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SHIP Project Review 2003-a

SHIP
PROJECT

SHIP project
(Social and Human Information Platform Project)
Institute of Social Sciences, Meiji University

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Table of Contents

Preface and Acknowledgement p.3

Part I. 6th International Symposium p.5

Programs of Conference p.5

Keynote Speech p.7

Chris Puplick, *Court Rulings and Privacy Issues* p.8

Herbert Burkert, *Commercialization of Legal Information - A Tale of Two Countries -* p.41

Curriculum Vitae p.68

Part II. Articles p.75

Takato NATSUI, *Legal Information: Basic Structure and Legal Issues* p.76

Hiroshi KOMATSU, *Legal Information and XML – An Introduction -* p.102

Osamu MIURA, *How to Conduct a Search for Japanese Translation of Foreign Laws* p.131

Appendix1 p.139
Appendix2 p.141
Appendix3 p.143
Appendix4 p.146
Appendix5 p.147

Members List p.149

Preface and Acknowledgement

Takato NATSUI
Editorial
Professor at Meiji University

The SHIP project is a research project for studying and constructing a platform system for social science database based on Extensible Markup Language (XML) technology. This project is funded by Meiji University and the Ministry of Education, Culture, Sports, Science and Technology of Japan.

In this project, we have been engaged in developing a legal information system, which functions as a demonstration system. Now, we have almost completed compiling judgments from the former Supreme Court in the Meiji era to store them in a database. Some of the compiled data will be processed for publication, and then, be used in an evaluation experiment with monitors, which will start by the end of this year. Also, for some laws, we are digitizing texts of the provisions from their original version to their latest revision in order to construct a system that can search and refer to provisions effective at a certain point. By combining these two systems, it will be possible to create links of provisions effective at the time when a judgment was delivered. In recent years, laws are frequently revised or abolished, and some are revised several times a year. XML technology is very effective in constructing a system which can automatically search laws being effective at a specific time.

As the research activities of SHIP project, we have taken up various legal problems and technical issues that need to be examined in constructing a legal information system, while developing those systems mentioned above. Some of the achievements from the project are published on the Web as retrievable documents. Also, we hosted report sessions and discussions as a truly significant joint research on a global basis, inviting a number of researchers, legal practitioners, and government and corporation officials from both Japan and abroad. The SHIP symposium is one of the most important public events for such report and discussion.

This Review is separated to two parts.

Part I of this review involves programs and agendas of SHIP Symposium 2003. The main aim of this conference is to discuss about the Public Aspects of Legal Information. There is a severe contradiction between free access and privacy protection relating to court rulings. This privacy interests consist of action party's interest, witness's interest, victim's interest and other person's interest. These are sometimes conjunction with each other. Also practical traditions on court ruling publication are fundamentally different, for instance between the US and Japan as well. Public Access should be superior to privacy protection, or not? This is a very difficult problem to be resolved.
On the other hand, there are some different problems on this area; the problem of commercialization of

legal information is one of such problems. Especially legal information which may be distributed by a private company is a private property for such private company, but the legal information itself should be a public common property that was made by officials or judges on the basis of TAX. If such legal information would be distributed with any fee, the problem of double charge would be taking place. This is a sort of problem relating to a public aspect of legal information.

Part II of this review involves 3 Articles; My "*Legal Information: Basic Structure and Legal Issues*", "*Legal Information and XML – An Introduction –*" by Hiroshi KOMATSU and "*How to Conduct a Search for Japanese Translation of Foreign Laws*" by Osamu MIURA. All articles have tight relation to the main Theme of our Symposium.

We hope that this symposium will play a significant role in order to move toward a better future for human beings as well as to realize a society in which people's rights to access to legal information are guaranteed as extensively as possible.

The complete record of our 6th conference will be published on the Web.

http://ship.mind.meiji.ac.jp/

Acknowledgment

Mr. Chris Puplick and Professor Dr. Herbert Burkert deserve our special thanks for their speeches and discussions at the 6th conference. And we have acknowledged their special contribution of Japanese-English translations by Hiroko Hayashi.

Part I.

6th International Symposium

- Public Aspects of Case Information -

Programs of Conference

Date; May 31 2003

Place; The 1013 room (Liberty Hall) at Meiji University in Tokyo, Japan

Equipment at Liberty Hall; Internet accessible devices which can be connected private PCs (full at stage, partly at audience seats but needs temporary access accounts that we will be able to issue), parallel display screens (each 1000 inch), simultaneous interpreting devices
Expectable number of audience; 80-150 (MAX 300)

11:00 **Opening Remarks**

11:10 **Greeting Messages**
Director at Social Science Institute, Meiji University
Director at Information Science Center, Meiji University

11:30 **Research Reports by SHIP project members**
Takato Natsui (SHIP project, Professor, Meiji University, JP)
http://www.isc.meiji.ac.jp/~sumwel_h/

12:00 **Lunch Break**

13:30 **Keynote 1: Court Ruling and Privacy Issue**
Chris Puplick (NSW Privacy Commissioner, AU)
http://www.aija.org.au/tech3/program/presenters/ChrisPuplick.bio.html

14:15 **Keynote 2: Commercialization of Legal Information**
Herbert Burkert (Research Center for Information Law (FIR), DE)
http://www.herbert-burkert.net/

15:00 **Coffee Break**

15:30 **Discussion;** Public Aspect of Case Information (a discussion on Free Access and Privacy Issue)

Chair:

Makoto Ibusuki (SHIP project, Professor, Ritsumeikan University, JP)

Panels:

Chris Puplick

Herbert Burkert

Makiko Miwa (Professor, National Institute of Multimedia Education, JP)

http://www.nime.ac.jp/~miwamaki/index.htm

Jun-ichi Yamamoto (Professor, Tsukuba University, JP)

Yasutaka Machimura (SHIP project, Professor, Nanzan University, JP)

http://member.nifty.ne.jp/matimura/

Fumio Shimpo (Assistant professor, SHIP project, Tsukuba University, JP)

http://www.hogen.org/

18:00 **Closing Remarks**

18:30 **Reception Party**

Keynote Speech

1. **Chris Puplick,** ***Court Rulings and Privacy Issues***

2. **Herbert Burkert,** ***Commercialization of Legal Information - A Tale of Two Countries -***

COURT RULINGS AND PRIVACY ISSUES

SHIP PROJECT

SIXTH INTERNATIONAL SYMPOSIUM

held at

Faculty of Law

Meiji University

Tokyo, Japan

address by

CHRIS PUPLICK

31 May 2003

Distinguished Guests, Members of the Judiciary, overseas Colleagues, members of the Faculty

May I start by thanking Professor Natsui Takato and his Faculty colleagues for inviting me to participate in this distinguished symposium. I am most honoured to be here. I would also like to thank Ryuji Akimoto the Liaison Officer at the Supreme Court of Japan for his assistance.

I hope that all of you will appreciate the utter sense of trepidation with which I approach the prospect of talking to you about matters which relate to the law and its administration. My formal academic qualifications are in Classical Greek and Roman history, and I staggered (or rather was pushed) into becoming the first Privacy Commissioner for New South Wales by political rather than legal forces. It is perhaps ironic for historians to be preaching to lawyers - but them somebody has to!

It is also why my classical background brings me so frequently back to Cicero's great question "*cui bono?*" – who benefits ?

What I wish to discuss with you are the issues, as I see them, arising from the interplay of new approaches to privacy protection, public access to information and the communications revolution as it affects the operations of our Court systems.

I made my first presentation on this general topic to a meeting of my States' Supreme Court judges in August 2001, and since that date something in our world has changed dramatically - I refer of course to the events of September 11, 2001. Not only did that

date shake the western world to its overly-self confident foundations but it has now shaken much of the rest of the world in an even more literal sense. For those Australians who, like myself, spend a large part of our lives concerned with the issues of privacy protection it was perhaps the most profound shock we had ever experienced, at least until the Bali tragedy of October 2002. This is globalisation with a terrible vengeance.

I have referred in numerous other places to the impact of 11 September on privacy matters and concerns. I have expressed my alarm at the extent to which this outrage has been used as an excuse to improperly and unnecessarily enhance police and security agency powers, to restrict freedoms and liberties and to tip the delicate balance between the citizen and the state far too sharply in favour of the latter.

In Australia we have not been immune from this rush into over-reaction although at least in some areas more sanity now prevails and the excesses of the federal Attorney General have been restrained. The same of course cannot be said for places such as the United States where the full implications of the erosion of civil liberties under to so-called *Patriot Act* will take a long time to be manifest and understood.

What September 11 should remind us all however is that information is power and access to it is the key for those who would exercise it.

Privacy Matters

Opinion surveys in the United Kingdom, North America and Australia consistently

show high levels of concern by members of the public over the protection of their personal privacy and information. The recent survey commissioned by the Office of the Australian Federal Privacy Commissioner reported record levels of concern:

Approximately 89% of the population thought it was important that organisations advise them who would have access to their personal information, with two-thirds (66%) rating this as very important. As few as 1 in 20 (5%) thought such advice wasn't an important issue.

As well as wanting to know who may have access to their personal information, the desire to know how their personal information might be used was also strong with more than 9 in 10 (92%) rating this type of information as important. Again, this information was seen to be very important for over two-thirds (68%) of the population.

....the practice of using information for a purpose other than that which was originally intended was of concern for 68% of the population with 41% recording great concern, and 23% recording little or no concern.

In November 2001 at a National Conference on Privacy, Technology and Criminal Justice Information held in the United States a number of distinguished judges and academics reviewed some of the issues about public perception of the way privacy issued were handled in the criminal justice sector. Attention focused upon the distinctions made, for example, between information related to adults and juveniles, and to information being available about people who had been convicted and those who were simply arrested but not convicted. It is not my purpose to go into details of those surveys here but rather to say that an overwhelming majority of people wanted to ensure that

the criminal justice system provided adequate privacy safeguards and that not all records, simply by virtue of being court records, were accepted as being automatically accessible and in the public domain. Indeed one Judge commented *"If we breach the public trust in the area of privacy, the loss of confidence is going to be immeasurable"* as far as the maintenance of public trust in the justice system is concerned.

Surveys conducted in the wake of September 11 show that while many more people now favour some expansion of police and security powers to deal with terrorism, they have concerns about the potential impact of these on civil liberties generally and that above all they are mistrustful of how police, judges and bureaucrats will administer any such laws - a feeling one commentator has described as "anxious trust".

Privacy itself is both a culturally and historically defined value, although I have no opportunity to discourse further on that point. Nevertheless even within the current Australian context, privacy is a contested value on which a there are a range of positions:

- privacy for some is a human right so essential that it displaces all other interests - it goes to the essence of how a person defines themselves : although I admit this is a very western-centric view and highly culturally specific paradigm

- respect for privacy may be seen as an essential basis for interacting with others in a civilised community and for defining relationships between individuals and the State

- privacy is the basic element in establishing trust between organisations and their customers or consumers (and hence promoting good business activities and higher

profits)

- for others, an emphasis upon individual privacy is not the best way to confront the challenges of an increasingly surveillance based society

- law and policy makers may see privacy as just one of many rights which need to be balanced against other individual or public interests

- there is always the haunting (and essentially mindless) refrain that privacy does not matter because if you have nothing to hide you have nothing to fear

- *"Get over it...you have zero privacy anyway"* (Scott McNealy CEO Sun Microsystems, 1999)

This variety of views reflects a degree of uncertainty and ambiguity over how this pervasive public concern can best be resolved in different and differing contexts. Nevertheless there has always been a presumption in free and democratic societies that people do have some rights to respect for their privacy - their right, as is classically said, to be left alone. If anything, this presumption has gained ground in recent years, both in terms of public perceptions and in terms of formal legal recognition.

I do not want to dwell upon this point of legal recognition other than to draw attention to the following points:

- democratic governments throughout the western world have shown an increasing

propensity to enact legislation defining certain rights to privacy and providing for its protection. In Australia we have formal broad brush legislation in the Commonwealth, New South Wales and Victoria with other more limited matters such as the privacy of health records protected in other jurisdictions;

- the long tradition of what I would described as the indifference of Anglo-Australian jurisprudence towards privacy as a right is being displaced by an increasing importation into our systems of those rights (including privacy rights) enshrined in international instruments such as the *International Covenant on Civil and Political Rights* or the *European Convention on Human Rights* . This latter instrument has now been effectively incorporated into the municipal law of the United Kingdom following passage of their *Human Rights Act* a few years ago. [Interestingly, this development leaves my country, Australia, almost unique among western democracies in not having some fundamental Bill of Rights enshrined with superior or formal constitutional status in our legal system.] The impact of such changes has been evident:

    - in the Australian High Court decision in invalidating Tasmania's anti-homosexual laws and in some of the comments made by the Justices in *A.B.C. v Lenah Game Meats P/L*;
    - in the comments made by the English Court of Appeal relating to the publication of the Michael Douglas / Catherine Zeta-Jones wedding photos, and in relation to the recent contradictory verdicts in relation to the "super-model" Naomi Campbell, (although the adulterous soccer player did not do so well);
    - in a powerful Oration given by the Chief Justice of New Zealand (Rt Hon

Dame Sian Elias) in June 2000 to the Australian Institute of Judicial Administration.

- the concern expressed in almost all quarters that the pervasive influence of technology, be it in anything from CCTV surveillance to DNA testing or genetic profiling, cannot be allowed to proliferate without some counterbalancing recognition of the privacy rights of individuals.

I have mentioned what I describe as the relative indifference of Anglo-Australian jurisprudence in relation to the formal and legislative protection of privacy.

This must be seen in sharp contrast from the way in which privacy is protected in most of Western Europe. There, formal legislation, strong sanctions, enforceable guidelines and powerful Data / Privacy or Information Protection Commissioners are the generally accepted pattern.

I believe that experience has shown that self regulation (that is the Anglo-Australian or American, compared with the European model) as a means of protecting privacy rights has been tried and on the whole found wanting.

Even the most effective legal protection can be cumbersome and is constantly challenged by new technical applications.

I must apologise to this distinguished gathering that I am so ignorant of the approaches now emerging in nations such as Japan, South Korea, Thailand, Singapore and Malaysia to dealing with privacy issues. I am, in this region, familiar only with the

model in Hong Kong, where of course the Anglo-Australian model is the dominant paradigm.

The subject matter of much legal regulation, namely personal information, is a protean concept and it is difficult to apply hard and fast rules to meet individual contexts in which information is processed.

For this reason legislation passed in Australia generally includes broad exemptions for various activities or agencies. These include exemptions for activities such as law enforcement and the judicial functions of courts and tribunals.

Unfortunately the breadth of these exemptions, and the lack of precision or clarity in terms such as the "judicial functions" of courts or tribunals, run the risk of nullifying the supposed benefits which privacy laws are supposed to deliver.

How far should the Courts be exempted from privacy regulation?

Section 6 of the *Privacy and Personal Information Protection Act 1998* of New South Wales [PPIP Act], which I administered as the Privacy Commissioner, provides that nothing in the Act affects the manner in which the judicial functions of a court or tribunal are exercised.

[An analogous decision has recently been handed down by the President of the Administrative Decisions Tribunal of New South Wales in relation to the State's *Freedom of Information Act 1989* which takes a very expansive view of what constitutes

"judicial functions."]

What I had to try and assess as the officer responsible for administration of the Act is just how far does this exemption extend to courts which are at the same time both judicial fora, managed by judicial officers and registries holding vast amounts of personal information managed by traditional public servants ?

The similar exemption in schedule 1 of the FOI Act has generally been considered not to affect the residual functions of courts. Indeed recent amendments to the FOI Act made by the *Statute Law (Miscellaneous Provisions) Act 2001* were specifically explained as clarifying that Act's coverage of the Supreme Court.

The Act clearly does not apply to the decisions taken by judges in the course of proceedings for example, to release evidentiary material to the media. This was illustrated in the recent new South Wales Supreme Court decision of Mr Justice Hamilton in *Hammond v Scheinberg which allowed*the media to report evidence being contested in highly publicised and controversial proceedings.

