

# Legal Challenges surrounding Online Voting

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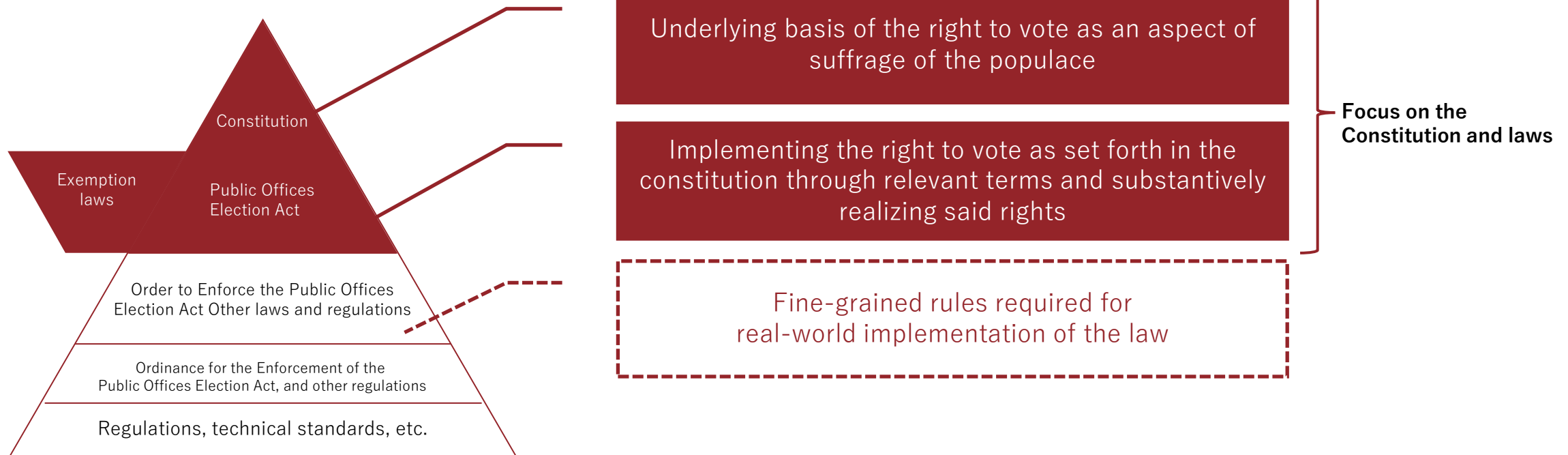
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# 1. Definition of Online Voting

A method of casting a ballot anywhere and at any time within the voting period via a smartphone or other personal device connected to the Internet

## 2. Is this viable under current law?

### (1) Laws and regulations pertaining to elections



## 2. Is this viable under current law?

(2) What is the fundamental method of casting a ballot?

What is the fundamental method of casting a ballot?

- ✓ Must go to a **polling station** on the day of the election
- ✓ Must **write the name** of a candidate (or party) for public office and
- ✓ **cast it**

Submitting votes without explicitly writing a name seems unfeasible under current law

### Public Offices Election Act Article 35

Elections shall be conducted by casting a ballot.

### Public Offices Election Act Article 44, Clause 1 (Voting at polling stations)

On the day of the election, the electorate must go to polling stations to cast ballots.

### Public Offices Election Act Article 45 (Completion and casting of ballot)

1. ...the electorate must **write the name of** one candidate for public office for the given election on a ballot slip and cast it in a ballot box at a polling station.
2. For elections for the House of Representatives (election by proportional representation), the electorate must **write** the name or abbreviated name pertaining to those found on the House of Representatives Roster...and cast it in a ballot box at a polling station.
3. For elections for the House of Councillors (election by proportional representation), the electorate must write the name or abbreviated name pertaining to those found on the list of candidates for public office on the House of Councillors Roster...and cast it in a ballot box at a polling station.

However, in lieu of **writing** the full name of a candidate for public office on the House of Councillors Roster, the appellation or abbreviated name found on the House of Councillors Roster...can be used.

## 2. Is this viable under current law?

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### 3. Are exceptional voting methods permissible?

**A. Early voting:** where extenuating circumstances require voting prior to the appointed date

(Voting is done at a polling station before the deadline established by the municipal election date management committee)

**B. Absentee ballot :** where extenuating circumstances require voting prior to the appointed date by postal mail

(Voting is done by completing a ballot and enclosing it in an envelope under the supervision of the nearest absentee voting manager)

**C. Overseas voting:** where a party registered in the overseas electorate casts a vote from another country

(Voting is done at a facility managed by the head of the diplomatic mission by completing a ballot and enclosing it in an envelope)

All of the above call for casting a ballot "**at a specific place,**" i.e., under supervision of third parties checking the status of votes



Under current legislation, which requires physically casting a ballot at a specific site administered by a third party, online voting is unlikely to be implementable.

