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## E-Elections: Time for Japan to Embrace Online Campaigning

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### I. INTRODUCTION

¶1 Communication and social networks play a vital role in the modern world. The role and importance of social networks has been heightened by the advent of the Internet and the new “information age” in which modern society operates. The Internet has had a profound impact upon nearly every society, and it has increasingly assumed indispensable functions. Not only has the Internet changed the way that people communicate and network, but it is also one of the most powerful and far-reaching technological developments known to the world with respect to information exchange, education, business, and entertainment.

¶2 As the Internet has evolved, Internet users across the world have embraced various forms of online communication, social networking, and social media through their computers, mobile phones, smart phones, televisions, and even game consoles. Internet users spend significant time using “Web 2.0” technologies and other World Wide Web tools (collectively “Internet tools”) that enable interactive information sharing, user-centered design, collaboration, and a compilation of collective intelligence.<sup>1</sup> Internet tools include communication platforms such as e-mail, instant messaging, online chatting, and texting. Internet tools also encompass commonly used Web 2.0 tools for social networking and online collaboration purposes (collectively “consumer-generated media” or “CGM”), including social media platforms such as blogs, podcasts, wikis, and online video sharing websites such YouTube,<sup>2</sup> microblogging platforms such as Twitter,<sup>3</sup> social networking websites such as Facebook,<sup>4</sup> and virtual communities. Individuals of all ages and backgrounds expend significant time connecting, communicating, collaborating, and even entertaining themselves together with others through CGM and other Internet tools.

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<sup>1</sup> Tim O’Reilly & John Battelle, *Web Squared: Web 2.0 Five Years On* (Web 2.0 Summit held Oct. 20-22, 2009), <http://www.web2summit.com/web2009/public/schedule/detail/10194>.

<sup>2</sup> YOUTUBE, <http://www.youtube.com> (last visited Nov. 20, 2010). Founded in February 2005, “YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small.” YOUTUBE, <http://www.youtube.com/t/about> (last visited Nov. 20, 2010).

<sup>3</sup> TWITTER, <http://www.twitter.com> (last visited Nov. 20, 2010). Twitter is a real-time information network powered by user-generated content from around the world. *See* TWITTER, <http://twitter.com/about> (last visited Nov. 20, 2010).

<sup>4</sup> FACEBOOK, <http://www.facebook.com> (last visited Nov. 20, 2010). Millions of people use Facebook everyday to keep up with friends, upload photos, share Internet links and videos, and learn more about the people they meet. *See* FACEBOOK, <http://www.facebook.com/facebook?v=info> (last visited Nov. 20, 2010).

¶3 With their increasing popularity, CGM and other Internet tools have given rise to many complex legal and ethical issues ranging from enforceable online commercial obligations to personal rights on the Internet to digital criminal acts. From a commercial perspective, the law has reacted to the efforts of individuals, entities, and organizations reaching out to Internet and CGM users for profit. Internet, technology, and information-based companies naturally rely upon the Internet and CGM to promote and deliver products, services, and information. Even the most conventional “brick and mortar” businesses have rushed to establish an online presence on both country native and global Web 2.0 platforms. On a personal level, individual rights and governmental interests often directly clash in an online environment due to the Internet’s speed, relative anonymity, and lack of regulation. As Internet and CGM users electronically disseminate vast amounts of information, governments and individuals are subject to closer scrutiny, increasing criticism, embarrassing truths, rumors, and even harmful untruths. Communications circulated via the Internet can quickly spiral into public relations quagmires or even full-fledged political movements. Accordingly, lawmakers and courts are increasingly tempted to use the law to regulate the Internet and restrict CGM, often at the expense of individual rights. As such, the scope of individual privacy rights on the Internet and privacy obligations of website operators continues to generate much debate. Issues related to freedom of expression, voting, and censorship on the Internet give rise to substantial discussion as well.

¶4 Asia is no exception to the recent Internet phenomenon and ensuing legal dilemmas. In fact, Japan and South Korea rank among the world’s leaders in technological innovation and Internet penetration. As of June 2010, China boasted over 420 million Internet users or “netizens.”<sup>5</sup> Asians living in Hong Kong, Singapore, Taiwan, Thailand, and other parts of Asia are increasingly active on the Internet as well. In the digital age, many Asian societies have also embraced CGM and other online communication mediums. In Asian societies with Confucian traditions, conventional social networks have traditionally played a prominent role, particularly in comparison with Western nations. This prominent role is increasingly translating itself into online platforms and forums.

¶5 With the rapid ascendancy of the Internet and CGM, Asian countries have sometimes struggled with striking the proper balance between individual rights and Internet regulation. The intersection between freedom of expression and the Internet presents a prime example of such struggles. Freedom of expression is a value shared across the world as reflected in Article 19 of the United Nations Universal Declaration of Human Rights (the “Declaration”), which states that “[e]veryone has the right to freedom of opinion and expression” including the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>6</sup> Consistent with the Declaration, freedom of expression is protected in almost every Asian country, often through constitutional guarantees.<sup>7</sup> However, the extent of freedom of expression differs greatly among Asian societies, particularly when analyzing the tremendous differences in Internet regulation among the countries.<sup>8</sup> In principle, Communist and authoritarian states such as China, North Korea, and Vietnam are known for restricting Internet access and monitoring Internet users. Website operators and Internet users in these countries struggle with asserting individual rights and freely operating in a digital environment.<sup>9</sup> Conversely,

<sup>5</sup> CNNIC *Says Chinese Internet Users Break 420 Million Mark*, CHINA TECH NEWS.COM (July 16, 2010), <http://www.chinatechnews.com/2010/07/16/12338-cnnic-says-chinese-internet-users-break-420-million-mark>.

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/index.shtml#atop>.

<sup>7</sup> David Ziskind, *Labor Provisions in Asian Constitutions*, 6 COMP. LAB. L. 117, 165 (1984).

<sup>8</sup> *Id.*

<sup>9</sup> One prime example is Google’s struggle with Internet censorship in China. Tini Tran, *China Renews Google’s Operating License*, ASSOCIATED PRESS (July 11, 2010), <http://abcnews.go.com/Business/wireStory?id=11136681>. Another example is Vietnam’s intermittent blocking of access to social media such as Facebook. *See* James Hookway, *In Vietnam, State ‘Friends’ You*, WALL ST. J. (Oct. 4, 2010), *available at* [http://online.wsj.com/article/SB10001424052748703305004575503561540612900.html?mod=wsj\\_share\\_twitter](http://online.wsj.com/article/SB10001424052748703305004575503561540612900.html?mod=wsj_share_twitter). In addition, Vietnam implemented regulations in April 2010 requiring that all retail Internet locations such as Internet cafes in the capital of Hanoi must install special government-approved software on their server computers by 2011. It is believed that this software will enable governmental monitoring and tracking of Internet and SNS use. Dorothy Chou, *Disturbing Concerns in Vietnam* (June 10, 2010, 1:41 PM), <http://googlepublicpolicy.blogspot.com/2010/06/disturbing-concerns-in-vietnam.html>.

democratic countries such as Japan and South Korea generally subscribe to the principle of limited Internet restriction. However, this distinction is not always clear.

¶6 This article particularly focuses on the struggle of Japan to balance technological innovation, legal regulation, and individual rights. More specifically, it examines the conflict between Japan's election laws and the desire of Japanese politicians, political parties, and voters to fully utilize the Internet's capabilities to freely express themselves online during official election periods. Japan has interpreted its election laws to prohibit online campaigning and curb online voter activity during the official campaign period immediately preceding an election.<sup>10</sup> As currently applied, Japan's Public Offices Election Law or *Koushoku Senkyo Hou* (hereinafter the "POEL")<sup>11</sup> precludes candidates for public office and political parties from utilizing the communication, information, and political advocacy tools available on the Internet during the official election period.<sup>12</sup> Instead, political candidates are mired in an environment restricted to a limited range of conventional campaign tools. To campaign for political office, candidates spend countless hours posting small 33-inch by 23-inch posters on general election poster boards throughout their jurisdictions, parading around in campaign vans with loudspeakers blaring, and standing in crowded train stations or other public venues to give short political speeches and hand out a limited number of printed promotional materials.<sup>13</sup> The POEL similarly hinders voter activity. Other than the act of voting, the POEL does not allow for significant voter involvement during the official campaign period. In actuality, it generally prohibits grassroots election efforts by voters including online activism, canvassing, and document circulation.<sup>14</sup>

¶7 The current interpretation of the POEL undermines political freedom and directly clashes with the desire of political actors to freely promote their ideals, disseminate policies, engage in political discussion, and gauge political currents via CGM and other Internet tools. It also hampers voters' rights, voters' participation in the political process, and grassroots activities. Accordingly, over the past several years, Japan's strict POEL and campaign prohibitions have come under increasing fire from various sectors.<sup>15</sup> While working to ensure the fairness of its elections, Japan needs to promptly embrace the Internet age and revise its electoral laws.

¶8 This article analyzes the need for Japan to relax or eliminate its strict Internet electioneering restrictions. To fully understand and evaluate the issues, Part II of this article provides a foundation by generally explaining Japan's political structure, its electioneering laws, and the current online campaigning restrictions faced by candidates for public office, political parties, and voters. Part III of this article builds on this foundation by describing the failed attempts to relax or eliminate online campaigning restrictions. Part IV completes the discussion by analyzing the Internet's potential role in Japanese elections, the legal clash between current campaigning restrictions and constitutionally guaranteed rights, and the future of online campaigning in Japan, including the various advantages that Japanese society can secure by embracing Internet electioneering and how Japan can employ existing law to overcome the potential dangers associated with online election-related activities.

<sup>10</sup> See *Koushoku Senkyo Hou* [Public Office Election Law or "POEL"], Law No. 100 1950, as amended by Law No. 86 of 2007, available at <http://law.e-gov.go.jp/htmldata/S25/S25HO100.html>; see also Kosaku Narioka, *The Last 20th-Century Campaign?*, WALL ST. J. BLOG (June 14, 2010), <http://blogs.wsj.com/japanrealtime/2010/06/14/the-last-20th-century-campaign/>; Takaaki Ohta, *Fairness Versus Freedom: Constitutional Implications of Internet Electioneering for Japan*, 11 SOC. SCI. JAPAN J., no. 1, 2008, at 99, 106-07.

<sup>11</sup> *Koushoku Senkyo Hou* [POEL], *supra* note 10.

<sup>12</sup> Narioka, *supra* note 10; Christian Caryl, *Fearing the Obama Effect: Japan Blocks Most Online Campaigning – But Insurgents are Starting to Push The Rules*, NEWSWEEK (Oct. 25, 2008), <http://www.newsweek.com/2008/10/24/fearing-the-obama-effect.html#>.

<sup>13</sup> *Going Grassroots in Japan*, THE WORLD (July 13, 2009), <http://www.theworld.org/2009/07/13/going-grassroots-in-japan/>.

<sup>14</sup> See *id.*; Zenichiro Kono, *Essay and Opinion: Citizens Have Right to Freely Campaign in Elections*, JAPAN INSTITUTE OF CONSTITUTIONAL LAW (Feb. 18, 2008), <http://www.jicl.jp/english/related/backnumber/20080512.html>.

<sup>15</sup> Ohta, *supra* note 10, at 102.

## II. JAPAN'S STRICT ELECTION LAWS AND THE INTERNET

¶9 Japan is an industrialized democratic country known particularly for its high-tech companies and technological advancement. Japan has enjoyed economic prosperity and much growth since World War II. Its advancement and prosperity have enabled Japanese citizens to easily obtain cutting-edge technology and affordably access the Internet through cell phones, smart phones, personal digital assistants (PDAs), laptops, desktop computers, game consoles, and televisions. In 2009, Japan claimed over 94 million Internet users or “netizens” (78% of its population).<sup>16</sup> Among these netizens, approximately 90% accessed the Internet from a personal computer and over 75% did so through a broadband connection.<sup>17</sup> Internet access through mobile devices such as cell phones and PDAs has also been very popular, as 85.1% of all Japanese netizens have used a mobile device to access the Internet.<sup>18</sup> Although all methods of Internet access experienced growth in 2009, the fastest growing methods of access in Japan have been television and game consoles, which both saw an increase of 30.3% over the previous year.<sup>19</sup>

¶10 Although different from the West in its evolution, CGM use in Japan has shown signs of maturity.<sup>20</sup> More blogs are written in Japanese than any other language.<sup>21</sup> Between 2006 and 2008, the number of CGM users in Japan grew by 65 percent.<sup>22</sup> Japan claims many native social networking websites, including leaders such as Mixi and Gree.<sup>23</sup> Global CGM players such as Twitter and Facebook have started to make substantial inroads into Japan as well.<sup>24</sup> In fact, over 16% of all Japanese Internet users “tweet” using Twitter, in comparison with less than 10% of all U.S. netizens.<sup>25</sup> Twitter, with its 140-character long limitations, resonates culturally with the Japanese as it has been compared to *haikai*, a form of Japanese poetry in which a very deep message is conveyed through only a few words.<sup>26</sup> Twitter and other CGM platforms possess great potential for businesses and organizations to reach and communicate with the Japanese, particularly given the country’s widespread availability of cheap broadband connections and near-universal access to mobile phones with Internet capability.<sup>27</sup>

¶11 Despite the Internet’s widespread diffusion and Web 2.0’s popularity, Japan’s election and campaigning laws still function in the “dark ages.” In other parts of the world, CGM and other Internet tools provide political candidates with a modern, quick, inexpensive, and relatively-efficient means to advocate positions, disseminate important information, interact with voters, and target specific constituents. However, Japanese political candidates are “handcuffed” from using CGM and other Internet tools to engage in election-related activities during the most important time of an election campaign – namely, the two-to-three week official campaign period immediately preceding

<sup>16</sup> Ministry of Internal Affairs and Communications of Japan, Heisei 21 nen [Tsuushin Riyou Doukou Chousa] no Kekka; Results of 2009 “Communication Use Trends Survey”] Apr. 27, 2010, available at [http://www.soumu.go.jp/main\\_content/000064217.pdf](http://www.soumu.go.jp/main_content/000064217.pdf).

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

<sup>18</sup> *Id.*

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

<sup>20</sup> See *Japan: Sociable Japan*, CAMPAIGN (March 26, 2010), <http://www.campaignlive.co.uk/news/rss/994315/Japan-Sociable-Japan/>.

<sup>21</sup> See Caryl, *supra* note 12.

<sup>22</sup> See *Japan: Sociable Japan*, *supra* note 20.

<sup>23</sup> See *id.*; Tim Kelly, *Gree Overtakes Mixi to Become Japan’s No. 1 SNS Site*, REUTERS (Aug. 13, 2010), <http://www.reuters.com/article/idUSTOE67C06B20100813>; see also MIXI, <http://mixi.jp/>; GREE, <http://gree.jp/?action=login>.

<sup>24</sup> See *id.*

<sup>25</sup> See Yuri Kageyama, *World’s Tweet is Japan’s ‘Mumble’ on Hit Twitter*, JAPAN TIMES (June 30, 2010), <http://search.japantimes.co.jp/mail/nn20100630f1.html>. Among global players competing for Japanese CGM users, Twitter has proven to be the most successful as the Japanese have embraced the concept of microblogging. See *id.*

<sup>26</sup> *Japan Politicians Ready to ‘Mumble’*, NEW STRAITS TIMES (July 9, 2010), [http://www.nst.com.my/nst/articles/Japanpoliticiansreadyto\\_mumble\\_/Article/](http://www.nst.com.my/nst/articles/Japanpoliticiansreadyto_mumble_/Article/); Antoni Slodkowski, *Politicians Tap Twitter to Tweak Profiles – Inspired by Obama’s Net Reach, Diet Ranks Test the Online Waters*, JAPAN TIMES (July 29, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090729f1.html>.

<sup>27</sup> Kageyama, *supra* note 25.

election day (hereinafter “official campaign period”).<sup>28</sup> In Japan, election-related activities, or *senkyo undou*, are limited to the official campaign period, while general political activities, or *seiji undo*, are generally not restricted.<sup>29</sup> In today’s digital age, imagine a candidate facing penalties for using the Internet to conduct election-related activities during the heat of an election such as mobilizing supporters, contacting voters, and advertising. Moreover, imagine the rebuking of voters seeking to support political candidates online during this same time. This represents the current reality in Japan.