The recognition that courts are also bureaucratic organisations subject to privacy regulation does not resolve the issue. Court registries are caught between their desire to comply with the law and their Judges' more expansive view of their judicial function and their prerogative.

Operating through rules committees and the like, Judges seek to establish detailed directions concerning the handling of records in their registries.

The kind of issues arising include:

- To what extent does the principle of "Open Justice" (in the terms used by New South Wales Chief Justice Spigelman in his Keynote address to the 31st Australian Legal Convention) presuppose that everything which takes place in our courts and tribunals should be available and open to anyone?

- If not everything is available to everyone, what is the nature or quality of interest a person must demonstrate to justify having access to court files?

- should it extend for example to an employer wanting to find out about a case involving an employee; to neighbours curious about the intimate family details of the folk next door; to any journalist on a fishing expedition hoping to discover the secrets of public figures; to an obsessed crusader wanting to publish a register of particular offenders?

- is there any temporal dimension to the question of access to such records, or are our dealings with the courts to be public information for ever in the way in which other information (e.g. spent convictions) may not be ?

- should we distinguish between records on the basis of their physical form or the degree of their accessibility ?

While the exemption for the judicial activities of courts serves an important public

interest in open justice it also raises its own set of privacy issues.

Open justice v individual privacy

I mentioned my initial training as an historian and so I am painfully aware of the history of the courts and legal systems in countries like Great Britain. There, justice was always described as "the King's Justice" and even today people are prosecuted in the name of the Queen, not in the name of "the people". Historically, the Courts were an extension of the royal authority, they were not a separate and independent arm of government, the way they were created for example in the American Constitution. However I would argue that the practice of electing judges and the politics of the United States Senate in confirmation hearings for senior judicial appointments basically compromises this independence to render it almost meaningless - as best illustrated in the Supreme Court's ruling on the outcome of 2000 Presidential election].

These English courts were often the instruments of oppression, never more so than in the days of the Court of the Star Chamber which judicially persecuted people on behalf of the King and held all its proceedings in secret.

The Constitutional revolutions in Great Britain - the overthrow of Kings Charles I and James II - led to a demand that secret courts be done away with and that proceedings should be subject to public scrutiny. This principle of "open justice" was seen as the antidote to royal oppression indeed - the philosopher Jeremy Bentham wrote that "publicity is the very soul of justice".

How ironic then that under provisions of the recent United States *Patriot Act* there is

established a new system of secret courts !

The principle that justice should be open and accountable means that courts have been reluctant to admit privacy arguments where they could be seen to restrict public information about what goes on in our courts. This is one manifestation of a broader mistrust of the idea of a right to privacy in Anglo-Australian common law.

Open justice serves definite functions, ensuring the law is publicly declared, preventing secret courts or publicising public disapproval of anti-social and illegal acts. However there is also recognition that circumstances may arise where open justice may give way, for example to protect children or victims of crime or the judicial process itself.

Courts in the British tradition have also offered wide support for the media in publishing court proceedings - favourable comments on the importance of the public having access to and knowledge of the operations and proceedings of the courts through the media may be found in rulings of the Federal Court of Australia (*R. v Davis*); the English High Court (*Attorney General v. Leveller Magazine*); the House of Lords (*Scott v. Scott*) and the Supreme Court of Ireland (*Murphy v. The Irish Times*).

The Chief Justice of New South Wales has gone so far as to declare : *"The principle of open justice should be understood as so fundamental an axiom of Australian law, as to be of constitutional significance."*

I think however it is also worth raising another fundamental question - one rarely if ever asked. That is, what is so special about these records or this information simply because they are generated in the courts? What makes court records so completely different from

any other records in which there may be some public interest? Is "open justice" so cardinal a value that it automatically transcends an individual's right to privacy?

Information produced in court is often produced as a result of the exercise of coercive powers and may be information which would never otherwise have entered the public domain.
What happens when an individual is compelled in court - against their will perhaps - to provide information about their health status (that they have terminal cancer) or about their sexuality (that they are homosexual or transgender) or about their genetic relationship to another person, or a psychiatrist's subjective reports - does the fact that the information was coerced from or provided by them in court then mean that it can be broadcast to the world at large in a way which would not be permitted were the disclosure made in some other forum ?

If so, why ? Upon what basis ? By whose decision ? With what degree of democratic consent, approval or support ?

One could look at any number of quite specific issues in this regard. For example:

- Juvenile Court or juvenile offender records - in the United States there is a rapidly growing tendency for the courts to open up juvenile records to a greater degree of public scrutiny and examination. This approach is also finding favour in places such as Australia and the United Kingdom where political pressures to enhance the concept of "responsibility" on the part of young people for their actions are a powerful motivating force

- Criminal Records history - are all of these, including all past convictions genuinely part of the public domain simply because they are alluded to or produced in court, very often in an uncontextualised setting ? How do we square this with the philosophy which underpins the system of Criminal Records Acts which work upon the basis of the eventual expunging of such material from the public record so that people can remake their lives once they show that they have eschewed criminal activity ?

- Health data - which may be produced in Court for any number of reasons and which is generally regarded as the most sensitive data which public authorities hold about us. This is a matter brought into sharper focus as we start to confront all the other aspects of the genetic revolution or issues such as people's behaviour when they know that they have an infectious or transmissible disease.

Different access issues

Without wishing to challenge the importance of ensuring open justice, I suggest that new communications media and technologies may alter the ways in which it is best achieved and in the process pose new questions about privacy.

Even in the United States where there has been traditionally a high level of access to paper court records, concerns have been expressed (for example by the Supreme Court of California as far back as 1997) that on-line access abolishes the often protective barriers of time and space that made generally open access socially acceptable.

We saw an example of this when the *Sunday Telegraph* (a tabloid newspaper in Sydney, Australia) of 12 May 1996 carried a front page story on how "intimate Family Court secrets of hundreds of Australians" had been "splashed across the Internet". This referred to the decision of our Family Court to put its records "on line" - thus potentially revealing a vast amount of personal data about people in the most intimate and difficult of circumstances.

Of course the material in Family Court reports has always been available in printed form, but access at the press of a button is another thing altogether.

I note in this regard that a book has apparently just been published in the United States which I found when trawling through the internet ! It is by the noted legal academic Joseph Jaconelli and is entitled *Open Justice.*

The advertisement for this book, published by Oxford University Press reads:

> "It has long been a fundamental norm of civilized legal systems that the administration of justice is conducted in full view of the public. This is regarded as particularly important in criminal cases, where the accused is traditionally viewed as possessing the right to a public trial. The rise of modern media, especially television, has created the possibility of a global audience for high profile cases. Increasingly, however it is seen that the open conduct of legal proceedings is prejudicial to important values such as the privacy of parties, rehabilitative considerations, national security, commercial secrecy, and the need to safeguard witnesses and jurors from intimidation..........(t)his topical new study......explores

> these issues and offers a critical examination, in the context of English law, of the values served by open justice and the tensions that exist between it and other important interests."

I suspect we should all read this.

On-line judgments

The European Community's Working Party on Data Protection in its recent report, *An Integrated European Approach to On-Line Data Protection* expressed concern over the privacy implications of being able to conduct full text searches over the Internet.

- Whilst case-law databases are public legal documentation instruments, their publication in electronic form on the Internet, providing wide search criteria on court cases, could lead to the creation of information files on individuals. This would be the case if the databases were consulted in order to obtain a list of court judgments on a specific individual rather than to find out about case law.

The EU Report went on to suggest various ways of limiting this including the use of the Robot Exclusion Protocol and adjusting methods of searching the relevant databases.

> - The on-line consultation of databases can be restricted by, for example, limiting the field of the query or the query criteria. It should be impossible to collect a large volume of data using a wide query such as the first letters of a name. It could also be made technically impossible to request court judgments, for example, based on the name of an individual, or to request the name of a person based on his/her telephone number.

During the most recent meeting of International Privacy Commissioners (Cardiff, September 2002) I had the chance to discuss this specific issue with my French counterparts. They informed me that the French Courts are now moving to a much more restricted access to on-line court records, and have positively determined that in the balancing equation between the right of the public to know and the right of the individual to maximum protection of their personal privacy, they intend to weight the scales towards the latter.

Closer to home, Privacy NSW received a complaint in 2000 from a company which found that clients searching for its web page were turning up multiple references on the Attorney General's LawLink web site to a court case in which it had been involved. Although technically this was not an issue of individual privacy, the implications of the search process appeared worth investigating.

We were unable to replicate the search results complained about when we used standard search engines. We discovered however that both LawLink and AUSTLII case databases applied the robot exclusion standard to discourage indexing of individual cases by search engines.

A further problem with the potential for search engines to create profiles on individuals is inadvertent disclosure of spent convictions. Under NSW and federal spent conviction legislation, people whose convictions are quashed need not declare them. Similar provisions apply to findings of guilt or minor sentences after a crime free period. Global indexing of cases threatens to undermine these benefits.

Suppression of identities or of evidence

The common law test for suppressing the identity of defendants and witnesses in the interests of justice has evolved in response to the print and broadcasting media. It is less suited for a medium like the Internet where information is available for an indefinite period and can be accessed by text based searching as I will illustrate below. On the one hand there may be compelling arguments to protect privacy by suppressing names - even of offenders. For example in Sydney we saw a recent case in which the name of the offender who assaulted a nurse in a psychiatric hospital was suppressed. There have been some interesting developments in the United Kingdom with decisions of the Courts to protect the privacy of notorious child-killers such as Mary Bell, Robert Thompson and Jon Venables - people who committed murders when they were children but have now re-entered society with new identities.

On the other hand when the Victorian Supreme Court issued suppression orders in relation to proceedings where a woman was bringing suit against a tobacco company, the *Australian Financial Review* (our major financial newspaper) editorial was scathing in its analysis of this matter.

On-line court lists and case files.

Government policies to encourage putting all appropriate services on-line are leading courts to publish daily court lists and experiment with giving lawyers and parties access to material on court files, such as subpoenas issued, orders made and future hearing dates.

Court lists will generally include file numbers or law enforcement identifiers which make it possible to link an individual to other information held in the justice system. Although court lists are only left on the web site for a few days, there is nothing to stop organisations capturing this information in their own databases. Bear in mind that such a database would record court appearances rather than outcomes and could have a highly prejudicial effect on the individuals recorded.

Under *the Child Protection (Prohibited Employment) Act (New South Wales)*, people with very old convictions for sexual offences must make a tribunal application to have these waived if they are to work with children. These applications may relate to offences which occurred under different social conditions when the applicant was a child or young adult.
The merit of making these applications public is questionable and suppression orders are routinely granted. [In 2001 all such applications were granted.]

Last year the Industrial Commission posted the name of an applicant for waiver on the daily case list on its web site. When the case was heard the following day interim orders were made suppressing the identity of the applicant and the school which supported his application. A delay in removing these details from the court list, gave interested parties an opportunity to identify the applicant which, for a day at least, effectively overrode the suppression order. Such incidents are likely to become common as more people rely on the Internet, rather than the traditional media for their news.

Indeed this occurred in Sydney very recently in a most spectacular fashion when a list was published on the summons registry of a local court identifying a prosecution against

Mr Kerry Packer - Australia's richest man and the owner of major newspaper and magazines outlets. The truth of the matter was that the Police were merely "giving consideration" to the preferring of charges (to do with a pistol licence) and that a "data entry error" had brought about this publication ! Apparently it can happen to anyone, even the owners of newspapers.

Access by parties and witnesses

Enhanced access to case files by parties and their legal representatives giving other interested parties on-line access to more detailed case files raises both privacy concerns and matters of equity.

Should this right extend to witnesses, on the basis that they are identified in the record and have rights to know what information is held about them ? How is the level of interest determined and the level of access controlled?

Once a case is over should parties have the right to correct or annotate inaccurate or irrelevant material on the record and if not why not? This issue has been raised with us by a party who secured a successful judgment from a Tribunal but objected to what she felt was the inaccurate way the tribunal member had summarised the evidence. Both Freedom of Information and Privacy legislation gives individuals the right to correct information which is held about them in public records and which is not accurate. Why should the same rule not apply to court records - if a doctor can be forced to amend his or

her records about a patient's diagnosis where that is challenged by the patient, why should the opinion of a judge be regarded as any more sacred?

Research access

This is arguably as much an aspect of open justice as access by media given that research offers a more considered and sustained evaluation of the way courts operate. Where research is proposed there is a need to balance some protection for individuals against unfair disclosure against a perception that only researchers approved by the courts can access their files. It should be borne in mind that there is now a structure for ethics approval of institutionally based research which can assist the courts in specifying conditions of access. However such ethics protection do not apply to researchers who are not affiliated with institutions and it is not well adapted to certain kinds of research where the subject matter cannot be clearly defined in advance, eg historical and biographical. Privacy NSW is putting the finishing touches to a research code for public sector agencies which addresses some of these issues.

Security issues

On-line access raises risks of court files being tampered with and the whole judicial process being corrupted. I am yet to be persuaded that if people can, quite easily it appears, hack into the records of NASA or the Pentagon; or hack into and alter sensitive medical records, that the mischief which could result from such an assault upon filed court records is one that can be easily prevented. These risks certainly need to be factored into decisions on what level of on-line access to implement.

Different solutions

There are a range of options worth consideration to address some of the issues which I have raised.

- information privacy legislation

  Courts could be required to comply with the purpose based restrictions of information privacy laws, but with more narrowly defined exemptions to protect the actual hearing process.

- categorising court records according to levels of access

  This could facilitate greater on-line access to court files, but it is an administratively complex process. How much should the decisions depend on individual applications and the determinations of judges and registrars, or how far could one go in automatically assigning levels of access to particular classes of documents and cases, so that the level of access would depend on the status of the applicant ? Concern for maintaining the integrity of court files may justify implementing systems which are capable of supporting controlled levels of access much as is now being considered with access to electronic health records or is theoretically practiced with police files.

- privacy enhancing technology

We cannot ignore the potential of the technology which threatens our privacy being used to provide easier means of protecting it. The robot exclusion protocol is a voluntary Internet standard which allows web sites to attach a line of code which serves as a request to search engines not to individually index pages which are regularly changed or up-dated. It has been adopted by some sites as a privacy protective measure for files such as court cases. It provides no protection against a search which deliberately targets personal information.

Digital signatures represent another way of giving people appropriate levels of access to court files, but there are still issues in making them secure and easily useable. Less ambitious ways of controlling how people use one's website include registration)for example of legal practitioners, parties and accredited journalists).

- anonymising cases

An extreme solution to an otherwise possibly insurmountable problem would be to change the method of citing cases to make it harder to search by individual names. This would require courts to rethink current practices which limit the grounds on which identity of litigants can be suppressed, and regulate conduct constituting contempt, which have grown up in response to pressure from the newspaper, radio and television media.

This could be coupled with a method of approved re-linking of cases with the identified subjects so that interests such as the media would not be prevented from reporting cases where there was a public interest in identities being known.

Different Philosophical Approaches

It might be useful at this point to review that differing approaches now being developed in contrasting jurisdictions.

- Australia

Quite recently the Australian government made amendments to its *Migration Act* to provide that the names of people coming before the Courts to contest the decision of the Minister for Immigration not to grant them visas or refugee status cannot be stated in public. This was a decision by the government, which argued that it was protecting the privacy of applicants when in fact it was done to ensure that the media could not investigate individual cases and publicly call into question the decisions of the Minister. This suppression by legislation has been trenchantly criticised by individual Justices of the High Court. It is interesting that the legislation prohibits the Court from publishing the name "in electronic form or otherwise".

In my own State of New South Wales, the Administrative Decisions Tribunal has taken a decision that while most of its decisions are published on the internet, it will increasingly refer to the applicant (especially in sensitive matters such as privacy and anti-discrimination cases) by a set of initials only. This initiative owes much to the President of the Tribunal, Mr Justice O'Connor who was Australia's first Federal Privacy Commissioner and has been pressing for this reform since at least 1993.

