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ESSAY

E-ELECTIONS: LAW IN ASIA & ONLINE POLITICAL ACTIVITIES

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I. INTRODUCTION

The Internet has had a profound influence on our global society. Widespread and affordable access to the Internet has facilitated a proliferation of "netizens" around the world.[1] The Internet is accessible through a broad range of conduits including desktop computers, laptops, mobile phones, smart phones, televisions, and even game consoles. Easy access to the Internet and World Wide Web has generated a wide-sweeping societal transformation across the globe. In fact, the Internet has altered the way people exchange information, communicate, socially network, transact business, and seek entertainment. Electronic mail, texting, instant messaging, and online chatting have become staples in the realm of societal interaction. In addition, technological innovation increasingly focuses on new and useful applications of the Internet and World Wide Web. The impact of online interaction, however, extends beyond social functions. Increased reliance upon the Internet has given rise to a plethora of legal and ethical issues in both

* This essay is an edited version of a speech given by Professor Matthew J. Wilson at the Second East Asian Law and Society Conference, Dialects and Dialectics: East Asian Dialogues in Law and Society, at Yonsei University in Seoul, South Korea on October 1, 2011. Recently, Professor Wilson published an article scrutinizing Japanese election law in greater detail, further illustrating the need for Japan to embrace online campaigning. *See* Matthew J. Wilson, *E-Elections: Time for Japan to Embrace Online Campaigning*, 2011 STAN. TECH. L. REV. 4 (2011). Professor Wilson is currently an Associate Professor of Law at the University of Wyoming College of Law. Kyung Hee University Law School in Seoul, Korea has also appointed him as an international scholar for the 2011–2012 academic year.

[1] A "netizen" is an active participant in the online community of the Internet. *Netizen Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/netizen (last visited Nov. 26, 2011).

domestic and international contexts as well. Legal issues in the online world involve commercial relationships, personal rights, criminal acts, and nearly every area of the law.

I want to focus on one particular important legal issue involving the Internet—namely, the clash between online electioneering restrictions and freedom of expression in select countries in Asia, particularly in China, Taiwan, Singapore, South Korea, and Japan. In addition, I contend that the democratic countries of South Korea and Japan need to relax their strict restrictions regarding online campaigning activities and fully recognize the importance of freedom of expression.

II. ASIAN CONNECTIONS: ONLINE ACCESS AND SOCIAL MEDIA

Before embarking on a full-fledged analysis of online campaigning laws in Asia, it is important to gain a general understanding of the role of the Internet and social media in this region of the world. In today's digital age, most Asian countries have openly embraced the Internet and social media. Japan and South Korea rank among the world leaders in technological innovation and Internet penetration. According to recent statistics, South Korea is the most "connected" country in the world with an estimated eighty-nine percent of South Koreans connected to the Internet,[2] and over seventy-five percent of the population accesses the Internet at least once per day. Japan ranks right behind South Korea in terms of online connectivity.[3]

In looking at total numbers, Asia leads the world in Internet users according to the statistics published by Internet World Stats. Asia boasts over 922 million Internet users.[4] Whether you are in Hong Kong, Singapore, Taiwan, Thailand, Japan, South Korea, or other parts of Asia, you can go there and not miss a beat when it comes to online connectivity. By comparison, Europe has 476 million Internet users and North America has over 272 million.[5] By country, China alone claims close to 500 million Internet users, and the number continues to grow at a rapid rate.[6] For example, as of June 30, 2010, there were 420 million Internet users in China and by June 30, 2011, the number had grown to 485 million.

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[2] *OECD Reaches Half Billion Mobile Internet Subscribers*, INTERNATIONAL TELECOMMUNICATION UNION (July 14, 2011), http://www.itu.int/ITU-D/ict/newslog/default,date,2011-07-14.aspx.

[3] Japan leads the world in fibre connections. *Id.*

[4] *World Internet Users and Population Statistics*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm (last updated Mar. 31, 2011).

[5] *Id.*

[6] Gang Lu, *China: 485 Millions Internet Users and 195 Millions Microblog Users*, TECHNODE (July 20, 2011), http://technode.com/2011/07/20/china-485-millions-internet-users-and-195-millions-microblog-users.

