amendments like those brought in Japan and South Korea. However, even if such challenges were possible, it is unclear that they would be brought as the 2021 Regulations from the National Press and Publication Administration were responsive to parents’ desire for stricter rules on gaming.<sup>108</sup> As one Chinese mother put it, this type of regulation “amounts to the state taking care of our kids for us.”<sup>109</sup>

## B. The PRC’s 2023 Guidelines for Building Mobile Internet Minor Mode

On August 2, 2023, the Cyberspace Administration of China (CAC) publicly sought comment on its “Guidance for Building Mobile Internet Minor Mode.”<sup>110</sup> According to the Purposes Article of these Draft Minor Mode Guidelines, the CAC’s aim is to “develop a more positive use for the internet, cultivate a better internet environment, prevent and intervene in the problem of minor internet addiction, [and] guide minors to form good internet use habits.”<sup>111</sup> All of which is done pursuant to the PRC’s Cybersecurity Law, Personal Information Protection Law, and Minor Protection Law, as well as any relevant administrative rules.<sup>112</sup> To those ends, the Draft Minor Mode Guidelines provide internet program providers (which includes any type of smart terminal provider, mobile app developer, or internet platform provider) with the “basic technological and administrative requirements . . . to launch minor mode development and practical use.”<sup>113</sup> The use of the phrase “smart terminal”<sup>114</sup> appears to be intentionally broad; though the Draft Minor Mode Guidelines do not define the term, one outside source defined it as, “[a] device with some processing capability . . . [which] is often a combination of a display and keyboard with at least one built-in microprocessor.”<sup>115</sup> This term encompasses every type of smartphone, tablet, or other electronic, internet device, and under these minor mode specifications, virtually any device or program that uses internet would be required to have minor

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<sup>107</sup> *Id.* at 4.

<sup>108</sup> Buckley, *supra* note 98.

<sup>109</sup> *Id.*

<sup>110</sup> PRC Draft Minor Mode Guidelines, *supra* note 8.

<sup>111</sup> *Id.* art. 1.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* art. 2.

<sup>114</sup> The Chinese word for “smart terminal” as used in the Draft Minor Mode Guidelines is 智能终端 (zhìnéngzhōngduān).

<sup>115</sup> *Intelligent Terminal*, ENCYCLOPEDIA.COM, <https://perma.cc/Y7TV-BYGW>.

mode capabilities that would, among other things, limit the amount of time children could use the internet.

### 1. Substantive provisions of the Draft Minor Mode Guidelines

The aspect of the Draft Minor Mode Guidelines that has drawn most attention, at least in Western media, has been the screen time restrictions.<sup>116</sup> With minor mode installed and activated, children under eighteen would at most be able to use a device for two hours per day, while for children under the age of eight, the allowed time could be as low as forty minutes per day.<sup>117</sup> Additionally, “under minor mode, mobile smart terminals will be prohibited from providing minors with service every day from 10:00 p.m. to 6:00 a.m. the next day.”<sup>118</sup> To this latter prohibition there are four general exceptions: (1) programs or applications related to emergency services, (2) educational programs or applications, (3) tools like calculators or image editing programs, and (4) apps that are approved by parents as exempted from the regulation.<sup>119</sup>

Speaking to the last exception, the CAC places parents at the center of this regulation as the installers and managers of minor mode in order to monitor their child’s use of mobile technology and the internet. For example, the Draft Minor Mode Guidelines describe the specifications for the placement of the “minor mode” application on the home screen or within the settings of the user interface of apps and smart terminal devices.<sup>120</sup> Minor mode must be “fast and convenient and easy to find,” such that parents and minors can enter or switch modes with one click.<sup>121</sup> Similarly, in order to exit out of minor mode, a child “needs their parent or guardian to authenticate and agree” to exit minor mode by either password, fingerprint, facial recognition.<sup>122</sup> Also, in anticipation of children trying to work around minor mode, the Draft Minor Mode Guidelines require parental verification and approval before the device is reset to factory settings.<sup>123</sup>

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<sup>116</sup> See, e.g., Simone McCarthy, *China Wants to Limit Minors to No More Than Two Hours a Day on Their Phones*, CNN BUS. (Aug. 21, 2023), <https://perma.cc/7269-QAHC>; Elise Viniacourt, *Internet: La Chine Veut Limiter à Une Heure par Jour Le Temps de Smartphone des 9–16 Ans [Internet: China Wants to Limit to One Hour a Day Smartphone Time for 9–16-year-olds]*, LIBÉRATION (Aug. 3, 2023), <https://perma.cc/9DZ4-WMQF>; Pete Syme, *China Quiere Limitar El Uso de Smartphones a Adolescentes a Solo Una Hora Diaria, para Combatir La Creciente ‘Adicción a Internet’ [China Wants to Limit the Use of Smartphones by Adolescents to Only One Hour Daily, to Combat the Rise of Internet Addiction]* (Aug. 3, 2023), <https://perma.cc/DJA5-ZKLF>.

<sup>117</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 4, § 2.

<sup>118</sup> *Id.* art. 4, § 2, para. 1(5).

<sup>119</sup> *Id.* art. 4, § 2, para. 1(6).

<sup>120</sup> *Id.* art. 4, para. 1.

<sup>121</sup> *Id.* art. 4, para. 2.

<sup>122</sup> *Id.*

<sup>123</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 4, para. 3.

Article 7 of the Draft Minor Mode Guidelines is entitled “Parental Supervision.”<sup>124</sup> In order to emphasize the role of parents and guardians, this section mandates that internet program providers ensure that their minor mode programs provide parents with enough supervisory privileges to exercise that supervision in both daily and emergency situations.<sup>125</sup> This is because parents are to possess a certain power to decide for their children how they can use the internet.<sup>126</sup> A more invasive part of this broad parental authority via administration of minor mode is that parents are able “to use a linked account to audit” the content their children are consuming.<sup>127</sup> However, the Draft Minor Mode Guidelines makes sure to reiterate that although parents with minor mode enabled are able to link their own devices to their children’s in order to make recommendations within the system about which content should be time-limited or restricted altogether based on the real-time content their children are consuming, parents are only able to access non-private information.<sup>128</sup>

Beyond centering parents as the primary administrators of minor mode, the Draft Minor Mode Guidelines provide that, for app developers specifically, there are certain types of content that apps in minor mode are supposed to recommend for children.<sup>129</sup> The content recommendations vary by age: kids under the age of three are recommended nursery rhymes and instructional content, while children between the ages of twelve and sixteen are recommended general educational content, life skills content, and age-appropriate entertainment.<sup>130</sup> Additionally, internet service providers have a duty to protect children from harmful material, and promote content that helps develop children’s values.<sup>131</sup> To that end, minor mode is supposed to push content that “promotes the core value system of socialism, the advanced socialist culture, revolutionary culture and the outstanding traditional culture of the Chinese people.”<sup>132</sup>

## 2. The Draft Minor Mode Guidelines in the context of PRC law

The Draft Minor Mode Guidelines are a clear expansion upon both the internet use restrictions for minors introduced by the 2019 regulations and the 2021 amendments to the Minor Protection Law.<sup>133</sup> However, the Draft Minor

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<sup>124</sup> *Id.* art. 7.