- United Kingdom

In September this year the Home Affairs Select Committee of the British House of Commons presented a report which argued that people accused of sexual offences, including rape and child abuse, should be granted anonymity until such time as they are convicted. Generally the names of victims in such cases are routinely suppressed. This extension of the principle to the accused until convicted is an interesting development and reflects the fact that regardless of whether that a person is cleared of an offence, in cases such as this there is always lasting and potentially devastating consequences for people arising just from the fact that they have been charged with offences of this nature. It will be interesting to see what the British Parliament does in this regard. I have already mentioned the approaches being taken by the British courts to protecting the identities of former childhood killers re-entering society.

- The United States of America

The different approach of the United States, relying on the principles of free speech stated in the First Amendment to the Constitution, is evident in a parallel situation. In 1975 the Supreme Court (*Cox Broadcasting Corp. v Cohn*) struck down a State statute which made it "a misdemeanor to publish or broadcast the name or identity of a rape victim." The Court held that since this information was obtainable from the court records, which were public records, then, "the interests in privacy fade when the information involved already appears on the public record." This of course is no comfort to the victim.

By contrast in July 2002 the Judicial Council of California approved new statewide rules that expand public access to electronic trial court records while protecting privacy interests. The new California rules permit broad electronic access to most civil records while restricting remote internet access in criminal records and other cases that are likely to contain sensitive personal information. The new system provides a wide level of access to base case information (registers, indices etc); it limits some areas to case-by-case searches using unique case identifiers; it severely restricts access in certain categories of cases (family law, juvenile, guardianship, mental health, criminal and civil harassment) and provides procedures for the regulation of access arrangements.

- The European Union

In May 1999 the European Commission adopted an Opinion on "Public Sector Information and the Protection of Personal Data", a great deal of which focussed on issues of access to court records. The Green Paper issued prior to this Opinion being adopted looked at a variety of approaches being taken by Member States. For example, in **Belgium** in December 1997 their Privacy Commission issued a ruling requiring that if court decisions could not be entirely anonymised, if they were accessible to any group of public users they should not be indexed by name, thereby preventing searches from being made on the basis of the names of the parties and thereby linking them with other data.

The **Italian** Commission for the Protection of Personal Data has also developed a system whereby, without affecting the integrity of exiting paper records, individuals may seek to prevent their names from appearing in electronic form in case-law databases as these

paper bases are updated and moved on line.

In November 2001 the **French** data protection authority issued an Opinion calling for the anonymisation of court records at the point at which they became generally accessible to the public. In September 2002 the French Government announced that it would accept this recommendation and move to its speedy implementation.

In **Germany** different courts adopt different practices. The Federal Constitutional Court and the Federal Labour Court anonymise not only the names of the parties, but also the names of the lawyers, although those of the presiding judges are made public. The Federal Court of Justice imposes different rules on access and use to its internet-based information systems for private and commercial users. The Federal Tax Law Court anonymises all names including those of the presiding judges.

Outside the European Union (for the moment at least) the Courts in **Switzerland** exhibit a similar system of different rules in different jurisdictions. The names of judges are made public but the names of parties may or may not be. Where the parties or institutions are generally known in the public and the media there is no anonymisation but in many cases involving individuals, particularly in the criminal jurisdiction, anonymisation is much more common.

- Japan

I understand that in Japan there is a similar move to use case numbers rather than names as a method of case identification and that there is a move towards more anonymisation of case details. My advice is that with particular emphasis on some

corporate issues, the names of prisoners and witnesses guidelines are being developed and that the generally emerging view is that courts should suppress personal details unless there is a specific public interest in doing otherwise.

This review of different jurisdictions, demonstrates, I think, that regardless of the background or tradition of various judicial systems, the privacy impact of the internet and electronic search engines are moving us all in the same direction to seek greater privacy of court records, recognising that in many instances the "openness" of such systems is not necessarily in the broader public interest.

It may well be that an even greater emphasis will be given to these developments as we confront more and more problems with the crime of identity fraud and theft. Court records can be a wonderful source of intimate personal data which may be used for illegal purposes and I think everyone here would be aware of the gravity of identity theft and fraud issues.

In addition, issues such as nuisance contacts; stalkers and "con-artists" approaching people after divorce proceedings; potential blackmailers datamining back over many years to build adverse personal profiles and the public humiliation which may face witnesses and others involved in court proceedings are all matters which need to be taken into account.

1 The lure of "reality" television

I would like to make one further comment about the extent to which it is argued that the public "right to know" should be enhanced by a more direct filming of judicial proceedings. Direct broadcasting of court proceedings is increasingly common in the United States – even here we are familiar with the nauseous outpourings of *Judge Judy* and the voyeuristic excesses of the OJ Simpson fiasco.

Quite recently Privacy New South Wales has been directly involved in advising various parties about proposals for television shows – one of which involved direct filming of proceedings in the Local (magistrates) Courts and the other in the Coroner's jurisdiction. I will not go into the details of these exercises other than to say that those who advocate for a completely open system of access to court records must, presumably, also be advocates for the open broadcasting of all judicial proceedings. After all, if the courts are open to any citizen to walk in off the streets to observe, why should they not be open to anyone with a television set ? Interestingly of course, very few people – especially judicial officers – take this point of view. Any more I might add than Parliamentarians support the unrestricted broadcast of all aspects of parliamentary proceedings.

The key issue of course is that of context. Just as knowledge is not the same as understanding, so open access in the absence of a contextual understanding is not a matter of fairness, it is a matter of potentially great unfairness. This is why Privacy New South Wales took a hard line on applications for such filming in the courts : eventually one project (the magistrates court) did not proceed but the other (the coroner's court) is now in development.

Summary of Arguments

I think it might be useful just to state in conclusion the principal arguments, as I understand them between "open justice" and a "right to privacy" in the courts.

An open justice approach recognises that:

- court records should be treated uniformly whether in paper or electronic form (technological neutrality)
- electronic records should not lead to a reduction in available information
- preserving paper records is unhelpful and eventually wasteful
- privacy is already compromised when people come into the judicial system
- open courts will work less effectively if the identities of parties/participants are unknown
- specific restrictions on data being made available should be done by legislation or in individual cases
- restricting access to court records tackles only one part of the major problem of datamining and database creation.

A more privacy sensitive approach recognises that:

- court records usually identify individuals not general categories of people
- much of the information before the courts has been obtained by various means of coercion and has not been provided wither voluntarily or pursuant to statute
- there are fundamental differences between paper and electronic records in terms of their accessibility and the ease of their interrogation and matching

- it would be better to err on the side of privacy protection and start from a more restrictive position which can be eased later whereas the contrary approach is not viable
- copying and dissemination of electronic records is much easier than with paper records
- identity fraud and theft issues are only just being recognised as major threats both to individuals but also to corporate and governmental activity.

Court Registries

While there is no argument that privacy laws should not restrict the judicial operations of courts or tribunals, it is quite clear, at least in my mind that the administration of the courts and the operations of their registries and their public registers are amenable and ought to be regulated by formal privacy statutes. The operations of courts vary enormously, but at the end of the day they are still essentially part of the bureaucratic apparatus of the state. As such they should not be unnecessarily immune from restrictions which are designed to ensure that the state and its agencies act in a privacy sensitive fashion and with due regard for the respect of individual human rights, including the right to privacy.

From Cicero to Juvenal : Quis custodiet....?

I started with Cicero's great question "*Cui bono?*", (who benefits?) and I end with another Latin author's Juvenal. He famously asked "*Quis custodiet ipsos custodes?*"

(who guards the guardians? Or perhaps today we should say - who watches the watchers?). It is a good question. What all this discussion comes down to is that the political system and the privacy regulators who derive their authority from that system may devise rules which control the judicial functions of the courts - but at the end of the day it will be judges who either rule that those laws and regulations are valid or constitutional or who pronounce upon how they shall be interpreted and applied. In this respect they are their own guardians.

As such it is up to us as citizens to be vigilant to ensure that they discharge their responsibilities, including the responsibility as self-regulators in a way which advances the development of our democratic societies and does not compromise our human rights.

That is an awesome challenge for us all.

Your distinguished SHIP Project and your Faculty have recognised that by organising this important symposium.

I hope and trust that we will be able to discharge that responsibility and meet that challenge with gratitude and congratulations of posterity.

Thank you.

Commercialization of Legal Information
A Tale of Two Countries

Herbert Burkert[1]

1 INTRODUCTION

2 SITUATION IN GERMANY

2.1 FEDERAL LEGISLATION

2.2 DECISIONS OF THE FEDERAL COURTS

2.3 SUMMARY

3 THE SITUATION IN SWITZERLAND

3.1 FEDERAL LEGISLATION

3.2 DECISIONS OF THE FEDERAL COURT

3.3 SUMMARY

4 THE POLICIES OF COMMERCIALIZATION OF LEGAL INFORMATION

4.1 GERMANY AND IMPACTS FROM THE LEVEL OF EUROPEAN UNION

4.2 THE POLICIES OF SWITZERLAND

4.3 SUMMARY

5 CAUTIOUS CONSTRUCTIVE SUGGESTIONS FOR A GENERAL POLICY FOR LEGAL INFORMATION

5.1 INTRODUCTION

5.2 PRINCIPLES FOR DISCUSSION WHEN DECIDING ON A COMMERCIALIZATION POLICY OF LEGAL INFORMATION

5.2.1 The Access Principle

5.2.2 The Equal Treatment Principle

5.2.3 The Private Sector Risk Principle

5.2.4 The Public Sector Restraint Principle

5.3 SUMMARY

6 CLOSING REMARK

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2 Introduction

The text describes and analyses current government policies regarding the commercialization of legal information and the legal framework of such policies. The text does not address technical questions as to what would be adequate formats for distributing such information.

Legal Information

"Legal information" in the context of this text means court decisions (to simplify matters the emphasis will be on decisions from the highest federal courts) and (federal) legislation after it has come into force. We will therefore not deal with parliamentary materials.[2]

Commercialization

"Commercialization" refers to policies of governments for disseminating or making such material available; not in all cases, however, as we shall see, will the outcome be "commercialization" in its proper meaning which is the selling of such information; in some cases such information will be free, in other cases there is a mixed policy, and in some cases such information is indeed being sold.

Examples: Germany and Switzerland

The main examples of this text will come from Germany. However, by way of contrast and because the author of this paper is working in both countries we also find it useful to introduce examples from Switzerland.

As we shall see the presentation of both countries provides interesting contrasts. This is why the text will is called a tale of two countries.

Structure of the text

In the parts 2 and 3 we will describe the current situation as regards the types of legal information which is available and the conditions under which such information is available in Germany as well as in Switzerland. In part 4 we will make an assessment of the underlying government policies government policies and draw some conclusions as what might be a useful policy for legal information. In part 5 we present for discussion purposes some principles which might serve for guidance when developing such polices. Part 6 will be a closing remark.

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[2] Further information on parliamentary material can be obtained (in English) for the Federal German Parliament at www.bundestag.de/htdocs_e/index.html; for the Swiss Federal Parliament such information is available also in English at: www.parlament.ch/poly/Framesets/E/Frame-E.htm

3 Situation in Germany

3.1 Federal Legislation

Federal Publication of Laws

Since 1949 in the Federal Republic of Germany, federal laws which have gone through the legislative process are published in the Federal Publication for Laws [Bundesgesetzblatt[3]]. The Federal Publication for Laws is published by the Publishing House of the Federal Gazette [Bundesanzeiger-Verlag][4]. The publishing house is a private law enterprise in which the Federal Republic holds a share of 35,1%. The interests of the Federal Republic in the company board are administered by the Federal Ministry of Justice which is also the responsible editor of both the Federal Gazette and the Federal Publication for Laws..

The Federal Publication for Laws is published regularly in two series [Bände], series I covers the federal legislation, series II covers international treaties. Both series are available against payment in printed format[5], or stored in electronic format (on CD-ROM)[6] or via the Internet.[7]

The databases of series I and series II can also be accessed for free. If you want to access series II in this way you have to register.[8] For series I you do not have to register. If you access the

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[3] The German original word is put in brackets where it is felt that the English translation might be a perhaps misleading approximation.

[4] www.bundesanzeiger.de. The Federal Gazette [Bundesanzeiger] is a federal publication which is different from the Federal Publication for Laws [Bundesgesetzblatt]. The former contains various information for which there is a publication duty, as e.g. those duties provided by in company law. The legal material we are concerned with here is published in the Federal Publication for Laws

[5] Each of the series costs - in paper format - 90 € per year.(All prices are those of May 2003; every effort has been made to provide correct information, unfortunately errors cannot be fully excluded).

[6] The price of a CD-ROM (of one year of series I) is 50 €. Back documentation on CD-ROM is available back to 1998. The license of the CD-ROM only allows usage for one terminal. Special prices are available for multi-terminal users.

[7] To access the text of the Federal Publication you need a subscription; a one year subscription is valid only for one terminal and the material of the subscribed year ; you can subscribe as far back as 1998 for series I; subscriptions for series II are possible as of the year 2002; the price of a one year subscription per series is 135 €. The publishing house claims to have a copyright in the material, so any commercial reuse of the material such received needs a special license.

[8] Registration is for free, but you have to give your full name, address and phone number. You have to use your email address as username and can choose a password. So each time you go back to the database, you can be identified. You do not need to register when you access series I

databases for free[9], you cannot do full-text word search. You can only select each individual number of the Federal Publication for Laws (going back to 1998 in case of series I and to 2002 in case of series II). So if you want to search for the text of particular law as it has been published in the Federal Publication you need to know the federal Publication, its year and number beforehand. Also you can only download in pdf-format, which you can read and stored in pdf-format, but not print, since the print function is deactivated in the pdf-file. So users can only read the material on the screen. The user is instructed not to use the material for any other purposes but to read privately.

Full and consolidated text of laws

In general, search for the full text of laws in force in their actual version is complicated by the fact that the Federal Publication only publishes laws exactly as they have been passed by parliament.

Parliament, however, as regards changes to laws it has already passed, usually only passes these changes; it does not pass (or does so only extremely rarely) consolidated versions. In order to look for a consolidated version to consult the Federal Publication, whether in its "free" form or in its paid form, does not help much.

To find consolidated versions of all of the federal legislation you have to consult the "juris" database.

"juris"

The "juris" database or rather databases (currently 39 in total) are offered by "juris"[10]. "Juris" is also a private company, and again one in which the Federal Republic of Germany is represented by the Ministry of Justice which administers the shares; in this case a majority of 50,01%.[11] Other share holders are Sdu (a Dutch private company providing information for professionals[12] - share: 45,33 %), the German province Saarland (3 %); [13] the Federal Chamber of Lawyers and some other publishers are the other share holders.[14]

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for free. - There is no explanation for this difference. - The registration page does not contain a privacy policy, although you gain access to material for which the Federal Ministry of Justice is responsible.

9 See: www.bundesanzeiger.de/index.php?main=5&sub=2&link=../ menu/0003/bgbl/b1index.php.

10 The full name of the company is " juris GmbH" ; GmbH means company with limited liability. Further information can be found at: www.juris.de.

11 "Juris" offers a wide range of legal information, similar to the Federal Gazette Publishing House. We will concentrate on such legal information which we have chosen for our report.

12 www.sdu.nl.

13 "Juris" has its main office in this province.

14 They hold very minor shares, mainly it seems - in order to be able to follow the developments of "juris" from within the company, since as shareholders they receive privileged information

One of the products of "juris" is a CD-ROM version of all (federal) German laws currently in force, consolidated and in full text including references to the legislation which has made changes to this body of law.[15]

There is no free of charge source to access all German laws in force in their up-to-date consolidated version on the internet.

In general it seems that the government as a main shareholder of the two most prominent providers of public sector legal information might want to increase general accessibility or at least wants to be seen as doing so, but at the same time wants to save the market for the products of those companies in which it holds shares.