Social media has caught on in other areas of Asia as well. Social media platforms including blogs, virtual communities, social networking websites, online video sharing websites, and microblogging platforms, such as Twitter, appeal to a diverse range of Asians. Using their smart phones or laptops, Asians expend substantial time on social media communicating, collaborating, and entertaining themselves.

III. ASIAN CHALLENGE: BALANCING INDIVIDUAL RIGHTS AND ONLINE REGULATION

With the rapid ascendancy of the Internet and social media, Asian countries have sometimes struggled with finding the proper balance between individual rights and the legal regulation of online activities. While many Asian countries support open Internet access and free online expression, others do not openly welcome social media or other aspects of the Internet. In principle, communist and authoritarian states, such as China, North Korea, and Vietnam, are notorious for restricting Internet access and monitoring Internet use. These countries regularly restrict personal rights in online settings and even criminalize certain forms of online expression. In contrast, democratic countries such as Japan and South Korea generally subscribe to the principle of limited Internet restriction and free online speech. However, this distinction is not always certain.

Information disseminated in an online environment may be politically objectionable, threaten culture, or undermine well-established traditions. In addition, because the Internet is relatively anonymous and lacks significant regulation, netizens can electronically disseminate large amounts of information without delay that subject governments, politicians, and other political actors to closer scrutiny. Essentially, the Internet provides a platform for rumors, harmful untruths, criticism, and embarrassing truths. In fact, the dissemination of information on the Internet can rapidly spiral into a public relations quagmire, and even into full-fledged political movements. Faced with such prospects, policymakers start getting nervous and may contemplate cracking down. They are also increasingly tempted to take countermeasures at the expense of individual rights by restricting online expression, manipulating information, blocking access to social media and the Internet, censoring, and monitoring online activity. The governments of Japan, South Korea, and many other democratic countries in Asia are not immune from these temptations regardless of their ideologies.

The recent riots in England provide an excellent illustration of the struggle between governmental concerns and individual rights in an online environment. On August 4, 2011, police shot and killed Mark Duggan, a twenty-nine-year old father of four with reported links to London gangs.[7] What started as peaceful

[7] *Mark Duggan Death: Timeline of Events*, BBC NEWS (Sep. 8, 2011, 10:05 PM), http://www.bbc.co.uk/news/uk-england-london-14842416.

demonstrations in north London, protesting the seeming unjustified death of Mr. Duggan, quickly spiraled out of control.[8] Four nights of rioting in London and other parts of England rapidly expanded to broader expressions of general anger and resulted in looting, injuries, deaths, and over 1500 arrests. Social media, including Twitter and Blackberry Messenger, played an integral role in these riots as some called for unified protests and coordinated riots. At one point, the English government seriously debated whether to pull the plug on social media and clamp down on online expression.[9]

Similarly, Asia has also seen a number of recent clashes between online personal rights and governmental regulation. Internet filters, censorship, monitoring, and restrictions on website operators are common in communist countries such as China. To the consternation of the Chinese government, Google decided in 2010 to stop censoring online searches in China and redirected Chinese searches through its Hong Kong server. This decision was made because the Internet should not be subject to censorship. Even a democratic country like South Korea has encountered balancing issues. In 2009, South Korea imposed a law requiring Internet users to provide their real names and other personal information as a prerequisite to posting online comments or uploading content onto larger websites. Rather than complying with South Korean's "real name" registration law, YouTube blocked comments and uploads to YouTube's Korean version and redirected users to YouTube.com, the site's international version, as an effort to avoid undue restriction on free expression.

IV. THE STATE OF ASIA: FREEDOM OF EXPRESSION AND ONLINE CAMPAIGNING

Freedom of expression in Asia faces significant challenges with respect to Internet electioneering. Although an examination of all Asian countries is beyond the scope of this presentation, my talk does provide a general overview of the level of conflict of freedom of expression and online campaigning in Taiwan, China, Singapore, South Korea, and Japan. It also suggests revisions to current electoral laws in South Korea and Japan.

Freedom of expression is a fundamental right reflected in Article 19 of the United Nations Universal Declaration of Human Rights, which states that "everyone 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."[10] Consistent

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[8] *Id.*

[9] *England Riots: Government Mulls Social Media Controls*, BBC NEWS (Aug. 11, 2011, 9:57 AM), http://www.bbc.co.uk/news/technology-14493497.

