

POLICING POLITICAL SPEECH: JAPAN'S MISTRUST OF THE MARKETPLACE

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INTRODUCTION

Think back to 1995. Ryutaro Hashimoto was Prime Minister of Japan. Bill Clinton was in the White House. Barack Obama was teaching law at the University of Chicago. The i-phone was still 12 years in the future. Even i-mode, NTT's pioneering mobile phone text message system didn't start until 1999.¹

People who wanted to listen to music on the go plugged their headphones into Walkman cassette tape players. A few early adapters had Mini Disc players, which were about the size of War & Peace, with batteries that lasted an hour, if the planets were in alignment.

Medical doctors carried pagers on their hips, in case of emergencies. Young people in Japan latched onto the devices and called them *poke беру* (pocket bell). At the office, secretaries left messages on workers' desks with the title "While you were out." The pink pieces of paper often stacked up as people decided whose calls to return, and in which order. If you wanted

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¹ See generally TAKESHI NATSUNO, I-MODE STRATEGY 1 (2003); Akki Akimoto, *In the battle with smart phones is i-mode dead?*, JAPAN TIMES (April 20, 2011), available at <http://www.japantimes.co.jp/life/2011/04/20/digital/in-the-battle-with-smart-phones-is-i-mode-dead/#.U0H00Nx0SII>; Elisa Batista, *I-mode, I Saw, I Conquered?*, WIRED (Mar. 16, 2001), available at <http://www.wired.com/techbiz/media/news/2001/03/42485?currentPage=all>.

something in a hurry, you sent a fax. And in 1995, I conducted research on election campaign laws in Japan.²

Much about everyday life has changed since 1995. In May of that year, Bill Gates issued a memo titled “The Internet Tidal Wave,” in which he said, “Now I assign the Internet the highest level of importance.”³ The Japanese government, however, only recently got the message.

The election for the House of Councillors in July of 2013 was the first in which internet campaigning was allowed.⁴ But Japan being Japan, the use of the net was controlled and circumscribed. In this paper, I consider the new law in the context of overall campaign regulations, and I discuss the effects of the system on democracy and freedom of speech.

I. CAMPAIGNS FROM THEN TO NOW

Japan has never bought into John Stuart Mill’s concept of the marketplace of ideas, in which the populace is trusted to assess competing facts and arguments.⁵ Indeed, the country has been skeptical of free market competition of the economic sort as well. Businesses have long been regulated to prevent the perceived ill effects of “excess competition.”⁶

Political speech is handled in much the same way. Unlike the United States, where political speech is considered so important

2. See Daniel A. Rosen, *Speaking for Democracy: Japan’s New Campaign-and Election Law System*, THE JAPAN FOUND. NEWSLETTER, Vol. XXIII No. 6, 10 (1995).

3. Memorandum from Bill Gates on The Internet Tidal Wave (May 26, 1995), available at <http://www.justice.gov/atr/cases/exhibits/20.pdf>.

4. *Japan’s first ‘Internet election*, JAPAN TIMES (July 10, 2013), available at <http://www.japantimes.co.jp/opinion/2013/07/10/editorials/japans-first-internet-election/#.UsJ5nv01Dnc>.

5. See generally JOHN STUART MILL, ON LIBERTY (1859). See also JOHN MILTON, AREOPAGITICA (1644) (illustrating an earlier expression of the idea).

6. See RICHARD KATZ, JAPAN AND THE SYSTEM THAT SOURED: THE RISE AND FALL OF THE JAPANESE MIRACLE 91-92 (1998); STEVEN R. REED, MAKING COMMON SENSE OF JAPAN 148 (1993).

that it should not be restrained, in Japan, it is considered so important that it *must* be restrained.⁷

The guiding principle is: everything is forbidden, except that which is allowed. Details of the Public Offices Election Law differ by type of office (House of Representatives, House of Councillors, and various prefectural and local positions);⁸ however, for the purpose of this discussion I will generally collapse the categories and describe the principal provisions. Those who wish to know the specifics should consult the various sections of the Law.

First of all, the length of the campaign itself is prescribed. The House of Councillors has the longest period: 17 days.⁹ Once the official campaign period begins, candidates and parties and voters are held on a tight leash. Everything from the size and positioning of posters¹⁰ to the number of *bento* (box lunches)¹¹ that can be given to campaign workers is regulated.