<sup>125</sup> *Id.* art. 7, para 1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* art. 7

<sup>128</sup> *Id.* art. 7, para. 3(1).

<sup>129</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 5, para. 1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. 5, para. 2.

<sup>132</sup> *Id.*

<sup>133</sup> *See supra* Part III.A.

Mode Guidelines are more intimately tied to the latter amendments to the Minor Protection Law, as one of the ways that the CAC as an executive agency is attempting to execute the law.<sup>134</sup> While this regulation is still in the drafting stage, there are a few questions about what force the Draft Minor Mode Guidelines will have. For instance, the Draft Minor Mode Guidelines do not have an enforcement mechanism by which to penalize noncompliance by technology companies tasked with creating and making available minor mode technology.<sup>135</sup> Furthermore, as one commentator noted, the CAC's "consistent use of should (应) rather than shall (应当)" throughout the Draft Minor Mode Guidelines implies that this regulation is not meant to be compulsory.<sup>136</sup> Despite this argument, the comprehensive coverage of the Draft Minor Mode Guidelines, addressing all smart terminal producers, might indicate that even if the draft version of the minor mode regulation is not compulsory, the Chinese government intends for the finalized requirements to be followed by these companies, either by self-enforcement or the introduction of a strict enforcement mechanism in the finalized regulation.<sup>137</sup>

In either case, the CAC is an executive agency whose actions can be reviewed by the National People's Congress (NPC) and its Standing Committee (NPCSC).<sup>138</sup> Although the PRC lacks constitutional judicial review and the NPCSC has never formally exercised its power of constitutional review after a law has been passed,<sup>139</sup> the NPCSC does actively issue constitutional interpretations during the lawmaking process.<sup>140</sup> That is, "[c]onstitutional enforcement in China largely occurs *ex ante*, rather than *ex post facto*."<sup>141</sup> Given that the Draft Minor Mode Guidelines are currently going through the lawmaking process, it is possible that the final version will be changed reflecting a constitutional interpretation from the NPCSC. As such, it will be useful to analyze relevant constitutional provisions in order to determine whether and to what extent these Draft Minor Mode Guidelines are or are not supported by the Chinese Constitution.

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<sup>134</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 1.

<sup>135</sup> Yan Zhuang & Siyi Zhao, *China Wants Children to Spend Less Time on Their Smartphones*, N.Y. TIMES (Aug. 4, 2023), <https://perma.cc/8L7W-RGJK>.

<sup>136</sup> Jeremy Daum, *Proposed Guidelines for "Minors' Mode,"* CHINA L. TRANSLATE (Aug. 4, 2023), <https://perma.cc/B3FB-NB49>.

<sup>137</sup> See, e.g., Johanna Costigan, *Chinese Companies Are Reacting to AI Regulations by Releasing Their Own Rules*, FORBES (June 29, 2023), <https://perma.cc/AMA8-CEGP> (explaining how Chinese companies like Douyin "are attempting to get ahead of possible alleged violations" of new AI regulations released by the CAC in April "by releasing their own guidelines").

<sup>138</sup> See Xiao & Lin, *supra* note 106, at 1.

<sup>139</sup> Yan Lin & Thomas Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467, 468 (2015).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

Two provisions of the Chinese Constitution are implicated by the Draft Minor Mode Guidelines: Articles 46 and 49.<sup>142</sup> Article 46 states that “Chinese citizens have the right and duty to receive an education.” It might be argued that restricted access to the internet prevents Chinese children from fulfilling their constitutional duty to receive an education, since the internet is a network via which children, like anyone else, are able to access vast amounts of knowledge through self-education. However, the second clause of Article 46 negates this argument almost completely, mandating that “[t]he state cultivate all-around moral, intellectual and physical development of children and young people.”<sup>143</sup> Because the Draft Minor Mode Guidelines provide for exceptions to time limits for educational content,<sup>144</sup> not only does the regulation appear to not violate children’s right to education, but it also might be the fulfillment of the state’s constitutional duty to provide for children’s moral, intellectual, and physical development by combatting internet addiction and protecting them from harmful content.<sup>145</sup> In a similar vein, that the Draft Minor Mode Guidelines require internet program providers to recommend content that strengthens socialist values via minor mode<sup>146</sup> also supports the constitutional requirement that the state “strengthen the development of a socialist spiritual civilization . . . through widespread idealistic, moral, and cultural education.”<sup>147</sup>

As with the children’s rights provisions of Article 46, the parents’ rights provision of Article 49 does not render the Draft Minor Mode Guidelines unconstitutional on its face. It states both that “marriage, the family, mothers, and children will receive the protection of the state,” and that “parents have a duty to raise and educate their minor children.”<sup>148</sup> Only one of these is an affirmative right, while the other is a duty that parents must fulfill. As such, there is no constitutional right to control their children’s upbringing that could be infringed by the Draft Minor Mode Guidelines. Even so, the high level of supervisory and exemption power given to parents in the implementation of minor mode by the Draft Minor Mode Guidelines indicates a certain willingness by the government to grant parents a certain level of control over their children’s upbringing.<sup>149</sup>

What’s more, the centrality of “parents or guardians” throughout the Draft Minor Mode Guidelines, reflects a change in strategy from the 2021 amendments to the Minor Protection Law and subsequent events. Recall that shortly after the

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<sup>142</sup> XIANFA [CONSTITUTION], arts. 46, 49 (1982, amended in 2018) (China).

<sup>143</sup> *Id.* art. 46, cl. 2

<sup>144</sup> *See* PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 4, § 2, para. 1(6).

<sup>145</sup> *See supra* notes 129–132 and accompanying text.

<sup>146</sup> *See supra* note 132 and accompanying text.

<sup>147</sup> XIANFA art. 26, cl. 1 (China).

<sup>148</sup> *Id.* art. 49.

<sup>149</sup> *See supra* notes 120–128 and accompanying text.



2021 amendments, the National Press and Publication Administration updated their internet use restrictions from 2019 in response to protestation from parents that the 2021 Minor Protection Law did not go far enough in combatting internet addiction.<sup>150</sup> It is possible that with these highly specific Draft Minor Mode Guidelines, the CAC is proactively thinking about the range of ideas that different parents have about appropriate internet use, deciding to set more burdensome restrictions as the baseline in minor mode, but simultaneously allowing parents to exempt certain apps, and extend internet use time. In this way, particularly in light of the Article 49 constitutional requirement that parents raise and educate their children, minor mode might be less about outright restricting children's internet use. Rather, it might be better understood as providing a universal tool for parents to monitor and moderate both the amount of time their children are spending on the internet as well as what types of content their children are consuming, which could arguably fulfill the government's duty to protect children.<sup>151</sup> Whatever the underlying motivation for this centralization of parents, these Draft Minor Mode Guidelines are more in line with Article 49 than earlier regulations.