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

with this provision, the right to freedom of expression is constitutionally guaranteed in almost every Asian country. The practical application and observance of this fundamental right, however, varies among countries.

A. The Taiwanese and Chinese Experience

Although Taiwan and China both constitutionally guarantee the right to freedom of expression, these countries fall on opposite sides of the online campaigning spectrum. Mainland Chinese authorities are extremely restrictive of any Internet use and very apprehensive about the concept of online campaigning. In contrast, Taiwan has fully embraced the idea of online campaigning. Taiwan views the Internet as a means for its citizens to participate in the political process. As such, Taiwan permits political candidates, political parties, and voters to unreservedly utilize the Internet for campaigning purposes. It embraces freedom of expression as an important concept in the election process. In fact, participants in the Taiwanese electoral process actively utilize social media for campaigning purposes.[11] Tools such as Facebook, Twitter, YouTube, blogs, and Plurk (the Taiwanese equivalent of Twitter) have been particularly popular. To meet demand, Google created specialized websites for Taiwan's recent municipal elections to enable Taiwanese voters and candidates to interact online.[12] In advance of Taiwan's January 2012 presidential election, the campaigns of President Ma Ying-jeou of the Kuomintang (KMT) and Tsai Ing-wen of the Democratic Progressive Party (DPP) have been geared to appeal to "digital natives" in an online environment.[13]

B. The Singaporean Experience

The Constitution of Singapore guarantees rights to free expression, peaceful assembly, and association.[14] However, it also allows the government to restrict these rights based on the concepts of security, protecting public order, morality, parliamentary privilege, race, and religious harmony.[15] The restrictions are interpreted broadly. As a result, Singapore only recently discovered the effects of online campaigning after revising its election laws. For the first time, Singaporean candidates and voters were able to use social media in connection with the 2011 general elections. With nearly eighty percent of Singapore's population regularly

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[11] Taipei Economic and Cultural Office, *Presidential Election Takes to Social Networking*, TAIWAN INSIGHTS (Aug. 25, 2011), http://www.taiwaninsights.com/2011/08/25/presidential-election-takes-to-social-networking.

[12] *Google, YouTube Launch Websites for Taiwan Elections*, CHINA TIMES (Oct. 17, 2010, 10:38 AM), http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1101&MainCatID=11&id=20101017000009.

[13] Taipei Economic and Cultural Office, *supra* note 11.

[14] *Singapore: Country Reports on Human Rights Practice*, U.S. DEP'T OF STATE (Feb. 25, 2004), http://www.state.gov/g/drl/rls/hrrpt/2003/27788.htm.

[15] *See id.*

accessing the Internet, candidates and political parties quickly looked to online campaigning to enlist support, interact with voters, and raise funds.[16] The use of social media tools galvanized the electorate and enabled online debate about key economic and social issues. These tools were also credited with motivating the electorate to cast votes, allowing citizens to criticize the government without fear of reprisal, and generating interest among younger voters. Although the ruling People's Action Party (PAP) was returned to power, Internet campaigning was credited, at least in part, with record voter turnout and yielded a record amount of votes for the opposition parties.[17] In the 2011 elections, the PAP garnered only sixty percent of the vote as opposed to sixty-seven percent in 2006.[18]

C. South Korea's Struggle with Online Campaigning and Freedom of Expression

In South Korea, the conflict between freedom of expression and online campaigning has escalated over the past decade. By way of background, South Korea has become one of the most vibrant democracies in Asia. South Korean elections are regulated by the Act on Election of Public Officials and Prevention of Electoral Malpractices,[19] which is otherwise known as the Public Official Election Act (POEA). The POEA was originally adopted in 1994, and restricts certain election-related activities such as disruptive political debates, bribery, improper conduct, and general voter disturbance such as night-time speeches on street corners, loudspeakers, and door-to-door campaigning.[20] The POEA also limits campaign expenditures, the use of mass media, campaign rallies, and advocacy of political candidates before the official election period.[21] Additionally, Article 93 of the POEA makes it illegal for non-candidates to distribute information supporting, recommending, or opposing any candidate or political party.[22] This prohibition includes the "the distribution, showing or post of the advertisements, greetings, pictures, documents, audio/video tapes and anything similar containing the support, recommendation or opposition on parties or candidates' from 180

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[16] Howard Tsang, *Turn of Tide: Singapore's Watershed Election 2011,* ASIA PACIFIC MEMO (May 17, 2011), http://www.asiapacificmemo.ca/turn-of-tide-singapore-watershed-election-2011.