Example a service by the Federal Ministry of Justice

An expression of the double-bind situation is a recent service offered by the Federal Minister of Justice: Back in 1999 the then Federal Minister of Justice, Ms. Daeubler-Gmelin had declared that in her view the state should pay attention when intending to provide legal information for free that such offers would not endanger private competition. She continued to say that this might lead to fewer offers from commercial providers which would then endanger the general availability of legal information.[16] But there was soon mounting pressure to make more public sector information available in order to increase the attraction of internet services in the e-government context. So the Federal Ministry is now offering on the internet for free access to a selected number[17] of laws in cooperation with its "juris" company[18]. But the Ministry has not given up on its fundamental policy: The laws offered on the internet can only be accessed paragraph by paragraph in html-format which

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which they otherwise would not obtain at least not so easily. - In 2002 the company had an annual turnover of 22 million €.

15 The CD-ROM is updated every six months; subscribing to one year is 249€ per CD, which means 498 € per year; if you buy a single CD the price is 349€. The same conditions apply for the CDs published by the Federal Gazette Publisher. - The "juris" company offers as stated above a large number of additional databases and electronic products, and differently packaged products in online as well as in electronic offline format. It is e.g. possible to use the "juris" interface to search for court decisions (see below) and also for articles published in legal journals of cooperating legal publishing houses. - Also it should be noted that "juris" offers special prices for their services to law libraries and encourages the use of "juris" among law students.

16 "Grusswort von Frau Bundesministerin der Justiz, 8. EDV-Gerichtstag, 15. - 17. September 1999" available at: edvgt.jura.uni-sb.de/Tagung99/Tagung99.html.

17 The Ministry does not provide detailed criteria for this selection, it only speaks of "important" laws.

18 Available at: bundesrecht.juris.de/bundesrecht/index.html.

makes it very difficult to get a full understanding of the text[19]; there is no access to the full text of the laws in pdf-format, so as not to endanger the business of the company in which the Ministry is administering the majority of shares.[20]

3.2 Decisions of the Federal Courts

General situation

As indicated above we will only look at the situation of the highest federal courts: the Federal Constitutional Court [Bundesverfassungsgericht] for constitutional law cases, the Federal Court of Justice [Bundesgerichtshof] for civil law and criminal law cases, the Federal Court of Administration [Bundesverwaltungsgericht] for administrative law cases, the Federal Labour Court [Bundesarbeitsgericht] for labour law cases, and the Federal Tax Law Court [Bundesfiannzhof] for tax law cases.[21]

Courts generally, including the lower courts and courts in the provinces., enjoy and defend a high degree of independence for constitutional law reasons (separation of power, independence of justice). This independence comprises their publication policies - at least to some extent. It is the courts which decide which decisions to publish, how to publish them, where to publish them and what to do with the revenue derived from these publications.[22]

Different practices

It has been the practice that the courts make arrangements with private publishing companies. In these arrangements decisions are prepared to be published by the publishing house in their legal journals and/or in special series of annual decisions by the particular court. By these

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19 At least a full text search of the laws available is possible; the results, however, are only individual paragraphs in html-format. One has also to keep in mind that the search only affects those laws which have been pre-selected by the Ministry and the "juris" company. This is not a complete search possibility for federal law.

20 For more criticism of this policy and for a general proposition to make German legal texts accessible for free on the internet in full quality: JÖRG BERKEMANN: Freies Recht für freie Bürger. In : JurPC Web-Dok. 188/1999, Abs. 1 - 79, available at: http://www.jurpc.de/aufsatz/19990188.htm.

21 We do not deal with the Federal Patent Court [Bundespatentgericht] because it does not exactly fit into the structure: Although being a federal court its decisions in legal matters can be appealed to the Federal Court of Justice [Bundesgerichtshof].

22 As to these practices in detail see: REINHARD WALKER: Die richterliche Veröffentlichungspraxis in der Kritik. In: JurPC Web-Dok. 34/1998, Abs. 1-163 at http://www.jurpc.de/aufsatz/19980034.htm.

arrangements - which may date back to a very long time - some publishers have obtained a monopoly to publish the printed official annual volumes of decisions of a particular court. Sometimes these arrangements also cover the publication in electronic format; in addition now all federal courts have arrangements with "juris" to enter their decisions into "juris" databases.

Usually these arrangements contain a barter agreement. What the courts actually receive in exchange is not always easy to know. As it seems so far only the Federal Constitutional Court is transparent in this matter. In some cases the publishing houses seem to have agreed to digitalize the decisions of the court and make the digitalized format accessible to the courts for free.[23] In other cases publishing houses pay individual judges, or chambers of judges, or presidents of chambers of judges for making the decisions available to them.

These publication policies do not exclude, of course, that the parties of a case will have the decision as the first concerned.

In addition, once the decision is published, everybody can receive individual decisions from these courts for a charge by writing to them, indicating the decision they want to obtain, and the format in which they want to obtain the decision.[24] The requester, of course has to know which decision to ask for. This sort of request is therefore not suitable for doing research for court decisions.

Although there is in this way no absolute monopoly, the arrangements with the courts have many advantages for the publishing companies:

- Publishers obtain monopolies at least to produce the printed annual "official" volumes [Amtliche Entscheidungssammlung] of court decisions which are the basis for quotation at the courts and in scholarly discourse. It is also very prestigious for a publishing house to serve as "the" publisher of a federal court.
- Publishers, particularly those of legal journals, have a time advantage and can publish decisions before they appear in the annual volume.
- Publishers, particularly those which publish highly specialized journals of areas of law which are covering particularly lucrative areas of law (like e.g. tax law) can provide very useful services to their customers. While eventually a court decision would appear in the "official" annual volume of decisions, the subscribers of the privileged journal has the advantage to use the decision immediately in tax law cases.

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23 JÖRG BERKEMANN [footnote 20] at margin number 55 reports on such a practice at the Federal Labor Court.

24 The price is about 5 € per decision or about 42 € per 2.0 MB regardless of the number of decisions. The court administration may wave the fee if the demand is for purposes which are in the general public interest. Details are regulated in the Ordinance on the Costs of the Administration of Justice [Verordnung über die Kosten im Bereich der Justizverwaltung]. For recent practices see also the following description of individual court practices.

This practice drew some criticism. Journals which were excluded from such deals claimed that this practice violated the equality principle and provided unfair advantage Administrative courts stopped this practice and ordered the courts to offer their publications without discrimination. The administrative courts were competent because they were not seen to intrude into the independence of the judges but only to make a judgement on a matter of court administration.

Federal courts publishing on the internet

Increasingly, however, courts have decided to become more visible on the internet and make their decisions available on the internet. This also makes courts less restricted by the publications in the printed official volumes and also less dependent on publishers which only want to publish selected decisions in their journals While the practice of the federal courts is very diverse in this respect (we will show some examples below), this practice immediately caused some concern among the legal publisher which see their advantages erode. It was even claimed that the regulation which set down the amount of charges to obtain individual court decisions in electronic format[25] did not allow courts to provide information on the internet for free.

To counter this argument the German Federal Parliament decided that federal courts have the right (but not the obligation) to publish their decisions for free on the internet.[26]

So while this practice of publishing court decisions on the internet for free is still causing concerns among publishers it must also be noted that the practice of the individual courts still remains very diverse.

Here are some examples for the internet publication policies:

Federal Constitutional Court

The court has a website.[27] Decisions after 1 January 1998 are available and can be searched in full text. The decisions can viewed, downloaded and printed in html-format. If a secure server connection is used to the site of the Federal Constitutional Court, decisions can be received in a digitally signed format using a Pretty Good Privacy electronic signature.[28] The names of the parties are anonym zed, but not the names of their legal representatives and the names of the deciding judges. The decisions contain no information as to whether they have been included (or will be included) into the printed annual "official" volume of court decisions nor do they contain markers of the pagination in the printed version. The decisions, however, contain margin numbers for each paragraph of the text of the decision, and court decisions may be quoted by indicating the internet source, the decision

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25 See footnote 24.

26 This is regulated at a very obscure place: in the law promulgating the annual budget of 2001 at § 6 sec. 9 [Gesetzes zur Feststellung des Haushaltsplans für das Haushaltsjahr 2001 vom 21. Dezember 1999 (BGBl. I S. 1920)].

27 www.bundesverfassungsgericht.de.

28 SSL 3.0, RC4 with 128 Bit key-length; RSA with 1024 Bit exchange.

number and the margin number. Unfortunately in cases where the court makes a reference to one of its own previous decisions which have been published on the internet and also in the printed official collection the court only provides a page reference to that printed version and not to the decision published on the internet with its decision and margin number. The court emphasizes on its webpage that it only permits the private use of the decision material; commercial use requires special permission by the court.

Federal Administrative Court

The court has a website.[29] Decisions after 1 January 2002 are available and can be searched in full text. The decisions can viewed, downloaded and printed in PDF- and html-format. Decisions in html-format contain links to the text of the legal norms which are quoted in the decision and to other decisions of the court if this decision has been after 1 January 2002 and is accessible in electronic format. The text of the referenced norm or the decision also appears in html-format when clicking the link. The names of the parties and their lawyers but not the names of the deciding judges are anonymized. The decisions contain no information as to whether they have been included (or will be included) into the printed annual "official" volume of court decisions, nor do they contain markers of the pagination in the printed version. The decisions can also be ordered via the internet to obtain the decision per email or via postal services. Decisions after 1 January 1999 can be sent per email and will cost 2.50 € per decision.[30] The court emphasizes on its webpage that it only permits the private use of the decision material; commercial use requires special permission by the court.

Federal Court of Justice

The court has a website.[31] Decisions after 1 January 2000 are available and can be searched in full text. The decisions can viewed, downloaded and printed in PDF-format. The names of the parties and their legal representatives but not the names of the deciding judges are anonymized. The decisions are marked if they contain a legal dictum, i.e. a short summary of the legal reasoning that might become specifically relevant in other decisions [Leitsatz].[32] Otherwise they do not contain information as to whether they have been included (or will be included) into the printed annual "official" volumes of court decisions nor do they contain markers of the pagination in the printed versions. The decisions can also be ordered via the internet to obtain the decision in printed form via postal services. Decisions sent this way cost 0.50 € per page. The court emphasizes on its webpage that it only permits the private use of the decision material; commercial use requires special permission by the court.

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29 www.bverwg.de.

30 You have to give your account number and allow the court administration to obtain the charge directly from your account. This service is only useful to obtain decisions electronically which were made between 1 January 1999 and 1 January 2002..

31 www.bundesgerichtshof.de.

32 The German law system is not a strict precedent law system; but in practice precedents do play a very important role.

Federal Labor Court

The court has a website.[33] Decisions after 1 January 2002 are available and can be searched in full text. The decisions can viewed, downloaded and printed in html- format. The names of the parties and their lawyers but not the names of the deciding judges are anonymized. The decisions contain no information as to whether they have been included (or will be included) into the printed annual "official" volume of court decisions nor do they contain markers of the pagination in the printed version. The decisions can also be ordered via the internet to obtain the decision in printed form via postal services. Decisions sent this way cost 0.50 € per page. The court emphasizes on its webpage that it only permits the private use of the decision material; commercial use requires special permission by the court.

Federal Tax Law Court

The court has a website.[34] Decisions after 30 November 2002 are available. They cannot be searched but only found in the sequence of their date of publication. The decisions can viewed in html-format embedded into frames which makes them more difficult to download and to print. No names even not the names of the judges making the decision are available. The decisions contain no information as to whether they have been included (or will be included) into the printed annual "official" volume of court decisions, nor do they contain markers of the pagination in the printed version. Decisions before 30 November 2002 can be ordered via email in order to obtain the decision in printed form via postal services. Decisions sent this way cost 0.50 € per page. The court emphasizes on its webpage that it only permits the private use of the decision material; commercial use requires special permission by the court.

3.3 Summary

As regards federal legislation, citizens who are interested in obtaining electronically the printable full text of any federal law in force in its consolidated version still have to use the commercial "juris" database; government policies currently do not leave them with another choice.

As regards court decisions via the internet the Federal Constitutional Court is certainly a very good example as regards the use of the digital signature and the margin numbers which allow adequate quotation. Unfortunately the court does not use the margin numbers in its own references to previous decisions and the availability of the pdf-format would also be of help. The Federal Administrative Court, on the other hand, is advanced as regards its inbuilt links; unfortunately the links are only of limited use in as far as they can only refer to decisions after 1 January 2002.

It comes as no surprise that the Federal Tax Law Court with the decisions which are perhaps the most lucrative for private publishers is also the most backward in its internet publication policies.

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33 www.bundesarbeitsgericht.de.

34 www.bundesfinanzhof de.

In general - as regards court decisions - the lack of a backward documentation that includes all the decisions of the courts is a strong disadvantage.

The lack of a coherent policy of all the Federal Courts may be one of the prices of juridical independence; still, more coherence might be helpful. As a general consequence - while the courts may not consciously have intended this - the way of offering their information still puts a strong pressure on information requesters to use the commercial "juris" data bases or similar commercial products for their electronic research.

4 The situation in Switzerland

Switzerland has about 1/10th of the population size and about 1/7th of the geographical size of Germany. However Switzerland has four official languages (German, French, Italian, Rumantsch[35])[36]. Switzerland like Germany has a federal system.

We shall concentrate on legal information as defined in the introduction, i.e. on legislation and court decisions on the federal level.

Switzerland technically has two courts on the federal level, the Federal Court proper [Bundesgericht] and the Federal Insurance Court [Eidgenössisches Versicherungsgericht] which although independent in its decision making as highest instance on insurance cases is organized as a department of the Federal Court proper. We shall concentrate on the decisions of the Federal Court proper.

4.1 Federal legislation

Federal legislation is available in German, French and Italian.[37]

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[35] Rumantsch as a spoken language consists of five sub-languages (Sursilvan, Sutsilvan, Surmiran, Puter und Vallader); in 1982 Rumantsch Grischun became the single official consolidated written language.

[36] 63,7% of the Swiss population have declared themselves German speaking at the last census in 2000, 20,4 % French, 6,5 % Italian and 0,5 % Rumantsch.

[37] The Federal Constitution is also available in Rumantsch. According to federal law Rumantsch persons have a right to be spoken to Rumantsch.- There should also be user information for legal information in Rumantsch. - Everything else is left to cantonal regulation. So there is no need to provide all court decisions and all legislation in Rumantsch.

Official Collection

Federal laws in Switzerland are published in the Official Collection [Amtliche Sammlung]. The Official Collection appears on paper and in pdf-format[38] at regular intervals and contains the legislative material as it has passed the law making process. The pdf-documents can be accessed free of charge on the internet.[39]

Each legislative document in the Official Collection contains a systematic number which relates it to the Systematic Law Collection [Systematische Rechtssammlung].

Systematic Law Collection

The Systematic Law Collection, also available in German, Italian and French is organized - as the name indicates systematically - according to subject areas of the legislation.[40] The legislative material in the Systematic Law Collection is constantly updated and consolidated and it covers all federal legislation in force regardless of its date of coming into force. The collection is available in paper format (updated at regular intervals) and in electronic format.[41]

For the electronic format there is a web interface in German, Italian and French accessible for free on the internet.[42] Laws can be searched in full text, according to the title of the law, or by their systematic number. Laws can be viewed, downloaded and printed in html-format (paragraph by paragraph) or in pdf-format. The html-version contains clickable links to other referenced federal legislation.

4.2 Decisions of the Federal Court

Decisions of the Federal Court are collected in annual volumes, the official printed volumes of the Federal Court decisions.

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38 The pdf-versions are available as of 1 September 1998.

39 German version: www.admin.ch/ch/d/as/index.html.

40 Legislation relating to telecommunications and postal services e.g. can be found under number 78: The Law on Telecommunications Servcies has the number 784.10; the law on Postal Services has the number 783.0. There is a general keyword index (in paper and generally accessible in electronic format) that helps you to move around the systematic system; you can also search the index by the names and by the numbers of the laws.