#### A. Law Governing Elections and Campaigning Activities

¶12 Japan is a mature democracy with political freedoms including, among others, universal suffrage, the right to choose and dismiss public officials, and freedom of expression.<sup>30</sup> It has a national system of government in which the Japanese parliament or Diet (the “Diet”) functions as the highest organ of state power and the sole lawmaking organ of the state.<sup>31</sup> The Diet is composed of the House of Representatives (also known as the “Lower House”)<sup>32</sup> and the House of Councilors (also known as the “Upper House”).<sup>33</sup> Members of both houses serve as representatives of the entire country.<sup>34</sup> Diet members can be elected through either a constituency system or a proportional representation system.<sup>35</sup> In effect, voters cast two ballots in Diet elections: one for the individual candidate of their choice running for public office in their local jurisdiction and one for a party-list candidate or specific political party.<sup>36</sup> Since the Second World War, Japan has essentially operated as a single party government with the Liberal Democratic Party (“LDP”) constantly in power.<sup>37</sup> Until 2009, the LDP either held or shared power in the Diet for 62 of the previous 63 years.<sup>38</sup> In 2009, however, the LDP lost its dominant party status as power essentially shifted to the Democratic Party of Japan (“DJP”) and its smaller partners.<sup>39</sup>

¶13 The POEL governs the election and political campaigning process for all national, prefectural, and municipal parliamentary elections in Japan.<sup>40</sup> In addition to defining general election rules, it addresses candidate eligibility, acceptable political activities, campaigning, election finances, elections

<sup>28</sup> See generally Tomoko Otake, *Net-based Campaigning Still Long Way Off, Interactive Stumping Remains Defined by Politicians in Loudspeaker Trucks*, JAPAN TIMES (July 7, 2004), <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040707f2.htm> (pointing out that political candidates have been prohibited from using the Internet during the official campaigning period for quite some time).

<sup>29</sup> Koushoku Senkyo Hou [POEL], *supra* note 10.

<sup>30</sup> KENPO [Constitution], art. 15, 21; Lawrence M. Friedman, *Roads to Democracy*, 33 SYRACUSE J. INT’L L. & COM. 51, 55 (2005); see generally *Japan Pre-Election Watch: July 2010 Legislative Elections*, INT’L REPUBLICAN INSTITUTE (2010), available at <http://www.iri.org/explore-our-resources/election-watch/japan-pre-election-watch-july-2010-legislative-elections> (pointing out that the tenants of democracy in Japan date back to the Taishō democracy from roughly 1912 to 1926).

<sup>31</sup> KENPO [Constitution], art. 41.

<sup>32</sup> Prime Minister of Japan and his Cabinet, *Fundamental Structure of the Government of Japan*, [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/fundamental\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/fundamental_e.html) (last visited Oct. 28, 2010). The more powerful Lower House is comprised of 480 members serving 4-year terms, unless the Lower House is dissolved before the completion of said terms. When the Lower House is dissolved, a general election of all members must be convened within 40 days of dissolution. KENPO [Constitution], art. 54.

<sup>33</sup> KENPO [Constitution], art. 42; The Upper House consists of 242 members serving 6-year terms. Prime Minister of Japan and his Cabinet, *supra* note 32.

<sup>34</sup> KENPO [Constitution], art. 43.

<sup>35</sup> Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society): Local Government System in Japan, 4 (2007), available at <http://www.soumu.go.jp/english/pdf/esij.pdf>.

<sup>36</sup> Leslie M. Tkach-Kawasaki, Roles and Regulations: Boundaries on the Japanese web sphere in the 2004 Upper House election in *THE INTERNET AND NATIONAL ELECTIONS: A COMPARATIVE STUDY OF WEB CAMPAIGNING*, 212 (Randolph Kluer et al. eds., 2007).

<sup>37</sup> *Japan Pre-Election Watch: July 2010 Legislative Elections*, *supra* note 30.

<sup>38</sup> *Id.*; see also Martin Fackler, *With Bold Stand, Japan Opposition Wins a Landslide*, N.Y. TIMES, Aug. 30, 2009, <http://www.nytimes.com/2009/08/31/world/asia/31japan.html>.

<sup>39</sup> See *id.*

<sup>40</sup> Koushoku Senkyo Hou [POEL], *supra* note 10.

disputes, and election law violations.<sup>41</sup> Japan adopted the POEL in 1950 in an attempt to combine the legislation and regulations governing national and local elections.<sup>42</sup> The POEL severely restricts campaign activities during the “official campaign period” in both national and local elections. It is the by-product of the rigid electoral system established in Japan around 1925 and largely perpetuated prewar electioneering restrictions.<sup>43</sup> The POEL has been called a collection of “thou shall nots” given its strict restraints on the time, place, manner, and method of soliciting electoral support during the official campaign period.<sup>44</sup> In contrast, political activities outside of the official campaign period, as opposed to electioneering during the official campaign period, are comparatively unrestricted.<sup>45</sup>

### 1. Conventional Electioneering Activities: Limitations During the Official Campaign Period

¶14 Japan is fairly unique among democracies in defining a time frame for campaign activities or an “official campaign period.”<sup>46</sup> The official campaign period runs from the day that an election is officially announced to the day immediately preceding the election date.<sup>47</sup> The official campaign period differs according to the type of election.<sup>48</sup> In the case of Diet elections, the official campaign period for Lower House elections must be at least 12 days, and the official period for Upper House elections must be at least 17 days.<sup>49</sup> The Cabinet determines the official campaign period for each election, and it often determines that the minimum-allowable time frame is appropriate.<sup>50</sup>

¶15 The Supreme Court of Japan has specified that candidates for public office may conduct election-related activities that are necessary for being elected during the official campaign period.<sup>51</sup> Notwithstanding, the POEL severely restricts the activities of political candidates during the official campaign or “blackout” period.<sup>52</sup> Also, candidates may not directly campaign for public office outside of the blackout period.<sup>53</sup>

¶16 The POEL’s restrictions on candidate activities during the official campaign period are wide-ranging. First, the POEL bars candidates from engaging in certain electioneering activities. Article 142 of the POEL prohibits the dissemination of “documents and drawings” (*“bunsho zuuga”*) for electioneering purposes during the official campaign period, except for those written materials specifically allowed by law.<sup>54</sup> Pursuant to this exception, candidates for public office may distribute a certain number of postcards and leaflets.<sup>55</sup> Kan Suzuki, a DPJ-member elected to the Upper House

<sup>41</sup> *Id.*

<sup>42</sup> MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 3. Before its adoption, Japan conducted national and local elections pursuant to separate laws. *Id.*

<sup>43</sup> Takaaki Ohta, *Elections - Unlocking Democracy: Internet Campaigning and Japan's Political Process*, JAPAN INC., Mar. 6, 2009, <http://www.japaninc.com/mgz85/internet-electioneering?page=79>; Tkach-Kawasaki, *supra* note 36, at 213.

<sup>44</sup> Editorial, *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, THE MAINICHI DAILY NEWS, May 28, 2010, <http://mdn.mainichi.jp/perspectives/editorial/archive/news/2010/05/20100528p2a00m0na001000c.html>.

<sup>45</sup> Masami Ito, *Strict Rules in Play to Keep Campaigning Above Board*, JAPAN TIMES, Aug. 4, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20090804i1.html>. The POEL separates election activities intended to promote general policies and political objectives, from campaign activities that are focused on getting elected. *Id.*; *see also generally* Koushoku Senkyo Hou [POEL], *supra* note 10, arts. 129-200.

<sup>46</sup> *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44.

<sup>47</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 129.

<sup>48</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, arts. 31-34; *see also* MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 33.

<sup>49</sup> Koushoku Senkyo Hou [POEL], arts. 31(4), 32(3); MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 34; Ito, *supra* note 45.

<sup>50</sup> *See* Ito, *supra* note 45.

<sup>51</sup> *See id.*; *see also* 61 Minshu 4 (Japan, Sup.Ct., June 13, 2007) (candidates may engage in campaign activities although there is a quantitative and time limit to them).

<sup>52</sup> *See* Koushoku Senkyo Hou [POEL], *supra* note 10, arts. 129-200; *see also* Ito, *supra* note 45.

<sup>53</sup> *See* Koushoku Senkyo Hou [POEL], *supra* note 10, art. 129; Ito, *supra* note 45.

<sup>54</sup> Koushoku Senkyo Hou [POEL], *supra* note 10; *see also* Ohta, *supra* note 10, at 106.

<sup>55</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 142; MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 37-38; Chris Hogg, *Japan's Old-Fashion Campaigning*, BBC NEWS, July 12, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6292602.stm>.

in 2001, has complained about the strictness of such limitations as applied to his own campaigns. These restrictions have allowed him only to distribute enough leaflets during the official campaign period to reach three percent of the eligible voters in his Tokyo district.<sup>56</sup> As such, Suzuki has turned to the Internet to reach his constituency where possible.<sup>57</sup> As will be discussed at length below, although the POEL does not expressly regulate the Internet and online campaign activities,<sup>58</sup> Japan's bureaucracy and lawmakers have interpreted the "documents and drawings" restrictions to encompass online text information and images.<sup>59</sup> Political candidates have generally complied with this view.<sup>60</sup>

¶17 During the blackout period, the POEL also bans door-to-door canvassing by candidates or third parties<sup>61</sup> and limits campaigning expenditures.<sup>62</sup> If a candidate's campaign expenditures exceed predetermined limits, then the election of the offending candidate can be nullified.<sup>63</sup> Along these lines, the POEL strictly limits paid television advertisements and radio spots by candidates. Although political parties may freely purchase television or newspaper advertisements,<sup>64</sup> candidates are prohibited from purchasing personal television or radio time.<sup>65</sup> Instead, individual candidates may only express their political opinions and present their personal resumes on two 5-minute complimentary television spots provided by NHK, Japan's national broadcasting network, during the official campaign period.<sup>66</sup> Similarly, candidates cannot place newspaper and magazine advertisements, unless the government provides them free of charge.<sup>67</sup> Some candidates, namely proportional representation candidates for the Upper House, are even prohibited from making speeches at certain public venues, including schools and civic centers.<sup>68</sup>

¶18 Candidates engaging in unauthorized campaign activities during the blackout period are subject to up to two years imprisonment and a maximum fine of 500,000 yen (approximately \$5,500 USD).<sup>69</sup> Although the stringency of these election-related regulations is relatively unique among established democracies, the Supreme Court of Japan has consistently upheld and enforced these restrictions.<sup>70</sup>

<sup>56</sup> Hogg, *supra* note 55. Candidates for the Lower House single-seat districts may distribute only 70,000 leaflets and 35,000 postcards. Ito, *supra* note 45.

<sup>57</sup> Japanese Electioneering Tiptoes Into Internet Age, SINA.COM, Aug. 4, 2009, <http://english.sina.com/technology/2009/0803/260457.html>.

<sup>58</sup> *Intanetto Senkyo Katsudou o Kaikin [Lifting Ban on Internet Election Activities]*, MAINICHI SHIMBUN, June 16, 2010, <http://mainichi.jp/select/seiji/indicator/muda/021.html>. On April 2, 2010, seven Internet companies including Yahoo and Rakuten presented a petition signed by 71,507 Japanese voters calling for the ban on online campaign activities to be lifted. *Id.*

<sup>59</sup> Koushoku Senkyo Hou [POEL], *supra* note 10; *see also* Ohta, *supra* note 10, at 106-07.

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

<sup>61</sup> Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 42; Ohta, *supra* note 10, at 100.

<sup>62</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 194; Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 44-45.

<sup>63</sup> Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 44.

<sup>64</sup> *See* Tkach-Kawasaki, *supra* note 36, at 213.

<sup>65</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, arts. 150-51; MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 35-37; *see also* Chisa Fujioka, *Japan turns to election gurus ahead of elections*, REUTERS, July 24, 2009, <http://www.reuters.com/article/idUSTRE56N01320090724>; Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 941 (1998); Allison R. Quinn, *National Campaign Finance Laws in Canada, Japan, and the United States*, 20 SUFFOLK TRANSNAT'L L. REV. 193, 204 (1996).

<sup>66</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, arts. 150-51; MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, LOCAL GOVERNANCE (POLICY MAKING AND CIVIL SOCIETY), *supra* note 35, at 36-37; *see also* Quinn, *supra* note 65, at 203-205.

<sup>67</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 149; Quinn, *supra* note 65, at 204. The POEL allows candidates five publicly funded newspaper advertisements that are limited to a certain size. Tkach-Kawasaki, *supra* note 36, at 213.

<sup>68</sup> Koushouku Senkyo Hou [POEL], *supra* note 10, art. 161; Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 35-36.

<sup>69</sup> *See* Narioka, *supra* note 10.

<sup>70</sup> *See* Ohta, *supra* note 10, at 100; *see* Krotoszynski, *supra* note 65, at 940-41.

¶19 During the official campaign period, permissible campaigning activities by the candidates include: affixing official-sized posters to general candidate election campaign poster boards constructed by the government at specified locations within each electoral district;<sup>71</sup> riding in vans armed with banners, leaflets, and loudspeakers blaring short messages;<sup>72</sup> soapbox speeches at crowded train stations and street corners between 8:00 a.m. and 8:00 p.m.;<sup>73</sup> and utilization of the telephone.<sup>74</sup> A candidate may also solicit votes from voters encountered on the street, in a store, or at other public venues.<sup>75</sup> Also, “individual meetings” may not be illegal so long as such visits are for non-campaign purposes.<sup>76</sup> For decades, Japanese politicians found the most success by promising favors to corporations, labor unions, and interest groups in exchange for their support.<sup>77</sup> However, as the political landscape in Japan has gradually changed and traditional LDP political domination has ended, candidates must now find different ways to appeal to a public that is increasingly cynical about government and politics.<sup>78</sup> Such political volatility is exemplified by an increasing number of voters not affiliated with any specific political party, as well as a revolving door to the prime minister’s office.<sup>79</sup>

¶20 Outside of the official campaign period, potential candidates for public office may participate in “political” functions although they cannot engage in election-related campaigning activities. More specifically, lawmakers and potential candidates for future office may conduct meetings, give lectures, and engage in similar political activities.<sup>80</sup> They may also hang posters containing their image to announce lectures or speeches, but the posters may not identify them as candidates for a specific office or particular election.<sup>81</sup> In the case of current lawmakers, all such posters must be taken down at least six months in advance of a general election.<sup>82</sup> This rule does not apply to political parties however, so one potential loophole for current lawmakers is advertising a party-sponsored gathering using his or her image together with the party leader’s photograph.<sup>83</sup>

¶21 Notably, the POEL restrictions do not stop at candidates and political parties. Rather, they also restrict voters and prohibit the vitalization of third-party electioneering. Grassroots movements by voters in support of specific candidates can play a vital role in the success of a candidate for political office. In Japan, however, citizen voters cannot start their own online efforts to support a preferred candidate during the official campaign period.<sup>84</sup> The POEL restrictions placed on candidates equally

<sup>71</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 143; Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 4041; Andy Williamson, Laura Miller & Freddy Fallon, *Behind the Digital Campaign: An exploration of the use, impact, and regulation of digital campaigning*, 39 (Hansard Society 2010), available at [www.hansardsociety.org.uk/files/folders/2455/download.aspx](http://www.hansardsociety.org.uk/files/folders/2455/download.aspx).

<sup>72</sup> See Coco Masters, *Japan's Twitter-Free Election Campaign*, TIME (Aug. 18, 2009), <http://www.time.com/time/world/article/0,8599,1917137,00.html>.

<sup>73</sup> Koushoku Senkyo Hou [POEL], *supra* note 10, art. 164; see Masters, *supra* note 72; Ito, *supra* note 45.

<sup>74</sup> Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 37.

<sup>75</sup> Ito, *supra* note 45.

<sup>76</sup> *Id.*

<sup>77</sup> Fujioka, *supra* note 65.

<sup>78</sup> See *id.*; see also *Japan Pre-Election Watch: July 2010 Legislative Elections*, *supra* note 30 (voters maintaining no party affiliation now comprise about 50% of the Japanese electorate as opposed to only 20% in the early 1980s). Fujioka, *supra* note 65.

<sup>79</sup> See Yuka Hayashi, *Jostling Begins Among Hopefuls to Lead Japan*, WALL ST. J. (June 2, 2010), <http://online.wsj.com/article/SB10001424052748704875604575281292285208862.html>. Since the resignation of Prime Minister Junichiro Koizumi after spending nearly 2,000 days in office, the subsequent four Japanese prime ministers have spent one year or less in office. Specifically, Shinzo Abe served from September 26, 2006, to September 26, 2007; Yasuo Fukuda served from September 26, 2007, to September 24, 2008; Taro Aso served from September 24, 2008, to September 16, 2009; and Yukio Hatoyama served from September 16, 2009, to June 4, 2010.

<sup>80</sup> See Ito, *supra* note 45.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* The posters will identify the candidate as a “speaker” as opposed to a “candidate” for a specific office.