The Mainichi Shimbun recently described campaign posters from the House of Representatives election in 1928, the first in which all male citizens were allowed to vote. They were issued by a political party of that time, *Seiyukai*. In one, a lookalike for the leader of a rival party was pictured under the title “something in the way on the main road.” In the other, the same rival party leader was portrayed as the god of poverty. The newspaper reported that soon after the election, the government began

7. See, e.g., Saikō Saibansho [Sup. Ct.] Apr. 6, 1955, Hei 9 (kyo) no. 4 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 819 (distribution of unlimited amounts of literature would create harmful levels of competition that are inimical to sustaining fairness).

8. See generally Leslie M. Tkach-Kawasaki, *The Internet and Campaigns in Japan: Traditions and Innovations*, in JAPAN AND THE INTERNET: PERSPECTIVES AND PRACTICES 55, 59-62 (Yutaka Tsujinkaka & Leslie M. Tkach-Kawasaki eds., 2011), available at http://www.cajs.tsukuba.ac.jp/monograph/articles/01_201103/cajs01_201103_055-075.pdf.

9. Public Offices Election Law, Law No. 100 of 1950, art. 32 (Japan) (hereinafter cited as Election Law).

10. *Id.* arts. 143-45.

11. *Id.* art. 139.

imposing stricter controls on both the words and images of such material.¹²

1928 may well have been the apotheosis of freedom of campaign speech. Since the post-election crackdown, parties and candidates have been comprehensively constrained. Two rationales are commonly proffered for the controls:

- 1) Candidates should have equal resources¹³
- 2) “False” and “misleading” messages should be prevented.¹⁴

As to #1, however, candidates do not have equal resources, despite the equalization of posters and handbills and expenditures.¹⁵ Incumbents begin with a considerable advantage.¹⁶ They are already known. Newcomers begin with a considerable disadvantage. They must both make their presence known to voters and convince them of the validity of the policies proposed, with no opportunity to overcome the lack of name recognition by additional spending on advertising.

Moreover, newcomers cannot even rely on shoe leather to introduce themselves to the voters. Article 138 of the Public Offices Election Law prohibits door-to-door campaigning,

12. *Yoroku: Removing obstacles to online campaigning*, MAINICHI (Mar. 13, 2013), available at <http://mainichi.jp/english/english/perspectives/news/20130313p2a00m0na004000c.html>.

13. See, e.g., Election Law, *supra* note 9, art. 194.

14. Professor Harumichi Yuasa has observed that Japanese courts have been disposed toward allowing restrictions on speech during elections. See Harumichi Yuasa, *Regulation of Internet Campaigning in the U.S.*, 17 KYUSHU INTL. U. LAW J. 71, 76 (2010), available at http://ci.nii.ac.jp/els/110007887217.pdf?id=ART0009558856&type=pdf&lang=jp&host=cinii&order_no=&ppv_type=0&lang_sw=&no=1368879596&cp=.

15. Election Law, *supra* note 9, art. 194.

16. In addition, small political parties (those with fewer than five members of the Diet) do not receive the general subsidy given to larger parties. Moreover, the more elected officials a party has, the greater the subsidy it receives. SEITŌ JŌSEI HŌ [Subsidies to Political Parties Law], Law No. 5 of 1994, arts. 2, 7 (Japan). Thus, the larger parties and their candidates enter any campaign with a substantial structural advantage.

purportedly to protect citizens from feeling unduly pressured by someone who seeks to explain why he or she deserves their vote.¹⁷ The ban applies to candidates, their campaigners, and others (presumably including a neighbor who wishes to suggest voting for someone). The restriction on house-to-house visits continues even after the election.¹⁸

To ensure that citizens are not able to assert their influence in any collective way, Article 138-2 prevents any petition drive aimed at influencing voter choice.

The specifics of that which is allowed in the name of equality brings to mind the observation of Yale Law Professor Grant Gilmore: “In Hell there will be nothing but law, and due process will be meticulously observed.”¹⁹

Candidates can speak at public facilities, but only once.²⁰ Street rallies must be over by 8 pm, and campaign personnel are required to identify themselves with armbands.²¹ Postcards and handbills are limited to specific sizes²² and specific numbers. In the case of a House of Councillors constituency election, the number of postcards is $35,000 + 2,500 \times (N - 1)$ (N being the number of single-member constituencies in the prefecture). In the same situation, the number of handbills is $100,000 + 15,000 \times$

17. In one case, a former schoolteacher who ran for the assembly in Tokyo's Shinjuku ward was sanctioned for visiting former students and parents. Saiko Saibansho [Sup. Ct.] Apr. 23, 1969, 23, SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 235 (grand bench) (Japan). The Court said campaign restrictions reduce the threat of unfairness due to economic differences and held that they are acceptable limitations on the freedom of speech rights of article 21.