## 2. Is this viable under current law?

Cf. Act on Special Provisions Regarding Voting by Means of Electromagnetic Recording Voting Devices Used for Election of Council Members and Heads of Local Governments

- Votes for elections of council members and heads of local governments can be conducted using electronic devices.

(However, this must be done at the discretion of the municipality conducting the election.)

### Voting methods

Elections for council members and heads of local governments can be performed by:

**1. The electorate 2. itself 3. manipulating an electromagnetic recording voting device 4. at a polling station.**



Source: Mainichi Shimbun, "Rokunohe-machi, the sole site of electronic voting, abandons system due to costs."  
<https://mainichi.jp/articles/20180404/k00/00m/010/090000c>

✓ **The need to physically write the ballot was eased, but voters must still go to polling stations, so this remains a far cry from online voting**

(The act forbids being connected to the Internet, i.e. telecommunications lines. (See Article 4, Clause 2)

✓ **Issues associated with unexpected system errors led to a ruling voiding the votes, causing the system to fail to gain**

(Cf. Nagoya High Court 2004 (Gyo-ke no. 3) ruling on election voiding in Kani-shi)

### 3. Amendments towards the Realization of Online Voting

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#### (1) Can an amendment to legalize online voting be justified?

There are sufficient **legislative facts** to support the argument for a need for legal amendment, and such an amendment would be feasible if the **scope of the amendment is seen as valid from the point of view of its legitimacy and constitutionality.**

**Need for online voting**  
(Legislative facts)



**Acceptability of online voting**  
(Justification and constitutional compatibility)

#### (2) Are the legislative facts supported?

✓ **It seems arguable that they would be supported**

- **Risks associated with going to polling stations under COVID-19**

- **May be an opportunity to improve sluggish voter turnout (particularly among youth)**

↳ The country's inability to prepare a sufficient voting environment causing people to be unable to vote could be said to be an infringement on national suffrage.

(Cf. Judgment of unconstitutionality of voting restrictions on citizens abroad, Supreme Court Ruling dated September 14, 2005, Minshu Vol. 59, Item 7, Page 2087)

### 3. Amendments towards the Realization of Online Voting

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#### (3) Approaches to stipulating online voting by law


By law, the following options might be possible for the incorporation of online voting as a new voting system.

1. Stipulate a new voting method in Section 6 of the Public Offices Election Act

2. Remove the remarks in Article 49, Clause 1 (Absentee Voting) of the Public Offices Election Act stating that voting must take place "at a site under the supervision of a party responsible for absentee voters," allowing online voting as one method for election of public officials under the Order to Enforce the Public Offices Election Act

3. Remove the remarks in Article 4, Clause 2 of the Electronic Voting Act (those stipulating a requirement of voting not being online) and expand the scope to national elections and advance voting.

4. Enacting a new law for online voting



Given that the current Electronic Voting Act is treated merely as a provisional measure, the Public Offices Election Act must itself be amended.

## 4. What methods of ballot casting would be permissible?

### (1) Considerations towards voting legislation

Suffrage is the fundamental concept underlying the right to vote and is the cornerstone of democracy, making it one of the most important rights upon which national sovereignty is based.

→ **Given constitutional requirements, unless the amendment is constitutional, the voting method would not be supported.**

#### Constitution Article 15, Clause 1

The right to appoint and dismiss civil servants is an **inalienable right of the people**.

#### A. Universal adult suffrage (Constitution Article 15, Clauses 1 and 3)

All of the people are equal under the law and there shall be no discrimination on the exercise of the right to vote, including restrictions on political, economic or social relations because of race, creed, sex, social status or family origin.

#### B. Equal suffrage (Constitution Articles 14 and 44)

The opportunity of the electorate to vote, as well as the value of voting itself, must be treated in an equal fashion.