<sup>84</sup> Williamson, Miller & Fallon, *supra* note 71, at 38.

apply to non-candidate third parties. In fact, Japan has punished more than 90,000 voters for illegal campaigning acts since 1946.<sup>85</sup>

## 2. *Reasons Underlying Restrictions During the Official Campaign Period on Conventional Campaigning Methods*

¶22 In general, the POEL is a complicated maze of minute regulations on political expression and campaign activities originally designed to promote fairness and inhibit political corruption by candidates and third parties.<sup>86</sup> As Japan developed, the ruling LDP was generally reluctant to change or update the POEL out of a desire to maintain power and contain minority party challengers.<sup>87</sup>

¶23 The POEL also strives to minimize campaign costs so that all candidates have a level playing field in pursuing public office.<sup>88</sup> Through strict regulation, the POEL strives to eliminate potential economic inequalities in campaigning resources among the candidates and to lighten the economic burden on the candidates so that an election does not rest upon the degree of funding available to each candidate.<sup>89</sup> Theoretically, well-funded candidates should not be able to gain an unfair advantage from large war chests, and candidates without substantial resources should not shy away from public office due to extreme campaign costs.<sup>90</sup> As a result of the POEL's restrictions, including the relatively short official campaign period, election costs in Japan are much lower than those in many other democratic countries.<sup>91</sup> Ideally, lower campaign costs enable more members of society to compete for representative office. At the same time, however, the stringent campaigning restrictions and short official campaign period reduce opportunities for meaningful political dialogue and debate. They also make it more difficult for new or unknown candidates to promote their policy ideals, propose solutions to societal problems, and gain substantial exposure. This was demonstrated by nearly six decades of unbroken single-party governmental rule by the LDP.<sup>92</sup>

¶24 In addition, the POEL seeks to promote the public welfare. To eliminate potential corruption, the POEL prohibits voter contact in forms such as house-to-house electioneering, based on the pretext that such contact may lead to corruption and vote-buying.<sup>93</sup> The POEL also seeks to reduce the disruptive impact that elections can play in society.<sup>94</sup> In essence, the law prioritizes the public's interest in being free from unwanted speech and elevates civility over the freedom of expression by essentially limiting the channels of communication between candidates and the voters.<sup>95</sup> Finally, based on the strict electioneering restrictions and short campaigning season, it can be argued that POEL restrictions help avoid costly negative campaigns and protect the candidates' name and honor.

<sup>85</sup> Kono, *supra* note 14.

<sup>86</sup> See Ohta, *supra* note 10, at 112.

<sup>87</sup> See Hogg, *supra* note 55.

<sup>88</sup> Ministry of Internal Affairs and Communications, Local Governance (Policy Making and Civil Society), *supra* note 35, at 44.

<sup>89</sup> See Ito, *supra* note 45.

<sup>90</sup> See Akiko Fujita, *Japanese Politicians Cut Off from Internet During Campaign*, VOICE OF AMERICA (July 27, 2009), <http://www.unsv.com/voanews/english/scripts/2009/07/27/9/>.

<sup>91</sup> See Ito, *supra* note 45. The United Kingdom is another notable exception for its relatively inexpensive elections. See Ohta, *supra* note 10, at 101. Because of strict controls on campaign funds, the UK relies heavily upon candidate and voter contact.

<sup>92</sup> Except for a brief 11-month period in 1993-1994, the LDP governed Japan either as the majority government or leader of coalition governments until 2009. See Tkach-Kawasaki, *supra* note 36, at 211. Even though the LDP lost its grip on power in 2009, its election defeat resulted not from certain candidates standing out to the electorate, but rather a stagnant economy and a "kick the incumbents out of office" mentality. Philippa Fogarty, *New Tricks as Japan Election Looms*, BBC NEWS (Aug. 17, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8204994.stm>. In the 2010 Upper House election, the DPJ suffered a similar fate as a discontent electorate stripped the DPJ of its majority position in the Upper House. See *Japan Pre-Election Watch: July 2010 Legislative Elections*, *supra* note 30.

<sup>93</sup> See Ohta, *supra* note 10, at 101.

<sup>94</sup> See Krotoszynski, *supra* note 65, at 942.

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

Japanese society places much import on good name and honor,<sup>96</sup> and Japanese election strategy typically avoids negative campaigning.<sup>97</sup>

### 3. Online Campaign Activities: Formal and Informal Limitations During the Official Campaign Period

¶25 Japanese politicians, political parties, and voters are quite active online outside of the official campaign period.<sup>98</sup> Many Japanese politicians maintain their own blogs, microblogs, websites, and personal channels on websites such as Niconico Douga and YouTube.<sup>99</sup> Using these platforms, politicians and political parties provide useful background information, position statements, and details about political related events.<sup>100</sup> Some politicians interactively communicate with their constituencies using Twitter, while others interact via e-mail or other online tools.<sup>101</sup> Many politicians invite interactive communication through their websites,<sup>102</sup> while others use virtual world websites such as Second Life to open “cyberoffices” and engage their constituencies.<sup>103</sup> Since the 2006 Lower House election, all Japanese political parties and most candidates have established election-oriented websites for use outside of the official campaign period.<sup>104</sup> In addition, Japanese voters also actively use CGM and other Internet tools to express their thoughts, opinions, and observations about political candidates, parties, and pressing issues.<sup>105</sup>

¶26 There are many potential advantages to Internet electioneering and online political activities by candidates, political parties, and voters. In short, such advantages include, among others, the ability to directly provide real-time information to an unlimited audience, facilitate communications between candidates and voters, vitalize third-party electioneering, and solicit political donations.<sup>106</sup> Other possible benefits include greater transparency in government, less control of information by the mass media, and increased accountability caused by more scrutiny of the candidates by the electorate. Despite these and other potential advantages associated with the use of online political advocacy tools, however, Japanese elections remain largely stuck in a pre-Internet era.

¶27 The POEL was drafted for traditional campaign means and media formats. Although it does not directly mention the World Wide Web, Internet tools, or CGM,<sup>107</sup> the POEL equally applies to online campaigning.<sup>108</sup> The Japanese government has interpreted the POEL to strictly limit election-related activities and political speech on the Internet or CGM by candidates, political parties, and voters during the official campaign period.<sup>109</sup> Outside of this blackout period, however, lawmakers

<sup>96</sup> See Salil Mehra, *Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States*, 78 U. COLO. L. REV. 767, 770 (2007); see also Krotoszynski, *supra* note 65, at 960.

<sup>97</sup> See generally Sachiko Sakamaki & Momoko Nishijima, *Negative Campaigning Hits Japan as LDP Cartoon Attacks Hatoyama*, BLOOMBERG (July 22, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ag.YaH4TYx6M> (noting the rarity of negative campaigning tactics in Japan).

<sup>98</sup> See Editorial, *Let Campaigning Join Digital Age*, JAPAN TIMES (April 23, 2010), <http://search.japantimes.co.jp/cgi-bin/ed20100423a1.html>.

<sup>99</sup> See Yoko Kubota, *Japan Eyes E-politics as Political Rivalry Grows*, REUTERS (Aug. 3, 2009), <http://www.reuters.com/article/idUSTRE57209720090803>. Niconico Douga is a popular video sharing website intended for native Japanese. See Niconico Douga Home Page, [www.nicovideo.jp](http://www.nicovideo.jp).

<sup>100</sup> See Tkach-Kawasaki, *supra* note 36, at 218-21.

<sup>101</sup> See Kubota, *supra* note 99.

<sup>102</sup> See Tkach-Kawasaki, *supra* note 36, at 218.

<sup>103</sup> See Chris Hogg, *Japanese MP Opens Cyber Office*, BBC NEWS (June 11, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/6739857.stm>. Second Life is a three-dimensional virtual world where users can socialize, connect, and create content for no cost using voice and text chat functions. See Second Life Home Page, <http://www.secondlife.com>.

<sup>104</sup> See Tkach-Kawasaki, *supra* note 36, at 214.

<sup>105</sup> See Hogg, *supra* note 55.

<sup>106</sup> See Ohta, *supra* note 10, at 103.

<sup>107</sup> See Intanetto Senkyo Katsudou o Kaikin [Lifting Ban on Internet Election Activities], *supra* note 58. On April 2, 2010, seven Internet companies including Yahoo and Rakuten presented a petition signed by 71,507 Japanese voters calling for the ban on online campaign activities to be lifted. *Id.*

<sup>108</sup> See Tkach-Kawasaki, *supra* note 36, at 211.

<sup>109</sup> See Ohta, *supra* note 10, at 100.

and aspiring political candidates may engage in such online activities through personal websites, blogs, microblogs, e-mail, and other Internet tools.<sup>110</sup>

¶28 In 1996, the Ministry of Home Affairs (now the Ministry of Internal Affairs and Communications) first indicated that candidate websites including election platforms and party websites containing candidate profiles and rosters violated the POEL's provisions on distributing campaign-related information.<sup>111</sup> In 2002, the Japanese bureaucracy issued an edict asserting that POEL restrictions against circulating conventional "documents and drawings" equally apply to virtual campaigning and online solicitations for voter support during the official campaign period.<sup>112</sup> To date, the Ministry of Internal Affairs and Communications Ministry still maintains this position.<sup>113</sup> As such, candidates engaging in online campaign activities during the blackout period are subject to imprisonment and fines.<sup>114</sup> Despite the POEL's absence of express prohibitions on online campaigning, candidates generally follow bureaucratic guidance related to the POEL to avoid a Prosecutor's Office known for its proclivity to enforce the election laws.<sup>115</sup>

¶29 Given the strict governmental interpretation of the POEL, online activities diminish considerably in the weeks leading up to an election.<sup>116</sup> In fact, during the official campaign period, candidates and political parties have frozen their existing websites or refrained from developing new ones.<sup>117</sup> Other online communications among candidates and voters have typically ceased during this "blackout" period as well.<sup>118</sup> Candidates and political parties cannot blog or solicit votes online during the blackout period.<sup>119</sup> They cannot use mediums such as e-mail, electronic bulletin boards, Twitter, or mobile phone text messages either.<sup>120</sup> In essence, Japanese politicians are widely restricted from using almost all Internet tools during the official campaign period due to bureaucratic interpretation of the sixty-year-old POEL.<sup>121</sup> Instead of taking advantage of technological innovations and a complete host of online tools, candidates for public office are generally limited to shouting short sound bites and key phrases to the electorate from a megaphone during the official campaigning period, as opposed to providing detailed information about their views, positions, and espoused policies.<sup>122</sup>

¶30 Because the POEL restrictions apply to online campaigning, Japanese voters cannot utilize CGM or other Internet tools to engage in campaign-related activities during the official blackout period either. Inspired by online voter mobilization efforts in the United States, Kensuke Harada founded

<sup>110</sup> See Masters, *supra* note 72; *Going Grassroots in Japan*, *supra* note 13.

<sup>111</sup> See Tkach-Kawasaki, *supra* note 36, at 214.

<sup>112</sup> See Narioka, *supra* note 10; Caryl, *supra* note 12.

<sup>113</sup> *Upper House Election 2010: Politicians Skirt Law in Web Campaigns*, YOMIURI SHIMBUN (July 1, 2010), <http://www.yomiuri.co.jp/dy/national/T100630004437.htm>; Miwa Murphy, *Internet-powered U.S. Elections Strike Sharp Difference from Japan*, JAPAN TODAY, <http://www.japantoday.com/category/commentary/view/internet-powered-us-elections-strike-sharp-difference-from-japan> (last visited Oct. 31, 2010).

<sup>114</sup> See Narioka, *supra* note 10.

<sup>115</sup> *Id.*; see also Japan Federation of Bar Associations, *Alternative Report to the Fifth Periodic Report of Japan on the International Covenant on Civil and Political Rights* (Apr. 2, 2003), available at [www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBARreport.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBARreport.pdf).

<sup>116</sup> See Narioka, *supra* note 10; see also Caryl, *supra* note 12.

<sup>117</sup> See Masters, *supra* note 72; see *Going Grassroots in Japan*, *supra* note 13.

<sup>118</sup> See Editorial, *Let Campaigning Join Digital Age*, *supra* note 98.

<sup>119</sup> Caryl, *supra* note 12; Williamson, Miller & Fallon, *supra* note 71, at 38-39.

<sup>120</sup> See Editorial, *Let Campaigning Join Digital Age*, *supra* note 98; Masters, *supra* note 72; *Going Grassroots in Japan*, *supra* note 13.

<sup>121</sup> See Daisuke Yamamoto, *Decision 2010: Diet Almost Freed Up Net Campaigning*, THE JAPAN TIMES, June 30, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100630f2.html> (quoting Keio University professor Yoshihiro Katayama); Editorial, *Let Campaigning Join Digital Age*, *supra* note 98; see also generally Otake, *supra* note 28 (pointing out that political candidates have been prohibited from using the Internet during the official campaigning period for a lengthy period).

<sup>122</sup> See Chico Harlan, *As Japanese Election Nears, Voters Grow Weary of Megaphone-wielding Candidates*, WASHINGTON POST, July 8, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070705040.html>. Some candidates have turned to podcasts and online audios recordings due to the interpretation of the law, however such attempts have been widely unsuccessful. See *infra* notes 251-53.

the “I-vote” website for Japanese voters.<sup>123</sup> As Harada began operating his website, he discovered that the POEL prohibited his online grassroots efforts during the official campaign period.<sup>124</sup> Campaigning restrictions apply to both candidates and third party voters, regardless of whether the website operator, CGM creator, or netizen is personally running for political office.<sup>125</sup> The prohibition on online voter activity has evolved from restrictions on conventional grass-roots voter activities, such as door-to-door canvassing and document delivery, and regulates conduct at the height of electoral interest.<sup>126</sup>

#### 4. *Reasons Underlying Reluctance to Remove Restrictions on Online Campaigning During the Official Election Period*

¶31 Japanese lawmakers and bureaucrats have traditionally justified their reluctance to embrace Internet technologies during the official campaign period on various grounds. First, consistent with the POEL’s original intent, the Japanese government has long-maintained that banning the updating of websites, use of CGM, online posting of videos, and use of other online tools during the official campaign period will preserve fairness because one candidate will not have an undue financial advantage over another.<sup>127</sup> Online advertising costs can be significant. Lawmakers also worry about runaway costs related to developing and maintaining attractive and effective websites and blogs.<sup>128</sup>

¶32 Second, lawmakers have cited concerns that online campaigning will increase incidents of candidate harassment.<sup>129</sup> Opponents and third parties have the ability to anonymously distribute harmful or inaccurate materials via the Internet. This potential threat has given rise to genuine concern about anonymous libeling and unfair electioneering tactics.<sup>130</sup> Moreover, negative campaigning has generally not been the norm in Japan. With the ability to quickly disseminate information and the difficulties associated with dispelling such information, lawmakers fret that negative campaigning and harassment could spin out of control.<sup>131</sup>

¶33 Third, lawmakers harbor reservations about potential online fraud. Some have taken issue with e-mail and CGM tools such as Twitter, in that a third party could easily spoof an e-mail address or create a fake Twitter account to engage in political attacks or spread negative messages that would appear to come from a candidate although they had originated elsewhere.<sup>132</sup> Hacking is another potential concern. Although spreading false information or creating false impressions is possible in the conventional world, it is easier to do in the virtual world because of anonymity and minimal cost. The concerns about online fraud appeared to materialize when Naoto Kan was selected as Prime Minister in June 2010. Just after his selection, someone created a Twitter account bearing Prime Minister Kan’s name and photo.<sup>133</sup> The initial “tweet” or message sent from the Twitter account announced “using this chance, I have started Twitter.”<sup>134</sup> Although the account was a fake, it soon had more than 10,000 unsuspecting followers.<sup>135</sup> Other Twitter accounts falsely bearing the name and image of Prime Minister Kan subsequently popped up as well causing the DPJ to quickly issue a

<sup>123</sup> See *Going Grassroots in Japan*, *supra* note 13.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> Kono, *supra* note 14.

<sup>127</sup> See Ohta, *supra* note 43.

<sup>128</sup> See *Japanese Politicians Still Wary About Full Internet Use*, JAPAN POL’Y & POL., Jan. 5, 2009.

<sup>129</sup> *TokyoNow: Calls Mount to Lift Ban on Internet for Electioneering*, JAPAN POL’Y & POL., Sept. 14, 2004.

<sup>130</sup> Ito, *supra* note 45; see Tkach-Kawasaki, *supra* note 36, at 214.

<sup>131</sup> See Tkach-Kawasaki, *supra* note 36, at 214.

<sup>132</sup> Narioka, *supra* note 10.