41 These publication activities in the Systematic Law Collection and the Official Collection (as well as in the Federal Gazette, which however, does not contain final legislation in force) are regulated by a special publication law [Publikationsgesetz]. This law is currently under revision to bring it fully on the level of the information society.

42 The web portal in German e.g. is available at www.admin.ch/ch/d/sr/sr.html.

It should be noted that the decisions (but not the volumes) may be in different languages (German, Italian, French), depending on the language of the initial court procedure.[43]

Federal Court decisions[44] from 1954 - 2000 in as far as they have been published in the official printed volumes are available electronically for free in html-format. Each html-decision contains markers of the page numbers in the printed version.

A larger amount of court decisions has become available as of 2000. Now also decisions which have not or will not be published in the official printed volumes are accessible. However, still not all federal Court decisions are published either in paper or electronically. As in Germany the Federal Court is free which decisions to publish generally.

Decisions from the year 2000 onward database which have subsequently been published in the printed volumes reappear in their original form in the database with a marker that they have been published, and the link in the marker leads the user to the published version as well (in electronic format) again with page markers of the printed version. Currently the latest decision which is both available in the printed format official volume and in identical electronic format, dates from November 2002. The latest electronic version of a decision is usually available on the day of when it is published to the parties.

There is no clear policy as regards names: The names of judges are not anonymized, other names are sometimes anonymized and sometimes not. Mostly in cases where institutions are parties and/or where the parties involved seem to be public knowledge there is no anonymization. And mostly in cases where individuals are involved and mostly in criminal law cases there is anonymization. But those are rules of thumb. While the Swiss federal data protection commissioner has asked for anonymization there is also considerable pressure from the public to make the parties of federal court cases known.

There is a whole range of sophisticated retrieval mechanisms available to search for court decisions; all these instruments are integrated into the web interfaces of the court and can all be used for free: Looking e.g. for a keyword in German may also produce decisions on that subject which are in French. Decisions shown as retrieved have different colour markers in relation to the relevance of the document in relation to the search criteria. Users' opinions on relevance are gathered electronically.

4.3 Summary

In terms of quality and availability of federal legal information Switzerland has a very high standard which certainly surpasses in range and quality the material that is available for free in Germany. One could certainly imagine further improvements like e.g. linking to the text of legal norms in court decisions (there is already automatic linking to court decisions of the Federal Court

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[43] This language is decided by cantonal law.

[44] The website is www.bger.ch.

quoted by court).But there are still limitations on such extensions by current Swiss information . We will deal with this policy in chapter 4.2.

5 The Policies of Commercialization of Legal Information

5.1 Germany and impacts from the level of European Union

As the description of the German situation has shown it was very difficult to discern a comprehensive policy as regards the commercialization of public sector information and of legal information in particular.

The development of public sector information policies in Germany

There have been attempts at such a policy in the 1970s when it was assumed that large online "data banks" would revolutionize policy making and when providing such data banks was seen as an infrastructural task of the government and also as a help to the national information industry. And indeed, it was at that time when the concept for the "juris" data bank had been born. In the 1980s when governments where retreating from areas they once regarded as their domain and privatization was becoming the more attractive concept, the Federal Government was looking for ways to find private partners for their information undertakings. It was not without difficulties and only very recently that a private partner had been found to be willing to take over a larger share of the "juris" company.

It must also be added that on matters of this kind government ministries tend to act independently of each other in spite of the coordination powers of the Federal Chancellor's office. One deeper reason for this independence is that federal governments in Germany to a very large extent have been coalition governments with ministers coming from different coalition parties defending their independence also politically. Also it should be added that information policy as such never had a very high priority in Germany. Furthermore, in the area of court decisions, as it had been shown above, the influence of the Ministry of Justice on the courts is limited for constitutional reasons.

There is now a more balanced view on the chances and limits of a privatization policy. At the same time, however, conflicting views on public sector information policy have still not been reconciled and harmonized, rather the conflicts have come to view more openly: The Ministry of Finance by tradition is still looking for extra sources of state income, and information resources are finally realized as being a likely source. The Ministry of Economics, by tradition, is more oriented towards the liberalization of the economy and views any state activity on the information market with some concern. There is mounting outside pressure on the Federal Government to finally introduce freedom of information legislation and make government information more easily accessible and less

expensive.[45] There are also considerations in the government to make e-government and e-democracy policies more attractive by providing easier and less expensive if not free access to public sector information and in particular to legal information.

Against this background it is very difficult to predict what sort of resultant vector the different vectors of political forces will produce.

Copyright situation

In addition certainly the Ministry of Finance feels its position encouraged by the situation in copyright law:

According to German national copyright law official legal texts are exempt from copyright.[46] But the way of presenting these laws, even the way in which they appear in print is claimed to be subject to copyright. This is why for e.g. the Federal Gazette Publishing House claims copyright for the Federal Gazette and Federal Publication for Laws presentation of legal material in printed form.[47]

This position in the government has recently been reinforced by changes in European copyright law which has then been transferred into national copyright law of the European Union Member States: The European Union Directive for the protection of databases[48] has created a special kind of copyright (sui-generis right). This legal invention in the interest of the database industry grants an "almost copyright" to compilations of material which itself is not copyrightable. So even if laws (and court decisions for this matter) would not be copyrightable according to national law their compilation in databases is subject to this specific copyright unless Member States have expressly exempted also these compilations from copyright. Member States were extremely reluctant so far to grant this new exemption to a newly obtained right for their databases.

Only time will show if the impact of these changes will generate sufficient opposition to force member states to legislate these exemptions. For the time being this type of European legislation has encouraged member states governments in their commercialization oriented strategies.

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45 Germany is one of the few countries in the European Union which still has not a general freedom of information (access to information law) on the federal level.

46 § 5 German Copyright Act.

47 According to German copyright law neither companies nor legal persons nor the government may be original holders of copyright. But it is assumed that civil servants and employees working for such entities implicitly (and sometimes explicitly) transfer their commercial rights to that entity.

48 Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, 11 March 1996, OJ No. L 77/20 of 27 March 1996. - A very good introduction is provided by one of the leading European experts on this issue: BERNT HUGENHOLTZ: Implementing the European Database Directive, at http://www.ivir.nl/publications/hugenholtz/PBH-HCJ-LIB.doc.

The situation on the level of the European Union

This look on copyright is one of the examples of the impact of European Union Law on commercialization strategies. However, the commercialization issue on the level of the European Union is almost as complicated as in Germany itself and one can observe on this level the same controversies on the commercialization of public sector information.

There is an additional difficulty on the European Union level: Law making on the level of the European Union may only take place if there is specific European Union competence laid down in the legal framework of the European Union. European Union competence on questions of governments' policies as regards their own information is strongly contested. There seems to be consensus that the European Union has no competence to force member states to have and to harmonize their general laws on access to government information (freedom of information legislation).[49] Consequently there has only been so far freedom of information legislation on the European Union level as regards European Union institutions themselves[50] and as regards access to environmental information[51], as there is specific European Union competence for the protection of the environment. There seems to be no European Union competence for forcing member states to adopt or to harmonize rules on the availability of legal information.

However, the European Union claims competence to set the legal conditions on the commercialization of public sector information. So once governments have decided which of their information resources to release for commercialization these conditions of commercialization can be harmonized by European Union legislation. The reason for this competence is that the information will then enter the information market, and the information market like any other market in the European Union has to be a common market with harmonized conditions in all member states.

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49 This is not only a legal question, it is also a political question. For more than twenty years European Union institutions had held the opinion that there was no legal competence to harmonize privacy protection in the European Union until finally the consequences of divergent privacy legislation in the member states could no longer be overlooked and the European Union finally produced a general directive on privacy protection.

50 Article 255 of the Treaty Establishing the European Community, implemented through Regulation 1049/2001 of 30 May 2001, grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a member state.

51 Council Directive 90/313/EEC of 7 June 1990 (OJ L 281, 23.11.1995, p. 31) on the freedom of access to information on the environment and Commission Proposal of 29 June 2000 for a European Parliament and Council Directive on public access to environmental information (OJ C 337 of 28.11.200, p.156) to revise this directive.

The draft European Directive on conditions of commercializing public sector information

The European Commission has therefore initiated a Draft Directive on the commercialization of public sector information.[52] This draft directive is still in the European Union law making process and its final outcome can still not fully be predicted. In general this directive would aim at providing the same general commercial conditions for information service companies in the European Union when these companies want to buy government information from government sources and want to reuse this information commercially. The final directive would therefore not ensure free access to government information. It would only ensure that if governments have decided to give away their information commercially the commercial conditions would be the same within the European Union. One of the still open questions in this context is whether governments would only be allowed to charge the costs for making the information available or whether they could also charge costs at least in part of creating this information or whether they would even be allowed to orientate themselves at prices which such information might gain in the information market. If governments would only be allowed to charge for the costs of dissemination then, of course, in cases where governments would disseminate such information over the internet costs would in tendency move to zero and governments would not be allowed to charge. This is one of the reasons why the text of the draft directive is still contested.

To sum up, the European Directive on the conditions of commercializing public sector information once in force will not change the situation for citizens' access, it will only harmonize the conditions for commercial access and the conditions of reselling this information. Once in force this Directive would then, of course, also cover the commercialization of legal information and in turn would set the framework conditions for commercializing such information in Germany.

5.2 The policies of Switzerland

European Union influence

One of the main differences between Germany and Switzerland is that Switzerland is not a member of the European Union, nor of the European Economic Space, nor of the European Free Trade Association. It would seem that Switzerland is fairly independent of European Union politics. However, Switzerland is geographically totally surrounded by European Union member states, and its main trading partners are European Union member states, so realistically and recently to some extent also legally Switzerland is following a policy closely oriented at developments in the European Union.

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[52] Proposal for a Directive of the European Parliament and of the Council on the reuse and commercial exploitation of public sector documents (OJ 24.9.2002 C 227 E p.17). The basis of competence is Article 95 Treaty establishing the European Community - (consolidated text (Official Journal C 325 of 24 December 2002.

It was under the impression of European Union policies relating to the availability of public sector information, including legal information, and particularly the discussions and conclusions of a 1996 European Commission conference on public sector information[53] that the Swiss government had decided to address the question of electronic availability and commercialization of legal information on the federal level in Switzerland.

Swiss policies for legal information

The Swiss government commissioned a study[54] and based on this study accepted formally a concept for its publication and commercialization practices [Rechtsinformatikkonzept]. It formed a special office at the Federal Ministry of Justice[55] and transformed its concept into an ordinance on the publication and commercialization of legal information.[56]

The Ordinance

The ordinance confirms as general principle that all (federal) legal information should be available electronically, still guarding, however, the principle that the electronic version is authentic only where it is stated expressly in the legislation or where there is only electronic legislation.[57]

The state confirms its duty to provide a basic public service for legal information to answer the needs of the population. The state may go beyond the provision of basic legal information and move into the area of value-added information (in particular by linking and adding intelligence to the system) where there is a social interest or a demand and where the private sector is not seen to be taking care of this interest or demand. Whenever moving into the value-added area the government should consult with the private sector.

The Ordinance states further that in principle the state should charge for this information. The costs should not exceed the costs which occur with the electronic publication of this information.

However, there are several exemptions from this principle which allow the state to make the information available for free, mainly if the state already uses such information internally or when charging would not be practical.

If third parties want to use the legal information for commercial products of their own, special conditions apply.[58]

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53 For more information on this conference see footnote 61.

54 Available in German at: www.rechtsinformation.admin.ch/copiur/dok/ri-konzd.pdf.

55 [Koordinationsstelle für die elektronische Publikation von Rechtsdaten - copiur] The german language site is at http://www.rechtsinformation.admin.ch/copiur/index_de.html

56 Ordinance on the elctronic publication of legal information of April 19998. [170.512.2 Verordnung über die elektronische Publikation von Rechtsdaten].

57 The validity of electronic legal information is to be extended in the revision of the law on publication (see footnote 41).

58 Ordinance on the fees for electronic legal information of 1999 [172.041.12 Verordnung der Bundeskanzlei über die Gebühren für die Abgabe von Rechtsdaten]. E.g. to receive the full

For cases of possible conflict between private sector and public sector legal information activities the Swiss government will soon formally establish the Swiss Association for Legal Informatics, an existing private law association with members both from the public and the private sector, as a formal mediation body to address such conflicts and find commonly acceptable solutions.[59]

The ordinance seems to be generally accepted by now after almost five years of operation, although occasionally and with regard to specific data bases there is still criticism from the private sector. In general, however, it is realized that Switzerland as a relatively small country, with at least three languages to take care of, is a very small market for legal information and that therefore it is necessary that the state accepts its responsibility for the informational infrastructure of the legal system.

Effects on the private sector

Still, by enhancing the capabilities of the information already available from the government, and by adding also texts of articles and from books, and/or by providing additional services which might of interest to legal scholars, lawyers, and judges, several private companies are now competing in the Swiss market for legal information.[60] Their activities prove that indeed the provision of a basic infrastructure of legal information by the state may be a beneficial push for private companies to move into more advanced value-added legal information services rather than destroying a local information industry.

5.3 Summary

Again we have seen two different approaches to information policy as regards the availability and commercialization of legal information. In a large country like Germany the situation might be more complex. On the other hand a well reasoned and analyzed, as well as transparent and coherent information policy for legal information should not only be possible in small countries. Such policies have certainly shown their positive results both for the general public and the information industry.

Systematic Law Collection for commercial reuse you have to pay 3000 Swiss Francs (300 Swiss Francs for every update) plus costs for the support material (diskettes, CDs) and for time (80 Swiss Franks per half hour person time).

59 For reasons of transparency it should be stated that the author of this text is a member of the board of this association where he represents the Swiss law faculties.

60 Probably the largest of these companies is Swisslex AG (www.swisslex.ch/d/index.htm).

6 Cautious Constructive Suggestions for a General Policy for Legal Information

6.1 Introduction

Against the background of the differences and occasionally disharmonies described above there is, of course, the question of what would be an optimal strategy for the commercialization of public sector information and legal information in particular.

We will not hesitate to make such a proposal against the background of our observations here and in other contexts[61]. We are aware of national differences in culture, politics and legal frameworks. By making this proposal we can therefore only offer a line of arguments for discussion purposes which might be used for testing when deciding on national policies. In order to invite discussion we present a numbered list of principles. The numbering of the principles is not necessarily according to their importance but it just to introduce some sequence and to allow for reference. Although we think that some of these principles are useful with regard to government and public sector information in general, we restrict ourselves to legal information because we think the context of information is important when deciding on an information policy.

6.2 Principles for Discussion when deciding on a commercialization policy of legal information

6.2.1 The Access Principle

Principle I

(I) Principle I: Legal information should be easily accessible, in the appropriate technical format for anyone and against the costs of dissemination only.

Arguments regarding Principle I

The legitimacy of legal systems is based on the assumption that legal systems are known. In order to be known this information has to be accessible for everybody.

It is true that this is perhaps only a symbolic assumption. Free accessibility does not guarantee that everybody fully understands the information without the help from a legal specialist. In this context a legal specialist, like a lawyer, or a law professor, or legal scholars would profit more from free accessibility than ordinary citizens.

It is therefore sometimes argued that such information is more helpful for specialists and it is not a general service but a service for special interests. The argument usually goes like this:

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61 See: HERBERT BURKERT, Personal Summary of the Conference. European Commission Conference: Access To Public Information: A Key To Commercial Growth And Electronic Democracy. Stockholm,27/28 June 1996.- Available at: europa.eu.int/ISPO/legal/stockholm/en/burkert.htmlStockholm conference

Governments should provide general services from which everybody can profit for free. Governments should provide such services out of the tax budget to which everybody has contributed. But if governments are asked to provide services from which only few may profit those may be charged additionally. Since legal specialists can profit from legal information far more than others there should be charges on legal information which take into account the value of such information for legal specialists.

However, the main reason for making legal information available is not a question of who profits more but it is a general normative condition for law to be observed and followed. Therefore legal information has to be provided for normative reasons and not for economic reasons.