[17] *Id.*

[18] Jon Russell, *Round-Up: Singapore Elections and Social Media Stories*, ASIAN CORRESPONDENT (May 9, 2011, 12:00 PM), http://asiancorrespondent.com/54028/round-up-singapore-elections-social-media-stories.

[19] Kongjikson'gomit Son'gobujong Pangjibop [Act on Election of Public Officials and Prevention of Election Malpractices], Act No. 4739 (1994) *as amended by* Act No. 10303 (2010) [hereinafter POEA]. The name of this statute has several different translations, including Election for Public Offices and Prevention of Election Malpractices Act among others.

[20] *Elections Overview*, REPUBLIC OF KOREA NAT'L ELECTION COMM'N, http://www.nec.go.kr/nec_2009/english/overview/overview01_07/20100119/1_1240.html (last visited Nov. 26, 2011).

[21] *Id.*

[22] POEA, *supra* note 19, art. 93.

days before the election day to election day."[23] In light of these limitations, South Korean candidates resort to creative campaigning methods such as having volunteers in color-coordinated outfits stand on busy street corners holding campaign posters, waiving, and dancing to special campaign theme songs.

These restrictions are in stark contrast to campaigning methods in North America. In the United States, it feels like the 2012 presidential election has already been in progress for eighteen months. In addition to a constant barrage of presidential election coverage in the U.S. media, one can easily find 2012 election-related advertisements on television, radio, and the Internet. By comparison, there may be merit in some of the limitations imposed by the POEA, at least with respect to time, so long as the right to freedom of expression is not unduly restricted.

Despite its democratic qualifications, free speech protections in South Korea are weak in practice with respect to electioneering and online campaigning. Article 21(1) of the Constitution of South Korea guarantees that "all citizens shall enjoy freedom of speech and the press," but this provision is qualified by Article 21(4), which states "neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics." [24] This qualification empowers the government to impose restrictions on a broad range of expression.[25] On its face, the POEA and related election regulations appear to undermine the constitutionally guaranteed right to freedom of speech by prohibiting voters from supporting, recommending, or opposing any candidate or political party. Voters cannot freely advance their opinions or philosophies. Instead, the qualification in Article 21(4) has been utilized to justify the restrictive election laws and online campaigning restrictions.

Currently, the POEA restricts election-related activities and free expression, particularly in the form of online user-created content, or "UCC" as it is often called. UCC consists of all content produced by Internet users including videos, photos, and web posts. Although a voter can express his or her opinion online that "I want Mr. Lee to be elected" or "I like Ms. Kim for this office," the government is concerned about campaign-related UCC that shows a direct intent to assist or hinder a particular candidate or party. Examples of campaign UCC include online comments such as "Let's help Mr. Lee get elected," longer online posts criticizing a certain candidate, or videos containing one-sided material. The government is also concerned when personal opinions are repeatedly posted or forwarded with

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[23] *Id.*

[24] HONBOP [Constitution], art. 21 (amended 1987), *available at* http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf (last visited Nov. 25, 2011).

[25] *South Korea*, OPENNET INITIATIVE (Dec. 26, 2010), http://opennet.net/research/profiles/south-korea.

the intent to influence the election outcome. In such cases, personal opinions may be deemed to fall into the prohibited campaign UCC category. Although South Korea typically seeks to remove illegal material from the Internet, non-candidates posting campaign UCC can face up to a maximum of three years in jail or a thirty million won (approximately 33,000 U.S. dollars) fine for violating the POEA.

Because of these restrictions, Korean voters feel overly-restricted and confused. The boundary between illegal online campaigning and acceptable dialogue is unclear and extremely vague. South Korean election laws and active enforcement have had a chilling effect on free speech and critical online discourse regarding elections, politics, candidates, political parties, and related issues. Comments deemed illegal by the government are removed from websites, comment boards, and even personal blogs. Video sharing sites, for example, have been reduced to little more than just a candidate posting their official campaign slogan online. Voters cannot create videos in support of their favorite candidate. Instead, voters' use of the Internet is largely relegated to encouraging others to simply vote via Twitter, Facebook, and other social media. Instead of discussing important issues or advocating for or against a candidate, voters in the April 2011 elections primarily only posted photos online showing polling places or a thumb stamp indicating that they had voted in the election.