<sup>133</sup> Joshua Williams, *New Japanese Prime Minister and Fake Twitter Account*, JAPAN HEADLINES EXAMINER, June 6, 2010, available at <http://www.examiner.com/x-16352-Japan-Headlines-Examiner~y2010m6d6-New-Japanese-Prime-Minister-and-fake-twitter-accounts>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

public announcement declaring that the Prime Minister had not issued any “tweets” through the Twitter service.<sup>136</sup>

¶34 Finally, online political activity in Japan has also been somewhat hampered by factors beyond the POEL. Japan has not embraced CGM for political purposes to the degree seen in the United States, in part due to the media’s slowness in embracing the Internet.<sup>137</sup> Many Japanese news outlets post only limited news content online so links to such content posted by CGM users expire relatively quickly.<sup>138</sup> Moreover, the Japanese mass media establishment does not possess a well-developed “watchdog” sense of holding the government accountable, primarily because they are part of the establishment and may have their access to valuable inside information restricted or terminated if they offend those in government.<sup>139</sup> Accordingly, the media has not pressed for major reform. Similarly, the failure of the public or even politicians to “push the envelope” with respect to political dialogue combined with absence of vocal challengers to the POEL has slowed the move towards substantive change even further. Candidates still largely rely upon informal networks, territorial connections, family ties, and local associations.<sup>140</sup> In addition, voter apathy has been cited as one of the reasons for the reluctance to change because the citizenry has been slow to develop an interest in politics.<sup>141</sup>

### III. FAILED ATTEMPTS TO RELAX ONLINE CAMPAIGNING RESTRICTIONS

¶35 Although many realize that Japan’s restrictions on online campaigning and communication are out of touch with reality, Japan has failed to allow the use of online political advocacy tools during the official campaign period for either national or local elections. Not only have these restrictions been detrimental to political candidates and voters, but some observers have characterized the failure to reform as extreme “political negligence.”<sup>142</sup>

¶36 Realizing the advantages of online campaigning, Japanese opposition political parties have proposed legislation on several occasions dating back to 1998 to relax the restrictions on online campaigning.<sup>143</sup> Even a research group formed within the Ministry of Internal Affairs and Communications recommended lifting the absolute ban on online campaigning based upon its internal study of the issue in 2002.<sup>144</sup> In the intervening time, political candidates and voters in the United States and other democratic countries have profited from the lack of restrictions on online campaigning.<sup>145</sup> Notwithstanding, Japan has yet to successfully revamp the POEL to permit online campaign activities during the official election period.<sup>146</sup>

<sup>136</sup> *DPJ Warns that ‘Kan Postings’ on Twitter are Hoaxes*, JAPAN TIMES, June 6, 2010, available at <http://search.japantimes.co.jp/mail/nn20100606a4.html>; Williams, *supra* note 133. A similar fake account was also started under the name of ex-Prime Minister Yukio Hatoyama in late 2009 immediately after his public announcement that he would start tweeting in early 2010. *Id.*

<sup>137</sup> Murphy, *supra* note 113.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Ohta, *supra* note 43.

<sup>141</sup> Kubota, *supra* note 99.

<sup>142</sup> Editorial, *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44.

<sup>143</sup> Ito, *supra* note 45; *TokyoNow: Calls Mount to Lift Ban on Internet for Electioneering*, *supra* note 129; see also *Japan’s Embrace of E-Electioneering Will Herald Administrative Reform and Business Chances*, J-CAST BUSINESS NEWS, Dec. 5, 2005, available at <http://en.j-cast.com/2005/12/05000087.html>.

<sup>144</sup> Editorial, *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44; *Japan’s Embrace of E-Electioneering Will Herald Administrative Reform and Business Chances*, *supra* note 143.

<sup>145</sup> See generally Murphy, *supra* note 113 (describing Barack Obama’s success from his electronic online outreach activities during the 2008 presidential election in the form of more information, better communication with the voters, and even mass-scale campaign fundraising).

<sup>146</sup> Narioka, *supra* note 10.

¶37 Despite suggested reforms, the Diet has failed to embrace online campaigning in any form. Prior to 2009, the LDP generally controlled the Diet. Older LDP lawmakers were reluctant to support any form of online campaigning due to their various concerns and lack of Internet understanding, particularly in comparison to younger politicians who would likely utilize the Internet.<sup>147</sup> LDP politicians further feared that the opposition would benefit from any reform, as typical LDP supporters were less likely to utilize CGM and other Internet tools as they tended to be older and reside in rural areas without high-speed Internet access.<sup>148</sup> Conversely, traditional LDP supporters typically responded favorably to more conventional Japanese campaigning methods, in which the election of LDP members came from exchanging favors with local unions, social networks, and community groups.<sup>149</sup> To be elected in the past, LDP candidates merely needed to show that they were sufficiently connected to the party – policy positions really did not matter.<sup>150</sup> As such, the LDP did not see tangible benefits for change to election laws, and its opposition was always sufficient to quash proposals or recommendations to allow online campaigning.<sup>151</sup>

¶38 Even when online campaigning law reform has seemed promising, the proposed reforms have fallen short. In 2009, Japanese voters were presented with an opportunity for change with the Lower House elections. The DPJ consisted of comparatively younger and more progressive politicians, and the electorate envisioned that the DPJ could inject new energy and creativity to propel Japan out of its economic doldrums.<sup>152</sup> Different from the past, political parties and candidates started engaging in policy debates, and as such, the parties even published “manifestos” describing their policies and plans to address hot issues.<sup>153</sup> One hot topic in the 2009 elections was online campaigning. Using its past reform proposals as a foundation,<sup>154</sup> the DPJ promised quick reform and relaxation of the POEL to permit online campaigning activities, if it were to achieve status as the majority party.<sup>155</sup> On August 30, 2009, the DPJ crushed the LDP in a landslide victory winning 308 seats in the 480-seat Lower House.<sup>156</sup>

¶39 When the balance of power shifted in 2009, more Japanese lawmakers indicated a desire to experiment with online campaigning on both a national and local level.<sup>157</sup> Outside of the blackout period, more Japanese politicians were communicating with the electorate via CGM and the Internet. In fact, a Japanese website tracking Twitter accounts listed over 80 lawmakers as having Twitter accounts.<sup>158</sup> In advance of the July 2010 Upper House election, over 100 candidates had procured Twitter accounts.<sup>159</sup> Even the Prime Minister’s Office had reached out to the electorate using CGM. In January 2010, then-Prime Minister Yukio Hatoyama of the DPJ started microblogging on Twitter.<sup>160</sup> By the end of his tenure six months later, Hatoyama had nearly 690,000 followers on Twitter.<sup>161</sup>

<sup>147</sup> *Going Grassroots in Japan*, *supra* note 13.

<sup>148</sup> *See Japan’s Embrace of E-Electioneering Will Herald Administrative Reform and Business Chances*, *supra* note 143.

<sup>149</sup> *See* Fogarty, *supra* note 92.

<sup>150</sup> *Id.*

<sup>151</sup> *See End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44.

<sup>152</sup> *See TokyoNow: Calls Mount to Lift Ban on Internet for Electioneering*, *supra* note 129.

<sup>153</sup> *See* Fogarty, *supra* note 92.

<sup>154</sup> *Intanetto Senkyo Katsudou o Kaikin [Lifting Ban on Internet Election Activities]*, *supra* note 58. Since 1998, the DPJ previously proposed legislation on four separate occasions seeking a relaxation of online campaigning restrictions. *Id.*

<sup>155</sup> *See* Kubota, *supra* note 99.

<sup>156</sup> *See In Landslide, DPJ Wins Over 300 Seats*, JAPAN TIMES (Aug. 31, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090831x2.html>; Fogarty, *supra* note 92.

<sup>157</sup> *See* Editorial, *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44.

<sup>158</sup> *See* Williams, *supra* note 133.

<sup>159</sup> *See Tweepers in Japan Fall Silent in Election Campaign*, MAINICHI DAILY NEWS (June 1, 2010), <http://www.gmanews.tv/story/194831/tweepers-in-japan-fall-silent-in-election-campaign>.

<sup>160</sup> Williams, *supra* note 133.

<sup>161</sup> *Id.*

¶40 By early 2010, the policy debate about online campaigning had increased among the political parties. During the 2010 ordinary Diet session, the majority and minority political parties engaged in constructive debate about the pros and cons of relaxing the POEL to allow candidates in national and local elections to use websites, blogs, e-mail, CGM, and other online political advocacy tools during the official campaign period.<sup>162</sup> Even the LDP indicated a new willingness to relax restrictions on online electioneering.<sup>163</sup> At a conference involving the policy affairs chiefs from 10 political parties (including the DPJ and LDP), it was agreed in principle that the candidates and political parties should have the ability during the July 2010 Upper House election to update their websites and blogs during the traditional blackout period.<sup>164</sup> This would enable the candidates to report on their rallies, identify campaign speech locations, and supply other basic campaigning information during the most crucial time of the campaign.<sup>165</sup> Subsequently, the parties further agreed to partially lift the ban on online campaigning for certain Lower House elections.<sup>166</sup> More specifically, for candidates running only for proportional representation seats in a Lower House election, the parties agreed that such candidates should be allowed to update their websites and blogs during the official election campaigns.<sup>167</sup>

¶41 Notwithstanding the movement towards partially relaxing the complete ban on online campaigning during the blackout period, the Diet failed to pass any legislation related to online campaigning during its 2010 ordinary session.<sup>168</sup> The abrupt resignation of Prime Minister Yukio Hatoyama and related events disrupted the Diet's schedule such that the legislation intended to partially relax online campaigning restrictions officially died.<sup>169</sup>

¶42 Although hope continues for reform in the near future, the relaxation of online campaigning restrictions is not guaranteed. To improve its election system, Japan needs to remember the famous proverb '*ishi no ue nimo sannan.*' This proverb literally means, "sit patiently for three years, even on a rock." When expressed figuratively, however, it means "perseverance brings success." To realize the many benefits associated with online campaigning, Japan needs to persevere and keep its attention focused on reform. Japanese voters and candidates have patiently waited many years for meaningful campaigning law reform. Now is the time to amend the POEL not only to allow candidates to simply update their web pages and blogs, but also to permit candidates, political parties, and candidates to utilize a full arsenal of online tools during the official campaign period.

#### IV. THE NEED TO RELAX OR ELIMINATE ONLINE CAMPAIGNING RESTRICTIONS IN JAPAN

¶43 Japan needs to allow online campaigning well beyond the scope of its recent discussions. Among other things, CGM and other Internet tools have the potential to foster the exchange of ideas, facilitate political advocacy, enhance knowledge, and improve transparency in the election process. During the official campaign period, online campaigning can also increase political participation among the electorate, strengthen the rule of law, and fully realize the recognition of constitutionally

<sup>162</sup> See *Net Electioneering Ban Likely to be Lifted*, YOMIURI SHIMBUN (May 13, 2010).

<sup>163</sup> See Editorial, *Let Campaigning Join Digital Age*, *supra* note 98.

<sup>164</sup> *Web Updates OK'd for Diet Candidates*, JAPAN TIMES (May 22, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20100522a3.html>; *Campaigns via Internet to be Allowed from Upper House Election*, JAPAN TODAY (May 13, 2010), <http://www.japantoday.com/category/politics/view/campaigns-via-internet-to-be-allowed-from-upper-house-election>; *Net Electioneering Ban Likely to be Lifted*, *supra* note 162.

<sup>165</sup> See *Campaigns via Internet to be Allowed from Upper House Election*, *supra* note 164; *Web Updates OK'd for Diet Candidates*, *supra* note 164.

<sup>166</sup> See *Web Updates OK'd for Diet Candidates*, *supra* note 164.

<sup>167</sup> See *id.* Lawmakers justified these decision based on the idea that such updates would be regarded as an act by a political party and not as individual candidate. *Id.*

<sup>168</sup> See Narioka, *supra* note 10.

<sup>169</sup> See *id.*

guaranteed rights. If Japan's bureaucracy cannot re-interpret the POEL to permit online campaigning, then this law needs to be revised to include a wide-range of Internet electioneering.

*A. General Role of the Internet in Elections*

¶44 The impact that CGM and other Internet tools have upon politics and elections naturally depends upon the country, its culture, and the context of use. In general, however, online campaigning tools present many potential benefits to the electoral process.

¶45 With access to real-time information, voters can individually benefit by using the Internet and CGM to save substantial time in accessing valuable data related to candidates and political parties, receiving political-related news, making political donations, and providing personal input to current and future representatives on matters of interest during the election period.<sup>170</sup> Easy access to valuable information may increase voter interest and political activism. In fact, supporters of online campaigning see the Internet as an opportunity to revitalize democracy. The Internet has the potential to expand political rights by allowing individual voters to provide more input into the type of policies and laws made by their government.<sup>171</sup> Because of the real-time and interactive nature of the Internet tools, voters can move from merely electing lawmakers to directly participating in political decision-making via online input and feedback.<sup>172</sup>

¶46 CGM and other Internet tools can also collectively bring voters together with current and future decision makers to discuss political issues.<sup>173</sup> In the political realm, online conversations about politics and elections may occur through interactive blogs, e-mail newsletters, regularly updated websites, chat rooms, or other CGM mediums.<sup>174</sup> Although the Internet does not win elections, online social media can be used to effectively and efficiently organize people who will not only vote for a specific candidate or political party, but who may also assist candidates on the campaign trail.<sup>175</sup>

¶47 In addition, the Internet and social media have the capacity to accelerate the news cycle. Political candidates and parties can use such tools to inform the public, disseminate news to key bloggers, attract the attention of the media, and conduct damage control.<sup>176</sup> They can also use these tools to target certain demographics, thus cutting down on potentially high advertising costs.<sup>177</sup> This can be particularly important during short campaigns in which money and fundraising do not play an overwhelming role.<sup>178</sup>

¶48 Leading up to an election, the Internet can also enhance transparency in the political process and bolster accountability. Using CGM and Internet tools such as e-mail, text messages, blogs, video, and websites, it is now possible for anyone to function as a reporter, pundit, or political organizer.<sup>179</sup> The easy accessibility of information on the Internet also makes it harder for candidates to deceive the public about their background, achievements, and daily activities. Additionally, social media and other Internet tools are so powerful, that disgruntled citizens have used the Internet to change governmental policies or even bring down governments in times of political or economic crisis.<sup>180</sup>

<sup>170</sup> See David M. Thompson, *Is the Internet a Viable Threat to Representative Democracy?*, 1 DUKE L. & TECH. REV. 23 (2008).

<sup>171</sup> See *id.* at 5.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 22.

<sup>174</sup> See *id.*

<sup>175</sup> See Mark Jones, *British Parties Imitate Obama in E-Election*, REUTERS, Mar. 25, 2010, available at <http://www.reuters.com/article/idUSTRE62O4V120100326>.

<sup>176</sup> See *id.*

<sup>177</sup> See generally *id.* (pointing out the uses of the Internet during the May 2010 elections in the United Kingdom, and noting the importance of digital tools in an election where there is a short campaign period and less money available).

<sup>178</sup> See *id.*

<sup>179</sup> Robert Faris & Bruce Etling, *Madison and the Smart Mob: The Promise and Limitations of the Internet for Democracy*, 32 FLETCHER F. AFF. 65, 67 (2008).

<sup>180</sup> See generally *id.* at 65-68 (citing examples of protests fueled by online and mobile phone communications in connection with the tainted Ukrainian elections in 2004, spike in fuel prices in Burma in 2007, movement to remove the Estrada government

¶49 Moreover, CGM and other inexpensive Internet tools have changed campaign strategies and broken down barriers that traditionally prevented some citizens from running for public office.<sup>181</sup> Using CGM and other inexpensive resources available on the Internet, it is now possible for unknown or under-funded candidates to mount credible political campaigns through Internet exposure and easy-to-use fundraising tools.<sup>182</sup> Also, cost is no longer an issue for wide-scale publishing and distribution of information over the Internet or mobile phones.<sup>183</sup>

¶50 In contrast, the Internet can pose certain dangers to voters and fair elections. Because the Internet is largely anonymous, a single user can easily circulate false and damaging information about a candidate. The reliability of information and credibility of services can be difficult to determine, particularly if typically credible sources start disseminating such information. Also, hackers can access otherwise private information related to elections, and fraudsters can seek to trick voters into providing donations or personal information under the guise of an election. Detractors or political opponents may also attempt to impersonate candidates online to gain attention or cause harm during an election.