18. Election Law, *supra* note 9, art. 178. See also FREE CHOICE FOUNDATION, ELECTION SYSTEM IN JAPAN 43 (2007), available at <http://www.freechoice.jp/electionsystem.pdf>.

19. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

20. Election Law, *supra* note 9, arts. 161, 164. See also FREE CHOICE FOUNDATION, *supra* note 18, at 35.

21. Election Law, *supra* note 9, arts. 164-67. See also FREE CHOICE FOUNDATION, *supra* note 18, at 36.

22. Election Law, *supra* note 9, art. 142. See also FREE CHOICE FOUNDATION, *supra* note 18, at 37.

(N-1) but in no case more than 300,000.²³ Use of broadcasting is also circumscribed. Individual candidates receive the opportunity to appear for a fixed number of minutes. Other than that, it is the parties that carry the load.²⁴ Space in newspapers is also provided, within prescribed limits.²⁵

The one method of reaching voters that is relatively unrestrained relies on the internal combustion engine. Article 141 allows up to two cars (or boats!) and sets of loud speakers. During a campaign period, anyone who needs to wake up at 8 in the morning can forego using an alarm clock, for that is the time at which the campaign cars are authorized to begin prowling the streets and delivering their amplified messages to the public. They continue until 8 at night.²⁶

The information that these campaign cars “broadcast” is typically something like this: “Sato [name of candidate], Sato. Sato is coming. Please look favorably on Sato. Sato.” Thus is democracy served.

Even if the candidate is on board, he or she typically does not speak for him/herself. An *uguisujo* is enlisted to do that. A literal translation of the word is “nightingale lady.” What it means in this context is a female announcer.

In a recent campaign, I happened to see several people around a train station wearing jackets in support of a candidate. One person in the group wore a sash. It said *honnin*, meaning “real person.” In other words, the candidate himself. Were it not for the sash, no one would be the wiser.

23. See FREE CHOICE FOUNDATION, *supra* note 18, at 39 (summary of formulas).

24. Election Law, *supra* note 9, art. 150. See also FREE CHOICE FOUNDATION, *supra* note 18, at 36.

25. Election Law, *supra* note 9, art. 149. See also FREE CHOICE FOUNDATION, *supra* note 18, at 41.

26. Election Law, *supra* note 9, art. 140-2. See also FREE CHOICE FOUNDATION, *supra* note 18, at 37.

II. EMBRACING THE INTERNET

Japan's campaign law, dating from the 1950s, said nothing about the internet. Thus, under the principle of all is prohibited except that which is allowed, its use during the campaign period was banned.²⁷ One may wonder why politicians did not rush to exploit a technology that could allow them to reach members of the public efficiently and repeatedly at low cost. The reason may be found both in inertia and by considering who would have to authorize a change.

For most of the postwar period, and almost all of the time since the rise of the internet, the Liberal Democratic Party has held power.²⁸ It has done so through the use of a well-developed system of supporters' organizations²⁹ and close relations with big business and farmers.³⁰ Thus, it was wary of anything that might alter the status quo. Proposals by opposition parties to allow internet campaigning were rebuffed.³¹ The internet was a technology with which newcomers would be able to break through the established screens and filters, something like door-to-door campaigning on steroids. Thus, like door-to-door activity, the internet too was kept off limits.

27. As of December 2012, the National Police Agency had issued 164 warnings and made five arrests for alleged violations through internet use. Alexander Martin & Yoree Koh, *Before Japan Votes, Mum's the Word, Twitterwise*, WALL ST. J. (Dec. 13, 2012), available at <http://online.wsj.com/article/SB10001424127887323981504578177040874830524.html>.

28. TOMOHITO SHINODA, *CONTEMPORARY JAPANESE POLITICS: INSTITUTIONAL CHANGES AND POWER SHIFTS I* (2013).

29. See generally GERALD L. CURTIS, *ELECTION CAMPAIGNING JAPANESE STYLE* (1971); GERALD L. CURTIS, *THE LOGIC OF JAPANESE POLITICS* (1999).