South Korean voters yearn to utilize online tools to advocate for candidates leading up to elections. This was demonstrated when online campaigning was not restricted. In the 2002 presidential election, South Korea experienced the power of the Internet on elections. President Roh Moo-hyun was crowned as the "Internet President" as his upset victory was fueled by younger generation Internet users, shocking everyone. While the power of online campaigning amazed some, it frightened many others. As support for President Roh declined during his tenure, those in power felt that the Internet's tremendous speed and power could enable partisan voices to take over the political debate or even help spread rumors and untruths. As a result, the South Korean government decided to tighten restrictions regarding online campaigning. These restrictions were justified because the economic playing field needed to be leveled, false rumors curbed, and malicious postings eliminated. Further restrictions on Internet use were sought as a result of online posting that fueled the 2008 beef-import protests and several celebrity suicides caused by online rumors. Misinformation and anonymous postings online were deemed to "undermine public morals or social ethics" in contravention of the Constitution. This provided the constitutional justification for new restrictions on free speech in an online context. As a result, the right to freedom of expression has retreated considerably over the past five years.

To enforce its online campaigning restrictions, South Korea implemented a number of controls. First, the National Election Committee (NEC) controls all aspects of Korean elections. This includes monitoring online behavior in Korea, enforcing the country's restrictions on election-related political speech, and

enforcing its ban on public advocacy of candidates before an election period. The NEC closely watches online activities during the election period, and has done so for nearly a decade. In fact, the NEC hires 1000 workers 120 days before the election to scour the Internet for illegal campaigning activities, including voters advocating on behalf of or against certain political candidates or political parties.[26] The NEC has used its authority to remove over 100,000 election-related articles, blog entries, and comments from the Internet.[27] It has also censored more than 65,000 movies posted to video-sharing websites.[28]

Second, the NEC has two divisions that focus on Internet regulation and censorship. The first division is the Internet Election News Deliberation Commission, which monitors online news outlets, media sources, and semi-official news services. This Commission has wide latitude to determine what violates election laws. If the Commission determines that an online media source has violated election laws through partial news coverage, it will ask the source to take down the offending content and possibly even issue an official retraction. The second division is the Cyber Censorship Team, which monitors websites, personal blogs, and online postings such as video uploads and message boards. The Cyber Censorship Team's mission is to prevent untrue statements from damaging candidates, to ensure candidates do not campaign outside of the officially sanctioned two to three week official election period, and to enforce the "real name" system, which I will address shortly. In essence, the Cyber Censorship Team works with a website or hosting service to have illegal content either deleted or changed. It may also open an official investigation and ask the prosecutor to press charges.

The South Korean government takes enforcement of online campaigning restrictions seriously. In comparing the 2004 and 2007 presidential elections, the number of governmental requests to delete online content rose from 2425 to 276,277. During a one-year period ending in May 2007, the media reported that the government deleted 19,000 online election-related messages and that prosecutors had brought charges against thirteen individuals for posting false rumors about candidates.

Third, South Korea utilizes a unique "real name" identification system to help control online behavior, including election-related activities. In 2009, South Korea amended its Act on the Promotion of Information and Communications Utilization and User Protection to require any website with 100,000 visitors per day to require users to provide their real names and resident registration numbers as a prerequisite to posting comments or uploading content. The forced

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[26] *Id.*

[27] *Id.*

[28] *Id.*

disclosure of personal information on the Internet is troubling on many levels, but after a two-year experiment, it appears that the real name system may have failed. In July 2011, there was a major security breach at several major South Korean websites. More than thirty-five million users had their names, addresses, telephone numbers, and social security numbers compromised as a result of this hacking incident. This caused the South Korean government to rethink its position and announce its intention to repeal the real name requirement. The government finally discovered that requiring frequent disclosure of sensitive personal information online is inherently risky and should not be required.