#### C. Secrecy of ballots (Constitution Article 15, Clause 4)

Voters must be free to vote of their own free will, without being subject to third parties questioning the content of their vote  
Moreover, the contents of a person's vote must not be disclosed to third parties

#### D. Direct election (Constitution Article 93, Clause 2)

Elected civil servants (heads and members) must be directly voted in by a valid election by the electorate



## 4. What methods of ballot casting would be permissible?

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### (2) Concerns over constitutional Issues pertaining to online voting

#### A. Concerns over equality of elections

##### 1. Concerns over the "one voter, one vote" principle

- Acquisition of voting rights by third parties
- Concerns over multiple votes being cast through hacks/cracks

##### 2. Concerns over loss of opportunity to cast a ballot due to system outage

#### B. Confidentiality concerns

##### 1. Concerns over vote data being leaked due to cracking


##### 2. Concerns on infringement of people's right to a secret ballot by being required to vote in front of someone

(moreover, major concerns regarding how this affects free will)

#### C. Concerns over direct election

##### 1. Concerns over mistaken or erroneous votes

##### 2. Concerns over impersonation or identity fraud



**The above concerns must be dispelled if  
online voting is to be achieved.**

\*In the absence of dispelling the above concerns, there would be doubts about the validity of the election, which would erode the fundamental basis of democracy.

## 4. What methods of ballot casting would be permissible?

### (3) Referring to past precedents in electronic voting

#### Electronic Voting Act Article 4, Clause 1

Ballot casting by electromagnetic recording media per the provisions of the preceding article must incorporate the below criteria.

1. The system prevents the **casting of two or more votes** by a voter in a given election.
2. **The secrecy of ballots** is not violated.
3. Prior to making an electromagnetic record of which candidate for public office the voter cast a vote for by operating the device, the system allows the voter to confirm the eligible parties by displaying their names **(prevention of unintentional or erroneous votes)**
4. The system allows for **reliably making an electromagnetic record of** which candidate for public office was voted for using the device.
5. **Sufficient technical measures must be taken to protect the integrity of records made on electromagnetic recording media from possible failure and determine which candidate for public office was selected by the voter operating the device.**
6. **The system allows for removing or retrieving the electromagnetic recording media from the device itself.**
7. **The system prevents unauthorized parties from managing or manipulating electromagnetic recording devices.**
8. In addition to the items set forth above, the system must not harm the fair and proper execution of an election.



**In addition to the above, use of Internet connections would likely require technical measures to ensure confidentiality and redundancy.**

## 5. To what extent can technology ameliorate these concerns?

### (1) Paper voting may not necessarily meet all of the constitutional requirements

E.g., Vote observers could publicize the outcome of a vote by a specific voter

Possibility of infringing on secrecy of ballots

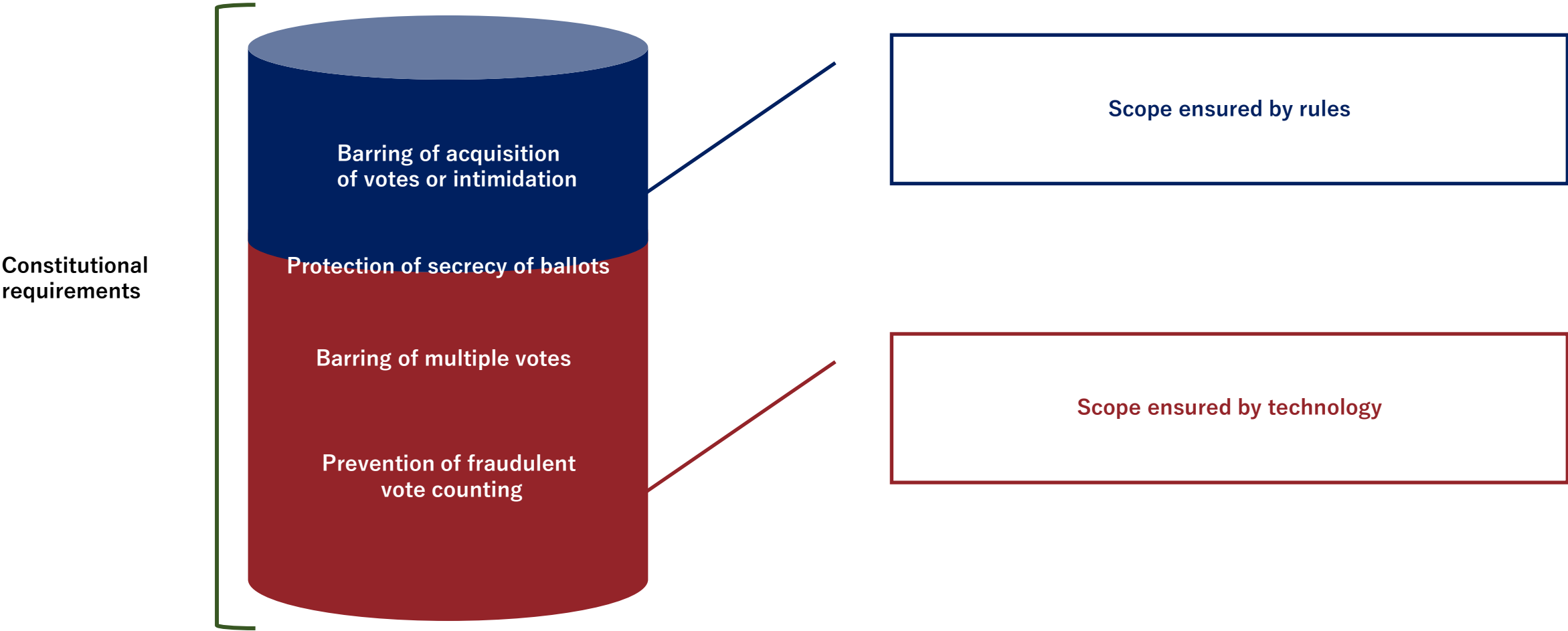
Prevention of certain conduct by imposing penalties through rules (law)