30. Rosenbluth and Thies observe that "[t]he LDP 'sold' targetable favors in the form of tax breaks, budget subsidies, and regulatory and trade protection to corporate and agricultural constituents." FRANCES MCCALL ROSENBLUTH & MICHAEL F. THIES, *JAPAN TRANSFORMED: POLITICAL CHANGE AND ECONOMIC RESTRUCTURING* 11 (2010).

31. See Chris Hogg, *Japan's Old-Fashioned Campaigning*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/6292602.stm> (last updated July 12, 2007).

In 2009, after enduring a succession of prime ministers and unfathomable political gaffes, voters relieved the LDP coalition of its majority status and threw it into the minority. The new majority coalition, led by the Democratic Party of Japan (DPJ), then had its chance to bring campaigns into the 21st century. However, it chose to concentrate on other matters first, policies related to economic recovery, cost-cutting, and government accountability. The earthquake/tsunami/nuclear disaster of 2011 pushed everything else to the side. The LDP dug in its heels and opposed almost anything the DPJ proposed. And the DPJ also proved more than capable of self-destructive behavior. Thus did the LDP return to power in the House of Representatives election of 2012.³²

Back in control, the party found that the landscape had shifted. Court decisions were pushing the government to correct the malapportionment that had given rural voters greater electoral power than those in urban areas. In the past, the LDP was in no hurry to alter the imbalance, as it enjoyed the support of farmers by maintaining trade barriers and tariffs on agricultural products, most notably rice.³³ It also endeared itself to other rural voters by shoveling out money to be used for local public works projects, many of which had little purpose other than simply to use money.³⁴

The days of the agriculture/industry alliance were also running out. The government had to decide whether to enter negotiations to participate in the Trans-Pacific Partnership

32. Krauss and Pekkanen may want to choose a new title for the next edition of their book: ELLIS S. KRAUSS & ROBERT J. PEKKANEN, *THE RISE AND FALL OF JAPAN'S LDP: POLITICAL PARTY ORGANIZATIONS AS HISTORICAL INSTITUTIONS* (2011).

33. DICK BEASON & DENNIS PATTERSON, *THE JAPAN THAT NEVER WAS: EXPLAINING THE RISE AND DECLINE OF A MISUNDERSTOOD COUNTRY* 106-07 (2004).

34. Alex Kerr compiled many examples, among them: multi-purpose halls that had no purpose and the construction of an art gallery that left no money for the purchase of art to display. ALEX KERR, *DOGS AND DEMONS: TALES FROM THE DARK SIDE OF JAPAN* (2001).

(TTP), a US-initiated free trade coalition.³⁵ Getting in would likely require a commitment to ending most agricultural trade restrictions in return for providing favorable market access for export-driven manufacturing companies. Farmers were opposed. Big business was in favor. The Prime Minister sided with the business interests.³⁶

In so doing, the party thus could no longer rely on the constituents that had kept it in power for so long. Concurrently with the decision to participate in TPP talks, it approved legislation allowing internet election campaigning, to an extent.

And now, the LDP has become the new best friend of internet *otaku*, known elsewhere as “geeks.” It dispatched some of its biggest names to troll for support among those attending *Nico Nico Chokaigi*, a two-day event run by the company that operates the Nico Nico Douga video-sharing service. Prime Minister Shinzo Abe made an appearance and defined himself as one of them. “From the upcoming Upper House election, we can use the Internet for the campaign, which means we can fight together,” he said.³⁷ Apparently no one was impertinent enough to ask him why his party had fought against it until then.

LDP Secretary General Shigeru Ishiba and the people at the event rarely cross paths under other circumstances. But the Japan Times reported that the crowd shouted his name “as he entered the venue and served his special curry to the participants.”³⁸ One

35. William H. Cooper & Mark E. Manyin, Cong. Research Serv., R42676, Japan Joins the Trans-Pacific Partnership: What are the Implications? 1 (Aug. 13, 2013), available at <https://www.fas.org/sgp/crs/row/R42676.pdf>; Ian F. Fergusson & Bruce Vaughn, Cong. Research Serv., R40502, The Trans-Pacific Partnership Agreement 1 (Dec. 12, 2011), available at <http://www.fas.org/sgp/crs/row/R40502.pdf>.