Given these broad constitutional provisions, it is unlikely that the NPCSC will issue an adverse constitutional interpretation requiring significant changes to the Draft Minor Mode Guidelines. There is no constitutional right to the internet, and even if one were constructed from some other right, the elaborate system of universal censorship by the state would render any such right essentially nullified.<sup>152</sup> Even if another right could reasonably be argued as having been violated, such as children's right to speech or assembly in an online forum,<sup>153</sup> Article 51 provides that individuals cannot exercise their rights in ways that "infringe the interests of the state, society, or the collective, or the legal exercise of rights and freedoms by others."<sup>154</sup> Article 51 is essentially a get-out-of-jail-free card for the Chinese government to gain the reputational credibility of having adopted rights like freedom of speech and assembly into the Chinese

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<sup>150</sup> See *supra* notes 98–101 and accompanying text.

<sup>151</sup> XIANFA art. 49 (China).

<sup>152</sup> See Jeffrey (Chien-Fei) Li, *Internet Control or Internet Censorship? Comparing the Control Models of China, Singapore, and the United States to Guide Taiwan's Choice*, 14 U. PITT. J. TECH L. & POL'Y 1, 25 (2013) (quoting Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 1, 1 (2013)). ("[China's] Great Firewall is a powerful Internet regulation apparatus erected by the Chinese government that selectively blocks website operators and Internet users" in order to "provide[] a general clamp on online activities that works to maintain the Chinese authoritarian regime by 'clipping social ties whenever any collective movements are in evidence or expected.'").

<sup>153</sup> XIANFA art. 35 (China) (This article was amended in 2018 to include both these rights.).

<sup>154</sup> *Id.* art. 51.

Constitution,<sup>155</sup> while also being able to violate any of those rights if need be.<sup>156</sup> Again, it is not immediately obvious that any rights guaranteed by the Chinese Constitution have been violated by the Draft Minor Mode Guidelines. However, even if the right to assembly were infringed by the Draft Minor Mode Guidelines, it is well within the realm of possibility that the NPCSC would invoke Article 51 to say that the interests of society or the collective outweigh the right of children to exercise that right online. With the high level of social awareness and prevalence of internet addiction for minors in the PRC, an argument that the Draft Minor Mode Guidelines and similar regulations are to the benefit of the nation is convincing.<sup>157</sup>

For all the reasons highlighted above, the Draft Minor Mode Guidelines are likely constitutional and a proper exercise of the CAC's mandate to carry out the Minor Protection Law. Even if there are changes to the guidelines before final publication, it is unlikely that these will have been made in order to avoid problems of domestic legality. Two months after the Draft Minor Mode Guidelines were released for comment, the State Council, the highest executive organ in the PRC, released the "Minor Internet Protection Regulation,"<sup>158</sup> which provides for many of the same internet use guidelines as the Draft Minor Mode Guidelines and the previous regulations in the country. It is thus clear that the PRC intends to continue regulating in this area, with few apparent domestic legal barriers to doing so.

#### IV. POTENTIAL CHALLENGES AGAINST THE PRC'S DRAFT MINOR MODE GUIDELINES IN INTERNATIONAL LAW

Although there are few serious domestic barriers to the PRC's Draft Minor Mode Guidelines, there are a number of international agreements that imply a right to the internet, which would possibly be infringed upon by the strict internet use time and content restrictions of the regulation. To begin an international law

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<sup>155</sup> See Taisu Zhang & Thomas Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 313 (2019) (explaining how the "legal awakening" of the Chinese citizenry "has given the legal system—even the aloof and rarely invoked Constitution—a social significance and prestige" that has a relatively new legitimating function in Chinese politics).

<sup>156</sup> See, e.g., James A. Dorn, *China's Constitutional Rights a Grand Illusion*, CATO INST. (Sept. 1, 2021), <https://perma.cc/VD5D-LQCJ> (To Dorn, "China's constitutional rights are merely 'paper rights,' and a grand illusion," because Article 51's reference to state interests most importantly stand to "maintain[] the Chinese Communist Party's (CCP's) monopoly on power.").

<sup>157</sup> See Menghui Gao et al., *Internet Addiction Among Teenagers in a Chinese Population: Prevalence, Risk Factors, and Its Relationship with Obsessive-Compulsive Symptoms*, 153 J. PSYCHIATRIC RSCH. 134, 136 (2022) (This recent study of a population of teenagers in vocational high school in Hunan Province found that of the 7,990 participants, 13.4% experienced internet addiction.).

<sup>158</sup> Weichengnianren Wangluo Baohu Tiaoli (未成年人网络保护条例) [Minor Internet Protection Regulation] (promulgated by the St. Council, Oct. 16, 2023, effective Jan. 1, 2024) (China), <https://perma.cc/54J2-LDUT>.

analysis, Part IV.A will analyze the PRC's Draft Minor Mode Guidelines as compared to the Taiwanese, South Korean, and Japanese internet use restrictions detailed in Part II in order to show that restricting children's internet use is not prohibited by customary international law or any regional norms. Following this analysis, Part IV.B will determine the degree to which the Draft Minor Mode Guidelines are consistent with the PRC's obligations under the following international instruments: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention of the Rights of the Child (CRC). As was the case with Chinese domestic law, the Draft Minor Mode Guidelines do not clearly violate any current rule or norm of international law.

#### A. Comparative Analysis of the Draft Minor Mode Guidelines in the Context of International Customary Law

There is not yet a rule of customary international law providing for a fundamental right to the internet.<sup>159</sup> As such, the conclusion that the PRC's Draft Minor Mode Guidelines do not violate customary international law might seem simple. However, unlike a fundamental right to access the internet, the right to freedom of expression *is* widely regarded as having attained customary international law status.<sup>160</sup> As such, customary international law is still a useful paradigm for understanding how the PRC Draft Minor Mode Guidelines fit within the regional context of state practice in East Asia with respect to internet use restrictions for children. This Comment doesn't purport to have discovered, in the absence of a customary law rule recognizing a fundamental right to the internet, a countervailing rule of customary international law requiring states to *restrict* internet use for children. However, by comparing the Draft Minor Mode Guidelines to similar internet use regulations in Japan, South Korea, and Taiwan, this Comment does posit that to the extent that a fundamental right to the internet

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<sup>159</sup> Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L. J. 393, 400, n. 27 (2013) (citations omitted) ("Despite the recognition of Internet access as a fundamental right under domestic law in a variety of jurisdictions . . . state practice in this area is not consistent or widespread enough to constitute a rule of customary law."); see also Nita Bhalla, *Internet Shutdowns: Are We Likely to See More in 2024?*, CONTEXT (Mar. 5, 2024), <https://perma.cc/79UG-G4M4> ("[T]here have been 13 cases of internet shutdowns in the first two months of 2024, compared to two cases over the same period [in 2023]" with "[d]igital blackouts hav[ing] affected people in India, Pakistan, warcrippled Sudan, Senegal, Comoros and Chad." The relatively high prevalence of internet blackouts in different parts of the world, and the internet use restrictions examined in this Comment suggest that Land's assertion from 2013 likely continues to hold true today.).