¶51 Because of the vast amount of information on the Internet, voters may also suffer from information overload. A politically undesirable property of the Internet is the need to filter information for purposes of relevance using “infomediaries” such as search engines or feed aggregators.<sup>184</sup> Not only can information filtering make it difficult to locate pertinent and useful information, but it can also limit voter exposure to valuable information located beyond the initial search results page presented by a search engine.<sup>185</sup> This can polarize ideas among loyal members of groups formed on the Internet, thereby causing users to lose the opportunity to be exposed to different societal values and viewpoints.<sup>186</sup> Polarization may also cause voters to shun politics and elections. For voters without access to the Internet due to wealth, geographical, or other constraints, an over-reliance on the Internet can create a substantial gap in information access.<sup>187</sup> Moreover, although the Internet has provided easier access to information, it may not have the capability of transforming voter apathy into voter action.<sup>188</sup> Voters and personal contacts are often the keys to electoral success, as opposed to mere access to information. After accessing information, a voter still needs to digest the information and then act upon it.<sup>189</sup>

¶52 Given the openness of the Internet, it is difficult to gauge the exact influence that the Internet has on political activities throughout the world. Many observers are optimistic about the positive effects of the Internet on the electoral process, while others are skeptical about whether there have been any significant changes with respect to voter activity. In the context of Japan where online activities have been prohibited during the official campaign period, however, many benefits await the arrival of online campaigning. Japanese society is technologically savvy. As Japanese society has embraced CGM and other Internet tools, these tools can function as agents for increased communication, information, transparency, and accountability during the election process. Also, regardless of the uncertainties and dangers associated with online activities, the Japanese government should seek to minimize any unnecessary encroachment upon political freedoms. Freedom of expression and other political freedoms must be valued and protected. Fear of anonymous acts and

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in the Philippines in 2001, and shutting down of television stations in Venezuela and Pakistan in 2007).

<sup>181</sup> See Thompson, *supra* note 170, at 35.

<sup>182</sup> See generally Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1045-46 (2001) (noting that the Internet presents relatively inexpensive methods of reaching the electorate).

<sup>183</sup> See Faris & Etling, *supra* note 179, at 67.

<sup>184</sup> See Ohta, *supra* note 10, at 109.

<sup>185</sup> See *id.* at 109-10.

<sup>186</sup> See *id.* at 109-10.

<sup>187</sup> See Thompson, *supra* note 170, at 28.

<sup>188</sup> See *id.* at 27.

<sup>189</sup> See *id.*

the availability of excess information are insufficient grounds to justify the limitation of free expression.

*B. The Specific Role that the Internet Should Play in Japanese Elections*

¶53 By embracing online campaigning with few or no restrictions, all actors in the Japanese election process stand to benefit. Japanese politics and personal values have changed significantly over the past decade. Current politics represent the old Japan and low party support has significantly magnified the importance of active campaigning in the weeks leading up to national and municipal elections.<sup>190</sup> Candidates for public office and political parties need an opportunity to distribute their ideas and proposed policies in a quick, efficient, and inexpensive manner. Similarly, voters need the chance to acquire information and participate in the political process. CGM and other Internet tools provide such opportunities.

¶54 At minimum, Japan should take advantage of the apparent consensus reached among political parties and decision makers in mid-2010 and move towards passing legislation that allows candidates and political parties involved in national and local elections to update their websites and blogs during the official campaign period. As substantive change in Japan can be long and arduous, progressive change might have to occur one step at a time.<sup>191</sup> In the past, the issue of online campaigning has arisen during a national election period only to subsequently fade from public view and lawmaker interest immediately following the election. Moreover, potential legislative gridlock in the Diet caused by the DPJ's setback in the July 2010 Upper House election may hinder the adoption of legislation partially relaxing the absolute ban on online campaigning during the official blackout period.<sup>192</sup> Notwithstanding these potential hurdles, most political parties agree that the POEL should be revised to allow candidates to update their websites and blogs during the official blackout period.<sup>193</sup> Japanese voters have indicated their support of online campaigning as well.<sup>194</sup> In an opinion poll taken in June 2010, over 80 percent of respondents indicated support for the concept of allowing political parties and candidates to update their web pages and blogs during the blackout period.<sup>195</sup> As such, Japan needs to enact legislation allowing candidates in national and local elections to update their web pages and blogs during the campaigning period.

¶55 Even if the Diet successfully passes such a measure, however, it should not stop there. All political actors should have unrestricted access to CGM and other Internet tools during the period immediately preceding an election. The recent open-minded attitude among Japanese lawmakers towards partially relaxing restrictions on websites and blogs has not transferred to other areas, and Japan is still not entirely open to the idea of using the entire arsenal of Internet tools during the official campaign period. Although some politicians want access to all online political advocacy tools,<sup>196</sup> the political parties still do not agree on permitting e-mail newsletters, text messages, Twitter,

<sup>190</sup> See Harlan, *supra* note 122.

<sup>191</sup> See Caryl, *supra* note 12.

<sup>192</sup> See generally *A Bad Night for the DPJ*, THE ECONOMIST, July 12, 2010, available at [http://www.economist.com/blogs/banyan/2010/07/japans\\_upper-house\\_election\\_results](http://www.economist.com/blogs/banyan/2010/07/japans_upper-house_election_results) (noting generally that the DPJ lost its majority in the Upper House and lacks an absolute two-thirds majority in the Lower House that would enable it to pass legislation without support from other parties or lawmakers). In the 2010 Upper House election, the LDP and other upstart political parties made substantial gains at the expense of the DPJ. *Id.*

<sup>193</sup> See *Web Updates OK'd for Diet Candidates*, *supra* note 164; *Campaign via Internet to be Allowed from Upper House Election*, *supra* note 164; *Net Electioneering Ban Likely to be Lifted*, *supra* note 162.

<sup>194</sup> See *Intanetto Senkyo Katsudou o Kaikin [Lifting Ban on Internet Election Activities]*, *supra* note 58. On April 2, 2010, seven Internet companies including Yahoo and Rakuten presented a petition signed by 71,507 Japanese voters calling for the ban on online campaign activities to be lifted. *Id.*

<sup>195</sup> See *Netto Chousa: Senkyochuu HP/Blogu Koushin Kaikin Gou (Hyouka), 80% Kaikin [Internet Poll: 80% Support Repealing Ban on Updating Homepage and Blogging During Elections]*, MAINICHI SHIMBUN, June 24, 2010, available at <http://mainichi.jp/select/wadai/news/20100624ddm008070045000c.html>. However, 57 percent of respondents felt that Internet tools such as Twitter and e-mail should still be restricted because of their susceptibility to fraud. *Id.*

<sup>196</sup> See Harlan, *supra* note 122.

or other CGM-related activities during the official campaign period.<sup>197</sup> Opponents continue to voice concerns about third-party impersonators or “spoofers” improperly utilizing e-mail, Twitter, and other communications mediums during the official election period.<sup>198</sup> The government is also quite concerned that Internet tools could lead to libel and abuse.<sup>199</sup> Potential smear attacks from anonymous Internet users,<sup>200</sup> as well as the possible misuse of online political advocacy tools by opponents and other third parties, stand as lingering concerns.<sup>201</sup>

¶56 Conversely, the advantages associated with e-mail, Twitter, CGM, and other Internet tools outweigh these potential concerns. Unrestricted online electioneering during the official campaign period would enable candidates and political parties to realize the various advantages of online campaigning described herein.<sup>202</sup> Moreover, it should be emphasized that the use of CGM and other Internet tools are not banned outside of the short two to three week campaigning period. Outside of the blackout period, actors in the political system have largely been able to deal with attempts at impersonation, fraud, spoofing, defamation, and other evils. Although more attention is naturally focused on the election during the official campaign period, there is no reason to believe that Japan cannot handle or deal with these evils any differently during the official campaign season than it does outside of the blackout period.

¶57 More significantly, the POEL needs to be relaxed to enable more political participation by Japanese voters. Recent discussions about amending the POEL to allow limited forms of Internet electioneering during the official campaign period have failed to address the question of voters’ rights. As currently interpreted, the POEL restricts Japanese voters from freely engaging in online campaigns on behalf of specific candidates.<sup>203</sup> Not only does this restriction hinder vital democratic debate and infringe on constitutionally guaranteed rights, but it also restricts the development of constructive policy debate within Japanese society. Accordingly, Japan needs to devote more attention to voters’ rights and recognize the value of free speech and voters’ online activities.

### C. *The Direct Clash Between Elections and Freedom of Expression*

¶58 The fundamental provisions of the Constitution of Japan support online campaigning and activities by candidates, political parties, and voters. The current interpretation of the POEL absolutely restricting online campaigning activities during the official blackout period directly clashes with the freedom of expression guaranteed by the Constitution of Japan.

¶59 Freedom of expression is a critical element of democracy.<sup>204</sup> The prohibition of online campaigning activities inhibits free speech by impairing candidates’ ability to reach out to the electorate. It also unnecessarily restricts voters’ rights and their freedom of expression. These restrictions starkly contrast with practice in the United States and many other democratic countries where online campaigning is allowed and the freedom of political speech is afforded the utmost deference.<sup>205</sup>

<sup>197</sup> See *Net Electioneering Ban Likely to be Lifted*, *supra* note 162; *Campaign via Internet to be Allowed from Upper House Election*, *supra* note 164; *Web Updates OK’d for Diet Candidates*, *supra* note 164.

<sup>198</sup> See Editorial, *End of Ban on Internet Campaigning Just First Step on Long Road to Election Law Reform*, *supra* note 44. “Spoofing” or “e-mail spoofing” can be described as the forgery of an e-mail header so that the message seems to have been sent from someone other than the actual sender.

<sup>199</sup> *Net Electioneering Ban Likely to be Lifted*, *supra* note 162; *Campaign via Internet to be Allowed from Upper House Election*, *supra* note 164. The government has continually expressed such concerns since 1996. See Tkach-Kawasaki, *supra* note 36, at 214.

<sup>200</sup> See Murphy, *supra* note 113.

<sup>201</sup> See *Japanese Politicians Still Wary About Full Internet Use*, *supra* note 128.

<sup>202</sup> See *Japan Politicians Ready to ‘Mumble,’ supra* note 26.

<sup>203</sup> See *Going Grassroots in Japan*, *supra* note 13.

<sup>204</sup> See Faris & Etling, *supra* note 179, at 73.

<sup>205</sup> See Ohta, *supra* note 10, at 100.

¶60 Like most modern constitutions,<sup>206</sup> the Constitution of Japan guarantees the freedom of expression. Before 1868, Japan was a feudalistic society governed by military leaders.<sup>207</sup> During the Meiji Period (1868-1910) after U.S. Admiral Matthew Perry opened Japan to the world with his black ships, Japan aggressively sought to modernize and copy the West.<sup>208</sup> The adoption of the Meiji Constitution was part of this process. The Japanese government wrote the Meiji Constitution and presented it to the Japanese people as a gift from the Emperor.<sup>209</sup> Although the Meiji Constitution appeared to detail individual legal rights owed to the citizenry, including free speech, it actually limited the rights of the Japanese people rather than those of the government.<sup>210</sup> The government could usurp any right granted by the Meiji Constitution through legislative action or Imperial decree.<sup>211</sup>

¶61 In the aftermath of World War II, the Showa Emperor promulgated a new constitution on November 3, 1946 (the “Constitution”). The Constitution was essentially drafted over the course of six days by a small group of U.S. attorneys working under the supervision of the Supreme Command of Allied Powers, overseen by U.S. General Douglas McArthur.<sup>212</sup> The draft constitution was given to Japanese lawmakers who commented on it, made some minor changes, and essentially adopted it in full.<sup>213</sup>

¶62 The new Constitution established the foundation for Japan’s fledgling democratic state. It limited governmental powers and provided the Japanese citizenry with new rights. It also guaranteed political freedom for the Japanese citizenry so that they could participate in the political process, freely engage in election campaigns, make petitions, and express political views through individual speech, the press, assembly, demonstration, and other institutions.<sup>214</sup> More specifically, the Constitution newly guaranteed freedom of speech from governmental abridgment.<sup>215</sup> At first glance, the freedom of expression clause in the Japanese Constitution structurally mirrors the one in the First Amendment to the United States Constitution.<sup>216</sup> Pursuant to Article 21, freedom of speech, press, and all other forms of expression are guaranteed.<sup>217</sup> However, Article 21 provides comparatively more protection than the United States Constitution by explicitly specifying “no censorship shall be maintained.”<sup>218</sup> The Supreme Court of Japan has consistently upheld freedom of expression.<sup>219</sup> In fact, “time and again, the Supreme Court has drawn the connection between democratic self-governance and freedom of expression; indeed, it is almost a reflexive gesture.”<sup>220</sup>

¶63 The constraints imposed by the POEL on election-related activities and political speeches contravene the express terms of Article 21. Pursuant to Article 21, political candidates and voters in Japan should have the right to express their opinions and views regarding politics and policies at all

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<sup>206</sup> See generally Krotoszynski, *supra* note 65, at 906 (noting that most modern constitutions, the United Nations Universal Declaration of Human Rights, and the European Convention on Human Rights and Fundamental Freedoms guarantee free speech).

<sup>207</sup> KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 15 (2d ed. 2003).

<sup>208</sup> See *id.*

<sup>209</sup> See CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 28-29 (2003).

<sup>210</sup> See *id.* at 29.

<sup>211</sup> See Krotoszynski, *supra* note 65, at 909.

<sup>212</sup> See GOODMAN, *supra* note 209, at 30.

<sup>213</sup> See *id.* at 30.

<sup>214</sup> Masahiro Usaki, *Restrictions on Political Campaigns in Japan*, 53 *LAW & CONTEMP. PROBS.* 133, 133 (1990).

<sup>215</sup> Krotoszynski, *supra* note 65, at 908.

<sup>216</sup> See Susan Minamizono, *Japanese Prefectural Scapegoats in the Constitutional Landscape: Protecting Children From Violent Video Games in the Name of “Public Welfare,”* 9 *SAN DIEGO INT’L. L.J.* 135, 140 (2007).

<sup>217</sup> KENPO [Constitution] art. 21 (Japan).

<sup>218</sup> *Id.*

<sup>219</sup> Daniel Dolan, *Cultural Noise: Amplified Sound, Freedom of Expression and Privacy Rights in Japan*, 2 *INT’L. J. COMM.* 662, 662 (2008).

<sup>220</sup> Krotoszynski, *supra* note 65, at 986.

times and in any form. The Internet and CGM are particularly well-adapted for easy and inexpensive exchange of political opinions and views. In essence, these digital forums serve as modern-day “street corners” where anyone can freely voice their opinions and call fellow citizens to action. However, unlike conventional forums, the range of speech found on the Internet far exceeds that found in traditional offline sources and broadcast media.”<sup>221</sup> As such, online speech is consistent with the Constitution and largely positive for furthering democratic concepts.<sup>222</sup>

¶64 International organizations have criticized Japan’s unwillingness to fully recognize the constitutionally guaranteed political rights of its people in the context of elections. The United Nations Human Rights Committee (“UNHRC”) has voiced concern about Japan’s unreasonable restrictions on free expression and the right to take part in public affairs.<sup>223</sup> In its concluding observations, the UNHRC recommended that Japan eliminate or relax campaigning restrictions on the distribution of written materials (including online distribution), door-to-door canvassing, and other political activities that are protected under Articles 19 and 25 of the International Covenant on Civil and Political Rights (“ICCPR”).<sup>224</sup>

¶65 Unfortunately, Japan has excessively impaired online political speech and activity despite the guarantees set forth in Article 21 and internationally recognized fundamental principles. Japan has failed to fully appreciate the value of constitutionally guaranteed free speech, as evidenced by the strict electioneering controls imposed upon candidates, political parties, and general voters.<sup>225</sup> Essentially, Japan has placed the fear of imbalance and unfair campaigning above freedom of expression by interpreting the POEL in a manner such that candidates and third parties cannot exchange vital information online during the official campaign period. Drafted sixty years ago, the POEL still reflects the influence of authoritarian social governance known to Japan before World War II, when the state paternalistically believed that official enforcement of the preventive measures against political corruption was a requisite for the realization of fair elections because Japanese citizens had only a superficial understanding of their public roles.<sup>226</sup> Modern Japanese society is extremely sophisticated, and it has progressed well beyond this point in its distant past. Now is the time for Japan to deregulate its election structure with respect to online campaigning.

<sup>221</sup> Faris & Etling, *supra* note 179, at 73.

<sup>222</sup> *See id.*

<sup>223</sup> U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee* 26, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008) available at <http://www.universalhumanrightsindex.org/documents/825/1450/document/en/text.html>.

<sup>224</sup> *Id.*; *see* International Covenant on Civil and Political Rights, (ICCPR) G.A. Res. 2200A (XXI), art. 19, 25, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm>. Article 19 of the International Covenant on Civil and Political Rights states that:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Article 25 further states that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

<sup>225</sup> *See* Ohta, *supra* note 10, at 112.