Internet campaigning is democratic, informative, and furthers free speech. Contrary to these concepts, South Korean election laws relating to online campaigning together with the government's regulation, monitoring, and censoring of online activities inhibit free speech. Online campaigning does not undermine public morals or social ethics. Conversely, the current online campaigning restrictions hamper political discourse and chill political engagement. The Internet provides many advantages for election campaigning including speed, reach, efficiency, and cost. It offers candidates the opportunity to quickly inform voters, drive voter behavior, and attract campaign donations. The Internet also enables voters to engage in grassroots activities, compare ideas, as well as explore political platforms and strategies. Limiting voters to the traditional press, interest groups, religious organizations, labor unions, or other traditional outlets for information is inadequate and unjustified. South Korea needs to re-examine its current restrictions and place more emphasis on the right to freedom of expression in an online environment.

D. Japan's Need to Relax Online Campaign Restrictions

Similar to South Korea, Japan also needs to re-examine and revamp its regulation of online political campaigning.[29] Japan is a mature democracy with a wide range of political freedoms and constitutionally guaranteed individual rights. However, it has struggled to balance legal regulation and individual rights in the context of elections. Technology and the Internet have only exacerbated the struggle. In fact, although Japan generally subscribes to democratic traditions and the principle of limited Internet restriction, its election laws effectively prohibit virtually all online campaigning by candidates, political parties, and voters during its two to three week official election period. Despite calls for fewer restrictions, Japan largely continues to maintain its ban on Internet electioneering. Due to the effectiveness of online campaigning tools and short official election periods, the prohibition of online campaigning during these periods is not only detrimental to all political actors, but several observers have even deemed Japan's actions to constitute extreme "political negligence."

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[29] *See* Matthew J. Wilson, *E-Elections: Time for Japan to Embrace Online Campaigning*, 2011 STAN. TECH. L. REV. 4 (2011).

The fundamental provisions of the Constitution of Japan support online campaigning and activities by candidates, political parties, and voters. Article 21 of the Constitution guarantees freedom of assembly and association as well as speech, press, and all other forms of expression.[30] Unlike the Korean Constitution, which has the express public welfare limitation to freedom of speech, however, the Japanese Constitution does not expressly incorporate this limitation into Article 21. Notwithstanding, Japanese electoral laws severely curtail the right to freedom of expression both in conventional and digital formats.

Adopted in 1950, Japan's Public Offices Election Law (POEL) was designed to govern all national, prefectural, and local elections.[31] The POEL sets forth certain rules about elections, candidate eligibility, acceptable political activities, campaigning, and election finance. Essentially it is a collection of "thou shall nots" or barriers involving the time, place, manner, and methods associated with elections and campaigning. The POEL also restricts candidates for political office to a limited range of conventional campaign tools such as handing out a limited number of promotional matters to placing small posters on common election billboards erected for all candidates in local neighborhoods, driving around in campaign vans with loudspeakers blaring, and giving short political speeches on street corners. Other POEL provisions prohibit door-to-door campaigning, limit financial campaign expenditures, and ban paid television or radio appearances by political candidates. Candidates can only take advantage of short complimentary television spots on Japan's national broadcasting network provided to all candidates during the official election period, during which each candidate can present their personal resumes and express their opinions. Naturally, the viewership of these television spots is extremely low. The POEL also prohibits paid newspaper and magazine advertisements, unless the government provides them at no cost, and restricts political speeches to certain venues. More significantly, the POEL stifles voter activity as Japanese citizens cannot engage in conventional grassroots activities such as canvassing or document distribution.

Penalties for violating the POEL can include up to a two-year imprisonment and a hefty fine. The seriousness of these restrictions is demonstrated by the number of enforcement actions brought by Japanese prosecutors. In Korea, prosecutors brought only thirteen enforcement actions in one year.[32] In contrast, Japan has punished over 90,000 voters since 1946 for election law violations. Japan's willingness to penalize expression during official election periods undercuts the right to free speech.

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[30] KENPO [Constitution], art. 21 (1946).

[31] Koushoku Senkyo Hou, Law No. 100 (1950) *as amended by* Law No. 86 (2007) [hereinafter POEL], *available at* http://law.e-gov.go.jp/htmldata/S25/S25HO100.html (last visited Nov. 26, 2011).

[32] OPENNET INITIATIVE, *supra* note 25.