The next question then is whether law specialists may at least not be charged additionally. So while legal information would be generally free for the ordinary citizen law specialists should at least be charged according to the value of the information.

However, the principle of equality in the law state forbids that the same service is charged for one person but free for another. Social differences are already accounted for by creating different tax classes for citizens according to their income.

The only difference for which there might be charges are costs of dissemination. So if someone wants to have shipped voluminous legal law collections in paper format by express mail this person can be charged for those extra costs. But if information is disseminated (or more correctly held in databases to be downloaded by potential users) then there are no costs of dissemination.

Basic information/Values-added information

Since governments cannot charge differently because of the principle of equality they sometimes try to create different levels of providing legal information. Legal information in its basic form would then indeed be free for all. But "upgraded information" or "vale-added information" would be charged according to market value. We remember the German example above: Everybody can read the Federal Publication, but if someone wants to print out or do full text search this must be paid extra.

The German example also shows that the separation line between what is basic information and what is value-added information is sometimes difficult to draw and very often it is drawn by governments somewhat arbitrarily. Clearly allowing a print-out is not an added value but a basic necessity if you want people to be able to read and not just strain their eyes. Presenting the text of a law article by article and in html-format, so as to make it difficult to read and print the full law is another way of artificially introducing added value which should be basic value. It is only an unnecessary nuisance to entice users to pay for the product in the pdf-format.

Are there criteria which help us to say what is "basic (legal) information" and what is "value-added" (legal) information?

We suggest the following solution to this question: Since taxes have covered the creation of information within the administration "basic information" is information which the government uses internally and in the format in which the government uses it internally. So if e.g. the government for

internal purposes is using full text retrieval to make sure which law is currently in force with which text or which text of the law had been in force on a given date then this information and the accompanying retrieval possibilities are to be regarded as "basic (legal) information".[62]

All legal information databases with all the legal information retrieval possibilities which are accessible for the government (and the courts) should be therefore be regarded as "basic (legal) information" and should be freely accessible for everybody.[63]

We have now determined what basic legal information is. We have maintained that this information should be accessible in whatever format and with whatever tool the government is using itself internally. We have added that this information should be free of charge except for the costs of dissemination where applicable.

Citation system

A minor point has to be added at this stage as regards court decisions: To help Principle I to become successful it is necessary to change the publication and citation practice of courts. The new unfortunately not yet fully consequential practice of the German Constitutional Court is remembered: Since the publishing houses claim copyright in the way they have presented the texts in the printed editions they may hold a monopoly on page numbering. In order to overcome this restraint the internet needs its own fully authorized citation system. The only way to overcome these limits in the long run is by the courts numbering their decisions, numbering the paragraphs in these decisions, using this way of citation themselves and allowing everybody else to quote court decisions solely by decision number and paragraph number.

Next question

The next question is: If Principle I is applicable to everybody, does "everybody" also include private companies which want to resell this information and make a profit out of it?

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62 In case where the government buys such information (or software) from the outside or where the government outsources such services to private companies it has at least to ensure by contractual provisions that the government is not limited to make these tools available to fulfil its public information duties.

63 This, of course, only applies to legal information systems, it does not apply to systems which use or include personal information of citizens like administrative systems. To administrative systems privacy and freedom of information laws apply which decide which (personal) information is accessible under which conditions. - There is, however, one area of overlap: In some legal systems the names of the parties in a law case are integral part of the judgement. This problem will have to be solved according to the legal traditions and privacy considerations of a. countrise (see also the individual practices of the German federal courts).

6.2.2 The Equal Treatment Principle

Principle II

(II) Principle II : Free access to basic (legal) information also means free access for companies. On this question there should be no discrimination between citizens and companies.

Arguments regarding Principle II

Indeed, this principle seems to be unfair to taxpayers who are thus subsidizing the profit making of private companies.

First of all, of course, we have to remember that always everybody profits from infrastructural public services. Security in the streets also contributes to profits of companies in such a street as well as it contributes to the well being of the citizens.

But more specifically we have to look into the consequences of Principle II for the information market. Let us assume that company A wants to profit from this principle. It e.g. downloads traffic legislation from a government database for free and sells it to the general public on a CD-ROM for 50 € per CD. This would be regarded as an unfair profit. But who would buy this information at such a price if everybody can download this information for free from the government source according to Principle I?

In consequence although Principle II extends free access to governments they cannot simply make use of this free access by reselling this information with a premium. There would be no market. So Principle II forces or at least encourages private companies to add value to the information they have received, and since all companies could obtain the basic information for free from government sources there would be equal conditions for a value-adding competition.

Principle II will therefore enhance competition in the information market without restricting citizens' access to public sector information.[64]

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[64] There is a problem hidden in this solution that should not be passed over in silence: Access is provided to everybody, including foreigners who are not citizens. This rule makes sense because each foreigner could easily ask a citizen to get access and pass on the information. This information could be passed on to the foreigner since it is not a secret. Also the costs of controlling whether a requester is a citizen or not would be too high. And finally European Union law forbids the discrimination of foreigners as long as they are from a member state. This antidiscrimination rule of course applies for companies as well. These anti-discrimination rules are also increasingly to be observed in the world market according to WTO regulations. Some smaller countries have therefore feared that if they would open their internal legal information sources this way foreign companies would easily have access to these information resources and in the long run might monopolize one country's legal information and making it dependent on a private foreign company. - We do not think this to be likely. In Norway e.g. the Norwegian company providing legal information on Norway has become one of most competitive

Problems between Principle I and Principle II

Finally a third principle is needed to solve possible conflicts between the consequences of Principle I and Principle II.

According to Principle I everything that is done within administrations is regarded as "basic information". Let us assume that the government decides to enhance its database on social security regulations by using "artificial intelligence" software in a way that allows entering personal information of a "test citizen" and the system will then tell automatically which social benefits such a citizen would be entitled to receive. Using statistical data available a government could then use such a system to make large scale testing on the effects of existing and possible new social security regulations. Let us assume that the government may be reluctant to make this system generally accessible at all or at least for free, because it could encourage citizens to request social security benefits they have not asked before. According to Principle I this enhanced legal information system allowing citizens to analyze social security regulations would have to be made accessible to everybody at the marginal costs of dissemination, which if offered on the internet would be zero.

Let us now also assume that company A has a long experience in social security regulation. One day - well before the government got this idea - they decided to build a system which uses existing social security regulations which they had obtained under Principle II. The system of company A makes it possible to tell citizens to which social security they are entitled once they enter their own personal information. Company A has marketed this product for some time at a considerable but nevertheless reasonable price, when suddenly the government product becomes available on the government website for free.

Should company A be protected against this kind of competition from government? Should governments be barred from adding further value to their (legal) information, particularly if similar private products are already in the market place? Who should decide on questions of adding value to existing government information resources?

Our next principle seeks to address these questions.

6.2.3 The Private Sector Risk Principle

Principle III

(III) Principle III: Companies using and enhancing (legal) information are not protected from competition by government sources, if (a) the competitive product falls under the legal competence of that government body providing this product, and (b) the government has made its intentions transparent as soon as possible.

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providers of European Union legal information (www.lovdata.no). Also the Swiss example does not prove this fear to be realistic.

Arguments regarding Principle III

Over the last thirty years, certainly in German speaking countries, legal doctrine has become more demanding on the conditions under which the public sector can act on the market. Also the European Union using European Union law has become more and more critical of state activities entering markets. One of the consequences of these developments had been e.g. the restructuring of the European telecommunications market. Still member states have a margin of appreciation as to what they regard as a public sector activity as long as there is no cross-subsidization from commercial activities. Once state organizations enter the market they have to do so under market conditions and are no longer allowed to receive preferential treatment for their public sector resource.

These rules, however, do not guarantee companies business for ever; nor do they protect them against their services becoming obsolete because of a change in government practices or regulations. This is a typical private sector risk against which the private sector receives the premium of profit. So in our example, company A would not be protected against the consequences of legal information activities of the government.

Any other solution would hamper government in enhancing the execution of its functions and would freeze its innovative spirit.

However, government would have to ensure a number of conditions:

- Government, as in all its activities, must have been entitled to this enhancement. This enhancement has to be covered by a legal mandate or by a specific encouragement from the legislator.
- Government, as in all its activities, should be transparent as much as possible. It should therefore make its information policies transparent and invite discussion at the earliest possible moment. Essential changes should be referred to the legislator for decision.

6.2.4 The Public Sector Restraint Principle

Still, one last principle is needed. While Principle I precludes governments from using legal information resources without making them available to the outside, and while it ensures that these resources are then essentially available for free, neither Principle I, nor any other of the principles stated so far, exclude the possibility that government creates a spin-off company and puts it on the market to compete with other companies. Therefore we need Principle IV:

Principle IV

(IV) Governments should not enter the information market.

Arguments

Competition law would - as described above - bar the government from giving that spin-off special market conditions. Also the government would have to buy information from that company as it buys information from other companies to ensure equal treatment. Also the basic information that

would be provided by government to that spin-off company would also have to be provided to competing information market companies. So what would be the difference?

The argument against such activities is first of all an argument of principle: Government is not in the business of making business. Government competing in the market is always in danger of competing unfairly. If there are activities considered as a public service of general interest they should be organized as such. If in government some activities are open to commercialization (and its compensations even if of only of an indirect kind) and others are not because of the nature of the activity this creates imbalances and rivalry within government without establishing the advantages of a true competition.

Even if government would severe all links with the spin-off company such a company would still be able to profit from the good will of its former relations; and all too often former government officials are seen to run such companies. While not all of these advantages are subject to intervention from competition law, they are nevertheless present and may provide advantages to the company and its activities without subjecting these activities to the control they would be subjected to if these activities were still carried out within the government.

While there is no protection against government extending its activities in the public interest (see above Principle III) there should be protection against the extension of government activities as commercial activities.

6.3 Summary

We have proposed that four principles might be helpful when determining what might be a useful policy for distributing and eventually commercializing legal information:

The first principle establishes free availability and free access of government legal information.

The second principle establishes the principle of non-discrimination between citizens and companies seeking to enhance and to commercialize legal information.

The third principle is a warning to private sector companies to remain alert to competition and to changes in public policies, while establishing a need for the public sector to discuss such policies publicly and timely.

And the fourth principle provides a reminder against commercial activities by governments themselves

Again it should be noted that these principles are not meant as absolute guiding principles for government policies but only as reminders of points which need to be discussed when deciding on such policies.

7 Closing remark

We have described the policies for commercializing legal information by governments in two countries. We have encountered a number of problems these policies are faced with. We have shown different ways to address these problems. We have noted the difficulties of balancing the general interest in legal information as an infrastructural resource of society. We have also shown the necessity to make such policies transparent and coherent. Against the background of these experiences we have tried to develop some general principles which might guide government policy making in this field.

We are aware that these principles are principles and might need wise modifications. We are aware that these principles are principles developed against the background of specific historical, political and cultural experiences and what fits one country does not necessarily fit another country. They have only been principles to encourage discussion. Although law experiences globalization and technological change everywhere, law is still read and understood very much through the eyes of a national culture. It is precisely this variety and this importance for national cultures that makes law's optimal availability so important for the inside of a country as well as for the outside of a country.

Curriculum Vitae

Organizer

Takato NATSUI

Professor of Law, Meiji University, Tokyo, Japan

Personal Data:

Born Iwate, Japan, 1956

Education:

BEc Yamagata University, 1978

Professional Employment:

1980 National Examination for Legal Professions

1981-1983 Legal Internship

1984-1994 Assistant Judge

1994-1997 Judge

1997- Professor, Faculty of Law and Graduate School of Law, Meiji University, Tokyo (Legal Informatics, Cyberlaw)

1998- Practicing Lawyer, Asuka-Kyowa Law Firm, Tokyo

2002- Adjunctive Lecturer, Faculty of Sociology, Toyo University, Tokyo (Information Law)

Studying and Researching Field

Legal Informatics, Cyberlaw (Cybercrimes, Electronic Commerce and Certification, Privacy Protection), Civil and Criminal Procedure Laws, Philosophy of Law

Research Activity

1999-2004 Project Leader of SHIP Project (Social Human and Information Platform Project)

Other Academic Activity

2002-2004 Vice Chair, Director, Information Network Law Association, Japan

1998- Director, Law and Computer Association, Japan

Selected Publications

Books

(Author)

Jurisprudence and Computers (1993, Nihon-Hyoron-Sha)

Culture and Law in Networked Society (1997, Nihon-Hyoron-Sha)

Electronic Signature Law (2001, Rick-Telecom)

(Editorial)

Business Method Patent (2001, Fuji Techno Systems)

Legal Research (2003, Nihon-Hyoron-Sha)

Keynote Speakers

Chris Puplick

Chris Puplick began his second five year term as President of the NSW Anti-Discrimination Board in January 1999. He is also the NSW Privacy Commissioner.

Mr Puplick chairs a number of other organisations, including the Australian National Council on AIDS, Hepatitis C and Related Diseases (ANCAHRD), the AIDS Trust of Australia, Central Sydney Area Health Service and the National Task Force on Whaling. He is on the Board of the Griffin Theatre Company. Chris Puplick served two terms as a Senator representing NSW, from 1979 to 1981 and from 1984 to 1990.

Mr Puplick is the author of five books: *Liberal Thinking* (1980); *Up the Greasy Pole and Completely Wrapped* (1992); *Is the Party Over?* (1994) and *NSW 1965 State Election* (1996). He has published close to 100 articles in journals, magazines and newspapers and is a regular contributor to broadcast debates.

In June 2001, Mr Puplick was awarded Member (AM) in the General Division of the Order of Australia, for "*Services to the protection of human rights and access to social justice, and to community health through advocacy and support in HIV/AIDS*".

Herbert Burkert

Dr. habil. Herbert Burkert is a Senior Research Fellow at the German Fraunhofer Institute for Media Communication St. Augustin, Germany from which he has obtained a temporary leave of absence for international research purposes.

He is the President of the Research Center for Information Law at the University of St.Gallen in Switzerland where he teaches public law, telecommunications and media law. Herbert Burkert is also the Chairman of the Legal Advisory Board to the European Commission's "Information Society" Directorate and International Fellow at the Information Society Project of the Yale Law School in New Haven, USA as well as a member of the Public Policy Board of the Auto-ID Project of MIT, Cambridge Mass.

Herbert Burkert is a member of the Cologne bar; he studied Law, History and Political Sciences at Cologne University and University College Dublin. He obtained his doctoral degree from the Goethe University of Frankfurt ("summa cum laude") and his "habilitation" (a second doctoral qualification to qualify for professorship in the German language academic system) from the University of St. Gallen. He is also a visiting professor of law at the University of Namur in

Belgium.

Herbert Burkert is on the editorial board of several law journals in Australia, Belgium, France, Germany, Switzerland and USA. He lives in Cologne, Germany, and is married to the German artist Candida Hoefer.

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1991-2000 Associate Professor of Law, Department of Law, Kagoshima University
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RESEARCH ACTIVITY

2001- Visiting Scholar at the Sydney University, School of Law (Australia)
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1997-1998 Visiting Scholar at the John Marshall Law School, Technology and Privacy Law Center (Chicago, USA)*

1995-1996 Visiting Scholar at Osaka University, Department of Law (JAPAN)*

TEACHING AND RESEARCH FIELD

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SELECTED PUBLICATIONS

Books

1. Author

Law on the Net, 2000(Tokyo: Nihon Hyoron Sha, 2000) with Prof. Yonemaru

Law on the Net (Tokyo: Nihon Hyoron Sha, 1996) with Prof. Yonemaru

Stay of Proceedings in Criminal Procedure (Tokyo: Nihon Hyoron Sha, 1995)

2. Editor

Cyberspace Law (Tokyo: Nihon Hyoron Sha, 2000)

Internet: Gateway to Foreign Law (Tokyo: Nihon Hyoron Sha, 1998)

3. Supervising

Ishikawa, Murai and Fujii, Legal Research (Tokyo: Nihon Hyoron Sha, 2003)

Mumia Abu-Jamal, Imai (Translator), Live from Death Row (Tokyo, Gendai Jinbun Sha, 2001)

Panels

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Member, Information Processing Society of Japan (IPSJ)

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Adjunct Faculty, Researcher & Ph D. Student, School of Information Studies, Syracuse University USA. (1994-2000)

President & CEO, Epoch Research Corporation (1983-1994)

Selected Publications:

"Information seeking for instructional planning" An exploratory study." Journal of Research on Computing in Education, vol. 31, o. 2. Winter, 1998. pp.204-219.