<sup>226</sup> *Id.* at 112. Although the Diet of Japan attempted to deregulate campaigns on several occasions, these attempts were not successful and strict regulations still remain today in large part. *Id.*

¶66 Although the freedom of expression is a fundamental right, it is not absolute. The manifestation of free expression potentially conflicts with societal interests and the rights of other individuals.<sup>227</sup> Even the ICCPR recognizes that the freedom of expression is subject to certain restrictions. Fundamentally, a country may limit free speech to protect the rights and reputations of others, national security, public order, or public morals.<sup>228</sup> However, limitations should only be imposed as absolutely necessary.<sup>229</sup>

¶67 Governmental and quasi-governmental bodies seeking to limit free expression typically do so to safeguard privacy, protect the public welfare, or guard against potential abuses of the duties and responsibilities associated with freedom of expression.<sup>230</sup> In Japan, the Constitution qualifies individual freedoms through the concept of “public welfare.” Article 12 of the Constitution specifies that citizens “shall refrain from any abuse of these freedoms and shall always be responsible for utilizing them for the public welfare.”<sup>231</sup> Moreover, Article 13 mandates that the right to life, liberty, and the pursuit of happiness shall “be the supreme consideration in legislation and in other governmental affairs to the extent that they do not interfere with the public welfare.”<sup>232</sup> Justice Toshio Irie, a former Supreme Court Justice, observed that “the liberties in the Constitution are not absolutely unlimited; in situations in which there exists sufficient reason recognized as absolutely necessary for public welfare or for other constitutional requirements, a limitation thereof . . . would not be considered unconstitutional.”<sup>233</sup>

¶68 Japan tends to liberally apply Articles 12 and 13 to individual rights. With respect to elections and campaigning, Japan weighs the freedom of expression against the public welfare in determining whether to restrict political expression.<sup>234</sup> The Supreme Court of Japan has explained that the citizenry “may not abuse [the freedom of expression, and] have a responsibility at all times to exercise it for the public welfare; in this respect [the freedom of expression does] not differ from other fundamental rights.”<sup>235</sup> The government has justified stringent campaigning restrictions based on its concern about protecting the “public welfare” during the election process.<sup>236</sup> It has a mandate to prevent corruption and ensure fairness.<sup>237</sup> In essence, the government has subscribed to the ideology that free expression is required for self-governance, and not for individual autonomy.<sup>238</sup>

¶69 In reviewing conflicts between election laws and freedom of expression, the Supreme Court of Japan has “fundamentally applied the rationality test” as opposed to a strict scrutiny standard.<sup>239</sup> In emphasizing the fairness of elections, the Japanese courts have validated the strict electioneering laws and relevant interpretations.<sup>240</sup> Moreover, the Supreme Court of Japan has never invalidated a local

<sup>227</sup> See Usaki, *supra* note 214.

<sup>228</sup> International Covenant on Civil and Political Rights, *supra* note 224, art. 19.

<sup>229</sup> *Id.*

<sup>230</sup> See generally Dolan, *supra* note 219 (citing limitations imposed on freedom of expression by the U.S. Supreme Court, United Nations Universal Declaration of Human Rights, European Convention, and Supreme Court of Japan).

<sup>231</sup> KENPO [Constitution] art. 12 (Japan).

<sup>232</sup> *Id.* at art. 13.

<sup>233</sup> See Isaac Young, *Shut Up and Sing: The Rights of Japanese Teachers in an Era of Conservative Educational Reform*, 42 CORNELL INT'L L.J. 157 (Winter 2009); Minamizono, *supra* note 216, at 145 (“In his dissent, Justice Tanaka emphasized the importance of the Article 21 freedoms in creating the foundation for democracy and bringing it to fruition. Justice Tanaka opined that Article 21 freedoms should be considered ‘absolute freedoms’ and should not be infringed upon by laws that are based on a pre-textual notion of deference to the ‘public welfare.’”).

<sup>234</sup> Minamizono, *supra* note 216, at 141-42; Krotoszynski, *supra* note 65, at 932.

<sup>235</sup> See Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L. L. 3, 30 (1996) (quoting JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 88 (Ikeda Masaaki trans., 1964) (translating the Tokyo Ordinance Decision, Saikō Saibansho [Sup. Ct.] July 20, 1960, 14 SAIKŌ SAIBANSHO KEIJI HANREISHŌ [KEISHŌ] 1243)).

<sup>236</sup> See Ohta, *supra* note 10, at 102-03.

<sup>237</sup> *Id.*

<sup>238</sup> Cf. RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 179 (2006).

<sup>239</sup> See Ohta, *supra* note 10, at 100.

<sup>240</sup> Ohta, *supra* note 10, at 100; Krotoszynski, *supra* note 65, at 941.

law or ordinance that attempts to regulate speech.<sup>241</sup> Even where legislative restrictions and bureaucratic interpretations affecting the right to free expression have not been absolutely necessary, or where their effect on free expression has not been minimized, the “public welfare” concept has seemed to trump this important individual freedom, particularly during the official campaign period.<sup>242</sup>

¶70 The application of the rationality test to political speech contrasts with the development of freedom of expression in the United States.<sup>243</sup> It has also faced criticism from a growing number of Japanese constitutional scholars, who advocate the application of a strict scrutiny test (such as that required to justify content-based restrictions) on the basis that all “political expression related to elections [comprises] a core of the democratic process.”<sup>244</sup> Unfortunately, the concept and scope of “public welfare” is vague and ambiguous. Such ambiguity allows lawmakers and courts to unnecessarily carve into fundamental rights, including restricting political expression on the Internet during key periods.

¶71 Japan’s current restrictions on free expression on the Internet during the official campaign period are overly strict and exceed the minimal level necessary to preserve the public welfare. The constitutional guarantee of free speech should not only limit “the government’s ability to censor or otherwise restrict expressive activity,” but it should also “significantly expand the protection[s] afforded to” political expression and political activity by candidates, voters, and political parties during an election period.<sup>245</sup> Political expression during an election period stands as the foundation of the democratic process, so restrictions on such expression cannot be justified unless they pass the strict test required for justifying the content-based restrictions.<sup>246</sup> The suppression of political speech and electioneering activities in a democratic society for the purpose of limiting costs or conducting an orderly election does not justify content or form-based restrictions. This is particularly true with respect to CGM and other Internet tools, which do not involve high costs or unduly undercut order in the electoral process. These tools in the new information age essentially harmonize the conflicting ideals of freedom and fairness in Japan.<sup>247</sup> Moreover, as seen in other countries that utilize online and digital tools during election campaigns, the prospects of corruption and harm to the public welfare are limited. Freedom of speech must be given the utmost deference, particularly during a short election period, so that the Japanese electorate can receive all relevant information, participate in the political process, and make an informed choice about its representative in the governmental process.

#### D. *Eliminating the Quest for Loopholes*

¶72 Permitting online campaigning in Japan will also eliminate the need for political actors to search for loopholes in the election laws, and will further strengthen the rule of law. “The value of constitutional and quasi-constitutional promises correlates ... with the strength of the rule of law.”<sup>248</sup> Not only does governmental action and inaction mold the rule of law, but it also heavily depends upon the citizenry’s willingness to voluntarily comply with the law on the basis that such laws are inherently just and reasonable.<sup>249</sup>

<sup>241</sup> Krotoszynski, *supra* note 65, at 933.

<sup>242</sup> See Dolan, *supra* note 219, at 665; see also generally Ohta, *supra* note 10, at 114 (emphasizing that online campaigning faces a challenge from the historical concept of fairness in Japanese elections).

<sup>243</sup> See Alford, *supra* note 238, at 10.

<sup>244</sup> See Ohta, *supra* note 10, at 102 (translating SHIGENORI MATSUI, NIHON-KOKU KENPO SHOHAN (THE CONSTITUTION OF JAPAN) 458 (1st ed. 1999)); see also *id.* at 102 n.10 (construing Hidenori Tomatsu, *Senkyo to Shihō Shinsa (Elections and Judicial Review)*, 42 KOHO KENKYU (PUBLIC LAW REVIEW) 108 (1980)).

<sup>245</sup> Krotoszynski, *supra* note 65, at 907.

<sup>246</sup> Ohta, *supra* note 10, at 102 (translating MATSUI, *supra* note 244, at 458).

<sup>247</sup> *Id.* at 103.

<sup>248</sup> See Krotoszynski, *supra* note 65, at 906.

<sup>249</sup> See generally Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 10-36 (1997) (discussing the meaning and values underlying the “rule-of-law ideal”). The rule-of-law ideal contrasts with the concept of

¶73 Due to the overly strict ban on online campaigning during the official blackout period, meticulous observance of Japanese election laws has started to weaken. First, Japanese candidates have started to look for loopholes in the current law. Some politicians have placed QR codes on their leaflets to direct voters to their web pages (albeit stagnant web pages) via mobile phone during the blackout period.<sup>250</sup> Others have attempted to skirt the current interpretation of the 60-year-old law by using online campaigning methods involving audio. Because the POEL has been pegged to primarily regulate “documents and drawings,” some candidates have posted audio podcasts on the Internet for voters.<sup>251</sup> One DPJ candidate in the 2010 Upper House election used Twitter to link his followers to voice recordings of daily campaign activities, contending that using one’s voice is not against the law, even as it relates to CGM tools and the Internet.<sup>252</sup> Audio is different from text- and image-based communications. In general, however, political candidates have not found audio podcasts alone to be an effective method of campaigning.<sup>253</sup>

¶74 Second, political parties have attempted to use semantics to justify their web campaigning activities during the blackout period. In 2005, the DPJ posted the content of a campaign speech given by its president, Katsuya Okada, on its website, only to delete the speech after it was pointed out that this act violated the POEL.<sup>254</sup> Four years later, several political parties proceeded to challenge the POEL’s interpretation by updating their websites with video footage or written articles related to their candidates’ public speeches during the official campaign period.<sup>255</sup> When questioned, these parties argued that the posted material “merely depicted politicians’ ordinary political activities, and did not specifically relate to the election campaign.”<sup>256</sup> Because “political” activities are not as rigorously regulated as “election” activities, the parties contended that the online activities were appropriate.<sup>257</sup> During the 2010 Upper House election, the major political parties posted video clips of campaign speeches on their respective websites.<sup>258</sup> Although this practice had been deemed strictly illegal in past elections, the Internal Affairs and Communication Ministry largely ignored these online activities.<sup>259</sup> The Ministry even publicly questioned the POEL’s clarity, stating that “updating [Web sites] to ask people to vote for a candidate would violate the law, but if the updates are within the range of normal political activity, they aren’t seen as violations.”<sup>260</sup> The POEL’s acknowledged lack of clarity, combined with attempts to circumvent its interpretation, only serve to cause confusion and unfairness among all actors in the political process.

¶75 Third, Japanese voters are increasingly ignoring the strict interpretation of the POEL. To skirt online campaigning prohibitions, some voters during the 2010 Upper House actively tweeted about issues, such as the presence of U.S. military bases in Japan, as opposed to directly stumping for particular candidates.<sup>261</sup> Other voters have been more direct in challenging the POEL. “During recent municipal elections in Tokyo and Osaka, some Web enthusiasts used video-sharing [web]sites

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“rule by law,” pursuant to which the government arbitrarily abridges constitutional civil liberties. See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT’L L. REV. 1335, 1353-1355 (1999).

<sup>250</sup> See Masters, *supra* note 72. A QR (“Quick Response”) code is a two-dimensional bar code created by Denso-Wave, a Japanese corporation, that allows mobile phone cameras to decode its contents at high speed.

<sup>251</sup> See Williamson, Miller & Fallon, *supra* note 71, at 38.

<sup>252</sup> YOMIURI SHIMBUN, *supra* note 113.

<sup>253</sup> See generally Caryl, *supra* note 12 (reciting the lack of success of Toshiaki Kanda, independent candidate for the Upper House election in 2007, in attempting to use audio podcasts to attract voters).

<sup>254</sup> YOMIURI SHIMBUN, *supra* note 162.

<sup>255</sup> See Editorial, *Let Campaigning Join Digital*, *supra* note 98.

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*

<sup>258</sup> YOMIURI SHIMBUN, *supra* note 113.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Tweeters in Japan Fall Silent in Election Campaign, *supra* note 159.

to post videos of candidate speeches” during the blackout period.<sup>262</sup> In defiance of the ban, other voters updated their third-party CGM and web pages with information and opinions regarding their candidates of choice.<sup>263</sup> Authorities sent warnings to POEL violators, but no arrests were made.<sup>264</sup>

¶76 Many believe that the current restrictions on online campaigning are illogical and that governmental authorities are unlikely to prosecute those engaging in online campaigning.<sup>265</sup> Still, the fact remains that the online campaigning restrictions exist and continue to chill political speech. Essentially, the “result of [the Japanese] system of legal restraints [on online campaigning] and institutionaliz[ed] modes for circumventing them has ... turn[ed] the [POEL] into an obstacle course through and around which candidates move in their search for votes, rather than an accepted and respected framework within which campaigns are conducted.”<sup>266</sup> By allowing online campaigning, Japan has the opportunity to eliminate loopholes and strengthen respect for its electoral laws.

*E. Relaxing Restrictions Will Improve the Election Process and Enhance Citizen Participation*

¶77 Japan has a prime opportunity to enhance its electoral process and bring its election system into the twenty-first century. The Internet presents great potential and many advantages for election campaigning including speed, reach, ease, and collaboration. Japan should embrace these advantages by moving its campaigning system into the digital age. As demonstrated in the United States and other countries, the Internet offers candidates and voters many online political advocacy tools with expansive range such as e-mail, blogs, Twitter, YouTube, search engines, social networking websites, and other social media tools. These present the opportunity to quickly and easily inform the electorate, drive voter behavior, and attract campaign volunteers.<sup>267</sup> They also enable candidates to effectively reach more people, more smartly target their messages to certain demographics, and interact with potential voters.<sup>268</sup> These tools and benefits are presently unavailable during the official campaign period in Japan.

¶78 Internet campaigning is democratic and informative. Most other democratic countries embraced Internet electioneering in the 1990s without imposing substantial, if any, regulations.<sup>269</sup> In the United States, online campaigning regulations are rare, and any such regulations are largely disfavored.<sup>270</sup> Other industrialized democracies, including the UK and Germany, have also tended to refrain from regulating Internet electioneering.<sup>271</sup> Even France, which is known for relatively strict election regulations, allows online campaigning, except for a prohibition against candidates updating their websites on the day immediately preceding election day.<sup>272</sup> Across the world, the Internet and CGM have increasingly assumed a vital role in many political campaigns.<sup>273</sup> Realizing the benefits of Internet electioneering, other countries that previously restricted online campaigning have recently loosened or eliminated restrictions.<sup>274</sup> Brazil is a prime example.<sup>275</sup> Until 2009, Brazilian politicians

<sup>262</sup> Caryl, *supra* note 12; *see also* Williamson, Miller & Fallon, *supra* note 71, at 38 & 55 n.117.

<sup>263</sup> *Cf.* Caryl, *supra* note 12 (describing the updating of candidates' Wikipedia pages).

<sup>264</sup> *See* Williamson, Miller & Fallon, *supra* note 71, at 55 n.117; Caryl, *supra* note 12.

<sup>265</sup> *See* Yuri Kageyama, *Internet Campaigning Arrives Cautiously in Restrictive Japan Ahead of National Elections*, THE GAEA TIMES (Aug. 27, 2009), <http://blog.taragana.com/n/internet-campaigning-arrives-cautiously-in-restrictive-japan-ahead-of-national-elections-150987/>.

<sup>266</sup> GERALD L. CURTIS, *THE JAPANESE WAY OF POLITICS* 174 (1988), *quoted in* Krotoszynski, *supra* note 65, at 941.

<sup>267</sup> *See* Jennifer Valentino-DeVries, *How Scott Brown Used Google to Get Results in Mass. Election*, WALL ST. J. (Jan. 19, 2010), <http://blogs.wsj.com/digits/2010/01/19/how-scott-brown-used-google-to-get-results-in-mass-election/>; Jones, *supra* note 175.

<sup>268</sup> *See id.*

<sup>269</sup> Ohta, *supra* note 43.

<sup>270</sup> Ohta, *supra* note 10, at 106.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *See* Kathryn Westcott, *The Power of Online Campaigning*, BBC NEWS (Jan. 23, 2007), <http://news.bbc.co.uk/2/hi/6287749.stm>.

<sup>274</sup> Korea is a notable exception to this trend as its National Election Commission applied strict regulations to online

could not engage in online campaigning except for certain electioneering activities using special top level domain “.can.br”.<sup>276</sup> In response to significant pressure, Brazil finally embraced greater freedom for online campaigning in 2009.<sup>277</sup> Now, not only are Brazilian candidates campaigning online using blogs, texting, Twitter, and CGM such as Facebook and the Brazilian-based Orkut due to the election law changes, but the Internet is being used as an exclusive vehicle to broadcast certain presidential debates as well.<sup>278</sup> Following the example set by the rest of the democratic world, Japan should repeal its restrictions against online campaigning to foster constructive policy and political debate as well as harness the many other advantages provided by Internet electioneering.