On the digital front, the POEL is silent about online campaigning activities. However, the Japanese governmental interpretation of this law has been to absolutely restrict online campaigning activities during the official election period. This means that all political actors must essentially forego the low-cost, speedy, and popular communication, information, and political advocacy tools available on the Internet during the most critical time of an election campaign. The current interpretation of the POEL as it relates to online campaigning stems from Article 142. This article prohibits the dissemination of "documents and drawings," or "*bunsho zuuga*," for electioneering purposes during the official campaign period, except for documents and drawings that are specifically allowed by law.[33] In a conventional context, candidates are authorized only to distribute a certain number of postcards and leaflets pursuant to the exception in Article 142, regardless of the number of voters they have in their district. One Diet member in Tokyo noted that this POEL limitation means he can only distribute enough leaflets during the official campaign period to reach three percent of the eligible voters in his district.[34] In a digital context, "documents and drawings" have been construed to encompass images on the Internet such as web pages, blogs, and other forms of social media. Because the government has not specifically granted an exception for these digital tools, candidates and voters cannot utilize them during the official election period. This interpretation not only hinders democratic participation in the electoral process, but it also directly clashes with the right to free expression guaranteed by the Constitution of Japan.

At the same, it should be noted that Japan does not ban all political-related Internet activity. Outside of the official campaign period, Japanese politicians and voters actively use the Internet. In fact, political actors have turned to e-mail, tweets, vodcasts, podcasts, and other instant online tools to educate, communicate, and advocate. Unfortunately, key information about the candidates and their views cannot reach voters during the official campaign period when everyone is focused most on an election and candidates. If a candidate has an existing website or blog, these tools must be silenced during the official election period. New election-related websites cannot be created during this period. Blogging and online solicitation of votes are not allowed. E-mail messages either to or from voters are also taboo. Messages supporting candidates posted on Facebook or online bulletin board postings, as well as Tweets or mobile phone text messages advocating the same, are all prohibited in an election context.

So, how do Japanese candidates get their word out and how can voters convey their opinions to others? Without social media and use of the Internet, campaigning activities are hindered and free speech inhibited. Japan's restrictive approach

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[33] POEL, *supra* note 31.

[34] Chris Hogg, *Japan's Old-Fashion Campaigning,* BBC NEWS (July 12, 2007, 1:16 PM), http://news.bbc.co.Uk/2/hi/asia-pacific/6292602.stm.

to online campaigning also makes connecting with younger voters particularly difficult. Younger voters are accustomed to interaction and instant information in today's digital world. Given that Japan is one of the most "connected" countries in the world, it almost seems unimaginable that political actors cannot utilize the Internet during the official election period.

Japan's long-standing maze of electioneering restrictions is based on certain principles and concerns. The first principle used to justify campaigning restrictions is the need to level the playing field among candidates by eliminating economic inequalities in campaign resources. The second justification is the need to promote the public welfare by preventing corruption through face-to-face contact. Third, Japanese election law considers long election campaigns to be disruptive and harmful to society. Instead of experiencing a three-year presidential campaign similar to the United States, the typical three-week official campaign period has been deemed sufficient for Japan. Naturally, incumbents benefit from a shorter election period because the electorate will likely recognize them. For new candidates, this extremely short window makes it very difficult, if not impossible, to get your message out. The fourth principle underlying strict Japanese election restrictions is a desire to protect the name and honor of candidates by reducing the chance for negative campaigning.

Online campaigning resolves many of these concerns as the Internet provides an inexpensive platform for candidates to reach voters in an indirect and expeditious manner. It also enables voters to obtain a wide variety of information, express opinions, and even interact with candidates over a short period of time. This enables Japan to retain its model of short elections, and thereby eliminates the fear of long, drawn-out campaigns. Online interaction and exchange of information also fosters transparency in government, increases accountability in the political process, and furthers participation in the democratic process. Conversely, restricting Internet electioneering inhibits candidates, political parties, and the public from promoting ideals, disseminating information, and engaging in meaningful political discussions. For voters, grassroots activities are hindered and meaningful participation in the political process is made difficult.