36. See generally Cooper & Manyin, *supra* note 35.

37. Kazuaki Nagata, *Nico Nico Douga Becomes Reality for Two Days*, JAPAN TIMES (Apr. 29, 2013), <http://www.japantimes.co.jp/news/2013/04/28/national/net-site-becomes-reality-for-two-days/#.UY9Ea-CCg20>. The Prime Minister’s resume as an internet aficionado is relatively short. He told the crowd he started using Facebook just the year before. *Id.*

38. Ayako Mie, *Politicians Roll Up Sleeves at Net Event*, JAPAN TIMES (Apr. 29, 2013) http://www.japantimes.co.jp/news/2013/04/29/national/politicians-roll-up-sleeves-at-net-event/#.UY8_qOCCg20.

39-year-old man who had never cast a ballot in his life said he would vote for the LDP. “Having Shinzo Abe or Ishiba at the event for online geeks definitely got our attention,” he said. Exit farmers, enter *otaku*.

No longer afraid of being upstaged by upstarts online, the LDP apparently saw internet campaigning as a way to pile on, making the most of its institutional advantages. Newcomers and also-rans may have home pages, but the LDP surely can avail itself of the best and most complete internet presence that money can buy.³⁹

Amended article 142-3.1 authorizes the distribution of literature and images for election campaigns via websites. 142-3.3 requires the website to provide contact information such as an e-mail address. Content may be uploaded through the campaign period until the start of voting. At that time, whatever is on the site may remain there.⁴⁰ Until the amendments, such websites’ contents were frozen at the start of the *campaign*.

Postings are also subject to a “truth or distortion” test, independent of prosecution for defamation.⁴¹ Article 235-1 is considered to include internet activities. Anyone who posts items found to be improper with the intent of preventing a candidate from being elected can be imprisoned up to four years or fined as much as ¥1 million (\$10,000).⁴² Moreover, in some cases, internet service providers can take down offending information after giving website operators two days to do it themselves.⁴³

E-mail is treated separately. Candidates and political parties may use it to distribute campaign information.⁴⁴ Others, meaning

39. For example, Abe met in Tokyo with the Chief Executive of Twitter and discussed its use in campaigns. See Yoree Koh, *Twitter CEO’s Direct Message @JapanPM*, WALL ST. J. (Mar. 26, 2013) <http://blogs.wsj.com/japanrealtime/2013/03/26/twitter-ceos-direct-message-japanpm/>.

40. Amendments to Public Offices Election Act, arts. 129, 142-3.2 (2013) [hereinafter Amendments].

41. Japan Crim. Code arts. 230, 231 (1907); KEIHÔ (PEN. C) arts. 230, para. 1, 231 (Japan).

42. Election Law, art. 235-1.

43. Amended Provider Liability Act of 2001, Law No. 137, art. 3.

44. Amendments art. 142-4.1.

the general public, may not. One explanation is a patronizing attitude toward the public. In a question-and-answer session in the Diet, LDP (governing party) member Ichiro Aisawa said the revisions impose various requirements on candidates for using e-mail, including identification. Ordinary people, he suggested, would be unlikely to strictly adhere to these requirements. Thus, to save them from the possibility of conducting illegal acts, the law prohibits them from acting at all.⁴⁵

Of course, this assumes that restrictions on private use of e-mail are appropriate in the first place, a proposition that rests on a dubious foundation.⁴⁶ Even on its own terms, the revised law fails to achieve its objectives. It distinguishes various forms of internet-based communication such as websites,⁴⁷ SNS (social networking services, such as Facebook and Twitter), SMS (short message services, such as mobile-to-mobile text), and SMTP (simple mail transfer protocol, ordinary e-mail). The restriction on ordinary citizens only applies to SMS and SMTP.⁴⁸ In other words, a voter is free to blog and Tweet about her preferences in the campaign and post them on her Facebook page. She may not, however, convey the same content by e-mail.

In a question-and-answer session about the bill, one legislator, Gaku Hashimoto, offered the explanation that SMS and SMTP are closed-end communications. That is, they are directed at specific individuals. Thus, he said, they carry a greater danger of imposing mental abuse and the risk of transmitting viruses.⁴⁹ However, the sending of person-to-person (or persons) messages through Facebook and Twitter appears to be categorized as

45. *Public Offices Election Law: Hearing on Amendments Before Comm. on Political Ethics and Electoral System*, Japan H. of Councillors (2013) [hereinafter Hearing].