<sup>160</sup> WILLIAM A. SCHABAS, *Fundamental Freedoms, in THE CUSTOMARY LAW OF HUMAN RIGHTS* 191, 200 (2021) (concluding that "[f]reedom of opinion and expression is enshrined in customary international law . . . includ[ing] freedom to . . . seek, receive, and impart information").

is implied in the right to freedom of expression,<sup>161</sup> such a right is not unqualified when it comes to children. Or, at the very least, this comparative analysis reveals that these powers in East Asia are a bloc of states whose laws are not compatible with an unqualified international customary law right to the internet, either implied in the right to freedom of expression or otherwise.

Before delving into the comparative analysis, it is necessary to define customary international law. Despite the fact that customary international law is primarily the law of nations, i.e., the laws governing inter-state relations in the absence of a treaty,<sup>162</sup> customary international law also governs how states can treat their own citizens,<sup>163</sup> which is more relevant to this Comment's discussion on customary law and fundamental rights.<sup>164</sup> There are two elements that are required for a law or practice to constitute customary international law: (1) "there must be a general and consistent practice of states, which . . . should reflect wider acceptance among the states particularly involved in the activity," and (2) "there must be a sense of legal obligation," known by the name, *opinio juris*.<sup>165</sup> That is, for a practice to rise to the level of binding customary international law, "[s]tates must follow [that] practice because they believe it is required by international law, not merely because . . . it is a good idea, or politically useful, or otherwise desirable."<sup>166</sup> As recognized by the International Court of Justice, "*opinio juris* and state practice [are] inextricably entwined: state conduct serve[s] as evidence of opinion, while the states' point of view could be deduced from their practice."<sup>167</sup> Likewise,

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<sup>161</sup> Pegah Banihashemi, *International Law and the Right to Global Internet Access: Exploring Internet Access as a Human Right Through the Lens of Iran's Women-Life Freedom Movement*, 24 CHI. J. INT'L L. 31, 38–39 (2023) ("Internet access can be viewed . . . as a prerequisite to broad and existing human rights already agreed upon by the international community . . . [or] as a much newer fundamental human right in and of itself.").

<sup>162</sup> See 44B AM. JUR. 2D International Law § 2

<sup>163</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. L. INST. 1987) (Entitled, "The Customary Law of Human Rights," Section 702 of the Restatement provides as a catchall that "[a] state violates international law if, as a matter of state policy, it practices, encourages or condones . . . a consistent pattern of gross violations of internationally recognized human rights," among other more concrete human rights violations like genocide and slavery.).

<sup>164</sup> 44B AM. JUR. 2D International Law § 2 (citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011)).

<sup>165</sup> *Id.* (internal citations omitted).

<sup>166</sup> *Id.*

<sup>167</sup> Harmen van der Wilt, *State Practice as Element of Customary International Law: A White Knight in International Criminal Law?*, 20 INT'L CRIM. L. REV. 784, 790 (2019) (citing International Court of Justice, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment, 20 February 1969, 1969 General List Nos. 51 and 52).

domestic legislation or judicial opinions can serve as evidence of either state practice or *opinio juris*.<sup>168</sup>

When comparing the measures taken by Japan, South Korea, Taiwan, and the PRC, it is evident that there is no state practice or sense of legal obligation not to pass internet use restrictions for children. In fact, the state practice of all four is to restrict children's internet use in some way. What's more, since Taiwan's Child Protection Act was enacted only months after the Taiwanese government ratified the CRC, there is evidence that it passed the 2015 Child Protection Act in order to meet its international obligations under that treaty, which cuts against the idea of there being a strong international legal obligation to the contrary.<sup>169</sup>

As stated in Part II, Taiwan and its 2015 Child Protection Act are the best comparators to the PRC and its Draft Minor Mode Guidelines for a number of reasons. First, both are national-level regulations. Second, Taiwan's 2015 Child Protection Act covers a wide range of internet activities rather than just a single type of activity, like gaming. Neither the Kagawa Gaming Ordinance nor the South Korean Shutdown Law possess both of these attributes. Unlike the Kagawa Gaming Ordinance, which is only effective in a single Japanese province (as well as a single city in a neighboring province),<sup>170</sup> the South Korean Shutdown Law was also national legislation. Given that its repeal was likely a product of the political climate and not any direct legal problem with the law itself, the Shutdown Law might appear to be a good comparator. However, the Shutdown Law, like the Kagawa Gaming Ordinance, only affected a single type of content, online gaming, which is more similar to the PRC's 2019 gaming regulations than its new Draft Minor Mode Guidelines. The Taiwan Child Protection Act, with its more comprehensive provisions and national scope is most similar in substance and form to the PRC's Draft Minor Mode Guidelines. That the two countries share a common history and culture while completely diverging in terms of government structures and ideologies makes a comparison between the PRC and Taiwan particularly interesting.<sup>171</sup>

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<sup>168</sup> International Law Commission, *Draft Conclusions on Identification of Customary International Law, With Commentaries*, U.N. Doc. A/73/10, pt. V(E), Conclusions 6(2), 10(2), cmt. 3 (2018) ("Forms of State practice include, but are not limited to . . . executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts," and "[f]orms of acceptance of law (*opinio juris*) include, but are not limited to . . . decisions of national courts." Comment 3 on Conclusion 10(2) on evidence of *opinio juris* also states that "[t]here is common ground between the forms of evidence of acceptance as law and the forms of State practice.").

<sup>169</sup> See *supra* notes 75–78 and accompanying text.

<sup>170</sup> See *supra* Part II.A.