#### Public Offices Election Act Article 227

Where committee members of the Central Election Management Council or personnel of the Ministry of Internal Affairs and Communications engaging in general affairs for said body, committee members or personnel of the House of Councillors Joint Election Commission, voting administrators, vote counting administrators, electoral chairs or electoral chapter chairs, national or municipal public servants engaging in election affairs, **observers** (including those parties required to assist in ballot casting per the provisions of Article 48, Clause 2 and those parties required to record items regarding ballots per the provisions of Article 49, Clause 3, and applying mutatis mutandis below) or supervisors disclose the name of a candidate for whom a ballot is cast (in the case of proportional representation by election for the House of Representatives, the name or abbreviation of the political party or body; in the case of proportional representation by election for the House of Councillors, the name of the candidate or the name or abbreviation of the political party or body), **they shall be subject to no more than 2 years imprisonment and/or fines not exceeding 300, 000 JPY. Even where the act of disclosure was itself false, the selfsame shall apply.**

5. To what extent can technology ameliorate these concerns?

(2) Technical guarantees and rule-based (legal) restrictions must be treated distinctly



## 6. Summary: towards the realization of online voting

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- ✓ **At a minimum, current law does not presuppose contexts in which ballots would be cast in the absence of a supervisory party.**

→ This requires considering how to amend the law.

- ✓ **There are sufficient legislative facts to support such an amendment.**

→ With advances in technology and the new normal under COVID-19, the in-person voting system contradictorily requires people to go out of doors. Ultimately, one is forced to conclude that the prevailing voting system is behind the times.

- ✓ **An online voting system must have functionality to satisfy constitutional voting rights.**

1. Identity verification functionality to ensure that each person can cast no more than one vote
2. Confidentiality that ensures secrecy of ballots
3. Redundancy to ensure validity of the election

- ✓ **There is no need to satisfy Constitutional requirements solely through such a technology**

## 7. Addendum: Using the My Number system to identify voters

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- ✓ The My Number registry and electoral roster are both created per certificates of residence

My Number



This number is obtained by converting the code found on a person's certificate of residence. When a code is listed on a certificate of residence (i.e., when the certificate is issued), the personal identification number is promptly created and the individual notified thereof.

Electoral roster



One necessary condition of casting a ballot is that the person be registered in the electoral roster. Registration in the electoral roster occurs when a party turns 18 years old and a certificate of residence is created, and the person is registered in a given municipality for a period of three or more months from that date.



Both are created based on certificates of residence.

**I.e., can be easily used to verify the identity of voters**

## 7. Addendum: Using the My Number system to identify voters


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### ✓ Can the My Number system be used for election processing?

#### In what cases could personal identification numbers be used?

##### **Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures ("My Number Act"), Article 9 (Scope of use)**

1. The administrative organs, municipal bodies, independent administrative institutions, and other parties handling administrative affairs as listed at the top of **Appendix 1** can use personal identification numbers to the extent required to efficiently search for personal information in specific personal information in files retained for the purposes enumerated at the bottom of the table and manage them accordingly. The above also applies to parties contracted to perform all or part of the above.
2. The heads of municipal bodies or other executive agencies can use personal identification numbers to the extent required to efficiently search for personal information in files retained for the purposes of welfare, health, medicine, or other social insurance, municipal tax...and/or disaster prevention or other matters as stipulated by ordinances, and manage them accordingly. The above also applies to parties contracted to perform all or part of the above.



While the appendix does not list election duties, could this not be implemented by **adding such provisions to it?**