46. A restriction on sending a handwritten or printed personal letter to someone by post would likely be ruled unconstitutional, even in Japan. The same is true of a personal telephone call.

47. YouTube is considered a video sharing website. Ustream is considered a video hosting website.

48. Amendments arts. 142, 142-4, 243.

49. Hearing, *supra* note 45.

website use.⁵⁰ If this is the case, then the same message directed at the same recipients would have different legal consequences based merely on the method by which it was routed.

Had the government opted for simplicity and just allowed use of the internet, the revision could have been a model of brevity. Instead, the convoluted approach gave rise to changes across some 20 pages of statutory language.⁵¹ The enforcement regulations of the Ministry of Internal Affairs and Communications ran nine pages.⁵² Even an outline (with bullet points and highlights in blue) consumed seven pages.⁵³

Perhaps suspecting that few citizens would be sufficiently motivated to make their way through any of these documents, the Ministry also prepared several pamphlets in the form of *manga*. One announced that internet campaign activity is now allowed. Most of the space, however, was dedicated to examples of what is not allowed, each of which was marked through with an X.⁵⁴

Another pamphlet was completely devoted to one particular prohibition: that on the involvement of people under 20 in campaign activity on the internet or anywhere else.⁵⁵ This long-standing policy ensures that when people do reach the age of

50. *See id.*

51. The before-and-after text is available on the website of the Ministry of Internal Affairs and Communications at: ACT FOR PARTIAL REVISION OF PUBLIC ELECTION LAW, available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/pdf/000222255.pdf. The new legislation, by itself, is also available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/pdf/000222254.pdf.

52. FOR THE ACT TO AMEND THE PUBLIC OFFICES ELECTION LAW (NOTIFICATION), available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/pdf/000223260.pdf.

53. The Current Public Office Elections Law, available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/pdf/000225176.pdf.

54. *See Prohibited Activities from Now On*, available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/pdf/000225177.pdf.

55. *See Even though Restrictions on the Use of the Internet in Campaigns have been Lifted*, available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/chirashi_minor.pdf.

adulthood, they are devoid of any experience with the political process. A cynic might suspect that is the point.

Yet another pamphlet began with a cartoon story of a clueless father who thinks he can now cast his vote by internet. (His wife relieves him of his ignorance.) The story also showed how their daughter's dreams of supporting the *ikemen* (handsome) candidate are dashed by the general prohibition on her being involved in political matters at all. (Of course, when she reaches 20, she will be free to rely on that criterion to make her choice.) The brochure then drearily reiterated the many internet activities that are illegal. It concluded with some questions and answers, accompanied by two earnest characters (who appear to be no older than 20) vowing to use the internet properly.⁵⁶

One way for citizens to use the internet "properly" during the election campaign is to not use it at all. Indeed, amidst all the warnings against breaking the law, that was probably the most predictable one. Preliminary data suggest that many people did indeed avert their eyes. One small-sample survey of citizens in their 20s during the campaign found that only 19% had looked at on-line information related to the election.⁵⁷ And this, of course, was the age group that would be expected to be the most net-savvy. The editor of a website that aggregates politicians' blogs observed that many candidates decided against devoting much time to updating their internet presence during the campaign period. Kota Otani said, "As the election drew closer, they realized it would be more effective to hit the streets . . . to shout their names from the sound truck."⁵⁸

56. See *Use of the Internet in Political Campaigns*, available at http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/chirashi_kouhou.pdf.

57. *Only 19% of young voters go online for election info: survey*, JAPAN TIMES (July 14, 2013), available at <http://www.japantimes.co.jp/news/2013/07/14/national/only-19-of-young-voters-go-online-for-election-info-survey/#.UkGp4RZ95oM>.

58. See Ayako Mie, *Inaugural Internet campaigning not proving to be game-changer in poll*, JAPAN TIMES (July 20, 2013), available at http://www.japantimes.co.jp/news/2013/07/20/national/inaugural-internet-campaigning-not-proving-to-be-game-changer-in-poll/#at_pco=cfd-1.0.

III. FREE SPEECH, WITHIN LIMITS

The Japanese Constitution protects freedom of speech and press with language similar to that of the American Constitution.⁵⁹ It says, “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained”⁶⁰ However, words are not always what they seem.