<sup>171</sup> The dynamic between Taiwan and the PRC is complex and has long threatened peace in the region. For example, in 2005, the PRC passed its "Anti-Secession Law" declaring that "[t]here is only one China in the world . . . [and] China's sovereignty and territorial integrity brook no division," including Taiwan in its definition of Chinese territory. Anti-Secession Law (promulgated by

On their face, the PRC's Draft Minor Mode Guidelines appear to be more restrictive, or at the very least more specific in the details of what is restricted under minor mode than the Taiwanese Child Protection Act. For example, although both the PRC regulation and the Taiwanese law grant a certain latitude to parents, the Draft Minor Mode Guidelines set a strict time restriction ranging from forty minutes a day to at most two hours of internet use a day,<sup>172</sup> while the Taiwanese Child Protection Act only imposes liability if children's daily use of electronics rises to an undefined "unreasonable" amount.<sup>173</sup>

However, the Taiwan Child Protection Law is likely more restrictive than the Draft Minor Mode Guidelines. First, despite the fact that the Draft Minor Mode Guidelines require minor mode to restrict internet use more than the Taiwan Child Protection Act, the former grants parents or guardians the power to adjust the time restrictions within minor mode.<sup>174</sup> In contrast, the Taiwan Child Protection Act imposes liability on parents if their children use the internet for an unreasonable amount of time,<sup>175</sup> leaving the entire decision about amount of internet use to the state. Thus, while the Draft Minor Mode Guidelines are facially more restrictive than the Taiwan Child Protection Act, the former grant parents more explicit control over their children's internet use, rendering the former less restrictive than the latter. A second reason the PRC's Draft Minor Mode Guidelines are less restrictive than the Taiwan Child Protection Act is one of substance. The minor mode Draft Minor Mode Guidelines are expansive and will be made available on any smart terminal and internet application. However, the Taiwan Child Protection Act restricts use of any electronic product, even those that do not require the internet.<sup>176</sup> While this distinction is relatively minor, it does reflect a willingness on the part of the Taiwanese government to restrict children's freedom to act in a way that is different, and slightly more burdensome than the PRC's Draft Minor Mode Guidelines. The third reason is one that may not survive with a finalized version of the PRC's Draft Minor Mode Guidelines. Currently, the Draft Minor Mode Guidelines do not impose a penalty on internet companies

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Standing Comm. Nat'l People's Cong., Mar 14, 2005) *translated in* China Daily (Mar. 14, 2005), <https://perma.cc/D9CM-LBD5>. Despite averring that "Taiwan may practice systems different from those on the mainland and enjoy a high degree of autonomy," the Taiwanese government released a statement condemning the law as a violation of the international law principles of sovereignty and self-determination. See *The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law*, MAINLAND AFFS. COUNCIL (Mar. 29, 2005), <https://perma.cc/2PVG-NCWR>. Despite the tensions between the two governments, the issue of internet addiction and its regulation with respect to children reveals an area where there is ground for agreement rather than conflict between the PRC and Taiwan.

<sup>172</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 4.

<sup>173</sup> Taiwan Child Protection Act, *supra* note 6, at art. 43, para. 1(5).

<sup>174</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 7.

<sup>175</sup> Taiwan Child Protection Act, *supra* note 6, at art. 43.

<sup>176</sup> *Id.*

that fail to create and implement a minor mode meeting the regulation's specifications while the Taiwan Child Protection Act does.<sup>177</sup> This further illustrates how the PRC's facially restrictive Draft Minor Mode Guidelines are actually less restrictive than the minor internet use regulation of a close neighbor. Of course, this Comment does not take a normative stance on which law is "better." The points made above are merely meant to show that both the PRC and Taiwan, polar opposites in many ways, are fairly restrictive of children's internet use in a way that supports the conclusion that children are not considered by these states to be covered by any implied customary law right to the internet, even via the widely recognized customary law right to freedom of expression.

Although Taiwan's Child Protection Act is most similar to the PRC's Draft Minor Mode Guidelines, the South Korean and Japanese approaches to combatting the same issue of internet addiction are also useful in understanding the international community's stance on such restrictions, or at the very least regional attitudes towards the issue. Despite the differences in substance between the Draft Minor Mode Guidelines, the Kagawa Gaming Ordinance, and South Korean Shutdown Law, the fact that these laws restricted minors' ability to use the internet at all, albeit just for gaming at certain times, bolsters the conclusion that such restrictions are internationally acceptable. The penalty for noncompliance with South Korea's Shutdown Law is particularly instructive in that regard. Violators of the Shutdown Law face even steeper penalties for noncompliance than the parent-violators of Taiwan's Child Protection Act: up to two years of hard labor in prison or a fine up to the equivalent of about \$15,000 USD.<sup>178</sup> This is relevant to assessing the reasonableness of the PRC's Draft Minor Mode Guidelines, because the Shutdown Law imposed liability on online video game providers rather than the parents at risk of liability in Taiwan.<sup>179</sup> While the Draft Minor Mode Guidelines in their current form do not impose liability on smart terminal internet companies that fail to create and implement minor mode that meets the regulation's specifications, the South Korean Shutdown Law shows that imposing penalties, even including jail time for the arguably lesser offense of providing internet games between midnight and 6:00 a.m., is likely not thought to be violative of some norm of customary international law.

To reemphasize, this Part is not meant to establish definitively that the particular practice of restricting children's internet use is or is not a part of customary international law. Yet, particularly when it comes to a vulnerable group like children, it appears that China and its neighbors are on a similar page about the ability, or perhaps even the duty, of the state to protect and guide them, with internet use restrictions as a valid method of doing so. As such, customary

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<sup>177</sup> *Id.* art. 91.

<sup>178</sup> South Korean Youth Protection Act, *supra* note 7, at art. 59.

<sup>179</sup> *Id.* art. 59, para. 5.

international law does not pose a significant barrier to the PRC or countries like her who wish to regulate children's internet use by means of minor mode, even if an international right to the internet becomes its own fundamental right of customary international law or if that right is already embedded in the customary international law right of freedom of expression.

## B. The Draft Minor Mode Guidelines and an International Treaty-Based Right to the Internet

In addition to customary international law, multi-national treaties are another source of international law that might be violated by the PRC's Draft Minor Mode Guidelines. As one writer noted, within the international community, "[m]ultiple resolutions have reiterated that 'the same rights that people have offline must also be protected online.'"<sup>180</sup> And as society continues to progress, "the internet has become a prerequisite to access fundamental human rights."<sup>181</sup> Because the PRC's Draft Minor Mode Guidelines limit both the amount of access to, and content consumed via, the internet, the rights most at issue with a regulation like the Draft Minor Mode Guidelines are children's right to freedom of expression and access to information. Both of these rights are guaranteed in Article 19 of the UDHR as well as Article 19 of the ICCPR, which arguably include an implied right to the internet.<sup>182</sup> While the UDHR is merely a declaration of rights, and thus not legally binding in itself,<sup>183</sup> the PRC has indicated its support for the Declaration, and since signed the ICCPR, which is a binding international treaty incorporating many of the rights contained in the UDHR.<sup>184</sup> Despite the

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<sup>180</sup> Banihashemi, *supra* note 161, at 34 (citing Human Rights Council Res. 32/L.20, U.N. Doc. A/HRC/32/L.20, at 3 (June 27, 2016)).

<sup>181</sup> *Id.*

<sup>182</sup> *See supra* notes 159–161 and accompanying text. *See also* Land, *supra* note 159, at 394 (Land argues that that even if Article 19 of the ICCPR does not guarantee a *per se* right to the internet, it does guarantee protections for "the 'media' of expression and information and was intended to include later-developed technologies such as the Internet."); *see also* Banihashemi, *supra* note 161, at 47 (citing Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90) (Banihashemi proposes that instituting a criminal case in the International Criminal Court against discrete actions like targeted internet blackouts "can help establish a precedent of recognition and enforcement of internet rights." However, this theory relies on prosecuting acts that constitute crimes against humanity, which child internet use restrictions almost surely are not).