*1. Internet electioneering during the official campaign period educates and fosters communications among candidates and voters during the most critical period*

¶79 Online campaigning can educate voters and foster interactive communications with candidates. Although Japanese politicians can use online political advocacy tools to make their policies known to voters before the official campaign period commences,<sup>279</sup> the most critical time for using such tools is during the official campaign period, when voters are most likely to focus on the election and require information sufficient to make educated choices. It is unfair to voters and candidates if real-time information can only be disseminated online outside of the peak period of interest and not when voters are most likely to check candidate, political party, and third party websites.<sup>280</sup>

¶80 By allowing online campaigning during the official election period, Japanese voters will have the ability to more easily access information about the candidates and political parties at the height of their interest. The period immediately preceding an election is when the voters need accurate information directly from the candidates and political parties.<sup>281</sup> It is also when dialogue among the voters is most likely to heat up, and voters are most likely to become active in the political process. With the Internet, a voter does not need to attend a public speech, happen to receive candidate leaflets, or stand in front of a crowded train station to hear a candidate’s message to gain a better understanding of the political choices and relevant issues. This is particularly important given the extremely short campaign periods for national and local elections. The window of opportunity for Japanese voters to obtain information about political candidates is extremely short. Accordingly, voters need the opportunity to procure meaningful information and engage in active discussion about political candidates and issues at anytime and anyplace around the world.<sup>282</sup>

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campaigning in advance of its 2007 presidential election, banning the publication of primary and secondary materials implying support for or disapproval of a candidate 180 days prior to the election on websites, chat rooms, bulletin boards and even comment boxes provided by online news sites. Park Han Woo & Lee Yeon-ok, *The Korean Presidential Election of 2007: Five Years on from the “Internet Election”*, 7 J. CONTEMP. E. ASIA, no. 1, 2008, at 1, 1-4. Despite such restrictions, however, a video clip of Presidential candidate Myung-bak Lee stating his involvement in a highly publicized corruption scandal was posted on international websites such as YouTube. *Id.* Also, the strict restrictions have come under intense fire, including a 2010 lawsuit filed in the Constitutional Court with respect to the use of Twitter by voters in elections. *S. Korean Lawmaker Challenges Election Limits on Twitter Use*, BUSINESS REPORT (Mar. 25, 2010), <http://www.busrep.co.za/index.php?fArticleId=5405049&fSectionId=552&fSetId=662>. At the same time though, Korean prosecutors vigilantly enforce the election regulations prohibiting certain online activities during the official campaign period. Hyo-sik Lee, *Twitter Under Tighter Scrutiny Before Election*, KOREA TIMES (Apr. 21, 2010), [http://www.koreatimes.co.kr/www/news/nation/2010/04/117\\_64611.html](http://www.koreatimes.co.kr/www/news/nation/2010/04/117_64611.html).

<sup>275</sup> Notably, similar to Japan, Brazil has a relatively short official campaign period (three months), during which television, radio, and print advertising are highly restricted. See Seth Kugel, *Should Internet Campaign Ads Be Against the Law?*, GLOBAL POST (Sept. 17, 2009), <http://mobile.globalpost.com/dispatch/brazil/090916/restrictions-internet-use-campaign-season?page=0,1>.

<sup>276</sup> See *id.*

<sup>277</sup> See Caroline d’Essen, *On the Social Media Campaign Trail in Brazil*, RADIO NETHERLANDS WORLDWIDE (Apr. 30, 2010), <http://www.rnw.nl/english/article/social-media-campaign-trail-brazil>; *Brazilian Presidential Candidate Launches Online Campaign*, PEOPLE’S DAILY ONLINE, Apr. 20, 2010, <http://english.peopledaily.com.cn/90001/90777/90852/6957370.html>; Kugel, *supra* note 275.

<sup>278</sup> *First Brazilian Presidential Candidates’ Debate Will Be On Internet*, MERCOPRESS (July 16, 2010), <http://en.mercopress.com/2010/07/16/first-brazilian-presidential-candidates-debate-will-be-on-internet>; *On the Social Media Campaign Trail in Brazil*, *supra* note 277.

<sup>279</sup> *Japanese Politicians Still Wary About Full Internet Use*, *supra* note 128.

<sup>280</sup> See Otake, *supra* note 28.

<sup>281</sup> See Fujita, *supra* note 90.

<sup>282</sup> See *Internet Campaigns*, *supra* note 127.

- ¶81 Candidates, political parties, and voters should not be deprived of the ease of access, instantaneous speed of distribution channels, and interactivity provided by Web 2.0 tools and the Internet during the two to three week period preceding an election. An unrestricted environment will enable candidates to deliver more information to the voters.<sup>283</sup> This will also enable voters to individually compare ideals, political platforms, strategies, and solutions, as opposed to primarily relying upon interest groups, religious organizations, labor unions, territorial ties, or blood connections for guidance.<sup>284</sup>
- ¶82 If Japan permits active websites with counterviews of Japanese political candidates and issues to function during the official campaign period, Japanese voters stand to benefit from more information and an increasingly sophisticated debate.<sup>285</sup> As currently interpreted and applied, the POEL has deprived voters of meaningful dialogue and information. It has also divested Japanese politicians from meaningful interaction with the voters. As such, the electorate has not had the direct information necessary to select a candidate.<sup>286</sup> Instead of candidates only reaching a limited percentage of the electorate using a restricted-number of leaflets and another small percentage through street-corner speeches or loudspeakers affixed to roaming campaign cars,<sup>287</sup> the Internet and CGM present political candidates with an opportunity to directly reach voters with more information. CGM and other Internet tools can foster interactive communications and force politicians to be even more honest. Voters can voice their opinions and views online, and candidates can solicit comments and feedback from the electorate in general.
- ¶83 In addition, online campaigning will decrease voter reliance on the mass media. To date, voters have basically been forced to resort to the mass media for information. This has unduly empowered the media to influence public opinion and given support to the traditional notion that the position taken by the Japanese mass media equates to the public opinion of the masses.<sup>288</sup> Through unrestricted access to CGM and other Internet tools, Japanese voters will have the capability of reaching beyond the influence of the mass media.
- ¶84 CGM and other Internet tools also have the capability to foster communication. More specifically, they can be used to mobilize supporters, encourage citizens to vote, generate discussion on policies and political topics among voters, and even inquire as to the topics-of-interest and priorities.<sup>289</sup> The smarter use of technology through the Internet has immense potential to mobilize new voters and energize traditional ones.<sup>290</sup> Using the Internet, valuable information can be tailored and directed to specific subsets of voters and various interest groups.<sup>291</sup> Furthermore, because online campaigning has the potential to increase debate and discussion regarding actual issues, it will become easier for opponents and citizens to point out contradictions in statements and positions as a campaign progresses and enters its final stages.
- ¶85 Outside of the official campaign period, Japanese politicians have already started to demonstrate the benefits of interacting with the electorate via the Internet. For example, Kan Suzuki, a DPJ member of the Upper House, often communicates online with voters by interactively discussing current issues and his ideas through his personal blog and weekly webcast called “Suzukan-TV.”<sup>292</sup> Other lawmakers have turned to e-newsletters, tweets, and other instant online communication tools.

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<sup>283</sup> *Id.*

<sup>284</sup> See generally Ohta, *supra* note 10, at 113 (noting that politicians traditionally needed to rely upon these groups to enlist votes and support).

<sup>285</sup> See *Japanese Politicians: Still Wary About Full Internet Use*, *supra* note 128.

<sup>286</sup> See Ohta, *supra* note 10, at 100.

<sup>287</sup> See Hogg, *supra* note 55. Candidates for the Lower House single-seat districts may distribute only 70,000 leaflets and 35,000 postcards. Ito, *supra* note 45.

<sup>288</sup> See *Japanese Politicians: Still Wary About Full Internet Use*, *supra* note 128.

<sup>289</sup> Murphy, *supra* note 113.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See Fujita, *supra* note 90.

These successful experiments in communication should also be allowed leading up to national and local elections, as currently, key information about the candidates and their policy views is not reaching most voters when they are most focused on electing their representatives.<sup>293</sup>

2. *Online campaigning provides an inexpensive and fair alternative to conventional campaigning methods*

¶86 The use of online political advocacy tools can foster fairness among the candidates and political parties as they provide an inexpensive and effective means of distributing ideas, solutions, messages, and promises to the electorate. Through online campaigning, all candidates and political parties will have equal access to the electorate. Incumbents in Japan benefit significantly from excessive electioneering restrictions and short official campaign periods.<sup>294</sup> As such, access to the electorate via online campaigning is vital for non-incumbents and smaller parties. Mito Kakizawa, a lawmaker with the smaller Your Party (*Minna no Tou*), observed that his party cannot deliver its message to the electorate without the Internet, particularly given its lack of regional clout and organizing power.<sup>295</sup>

¶87 In responding to calls for online electioneering, the Japanese government and opponents of change have expressed fear of costly online campaigns. Critics of online campaigning argue that the cost of developing, creating, and maintaining an appealing and interactive website can consume substantial resources for a candidate.<sup>296</sup> However, these concerns are misplaced. Japanese political candidates typically create and maintain websites before the official campaign period restrictions kick in. As such, website development costs already exist under the current system regardless of the current restrictions.

¶88 Critics also worry about potentially excessive online advertising expenses. At present, the cost of running a conventional election campaign in Japan averages JPY 23,800,000 (about USD \$250,000) for a single-seat constituency of the Lower House and JPY 52,000,000 (about USD \$550,000) for a proportional representation constituency of the Upper House.<sup>297</sup> If online advertising is allowed, critics worry that candidate costs could increase exponentially. However, potential online advertising costs should not be a deterrent to positive campaign law reform. To ensure a level playing field, Japan could simply cap online advertising costs and require candidates to report such costs. Regardless of a cap on online advertising spending though, candidates could still avail themselves of the many no-cost or inexpensive political advocacy tools that are available on the Internet.

¶89 If approached strategically, online campaigning can significantly reduce costs.<sup>298</sup> CGM and other Internet tools fundamentally equip candidates to campaign on a level playing field, regardless of their financial status.<sup>299</sup> Traditional campaigning costs arise from the creation, printing, and distribution of conventional printed materials. With online campaigning, actors in the political process can effectively cut printing and distribution costs to zero.<sup>300</sup> The costs associated with Internet tools can pale in comparison to conventional printing and advertising costs.<sup>301</sup> The cost of utilizing Internet tools, native Japanese websites, or global CGM platforms is minor. CGM tools such as Twitter and Facebook facilitate real-time information, communications, and debate with little or no cost to a candidate other than staff time. This differs significantly from the fixed information presented through printed publications.

<sup>293</sup> See Kageyama, *supra* note 265 (quoting Ken Takeuchi, president of Japan Internet News Co.).

<sup>294</sup> See *Japan Politicians Ready to 'Mumble,' supra* note 26.

<sup>295</sup> See *id.*

<sup>296</sup> Ohta, *supra* note 10, at 108.

<sup>297</sup> *Id.*

<sup>298</sup> See Ito, *supra* note 45.

<sup>299</sup> See Ohta, *supra* note 108. As early as 1996, political actors supporting online campaigning argued that use of the Internet is consistent with the original intent of the POEL.

<sup>300</sup> See Yamamoto, *supra* note 121 (citing Yoshihiro Katayama).

<sup>301</sup> See Ohta, *supra* note 10, at 108.

¶90 Moreover, the potential outreach of CGM tools is incredible. The increased availability and declining cost of quality digital recording technology provides candidates and voters with an unprecedented ability to inexpensively record, monitor, and post videos and photos of political and personal activities.<sup>302</sup> Online video sharing CGM such as YouTube enables candidates to quickly broadcast professional or amateur versions of speeches, policy messages, and other videos without the need to pay high advertising or production fees. Candidates can also turn to supporters for content. In a U.S. senatorial campaign held in 2006, one candidate solicited video clips from supporters to highlight his political opponent's gaffes. Not only did several clips embarrass the opponent, but supporters felt that they were essential to the campaign due to their contributions of user-created videos.<sup>303</sup> Additionally, in the 2008 U.S. presidential campaign, Barack Obama's election supporters put together a "Yes We Can" video in the space of two days featuring emotionally moving clips from an Obama campaign speech.<sup>304</sup> Within one month of being posted on YouTube, the video had gone "viral" as it had been viewed over 20 million times.<sup>305</sup> In essence, this CGM tool provided Obama and his campaign speech with unparalleled exposure to the masses.<sup>306</sup>

¶91 If the electioneering regulations are relaxed in Japan such that candidates may freely use CGM and other Internet tools, even more citizens would be able to compete for public office. Also, similar to the two examples detailed above, Japanese voters would have the opportunity to contribute their collective brainpower to spread information, build a collective community of supporters, and creatively participate in the campaign process.

¶92 Online campaigning also presents more voters with unprecedented access to candidates during the election, in turn helping to level the playing field among the candidates competing for public office. With access to the masses, non-traditional candidates and political challengers do not need to rely on traditional media outlets to reach the electorate. The Internet provides additional media and direct routes for meaningful interaction. With unrestricted use of CGM and Internet tools, candidates could potentially solicit written content from supporters for use on websites and blogs. This may help motivate and engage supporters in the electoral process.<sup>307</sup> At little or no cost, a candidate could also realistically use CGM or online bulletin boards to conduct a virtual town hall meeting in which voters pose questions and the candidate provides real-time answers. Using CGM or Internet tools, voters could also have the ability to submit questions about policies and issues to a candidate at anytime, and actually receive a response from the candidate or a staffer within a relatively short period of time.

¶93 The interactive nature of CGM and the Internet has the potential to narrow the gap between politicians and voters, and may also have a positive influence on the input process on policy and its formulation. Over the past decade, Japan has been working to improve the public's access to and the transparency of its government. Measures such as the adoption of a quasi-jury system for serious criminal trials and implementation of new professional law schools to boost the legal population were founded on these concepts.<sup>308</sup> Online campaigning can enhance transparency as it provides the electorate with more insight into the nuts and bolts of politics and facilitates access to political candidates. Also, by loosening restrictions on third party participation in elections, the voters would

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<sup>302</sup> Faris & Etling, *supra* note 179, at 67.

<sup>303</sup> *Online Advocacy Tools: Social Media*, E.POLITICS: DISSECTING THE CRAFT OF ONLINE POLITICAL ADVOCACY (June 2008), <http://www.epolitics.com/2006/07/03/online-advocacy-tools-social-networking-sites/>.

<sup>304</sup> Faris & Etling, *supra* note 179, at 67.

<sup>305</sup> *Id.*

<sup>306</sup> Neil McCormick, *Barack Obama's 'Yes We Can' Video*, TELEGRAPH.CO.UK, Feb. 14, 2008, available at <http://www.telegraph.co.uk/culture/music/3671190/Barack-Obamas-Yes-We-Can-video.html>.

<sup>307</sup> See *Online Advocacy Tools: Social Media*, *supra* note 303.

<sup>308</sup> See JUSTICE SYSTEM REFORM COUNCIL, Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century, ch. I, pt. 1 (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

have the opportunity to better evaluate past political decisions, discover candidate stances, and assess future plans. The public welfare is well-served by transparency and open access to information.

3. *Online campaigning may help attract younger voters*

¶94 Greater use of CGM and other Internet tools has the added potential of attracting younger Japanese voters to the polls.<sup>309</sup> In an age where voter interest has dwindled and younger generations seem increasingly disinterested in the political process, candidates will have more opportunities to attract a younger demographic and engage them in the political process through the Internet.<sup>310</sup> By removing restrictions on online political advocacy efforts by voters, the younger generation may also take a more active role in the election process through their mobile phones, computers, and game consoles.

¶95 Younger Japanese are immersed in the Internet. In fact, approximately 95% of Japanese in their twenties have access to the Internet.<sup>311</sup> An overwhelming majority of young Japanese use their mobile phones and computers to obtain news, procure information, and communicate.<sup>312</sup> Although younger Japanese voters may not be accustomed to political activities on the Internet, many observers believe that online campaigning provides a prime opportunity to connect with younger voters who have stayed away from the polls.<sup>313</sup> On average, about one-third of eligible Japanese voters in their twenties typically go to the polls.<sup>314</sup> Observers contend that conventional campaigning methods and traditional political candidates turn off the younger generation.<sup>315</sup> They believe that online campaigns will entice more of the younger generation to participate in the political process, as Japanese politicians can use CGM and Internet tools to reduce the distance traditionally felt between politicians and constituents.<sup>316</sup> Because the digital generation expects instantaneous and engaging information, candidates may be able to use the Internet to entice and engage more voters through their computers, cell phones, personal digital assistants, game consoles, and other technologies. They can also use these tools to disseminate important information and communicate with voters. This is particularly important in Japan as its society continues to quickly age, and the younger generation will need to assume a greater role in government and politics.