The Constitution also includes an escape clause for the government. Article 12 states that “the people . . . shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.”⁶¹ The U.S. Constitution, by contrast, includes no such duty. The difference is significant.

The U.S. Supreme Court has said, “The First Amendment is a value-free provision whose protection is not dependent on ‘the truth, popularity, or *social utility* of the ideas and beliefs which are offered.”⁶² Further, “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.”⁶³

The Japanese government can claim Article 12 to be a constitutional imperative to restrain expression that—allegedly—adversely affects the public welfare. In this instance, the public welfare is defined as elections in which campaign activity is standardized. Thus, in the Japanese system, uniformity is seen as a more important value than the unfettered exchange

59. The similarity is not surprising, as Americans drafted the post-war Japanese Constitution. See KYOKO INOUE, *MACARTHUR’S JAPANESE CONSTITUTION* (The University of Chicago Press, 1991).

60. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan). The “all other forms of expression” language goes beyond the words of the First Amendment to the U.S. Constitution, as it incorporates a century-and-a-half of interpretation by American courts.

61. *Id.* art. 12.

62. *Meyer v. Grant*, 486 U.S. 414, 419 (1988), quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963) (emphasis added).

63. *Meyer v. Grant*, 486 U.S. at 419, (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

of information. From this assumption flows the labyrinth of restrictions.⁶⁴

By contrast, in the United States, when the government seeks to abridge speech, it always bears the burden of overcoming the proscriptions of the First Amendment.⁶⁵ It has nothing like Article 12 to bolster its case. So, the government can only prevail in the most extreme circumstances. This is true of speech in general and especially so when the subject is political speech.⁶⁶

The much revered and reviled decision of the U.S. Supreme Court in the *Citizens United* case⁶⁷ embodies this way of thinking. What makes it controversial is its holding that the political speech rights of juridical persons, such as corporations and labor unions, are equivalent to those of natural persons. The Court struck down restrictions on spending for the advocacy of policies and candidates, so long as the money is spent by the juridical person directly and is not simply a contribution to a candidate or party.

Japan's law, however, imposes restrictions on natural persons--the voters--and the candidates themselves. Citizens are forbidden to use e-mail to express opinions about the candidates

64. Owen Fiss has argued that the government might constitutionally restrict political expenditures as a way of protecting popular sovereignty. He says, "The law's intention is to broaden the terms of public discussion as a way of enabling common citizens to become aware of the issues before them and of the arguments on all sides" OWEN FISS, *THE IRONY OF FREE SPEECH 2* (Harvard University Press, 1996). He writes, "It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way." *Id.* at 4.

65. See, e.g., *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (government has burden to show that burden on political speech "furthers a compelling interest and is narrowly tailored to achieve that interest."), cited in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

66. See generally, ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE* (Basic Books, 2010).

67. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). Cf. *McCutcheon v. Federal Election Comm'n*, 572 U.S. ____ (2014) (striking down limit on aggregate campaign contributions).

and parties. This is democracy turned askew: candidates are allowed to talk at voters, but voters are prohibited from talking to each other.

The penalty for violating the restrictions is substantial: imprisonment up to two years and a fine of as much as ¥500,000.⁶⁸ In the revisions, however, the government promised to revisit the issue of e-mail after the House of Councillors election.⁶⁹ Apparently, the attitude was that politicians can go first: citizens must wait.

The truth and distortion sanctions are also troubling. In the midst of an election campaign, is an internet service provider to be the ultimate judge of what information and allegations are to be removed? Would a complaint by an “offended” candidate be enough to have a criticism banished? What is the remedy if, after the election, the purged criticism is found to have been true or, at least, not untrue? Would the public have standing to sue for being deprived of the full range of information upon which to make its electoral decision? Would the election result be nullified?

Matters such as these indicate that despite the appearance of liberalization, the election laws continue to reflect a deep-seated distrust of full-fledged democracy. Candidates must stick to the limits in the ways and means of informing voters and confine their criticisms. Voters must refrain from expressing their opinions about their electoral choices to other citizens, at least by certain electronic means. The system is effective in one way, though. Thanks to the sound trucks, everyone can hear the names of the people running for office, *ad infinitum*.

68. Election Law, *supra* note 9, art. 243-1.

69. Amendments, *supra* note 40, Addendum art. 5 states that the use of the internet shall be reviewed annually and revised as appropriate to the circumstances of campaign activity.