<sup>183</sup> *See* Michèle Olivier, *The Relevance of 'Soft Law' As a Source of International Human Rights*, 35 COMP. & INT'L J. S. AFR. 289, 296 (2002) (citations omitted) ("Declarations promoting specific programmes, for example the Universal Declaration of Human Rights, which proclaims the rights therein as goals rather than rights already recognised under international law . . . Such resolutions can only be regarded as moral authority, and constitute non-legal programmes of action.").

<sup>184</sup> Mark C. Eades, *China's Excuses for Its Human Rights Record Don't Hold Water*, U.S. NEWS & WORLD REP. (Jan. 17, 2014), <https://perma.cc/XZ95-AHRV> (The Republic of China (ROC), at the time the sole internationally recognized claimant of Chinese sovereignty, voted in favor of the Universal



fact that the ICCPR applies to children,<sup>185</sup> because the PRC has refused to ratify the ICCPR in the twenty-five years since it signed the Covenant, the extent to which it is bound by Article 19 of the ICCPR with respect to the rights of anyone is unclear.<sup>186</sup> As such, this Section will also analyze the CRC, which the PRC has formally ratified,<sup>187</sup> to determine whether the Draft Minor Mode Guidelines violate the right to freedom of expression, and thus any implied right to the internet.

### 1. General human rights instruments: the UDHR and ICCPR

Article 19 of the UDHR guarantees that “[e]veryone has the right of freedom of opinion and expression.”<sup>188</sup> Included in this right to freedom of expression and opinion is the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>189</sup> In 2016, the U.N. General Assembly’s Human Rights Commission passed a resolution “condemn[ing] unequivocally measures to intentionally prevent or disrupt access to the dissemination of information online,” which defined more clearly the purpose of Article 19.<sup>190</sup> Similarly to the UDHR, Article 19 of the ICCPR provides for a right to freedom of expression, which “include[s] freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally . . . or through any other media of his choice.”<sup>191</sup> However, paragraph 3 of Article 19 states that “[t]he exercise of the rights provided for in paragraph 2” may be subject to restrictions only if such restrictions “are necessary: (a) [f]or respect of the rights or reputations of others; [or] (b) [f]or

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Declaration in 1948. Further, the PRC has reiterated its support for the Declaration on numerous occasions); *China: Ratify Key International Human Rights Treaty*, HUM. RTS. WATCH (Oct. 8, 2013), <https://perma.cc/5HFE-JNG3> (The PRC signed the ICCPR in 1998, but has yet to ratify it).

<sup>185</sup> See U.N. Human Rights Committee, General Comment No. 17: Article 24 (Rights of the Child), 35th Session, paras. 2, 6 (1989) (The Human Rights Committee, a panel of human rights experts charged by the UN to interpret the ICCPR, found that not only do “children benefit from all the civil rights enunciated in the Covenant,” and also states are required to adopt measures “to create conditions to promote the harmonious development of the child’s personality.”).

<sup>186</sup> See, e.g., Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights,”* 16 IND. J. GLOB. LEGAL STUD. 437, 439, n.6 (2009) (citing LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES (1995)) (“Many scholars hold that at least some of the obligations found in the ICCPR reflect customary international law.”).

<sup>187</sup> *China and the CRC*, HUM. RTS. IN CHINA, <https://perma.cc/H95V-TGH2> (The PRC ratified the CRC in 1992.).

<sup>188</sup> Universal Declaration of Human Rights art. 19, Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR].

<sup>189</sup> *Id.*

<sup>190</sup> Banihashemi, *supra* note 161, at 40 (internal quotation marks omitted) (citing Human Rights Council Res. 32/13, U.N. Doc. A/HRC/RES/32/13, ¶ 10 (July 1, 2016)).

<sup>191</sup> International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

the protection of national security . . . , or of public health or morals.”<sup>192</sup> This paragraph “creates a problematic loophole” by which states can restrict the ICCPR’s guaranteed freedom of expression.<sup>193</sup>

It is unclear whether the Draft Minor Mode Guidelines impermissibly restrict children’s freedom of expression under either the ICCPR or the UDHR, because although the amount of time is restricted, even the youngest children are allowed to use the internet for forty minutes a day using minor mode.<sup>194</sup> Starting with the UDHR’s more general version of freedom of expression, it is not clear that the time or content restrictions in the PRC’s Draft Minor Mode Guidelines have extinguished children’s ability to “seek, receive and impart information and ideas through any media.”<sup>195</sup> Of course, Article 19 applies to “[e]veryone,”<sup>196</sup> which undoubtedly includes children. However, even if it were argued that the Draft Minor Mode Guidelines restrict children’s Article 19 right to freedom of expression, another article of the UDHR seems to suggest against declaring the Draft Minor Mode Guidelines to be violative of the UDHR overall. Article 26, which is one of only two articles in the UDHR that mentions children explicitly, and the only child-specific article relevant to this Comment,<sup>197</sup> provides that “[p]arents have a prior right to choose the kind of education that shall be given to their children.”<sup>198</sup> The PRC’s Draft Minor Mode Guidelines grant parents a high level of discretion to do just that by administering minor mode with a broad power to exempt both certain content and applications from the default time and content restrictions.<sup>199</sup> As such, there is not a strong argument that the Draft Minor Mode Guidelines violate the principles of the Universal Declaration.

Turning now to the ICCPR, there is more clarity as to whether Article 19 applies to these Draft Minor Mode Guidelines. The Human Rights Committee (HRC), a body of independent experts authorized by the U.N. to issue interpretations of the ICCPR among other duties,<sup>200</sup> has issued a General

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<sup>192</sup> *Id.* art. 19, para. 3(b).

<sup>193</sup> Banihashemi, *supra* note 161, at 45.

<sup>194</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 4.

<sup>195</sup> UDHR, *supra* note 188, at art. 19.

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* art. 25, para. 2, art. 26 (The other mention of children is in Article 26, which is about protecting family, providing in paragraph 2 that “[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection.”).

<sup>198</sup> *Id.* art. 26.

<sup>199</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 7.