4. *Voter freedom to actively participate in campaigns needs greater recognition*

¶96 Japanese voters deserve more freedom to participate in the political process. Pursuant to the government's current interpretation of the POEL, "third parties" or Japanese voters cannot actively engage in online or virtual activities to support their candidate during the official campaign period.<sup>317</sup> As of 2010, Japan does not appear willing to remove voter restrictions. Although Japanese political parties were willing to relax restrictions on candidate blogs and websites in mid-2010, there was no proposal to modify restrictions on voter conduct.<sup>318</sup> Not only does the current prohibition on the voters' online conduct infringe constitutionally-guaranteed freedom of expression rights, but it also stifles important discussion regarding political opinions, policies, ideals, candidate qualifications, and

<sup>309</sup> *Internet Campaigns*, *supra* note 127; Japan Pre-Election Watch: July 2010 Legislative Elections, *supra* note 30.

<sup>310</sup> See Slodkowski, *supra* note 26.

<sup>311</sup> Hogg, *supra* note 55.

<sup>312</sup> See *Going Grassroots in Japan*, *supra* note 13.

<sup>313</sup> See Yamamoto, *supra* note 121.

<sup>314</sup> See Slodkowski, *supra* note 26. However, it should be noted that 49.45 percent of the eligible voters in their twenties voted in the 2009 Lower House election. Mayu Yoshida, *Young Voters Want Business Pros, not Heirs to Political Dynasties*, JAPAN TIMES, July 10, 2010, available at <http://search.japantimes.co.jp/mail/nn20100710b4.html>.

<sup>315</sup> See Yamamoto, *supra* note 121 (noting that conventional campaign methods aren't reaching younger voters); see also Yoshida, *supra* note 314 (noting that younger voters are hoping for experienced business leaders to take control of the political landscape).

<sup>316</sup> See Yamamoto, *supra* note 121; see also Slodkowski, *supra* note 26.

<sup>317</sup> See *Going Grassroots in Japan*, *supra* note 13.

<sup>318</sup> See *Internet Campaigns*, *supra* note 127.

other related matters. It also reduces the possibility that the public can serve as a “watchdog” on the conduct and assertions of candidates running for public office.

¶97 Japanese law expressly guarantees the right of citizen voters to participate in the political process. In addition to the freedom of expression guarantees provided in Article 21 of the Constitution, Article 15 further specifies that the citizenry has the right to choose its public representatives and guarantees universal and equal suffrage.<sup>319</sup> In 1979, Japan also ratified the ICCPR.<sup>320</sup> Based on international law principles, Japanese citizens also have political freedom to participate in elections. More specifically, the ICCPR states the right “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”<sup>321</sup> According to the United Nations Human Rights Committee’s analysis, the ICCPR “requires the full enjoyment and respect for the rights . . . , including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, . . . to publish political material, to campaign for election and to advertise political ideas.” Notwithstanding, Japan has strictly limited such freedoms and rights.<sup>322</sup>

¶98 Online grassroots campaigns may be supportive or antagonistic. The campaign to elect Barack Obama as president of the United States illustrates the ability of a candidate and his supporters to reach both traditional and non-traditional voters through CGM and other Internet tools.<sup>323</sup> On the other side of the coin, the South Korean general election held in 2002 demonstrated the power of antagonistic campaigning, as approximately 500 groups used the Internet to target certain candidates as “improper” for official positions, and conducted Internet campaigns against the election of these “improper” candidates.<sup>324</sup> In either case, almost all major election campaigns in today’s digital age will involve voters voicing their opinions via CGM and other Internet tools. Voters are creating groups on social networking websites both in support of and against particular candidates. Blogs building up and cutting down candidates abound. Internet users quickly voice their opinions and observations about candidate speeches and comments on interactive message boards provided by media outlets. Democratic nations should not censor or unduly restrict voter activities or grassroots campaigns, regardless of whether the activities or campaigns are supportive or antagonistic.

¶99 During Japan’s short official campaign period, Japanese voters should have the unrestricted right to voice their opinions and advocate their views in an online setting based on fundamental rights and democratic ideals. Voters should also possess the ability to engage in online activities that will solicit candidate support, stimulate electoral interest, and assist in community building.

¶100 Any attempt to partially restrict online speech and essentially “split the baby” would be counterproductive, in that it would lead to confusion among voters and potential enforcement issues. Moreover, if voters hesitate to post political comments or a creative video incorporating campaign speech excerpts in fear of violating the election laws, then not only is the freedom of expression undermined, but many of the benefits of online communication and campaigning are defeated.<sup>325</sup>

<sup>319</sup> KENPO [Constitution], art. 15.

<sup>320</sup> *Treaty Status: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (Nov. 19, 2010, 1:06 AM), <http://www2.ohchr.org/english/law/ccpr.htm> (follow “Status of ratification” hyperlink; then follow “International Covenant on Civil and Political Rights” hyperlink). The ICCPR was adopted by the General Assembly of the United Nations in 1966. *Id.*

<sup>321</sup> ICCPR, *supra* note 224, art. 25.

<sup>322</sup> U.N. Human Rights Committee, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), ¶ 25, U.N. Doc. C/21/Rev.1/Add.7 (July 12, 1996); *see also* Kono, *supra* note 14.

<sup>323</sup> Naturally, Mr. Obama faced much opposition from his foes through social media and other Internet tools. By way of illustration, Mr. Obama was hurt by online videos posted on YouTube involving his allegedly radical, former pastor. However, Mr. Obama did make significant inroads into the positive use of the Internet in political campaigning.

<sup>324</sup> Ohta, *supra* note 10, at 104.

<sup>325</sup> *Internet Campaigns*, *supra* note 127 (stating that “[i]f people hesitate to post political comments in fear of violating the law, the Internet cannot bring out the desired effects on election campaigns”).

“Unless the election system is adjusted to the new realities of our times, there will be no evolution of Japanese politics.”<sup>326</sup> Given the end of one-party domination and Japan’s continuing struggles to find strong leadership, Japan needs its citizens to become engaged and involved in politics more than at any time in its recent past. The expansive reach of the Internet combined with its ease, speed, and inexpensiveness makes it an ideal vehicle to facilitate an evolution in Japanese politics.

*F. Concerns About Online Campaigning Are Overblown*

¶101 Despite increasing pressure to relax Internet electioneering restrictions, Japan has been slow to embrace online campaigning in any form. Until recently, the unwillingness to change stemmed from the traditional “political establishment[s] fear[] [of the Internet’s] formidable potential for change.”<sup>327</sup> Beyond the mere fear of change, however, Japanese lawmakers and bureaucrats have expressed a variety of other concerns with respect to online campaigning. These concerns are largely unfounded.

*1. Campaigning costs will not unduly increase*

¶102 Opponents of change have cited the potential for increased campaigning costs as an issue,<sup>328</sup> but this argument is mistaken. Using CGM and other Internet tools, political candidates will have equal campaigning opportunities and unbalanced campaign coffers will not become an issue. As previously discussed, there are many free or inexpensive CGM and Internet tools available to reach voters during the official campaign. The dissemination of information over the Internet is inexpensive and instantaneous. The creation and updating of web pages is relatively inexpensive, particularly in comparison to the distribution of print-campaign materials. Moreover, website development costs should not be a concern as candidates tend to develop their websites well in advance of the official blackout period when the restrictions do not apply.

¶103 To the extent that concerns exist about out-of-control spending on the Internet, it is important to note that current restrictions relate only to the relatively short official campaign period and not to activities outside of the official campaign period. The brevity of the official campaign period keeps costs down. Also, to temper concerns about fairness and spending inequalities, Japan can apply current election spending limits to online advertising and other Internet-related activities. Costs could be controlled by counting online expenditures towards the official spending limit.<sup>329</sup> Public campaign financing similar to public outlays for television and newspaper advertisements is another possibility. However, the availability of free Internet tools basically negates the necessity of such expenditures.

*2. The “digital divide” is closing*

¶104 Online campaigning advocates maintain that allegations of increased election costs were merely red herrings used by LDP lawmakers who were fearful that online activities would lead to political gains by more tech-savvy opponents.<sup>330</sup> The LDP typically drew its political power from elderly and rural communities – two demographics that were less likely to be active online.<sup>331</sup> There was a digital divide between the less computer literate elderly and younger Internet-savvy voters, who were more likely to support opposition parties than the LDP.<sup>332</sup> This digital divide also existed among those living in metropolitan areas and those living in rural areas.<sup>333</sup>

¶105 The “digital divide” concept in Japan has been overblown. Japanese lawmakers’ concerns about the access of the elderly to the Internet should be set aside in light of recent trends. In 2009, the

<sup>326</sup> *Id.*

<sup>327</sup> Caryl, *supra* note 12.

<sup>328</sup> Williamson, Miller & Fallon, *supra* note 71, at 39.

<sup>329</sup> *Japan’s Embrace of E-Electioneering Will Herald Administrative Reform and Business Chances*, *supra* note 143.

<sup>330</sup> *See* Williamson, Miller & Fallon, *supra* note 71, at 39, 55 n.121.

<sup>331</sup> *See id.*

<sup>332</sup> *See id.*

<sup>333</sup> *See id.*

number of Japanese between the ages of 60 to 64 using the Internet increased from 63.4% to 71.6%; and those between the ages of 65 to 69 increased from 37.6% to 58%.<sup>334</sup> The number of Internet users over the age of 70 continues to increase as well.<sup>335</sup> Even if a “digital divide” does exist, it is insufficient to justify continued online campaigning restrictions. There is no medium in today’s world that will reach all potential voters. However, Internet use in Japan has reached a critical mass, and will continue to expand among all age groups in years to come.<sup>336</sup>

### 3. *Conventional laws can sufficiently address libelous and offensive attacks*

¶106 Japanese policymakers are also very concerned about libelous or scandalous material being anonymously circulated online during an election campaign period if current POEL restrictions are lifted or relaxed. Observers point to the cynical messages that have dominated Japanese-language political bulletin boards outside of the blackout period.<sup>337</sup> Lawmakers hesitate to implement changes out of fear that they may be maliciously and unjustly attacked by opponents or voters empowered by the veil of anonymity. These concerns are overstated and largely mask the reluctance of incumbents to change the current election system, thereby potentially jeopardizing their own political futures.

¶107 Conventional Japanese law can sufficiently address online libel and other inappropriate attacks made during elections and political campaigns. Japanese law stipulates that defamatory comments are subject to both civil liability and criminal punishment.<sup>338</sup> In fact, in an attempt to limit offensive speech, criminal libel thrives in Japan as police arrest hundreds of citizens each year for online criminal libel law violations.<sup>339</sup> Japanese police typically have the resources and availability to combat online criminal libel,<sup>340</sup> particularly during a brief election period. In response to incidents of offensive speech, governmental officials can turn to criminal libel law and defamed victims can pursue civil redress. Accordingly, eliminating the current restrictions on Internet electioneering during the brief official campaign period may not lead to an increase in slanderous remarks or scandalous attacks.

¶108 By relaxing restrictions on online campaigning, all political actors will more likely be able to quickly respond to any false and libelous assertions. If a candidate or political party is unjustly attacked, they will have the opportunity to utilize the Internet and CGM tools to rebut allegations, demonstrate the truth, and even emphasize their policies, ideals, and plans. Oftentimes, any publicity can be good publicity as it raises one’s profile and draws attention to more topical matters. Conversely, if the online postings happen to be valid, then the revelation of such information will serve the public welfare. In fact, “[o]nline anonymity can [even] promote free speech . . . [when there is danger] of government[al] harassment and arrest.”<sup>341</sup>

¶109 Although increased online activity during the official campaign period may require a greater degree of vigilance, and thus more resources dedicated to investigating the credibility or source of online postings, the period of additional monitoring is relatively short. More importantly, it is a small price to pay for freer political speech. Not only should candidates be allowed to use the Internet for non-slanderous political speech, but voters should be able to freely express themselves in the political realm. A voter creating a supporter page on Facebook or a website encouraging other voters to support a specific candidate does not necessarily disparage, slander, or spread falsehoods.<sup>342</sup> These valuable methods of political participation should not be eliminated due to fears of disparaging

<sup>334</sup> Ministry of Internal Affairs and Communications, *supra* note 16.

<sup>335</sup> *See id.*

<sup>336</sup> *See Ohta, supra* note 10, at 107.

<sup>337</sup> *Japanese Politicians Still Wary About Full Internet Use, supra* note 128.

<sup>338</sup> *See* MINPO [MINPO] [CIV. C.] art. 709-10, 723; KEIHO [KEIHO] [PEN. C.], art. 230.

<sup>339</sup> *See Mehra, supra* note 96, at 768-71.

<sup>340</sup> *See id.* at 785-86.

<sup>341</sup> Faris & Etling, *supra* note 179, at 73.

<sup>342</sup> *See Internet Campaigns, supra* note 127.

online comments—particularly when conventional laws contemplate defamatory conduct and provide mechanisms to discourage such behavior. Online political commentary and activity should be supported as it is the essence of a thriving democracy.

*4. Third party impersonator concerns are not limited to the official campaign period and can be adequately addressed*

¶110 Another major concern raised by opponents of online campaigning relates to the potential for third parties to easily use Internet tools to pose as a candidate. The likelihood that third party impersonators will use CGM and Internet tools, however, does not in itself justify the absolute restriction on online campaigning during the official election period. Other less-restrictive means can, and should, be used to combat online fraud.

¶111 If Japan is seriously concerned about fraudulent impersonation with respect to elections or political activities, it should be addressed on a larger scale without prejudice to the rights of candidates and voters to freely speak in a digital setting. During the official election period, Japan might consider mitigating the dangers associated with fraudulent e-mails, tweets, or web postings using mechanisms designed to facilitate easy determination of the accuracy of information. Technology might provide a variety of potential solutions. Direct verification with a candidate or political party may be useful as well. In addition, Japan might also explore an official registry maintained by an election control committee to help determine the origination and validity of election-related information or communications. Political parties and candidates could register a designated website, blog, social networking website, or e-mail address with the election control committee, for example. This could be posted on the election control committee website for simple source verification by the public.

¶112 In any event, fundamental constitutional rights should trump the possibility of improper actions by third party impersonators. Although the likelihood of fraudulent activity is magnified on the Internet because users' identities are generally hidden,<sup>343</sup> the POEL does not preclude such activity in its current form. Without election law reform, Japan has already dealt with instances of user fraud where CGM and Internet tools were used to imitate lawmakers or politicians.<sup>344</sup> Attempted fraud and impersonation are not limited to the brief official campaign period. Third parties can impersonate Twitter accounts, spoof e-mails, or create false websites at any point outside of the official campaign period. As such, persons desiring to impersonate candidates or politicians online will likely do so regardless of the POEL in its current or modified form.

*5. The other concerns about online campaigning do not trump political freedoms*

¶113 Other potential concerns related to online campaigning should not trump political freedoms in Japan either. Japan is quite sensitive to both privacy concerns and unsolicited e-mail communications.<sup>345</sup> The potential use of e-mail, CGM, and other Internet tools during the official election period gives rise to concerns about privacy, while lawmakers also fear inundating the electorate with excessive e-communications.<sup>346</sup> In response, Japan might fashion limited restrictions to prevent candidates from engaging in spam-like activities. Another possibility would be to limit the content of campaign-related e-mails to those containing policy proposals and political solutions.<sup>347</sup> In any event, there are ways to overcome concerns about privacy and harassment of the electorate without sacrificing fundamental constitutional rights.

<sup>343</sup> See generally DPJ Warns that 'Kan Postings' on Twitter are Hoaxes, *supra* note 136 (discussing Twitter users' creation of fraudulent Twitter accounts in the name of Prime Minister Naoto Kan).

<sup>344</sup> See *id.*; Williams, *supra* note 133. A similar fake account was also started under the name of ex-Prime Minister Yukio Hatoyama in late 2009, immediately after his public announcement that he would start tweeting in early 2010. *Id.*

<sup>345</sup> See Kojin Joho Hogo Ho [Personal Information Protection Act], Law No. 57 of 2003; Tokutei Denshi Meru no Soshin no Tekiseikato ni Kansuru Horitsu [Law on Regulation of Transmission of Specified Electronic Mail], Amended Law No. 49 of 2009.

<sup>346</sup> See Editorial, *Let Campaigning Join Digital Age*, *supra* note 98.

<sup>347</sup> See *id.*

## V. CONCLUSION

¶114 An absolute ban on Internet electioneering by candidates, political parties, and voters during the official campaign period is not only unnecessary but inconsistent with Japan's constitutionally-guaranteed individual political freedoms. To strengthen individual rights and further democratic participation in the political process, Japan should revise the POEL to permit unrestricted online campaigning. Fear should not discourage the relaxation of online campaigning restrictions.