Research Report on Distant Learning and Supporting Systems for Teacher Education in U.S.A. (National Institute of Multimedia Education, 2003)

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Personal Employment

1988-1999 Instructor and Associate Professor, Otaru University of Commerce (Otaru, Hokkaido)

1993-1995: Invited Research Fellow, Université Jean Moulin (Lyon, France)

1999-2003: Professor of Civil Procedure, ASIA University (Tokyo)

2003-present: Professor of Civil Procedure, NANZAN University (Nagoya, Aichi)

Current Areas of Research:

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Research & Publications:

My first research paper is about the right to proof in French civil procedure. I was interested in the duty to present documents in civil process. I am also interested in the American discovery system. Recently, I wrote an essay about interrogation in the Japanese civil

procedure. This is a new tool introduced from the American equivalent "interrogation" in 1998. But, it is without any sanction for observation. Now, my principle study is about Cyberlaw, especially dispute resolution in cyberspace. This field is very exciting and extremely mobile.

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Member Data Protection Committee, Japan Information Processing Development Corporation (JIPDEC)

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Director, Japan Marketing Research Association (JMRA)

Advisor, Data Protection Working Group, Electronic Commerce Promotion Council of Japan (ECOM)

Previously :

Researcher, First Research Department, Research Institute of Telecommunications and Economics, Japan. (1999-2001)

Researcher, Information Security Department (Privacy Mark System Office), Japan Information Processing Development Corporation (JIPDEC). (2001-2002)

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The Right to Privacy (Seibun-doh, 1999)

Electric Communication Network and the Data Protection (Research institute of economy, trade and industry, 2002)

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Part II.

Articles

1. Takato NATSUI, Legal Information: Basic Structure and Legal Issues[1]

2. Hiroshi Komatsu, Legal Information and XML – An Introduction -[2]

3. Osamu Miura, How to Conduct a Search for Japanese Translation of Foreign Laws[3]

[1] This article is a transcription from a lecture at Yamagata University on January 2003. This lecture was originally in Japanese, and Japanese version transcription is published from Yamagata University.
[2] This article was originally published in Japanese on the Web. This is a translation from this Web contents.
http://icrouton.as.wakwak.ne.jp/xml/primer/index.xml
[3] This article is a transcription of a lecture by Osamu MIURA at the 2nd study meeting on October 19, 2002. This meeting was held by the Study Group on Court Ruling Information.

Legal Information: Basic Structure and Legal Issues

Takato NATSUI[1]

Introduction

Let me introduce myself. I am Takato Natsui, professor at the Faculty of Law of Meiji University. I am visiting Yamagata City, the city of my alma mater, for the first time in 10 years. From Yamagata Station, I could see huge new buildings and was surprised to find the city totally urbanized.

I graduated from the Faculty of Humanities at Yamagata University in 1978. The department structure being different at that time, I was a law major at the Department of Economics. Though I was a law major, half of my course credits were in economics, and the remaining half in law. I mainly studied economic history and Hicks' economic theory. As for law, I studied Corporation Law under Professor Eiji Kakizaki, who specialized in Commercial Law.

I started to study for the National Legal Examination after graduating from the university. Following training at the Legal Training and Research Institute, I became a judge. Now, I am working as a university professor, after my retirement from the bench a few years ago.

Some of you are planning to take the bar exam, or other examinations for legal qualifications. I would like to give you, my junior fellows, one piece of advice based on my own experience; you will never pass an exam unless you have in your mind a clear image of your future. When I decided to take the bar exam, I did not set my goal at passing the exam. My goal was to become a judge. So, I thought about how much education I would need to become a judge. The bar exam is only one step in the process to become a judge, and you need to pass the exam as the first part of achieving this goal. Not once did I think that passing the exam was my final landing place. I aimed higher. Some of you are intending to take various certification exams. If, however, your sole purpose is to obtain good scores in your exams, you may lose your drive or encounter insurmountable walls. When you have a clear vision about what kind of work you want to do and how you want to live your lives, you will be able to hold on, even when you feel discouraged.

Overview of Today's Lecture

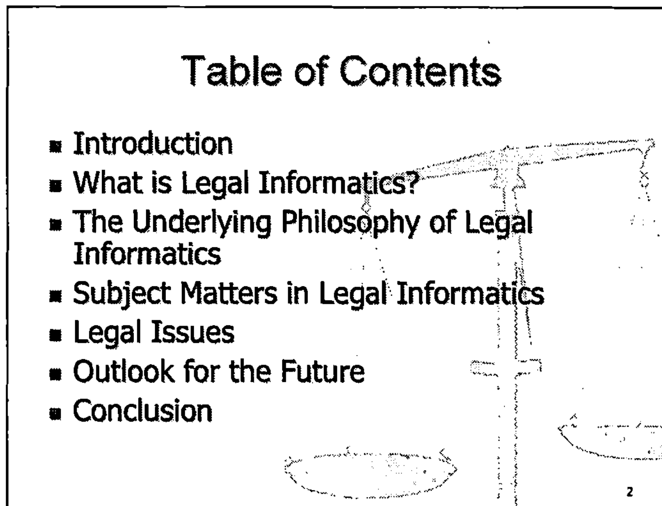
Today, I will give my lecture with the aid of Microsoft PowerPoint slides.

As shown in Slide 2, my speech will start with the topic "What is Legal Informatics?" followed by "The Underlying Philosophy of Legal Informatics," "Subject Matters in Legal Informatics," "Legal Issues," "Outlook for the Future," and the conclusion.

To begin with, I believe you need some explanation about what legal informatics is, so I would like to talk about my concept of legal informatics, and then introduce how legal informatics is

[1] See Curriculum Vitae in this Review.

viewed in some universities that provide courses named legal informatics. After that, I would like to explain the philosophy of legal informatics, based on my own ideas about legal informatics, as well as the subject matters of the discipline. I hope it will deepen your understanding of what creates legal issues when you see things from this angle. Lastly, I will present my own perspective regarding what issues legal informatics should, or need to, deal with in the future.



Slide 2; Table of Contents

What is Legal Informatics?

First of all, I would like to explain my idea about legal informatics. "Legal informatics in the substantial sense," as shown in Slide 3, indicates that the discipline handles legal information from the perspective of informatics.

There are many ways to understand informatics. The lecture I am giving now is one type of information source. The medium for information in use here is "sound." As you know, sound is a kind of air vibration. When I finish speaking, the air stops vibrating, and you will not hear anything anymore. Electronic mail messages you send and receive on your cellular phones remain for a certain period of time. The medium used in cellular phones, namely, computer memory, is more stable than sound, so the messages remain in your phone unless the magnetism dies out. However, all the information in the memory will probably be lost if it is exposed to a powerful magnet, which might also destroy the cell phone itself. Something printed on paper is much more stable than that, and lasts about 2,000 years when properly maintained. Still, it can and will be reduced to ash in a fire. I believe that the longest-lasting medium in history is the clay tablets unearthed in Mesopotamia. Even after several thousands of years when today's computer civilization perishes, some legible clay tablets will be dug up somewhere in the region. In contrast, mail messages on your cellular phones will probably become illegible in less than five years due to model changes. You might think you are living in a very

stable world, but in fact, you are in a quite impermanent world. Each moment you live might be as transient as my voice, which is nothing but vibrations of air.

What is Legal Informatics

- Legal informatics in the substantial sense
  - the discipline handles legal information from the perspective of informatics
  - examines means to use legal information
  - what the best form of legal information should be
- Legal informatics in a formal sense
  - courses currently given under the name of "legal informatics"
    - Legal Research (Informatics, Librarian Informatics)
    - Cyberlaw (Information Law)

3

Slide 3; What is Legal Informatics

However, what is important is not the media by which information is conveyed, but rather, the content of the information itself. Some of you might be interested in what I am talking about now, and some might be feeling bored. You find my lecture either interesting or boring based on the content of my talk. Perhaps, no one here will be intrigued with my lecture on the grounds that I have a pleasant voice.

In short, what matters with information is its content, and media is nothing more than a means for conveying the content.

From the standpoint of legal informatics, which examines the basic structure of legal information, law is perceived to be a kind of information. Also, legal information seen as information can be approached from two aspects, the form and the content. So, it could be said that legal informatics is close to philosophy or logic, or more like psychology, rather than belonging to legal studies. However, since the discipline handles legal information as its subject matter, you do not understand what it is that you are studying, without having knowledge, experience and some basic ideas or philosophy about legal studies. About half of what is handled in legal informatics is related to jurisprudence.

Next, what does it mean when we say that legal informatics "examines means to use legal information," as is printed on the slide?

Law is one of the rules of society, and one with a special nature.

For example, assume you decided to hold a get-together with your university circle members. This is a promised appointment, so you have made up a rule there. If you should break the

rule dictating that the members get together at a restaurant at a specific time on a specific date, you would be subject to sanction (penalty) from the other members, who would not invite you to a get-together next time. You would deserve the ostracism as you and the others made up the rule together. However, such a rule being no more than a promise about a get-together, you would be able to change the rule anytime, just by saying something like "Let's cancel the party as some of us cannot make it," or "We are on a tight budget, so let's go to a cheaper restaurant." It is a rule that can be changed anytime.

In contrast, law is a rule that should be observed in the strictest way, and you can be punished if you break the law. Also, changing an existing law is rather laborious, as any change in a law requires an amendment bill to be submitted and approved in the Diet. Even when attempting to change a law that you believe unconstitutional, you would have to spend years to have it reach the Supreme Court to finally have it be adjudged void. Law is a rule that cannot be easily changed.

To put it the other way around, law is one of the most significant rule systems in society. Thus, I believe it is of great importance to consider how to describe such significant rules and how to store or record these rules.

Pursuing this idea further, we would eventually have to study what kind of legal information is needed and what the best form of legal information should be.

All of you have seen the Compendium of Laws. Should there be a freshman who could understand all the provisions written in that book, I would praise that student to the skies, but this is totally unthinkable. I am a legal professional, working as a practicing lawyer while teaching law at a university. Nonetheless, a number of legal texts put me at a loss as to how to interpret the logical structure or the meaning, although I understand each single word written there or each sentence in a grammatical sense. Quite a few statutory texts are difficult to understand even after contemplating them at length. Even when I try to clarify my questions by asking government officials in charge of legislation, they often refuse to give me sufficient explanation, giving me nonsensical answers like "I've forgotten that." So, some legal texts are unclear to professionals, as well. Leaving things as they are is a controversial issue, and I will discuss that in more detail later.

What I have talked about so far is the idea of legal informatics in a substantial sense as I perceive the situation right now.

Now, with Slide 3 titled "Legal informatics in a formal sense," I would like to introduce two types of courses currently given under the name of "legal informatics" at other universities. In many universities, a subject presented as "legal informatics" is deemed to cover what legal informatics is, but it is only a nominal definition. In reality, quite a few universities only teach how to search for legal information in their "legal informatics" courses. They put students in a computer room and teach them how to find a specific text in a certain law, using various databases of judicial precedents or statutes. They call it a "lecture" when it is nothing more than what is offered at so-called "PC School." The second type deals with what is covered in the fields of cyber law or information law. Generally speaking, cyber law, while not having a clear-cut definition, is law related to the Internet. It examines legal issues unique to the Internet, such as intellectual property rights on the Internet or hacking problems. Also, Information Law studies law related to information, including that concerning

telecommunications. It is not uncommon that students are studying cyber law or information law in a course named legal informatics. This is what legal informatics is, by its formal definition.

Legal Informatics in a Substantial Sense

I myself teach a course titled "Legal Informatics" at Meiji University, and it is focused on dealing with legal informatics in a substantial sense.

My lecture series at the university covers what might have been taught in a course of Constitutional Law, in the past. Topics such as how to secure voting rights (the right to participate in politics) or what it means when one says that "sovereignty resets with the people," were originally taught as part of Constitutional Law. The Constitution is a system established about 100 or 200 years ago. At that time, there were no computers. Also, all constitutions around the world are based on the belief that every individual country is an independent and self-contained entity. This is true for the constitution of the United States, and the constitution of Japan. They just dictate, "Sovereignty rests with the people," not envisaging anything beyond that. However, in today's world (now popularly termed the "borderless world,") where many things inter-relate regardless of borders, we cannot turn a blind eye to the constitutions or laws of other countries. Of course, one can choose to make a self-contained argument or assumption, but people often get involved, without their knowing, with various problems arising beyond their national borders.

Let me give you an example. I am using the Hotmail service of Microsoft (MSN.) When I do nothing to prevent it, hundreds of spam mail messages flood my Hotmail account. Half of those messages seem to be a part of some fraudulent business, promising things such as "This will build up your muscles," or "You will be an instant millionaire, if you send your application to us." If they were coming from sources in Japan, various legislations in Japan that prohibit misrepresentation or misleading advertisement could be applied to punish or regulate such sources. However, most of the spam mail delivered to a Hotmail account is sent from the United States. The United States does have some regulations for such mail, but if I wanted to have senders of spam mail punished, I would have to go all the way to the Untied States spending several hundreds of thousands of yen, and stay there for a few months, just to file a suit. This would be too much of a burden for me. So, I just have to let them do what they are doing. Many people do care about this situation, though. Legal professionals have to think, then, about what should be done. That is our responsibility.

Philosophy of Legal Informatics

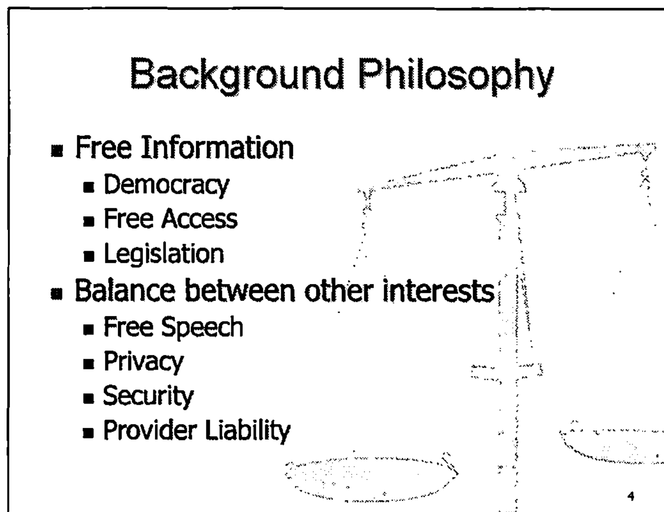
My concept of legal informatics is based on a certain philosophy.

For example, assume you are to study what should be researched and how this should be approached in a borderless world. First of all, if you do not have your own value system, you will not be able to judge what is good and what is bad. In a world where conventional concepts, such as

sovereignty resting with the people, do not function as criteria of judgment, it is important to determine what you should use for your own criteria.

I believe that there exist a certain number of rules that can be accepted, or should be accepted, in any country or by any group of people. Such rules can be a foundation when you devise your own criteria. After much trial and error throughout the history of mankind over thousands of years, some things have been proved, historically, not to be acceptable. In contrast, some things, which we are unsure about, have managed to survive.

For example, nobody has been able to prove whether "democracy" is a truly right principle – it might be a total fallacy. However, it is believed to be better than totalitarianism or dictatorship. That is why I would like to employ democracy as the foundation of my philosophy.



Slide 4; Background Philosophy

Democracy is based on several principles. The most important principle is "freedom of information," as I have written down on Slide 4.