<sup>200</sup> Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 116–17 (Helen Keller & Geir Ulfstein eds., 2012) (quoting Philip Alston, *The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST. OF EQUITY AND

Comment interpreting Article 19.<sup>201</sup> In interpreting paragraph two's protection of freedom of expression, the HRC declared that "all forms of audio-visual as well as electronic and internet-based modes of expression" are protected.<sup>202</sup> This definition would seem to implicate the content-based restrictions of the Draft Minor Mode Guidelines. However, even if the content- and time-based restrictions of the Draft Minor Mode Guidelines facially infringe minors' Article 19 right to freedom of expression, the HRC also acknowledges the loophole of Subsection (b) of paragraph 3, which allows restrictions on that freedom in order to ensure "the protection of national security or of public order . . . or of public health or morals."<sup>203</sup> While reiterating that this exception does not allow for complete destruction of the freedom of expression, the HRC does provide the PRC with a fairly convincing defense of the Draft Minor Mode Guidelines in declaring that any restrictions on the right to freedom of expression must be proportional and necessary, without defining those terms.<sup>204</sup> Because of the relatively high prevalence of internet addiction in China,<sup>205</sup> and because the primary purpose of the Draft Minor Mode Guidelines is to "prevent . . . minors' internet addiction,"<sup>206</sup> it is likely that the proposed regulation falls squarely into the paragraph 3(b) exception as a measure taken in order to protect public health. In the absence of clearer guidance from the HRC on what qualifies as a proportional and necessary public health or morals measure, the PRC could argue, and not unconvincingly, that the Draft Minor Mode Guidelines are (1) necessary given the failure of previous measures to curb the problem of child internet addiction and (2) proportional as the content- and time-based restrictions vary by age and allow wide discretion to parents, even allowing them to disable minor mode altogether. Without more from the HRC, the potentially problematic implications of states defining for themselves what constitute public health and morals regulations remain possible. Thus, even though Article 19 is considered to be fully integrated into customary international law,<sup>207</sup> and thus binding on the

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UNIVERSALITY 763, 775, n. 49 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., (2001)) (defining a general comment as "a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance").

<sup>201</sup> U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (2011).

<sup>202</sup> *Id.* para. 12.

<sup>203</sup> *Id.* para. 21.

<sup>204</sup> *Id.* paras. 21–22.

<sup>205</sup> *See supra* note 157 and accompanying text.

<sup>206</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 1.

<sup>207</sup> *See* Schabas, *supra* note 160, at 194–95 ("Unquestionably . . . freedom of opinion and expression is universally accepted and is without a doubt a norm of customary international law" since even states not party to the ICCPR, including the PRC, recognize the right to freedom of expression.).

PRC, the Draft Minor Mode Guidelines are not clearly violative of the ICCPR's right to freedom of expression.

If the Draft Minor Mode Guidelines are framed as merely regulating access to the protected media by which children are entitled to exercise their Article 19 right to freedom of expression rather than fully extinguishing that right, then neither version of Article 19 has been violated. Furthermore, that the Draft Minor Mode Guidelines also rely on parents as the primary enforcers of their internet restrictions arguably supports parents' UDHR Article 26 right to control their children's education, which is equally as fundamental.<sup>208</sup> In the absence of clear guidance from the Human Rights Committee on how to rank competing rights and interests within these international human rights instruments, the PRC's Draft Minor Mode Guidelines do not currently violate either the UDHR or the ICCPR, particularly since the restrictions fall on a vulnerable population like children.

## 2. The Convention on the Rights of the Child

Unlike the UDHR and the ICCPR, in which references to children are fleeting,<sup>209</sup> the Convention on the Rights of the Child (CRC)<sup>210</sup> is exclusively focused on the rights of children. The CRC in Article 13 uses language almost identical to the ICCPR and the UDHR to declare that "[t]he child shall have the right to freedom of expression" including the "freedom to seek, receive and impart information and ideas of all kinds . . . through any . . . media of the child's choice."<sup>211</sup> However, as with the ICCPR, the right to expression and information in Article 13 of the CRC is not an absolute right, as [t]he exercise of this right may be subject to restrictions" as are "provided by law and are necessary . . . [f]or the protection of . . . public health or morals."<sup>212</sup>

While the Committee on the Rights of the Child (the "Committee")<sup>213</sup> has not issued a General Comment fully interpreting the public health and morals exception of Article 13, it has issued one clarifying "children's rights in relation to the digital environment."<sup>214</sup> In order to balance the importance of respecting

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<sup>208</sup> UDHR, *supra* note 188, at art. 2 (emphasis added) (The Declaration provides that "[e]veryone is entitled to *all* the rights and freedoms set forth in this Declaration, without distinction of any kind," and without ranking the rights in the Charter.).

<sup>209</sup> Children are only referred to five times across four articles of the ICCPR, *see* ICCPR, *supra* note 191, at arts. 14, 18, 23–24, while the UDHR only references children three times across two articles, *see* UDHR, *supra* note 188, at arts. 25–26.

<sup>210</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989) [hereinafter CRC].

<sup>211</sup> *Id.* art. 13, para. 1.

<sup>212</sup> *Id.* art. 13, para. 2.

<sup>213</sup> This Committee is the equivalent to the HRC for the ICCPR and UDHR. That is, it is the UN treaty body tasked with interpreting and supervising the implementation of the CRC.

<sup>214</sup> Committee on the Rights of the Child, General Comment No. 25 (2021) on the Rights of the Child in Relation to the Digital Environment, U.N. Doc. CRC/C/GC/25 (2021).

children's rights in online settings with the risks of abuse that could take place online, the Committee positions the best interests of the child as paramount in states' regulation of children and the internet.<sup>215</sup> The Committee also advises that "[s]tates should involve all children, listen to their needs, and give due weight to their views." It is unclear whether, or the extent to which, the PRC has considered the views of children in crafting its proposed regulation as the Draft Minor Mode Guidelines are parent- and provider-specific. However, in the absence of a clear sanction in the General Comment, whether the PRC has met this obligation is less relevant than the Committee's interpretation of the Article 13 freedom of expression in digital settings. Similarly to the HRC's interpretation of Article 19 of the ICCPR, the Committee on the Rights of the Child adopts the position that "[a]ny restrictions on children's right to freedom of expression in the digital environment . . . should be lawful, necessary and proportional."<sup>216</sup> Like the HRC with the ICCPR, the Committee leaves these three requirements undefined. As such, the test can likely easily be met with respect to the "lawful" and "proportional" prongs given the lack of serious domestic legal barriers to the Draft Minor Mode Guidelines as well as the how the regulations gradually ease restrictions as children grow older, respectively.

With respect to the "necessary" prong of the test for acceptable restrictions on freedom of expression in the digital space, analyzing a different article of the CRC and its interpretation by the Committee is useful. Article 24 of the CRC requires that "[s]tates [p]arties recognize the right of the child to the enjoyment of the highest attainable standard of health."<sup>217</sup> In a separate General Comment interpreting this provision, the Committee declares that it "is concerned by the increase in mental ill-health among adolescents, including . . . obsessive behaviour, such as excessive use of and addiction to the Internet and other technologies."<sup>218</sup> In order to achieve access to this right, the Committee obligates states to "[p]rovid[e] an adequate response to the underlying determinants of children's health,"<sup>219</sup> and to support parents in "fulfil[ling] their responsibilities while always acting in the best interests of the child" regarding their health.<sup>220</sup> Given this, the PRC has ample room to argue that the Draft Minor Mode Guidelines represent its best effort to support parents in acting in the best interests of their children to limit access to the cause of the health issues associated with

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<sup>215</sup> See *id.* paras. 12–13.