Should Japan remove its online barriers? Doing so would benefit the country on many levels. It would respond to criticism from international organizations, including the United Nations, which have openly denounced Japan's absolute restriction on free speech in cyberspace during official election periods. It would satisfy the electorate. In fact, over eighty percent of the Japanese electorate supports greater online freedoms. Japan has seen various attempts to liberalize its election laws and allow online campaigning dating as far back as 1998. Naturally, calls for reform came primarily from minority political parties and their supporters. However, these calls were quickly dismissed by the Liberal Democratic Party (LDP). The LDP maintained an iron grip on power for decades, until it recently yielded to the Democratic Party of Japan (DPJ) in 2009. During the 2009 national

elections, online campaigning was a "hot topic."[35] In fact, the DPJ pledged to reform Japan's election laws and adopt online campaigning, if it were to achieve status as the majority party. Despite its landslide victory however, the DPJ has not kept its pledge and the ban on Internet electioneering continues to this day.

One might wonder why Japan remains trapped in its pre-Internet electioneering age despite the potential advantages associated with online tools. Many bureaucrats and incumbents contend that online advertising and website development costs are so significant that wealthy candidates will have an undue financial advantage. Other arguments against an open Internet policy include the potential for anonymous harassment of candidates, disparity in online activities between younger and older voters, information overload, and online fraud. Because these prospects allegedly undermine the public welfare, online campaigning opponents continue to urge a ban on most, if not all, Internet activities during the official election period. One example of online fraud that is often cited by online campaigning opponents happened in June 2010 when Naoto Kan was selected as Prime Minister. Just after his selection, an imposter created a Twitter account bearing the Prime Minister's name and started sending messages. The fake account quickly had thousands of unwary followers.

Now is the time for change in Japan. Legal considerations and political realities dictate that Japan completely eliminate, or at least relax, its stringent restrictions on online campaigning. Potential issues can be sufficiently addressed and resolved. By allowing political actors to use the Internet and social media during official election periods, Japanese citizens can take full advantage of their constitutionally guaranteed right to free speech. In turn, not only will this lead to increased political participation among the electorate and strengthen democratic activities, but it will also improve transparency and bolster accountability in the political system. Politicians will be able to better inform, educate, interact, and actively communicate with more voters by taking advantage of inexpensive or free media tools online. They can also use the Internet for political fundraising. Through the Internet, third-party electioneering can be revitalized in Japan. In fact, voters could openly express their thoughts, opinions, observations about political candidates, parties, and pressing issues in an online setting during the official election period. Online campaigning could also mean less control on information from mass media. In Japan, the mass media has been often criticized for conformity and its lack of critical analysis of the government. Open online dialogue during the official campaigning period has the potential to cure these alleged ills.

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[35] *See* Yoko Kubota, *Japan Eyes E-politics as Political Rivalry Grows*, REUTERS (Aug. 3, 2009, 9:28 AM), http://www.reuters.com/article/idUSTRE57209720090803.

Even with the liberalization of its election laws, Japan will not have to revamp the structure of its electoral process. Established traditions and cultural values integrated into the election process do not have to change. Important aspects of the current process including political expenditure caps, short election periods, and safeguards against corruption do not require revision. Also, Japan has other legal mechanisms to adequately deal with online harassment, deception, and unfair behavior. Officials can rely on other laws related to defamation, fraud, and election-related behavior to prosecute and deter unwanted behavior.

The idea of adopting online campaigning has widespread public support. It also has the potential of enticing younger voters to engage in the political process. Voting rates in Japan have dropped, and online activities are another way to re-engage the electorate. Also, the rapidly closing digital divide between younger and older voters supports a liberalization of existing election laws. Older voters have regular access to technology and the Internet—when I ride the train in Tokyo, I often see the elderly pull out their smart phones and start texting or surfing the web. Most significantly, however, a relaxation of current laws is warranted based on the right to free speech, which is guaranteed under the Japanese Constitution. Actors in the political process should be able to freely express themselves online during the official election period without reservation.

V. CONCLUSION

This essay illustrates the clash between freedom of expression and online campaigning in several parts of Asia. Although the right to freedom of expression is constitutionally guaranteed in nearly all countries, the application of this fundamental right differs among countries in the context of elections and online campaigning. The Internet provides many useful tools for candidates, political parties, and voters to engage in the political process. To strengthen individual rights and further democratic participation in the political process, Asian countries should permit online campaigning to the fullest extent possible. Fear should not discourage the relaxation of online campaigning restrictions.