<sup>216</sup> *Id.* para. 59.

<sup>217</sup> CRC, *supra* note 210, at art. 24, para. 1.

<sup>218</sup> Committee on the Rights of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24), U.N. Doc. CRC/C/GC/15, at pt. III(B) (2013).

<sup>219</sup> *Id.* at pt. IV.A.

<sup>220</sup> *Id.* at pt. IV.B.1.

internet overuse. Combined with the lack of more complete interpretive guidance from the Committee on what counts as a permissible public health or moral restriction on the right to freedom of expression of Article 13, its interpretation of Article 24 leads to the plausible conclusion that the Draft Minor Mode Guidelines represent the PRC's method of meeting rather than ignoring its obligations under the CRC.

Moving now from the most obvious substantive rights of children implicated by the Draft Minor Mode Guidelines, the CRC also requires states to protect children and their rights through various other provisions, some of which the Draft Minor Mode Guidelines appear to support, while others of which they appear to violate. For example, Article 18 requires the state to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities,”<sup>221</sup> and Article 27 requires states to “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”<sup>222</sup> Both of these are supported by the PRC’s Draft Minor Mode Guidelines, with Article 18’s requirements being fulfilled by the provision of minor mode as a tool for parents to manage their children’s online activities,<sup>223</sup> and Article 27’s recognition mandate being met by the very purpose of the Guidelines, preventing internet addiction, which negatively affects children’s development on all levels.<sup>224</sup> On the other hand, Article 17 of the CRC requires parties to “recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of . . . sources.”<sup>225</sup> It might be argued that the content restrictions of the Draft Minor Mode Guidelines violate this requirement. However, Article 17 also provides that states shall “[e]ncourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18,” which arguably describes the Draft Minor Mode Guidelines.<sup>226</sup> Given the vagueness of these provisions, in the absence of any General Comments from the Committee on these articles, the PRC is unlikely to be definitively in violation of any of them.<sup>227</sup>

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<sup>221</sup> CRC, *supra* note 210, at art. 18, para. 2.

<sup>222</sup> *Id.* art. 27, para. 1.

<sup>223</sup> PRC Draft Minor Mode Guidelines, *supra* note 8, at art. 7.

<sup>224</sup> *See supra* Part III.A.

<sup>225</sup> CRC, *supra* note 210, at art. 17, para. 1.

<sup>226</sup> *Id.* art. 17, para. 2(e).

<sup>227</sup> It should be noted that the Committee has also interpreted Article 31 of the CRC, which guarantees children the right “to rest and leisure, [and] to engage in play,” in Committee on the Rights of the Child, General Comment No. 17 (2013) On the Right of the Child to Rest, Leisure, Play,

As with the UDHR and ICCPR, the interaction of different competing interests and duties contemplated by the CRC place the PRC's Draft Minor Mode Guidelines, theoretically, in a middle zone of potentially supportive and potentially violative of the Convention. However, as with the other two international instruments, in the absence of clarification on how to rank rights and duties of the child and the state from an international body, the Draft Minor Mode Guidelines cannot be declared to be in violation of the PRC's commitments under the CRC.

## V. CONCLUSION

The health and development problems associated with children's excessive screen time and overuse of the internet are real,<sup>228</sup> and governments have an affirmative duty to make an effort to protect children from these harms.<sup>229</sup> The PRC's Draft Minor Mode Guidelines represent the latest development in a smattering of regulation in this area in the country over the past several years. And while minor mode appears to be a more facially restrictive method of reducing children's screen time than the previous Chinese regulations, it is well-founded in Chinese law. Furthermore, as displayed by the examples of South Korea, Japan, and Taiwan, China's neighbors have all attempted to resolve this issue in a number of ways which, despite differing slightly in substance, are not clearly less restrictive than the PRC's Draft Minor Mode Guidelines. Finally, while various rights of children are certainly implicated by all of the internet use restrictions mentioned in this Comment, current versions of relevant international instruments like the UDHR, the ICCPR, and the CRC all fail to provide a meaningful answer on how governments should balance children's fundamental human rights with protecting children from the real harm that internet overuse can cause to their physical, mental, and emotional wellbeing and development. While this Comment does not take a stance on how international institutions might accomplish this, or on whether they should do so at all, the analysis above depicts a significant gap in the

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Recreational Activities, Cultural Life, and the Arts (art. 31), U.N. Doc. CRC/C/GC/17 (2013). However, the Committee appeared unable to determine how the internet might change states parties' obligations under the CRC. For example, although the Committee recognized that "[a]ccess to the Internet and social media is central to the realization of article 31 rights in the globalized environment," it also was "concerned at the growing body of evidence indicating the extent to which these environments, as well as the amounts of time children spend interacting with them, can also contribute to significant risk and harm to children." *Id.* at pt. V.B. The Committee does proclaim that states should adopt "[m]easures . . . to promote online access and accessibility, as well as safety for children" in order to ensure "the widest possible enjoyment of the relevant rights under the prevailing circumstances." *Id.* at pt. VIII. Because this interpretation is vaguer even than those of the provisions discussed in the body of this Comment, it has even less evidentiary value as to whether the Draft Minor Mode Guidelines are or are not in compliance with the PRC's obligations under the CRC.

<sup>228</sup> See *supra* notes 1–5 and accompanying text.

<sup>229</sup> See, e.g., CRC, *supra* note 210, at arts. 17–19.

current framework of international human rights when it comes to children and competing interests. As governments continue to adopt new ways of approaching this issue, these ambiguities will continue to lead to confusion and a lack of uniform application of these treaties. The PRC's Draft Minor Mode Guidelines, even at the draft stage, rest on solid legal ground, both domestically and internationally, and they represent a regulatory trend that may continue across the globe as the internet continues to become more and more integral to daily life.<sup>230</sup> If there is an international right to the internet embedded in the right to freedom of expression of either customary international law or in one of the international instruments analyzed above, an international body needs to make that clear or at the very least engage with how internet use restrictions for minors interact with such a right.

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<sup>230</sup> See, e.g., Kirk Nahra et al., *US Lawmakers Continue Legislative Focus on Children's Online Privacy and Social Media Use*, WILMERHALE (May 9, 2023), <https://perma.cc/3NNN-URCP> (A bipartisan coalition of U.S. Senators introduced the "Protecting Kids on Social Media Act," which restricts children's access to social media under the age of thirteen. This federal legislation builds upon state laws in states like Utah and Arkansas and "would prohibit children under thirteen from using a social media platform unless no data is collected at all from those individuals."); *L'usage des réseaux sociaux à l'école: intérêts, risques et obligations [The Use of Social Media at School: Interests, Risks, and Obligations]*, L'AUTONOME DE SOLIDARITÉ LAÏQUE (Feb. 21, 2024), <https://perma.cc/H85U-8ZWN> (In July 2023, France's legislature passed legislation limiting children's use of social media by disallowing social media companies from allowing those under fifteen to register for accounts.).