Now, assume you became the leader of a circle, and you had the responsibility to decide on the activities of this group for the next year. If you were allowed to decide on your own, you would just develop a schedule of activities by yourself, and that would be that. It would be very easy. But generally, you have to discuss an activity plan with other officers of the circle and then seek approval for the plan from circle members. Then, when the other members have agreed, the plan can be adopted. That is the common process. People who are in a position to take on leadership and to make decisions usually have all pertinent information about the circle, but the rank and file members do not always have as much information as the leaders do. Still, if they are not given enough information, they will feel at the mercy of the executive group. When the leader gives a satisfactory report, saying something like "Our tight budget, due to this and that, does not allow us to do more activities than specified in this plan," they will understand, or if not, propose new decisions. They might suggest collecting more

money from the members which they might raise by finding part-time jobs. Lack of information would not only lead to discontent among the members, but also prevent them from being able to make the best choice.

I believe this pattern can be applied not only to members of a student circle but also to all the larger groups of society. The decisions of people who are provided with all the necessary information would be better than those made by people who are not privy to sufficient information. Even when given enough information, people will not necessarily make the right decisions, but a society where members are given more free access to information is sure to be in a better position to make better choices.

In the United States, access to information in this way has long been believed to constitute a right under the Constitution. Also, four or more laws ensuring freedom of information have been established to make sure that this point is clear. Particularly, information held by the government is considered to have been generated by the tax money its people pay. This seems completely logical. Public officials are living on the taxpayer's money. I, too, was living on taxpayer's money when I was working as a judge. Nobody is happy to pay taxes. People are compelled to pay tax, and public officials are making a living on the money people reluctantly hand out. But tax money is definitely not intended to be an asset to individual public officials. It should be an asset to the taxpayers. This idea is commonly accepted in the Untied States and in advanced countries in Europe.

Thus, it is and should be believed that the taxpayers should be able to access and learn about what has been produced with their tax dollars. However, this way of thinking is not so common in Japan.

Although the situation has changed since September 11 2002, in the several times before that when I visited the United States, citizens were allowed to visit the Oval Office to look at the inside. They even had a chance to touch a chair former President Clinton had used. The underlying idea was that people should be provided with an opportunity to inspect, at any time, whether their tax money was properly used, because their tax money was used to construct and maintain the White House, as well as to provide salaries for all the staff working there. Depriving people of such an opportunity would be considered undemocratic.

In judging whether a country is democratic or not, the degree of free access allowed to public institutions can be used as a good indicator. I believe that this clearly shows if the country is a democratic society or not.

In my opinion, Japan cannot be called a democratic country, in the true sense, as such freedom of access is not generally granted.

Such being the situation, I would like to show in detail that securing freedom of information is one of the basic philosophies of legal informatics. As I have already explained, law is a most important rule in our daily life, so knowing under which rules we are living is a basic human right. Therefore, establishing a right of access to legal information should be one of the primary objectives of legal informatics.

Furthermore, if we consider legal informatics as one field of academic study, it is, in itself, a part of the movement to advocate a right of access to the public. Also, based upon insight and

knowledge gained through such various examinations and studies, an ideal process of establishing future law should be taken into consideration as part of the philosophy of legal informatics.

Balance with Other Interests

Meanwhile, there are other kinds of freedom or interests important to human beings. Humans are very complicated beings and human society, comprised of such complicated beings, is ever more complicated. Each individual has his or her own wish about how things should, or should not be. Some people might want to be indifferent to what is happening around them. Everyone is very different. Also, human beings are affected by their ever-changing moods. What bothers them at a certain time may not matter at all, on another occasion. Humans are unstable beings. So, the pursuit of freedom of information might sometimes conflict with other interests, and ignoring the rights of others could lead to the total collapse of the democracy we are aiming to achieve.

I will illustrate this point further, step by step along with Slide 4, showing some practical examples.

Balance between Right of Access and Freedom of Expression

First, let's look at freedom of expression. For example, approving unconditional right of access means allowing access to any information, like what you are thinking or what you are going to write, for example. If someone were to say to you, "You are going to write this and that," or "You are intending to say this or that" when you were about to express yourself, you would feel discouraged about speaking up and feel like putting restraint on yourself.

Such restraint is called "prior restraint." When such restraint is imposed by government power, it will lead to censorship. So, granting unconditional right of access alone could lead to suppression on people trying to express themselves.

Guaranteeing freedom of speech is a fundamental principle in any democratic society. The idea is to encourage debate and different opinions, so as to adopt the best ones among them. Imposing a prior restraint on what someone is trying to express would distort this principle. You would have your right of access guaranteed, but would not be able to freely express your opinion. So, we need to draw a line somewhere, to keep the right balance between freedom of access and freedom of information.

Balance between Right of Access and Privacy

The next thing to consider is privacy, as shown in the slide. The previous discussion also applies to our personal lives. If unlimited access to all information were permitted, the right of access

would force its way into our own homes. Then, what you do not want others to see might be disclosed, or your own private space might be invaded. So, "adjustment of privacy" is also necessary.

Actually, protection of privacy carries with it quite a few problems.

For example, the Japanese Diet has deliberated on the privacy protection bill, which aims at protecting "personal information." Here, "personal information" is defined as information that helps identify attributes of a particular individual. Thus, information that does not include personal identification information does not constitute personal information, in a theoretical sense. Is it really so, though? When you use a credit card to buy a commodity, the barcode information does not involve personal identification information in itself, but the user information on the credit card is instantly linked to the information about the commodity. Such linking of information is called "data matching" or "data mining." The data generated in that way is obviously personal information, and thus, will be subject to protection by the current bill. However, the current bill does not prohibit the act of data matching itself. It can be safely said that the main objective of the bill is to make businesses properly handle privacy information they collected, while still allowing them to freely collect such information. I find some inconsistency there. Of course, most corporations would not be able to carry on their businesses, should collection of private information be uniformly banned. Here, freedom of access to customer information on the side of corporation runs counter to the right of privacy of the individual. This is a highly difficult problem.

Right of Access and Security

The next point is security. Security is not a matter of concept; it needs to be actually implemented. Implementation means having security measures function on a practical level.

For example, when you use a computer system in the university, the Information Center or a similar institution usually manages security measures so that the system will be protected from computer virus or hacking by outside attackers.

Some of the security information should be disclosed; namely, basic information and policies as to what the system can or cannot do. I believe a user's right of access to that kind of information should be protected.

However, should all the detailed information regarding programs or devices implemented in the system be disclosed, it would be like telling attackers where vulnerability that can be effectively attacked exists. So, information about some of the programs or devices implemented in the system cannot be disclosed.

Also, the name of a security person cannot be disclosed in some cases. Were a person in charge of security to be bribed, regrettably, the whole system would be exposed to potential takeover. The identity of the administrator should be kept secret, when need be.

Therefore, access to any information should sometimes be able to be restricted, for security reasons.

Democracy in Network Society

Now, you might be wondering why security comes up in a talk about democracy. It is related to the fact that one of the characteristics of the modern world is that it is a network society. In fact, various aspects in your daily lives are supported by networks.

Let us take a cellular phone as an example. Telephone calls or mail exchange cannot be made just with two transceivers. The radio wave sent from any cellular phone, whether the device is of a DoCoMo brand or J-Phone brand, is first connected to a server, or a computer center, and then, sent on to reach the cellular phone of the other party. Two cellular phones do not directly communicate with each other, unlike walkie-talkies. So, if the network system working as a medium between cellular phones breaks down, your daily life is inconvenienced. And one of the obstructions will be the deprivation of the opportunity to freely express your opinion.

Similarly, the government system is currently depending on a network system for it to function smoothly.

The management system of the Basic Resident Register scheme is one example, and the data management system for tax service or real property registration is another. In recent years, a lot of public biddings conducted by the central or local governments are also being made available though a network system. I have heard that voting will also be available via a network system in the near future.

This means that a certain part of the current democratic system – I mean, democracy as a substantial system rather than democracy in an ideological sense – exists in a computer system. Should the system be destroyed, there would be total disaster. Inarguably, a certain part of the foundation of democracy would be lost.

Of course, a computer system has its good and bad aspects. When left in the hands of a person with bad intent, it can be used to destroy democracy. In light of the fact that we are actually using a network system to express ourselves or our views and to eventually exchange opinions, as indicated in the example of cell phones, protecting network security is equivalent to protecting a certain portion of the foundation of a democratic society. This is where the need for adjusting the balance arises.

Responsibility of Service Providers

The same subject leads to the issue of "service provider responsibility."

Any telecommunication company, including DoCoMo and J-Phone, first accumulates contents of telephone calls or e-mail messages in a server, and then distributes the data to individual phones. Your mailbox is located within the server, not within your cellular phone. You just access the mailbox in the server to check messages for you. The organizations and corporations managing the mailboxes for tens of thousands of people are generally called "providers." In Japan, J-Phone, DoCoMo and Nifty are some of the most well-known providers.

The word "provider" in this context means "those who provide service" or "corporations or

organizations who provide service." Providers manage the information consigned from their customers.

Information consigned to providers can sometimes include harmful information. Providers who accept harmful information into their keeping or disclose such information could be obliged to take responsibility as a provider. Not only that, provider responsibility towards users also arises when providers do not manage information entrusted to them properly. If a provider had to take full responsibility for everything under their supervision, nobody would want to be in that business because of the burden it involves. Or, all the providers would be forced to go out of business, which would disrupt network society. Such risks always accompany the provider industry. Thus, it is necessary to establish a reasonable standard that draws certain lines about issues of responsibility; demarcating the areas of self-responsibility and provider responsibility, or dictating the area in which nobody should be held responsible.

Since provider responsibility is not an apparent issue of network society, as is the problem of security, it is a kind of invisible problem in discussions of democracy. It is a significant issue in network society, though. Freedom of information would be threatened if we failed to keep the right balance here.

I have discussed rather difficult issues, so some of you may be feeling drowsy. I previously said that these kinds of issues, which should have been or were handled in a course of Constitutional Law, need to be examined in legal informatics. The very reason lies in what I have just explained; we need to review various social backbones that we did not have to pay much attention to before the advent of network society. Otherwise, we will be unable to tell if our basic human rights are properly protected or not. This is the environment we are now living in.

Legal informatics examines the situation from this angle.

In 10 or 20 years, legal informatics may be absorbed into Constitutional Law developed for the new age. To me, that sometimes seems how things should be, ideally. But until that day comes, I would like to pursue my study in this field so as to fulfill my responsibility as a professional in legal informatics.

Further Details

Now, let me explain this philosophy in further detail.

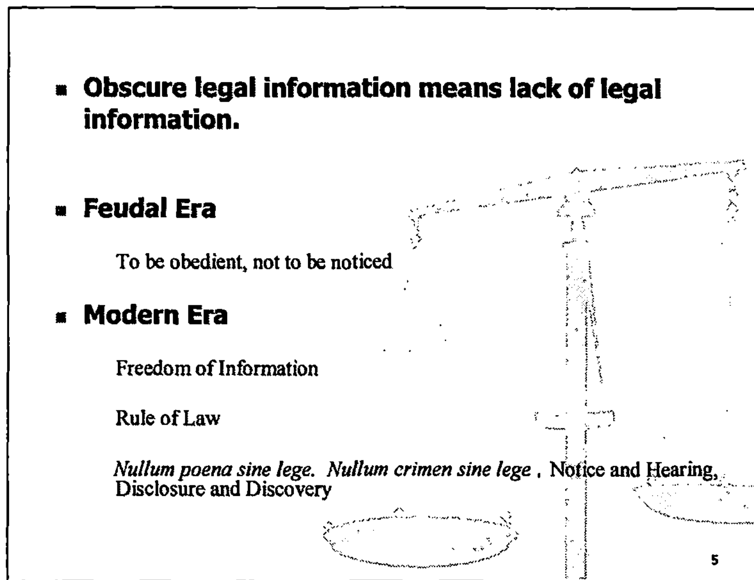
I previously said that even legal professionals sometimes have difficulty understanding what a certain text in the Compendium of Laws means though they recognize what is written in the text. I would like you to think about what it means when you say that you "do not understand," that is, the issue of incomprehensibility.

When you find yourself having difficulty understanding the study of jurisprudence at university, some of you might think that professors or lecturers are to blame, because their way of teaching is not good enough. Some of you might decide you are not cut out for jurisprudence, opting to earn the necessary credits in other subjects. Or you might exert yourself to understand because the

subject is a compulsory one. But let's consider this from a more philosophical angle.

In the example of how to run a university circle, I mentioned you have the chance to form your own opinion provided that rules are given as information in advance, or that various kinds of information are offered to you. It is the same with legal information. If you are provided with information about how rules of law are made consistent, and if the rules seem reasonable to you, you would have a firm basis for your judgment. If you find the rules inappropriate in light of the information you have, you would make efforts to have it amended. However, when you do not have all necessary information, you would not even realize that you are governed by faulty rules.

So, it is essential for a better life that information about rules is properly supplied. Law, above all things, is a very significant rule, which you must observe whether you like it or not. You have no choice about that. If you do not follow the rules, you will be subject to punishment or forced to pay damages.



Slide 5; Details of Philosophy

On Slide 5, I wrote "obscure legal information means lack of legal information." It is naturally inferred that legal information must be in a form that is comprehensible to the public, because, if not, many serious problems arise.

The judgment that obscure legal information is problematic, is a relative one, not an absolute one. It is dependent on a certain, major premise. Since I believe that democracy is better than a dictatorship, I conclude that obscure law is not good. In a feudal society, however, obscure law might be more convenient for a political leader.

I assume you all know the TV program called "*Tohyama no Kin-san.*"

I imagine you have all seen the program at least once or twice. I believe *Kin-san* was a

southern magistrate of the city of Edo. I do think he was. Anyway, in the Tokugawa Period, a southern magistrate and a northern magistrate took half-year turns to police the city of Edo. One of the two magistrate's offices was closed for the six-month period when the other was on duty. *Kin-san* is said to have been a real, respected magistrate called Kinshiro Tohyama. At that time, there were many laws and regulations and in light of those rules, trials were conducted following established procedures. I believe it was not so different from today's trial system. For example, in handing down a death sentence, a magistrate must state something like "This act constitutes a crime of murder, so the accused shall be hanged on a cross."

However, the trials depicted in the TV program are rather odd, aren't they? I am older than you by 20 years or more, and I have seen the program several hundred times, probably. Not once have I seen *Kin-san* pronouncing, "You are in violation of Article X of Law Y, so you deserve a death sentence." This is obviously strange. Instead, *Kin-san* in the program dramatically pulls off his *kimono* to show his tattoo, roaring "Admit that you recognize this storm of cherry blossoms! This tattoo has witnessed everything!" With the tattoo of cherry blossoms revealed, the magistrate declares, "Yes, you have admitted to your guilt," and hands down the punishment. This is how the story goes.[2] The accused would never explicitly understand on which grounds they are to be punished.

In the TV program, the audience, who already knows that the accused are bad guys, might feel satisfaction in seeing them being punished. In the real world, however, it would probably be questioned if there was enough evidence to conclude that the accused really committed the crime. To begin with, the reason for punishment must be clarified.

Have you read "The Trial" written by Franz Kafka? I would recommend that you read this story during your school days, when you have the energy and time to do such hard reading. Since the story has been made into a movie, you could also rent a video. This story begins with the leading character arrested and put on trial, all of a sudden. Were I in the shoes of a bad guy in a *Kin-san* episode, it would be like a detective unexpectedly arresting me and dragging me into a court. Then, a person called Kinshiro Tohyama would appear and display his tattoo, yelling "Admit that you recognize this storm of cherry blossoms!" What would I say? I guess I would say, "Yes, Your Honor, I see them." "All right, you see. Then, you are guilty!" What would you do if you were treated like that? Outrageous, isn't it?

So, I have always thought that "*Tohyama no Kin-san*" is the most absurd program. It blunts the legal consciousness of the Japanese people, depriving them of the opportunity to be clear sighted.

This type of caricatured world, however, may be convenient to rulers not wishing people to

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[2] This program has been one of the most popular and long-lived TV programs in Japan for the past several decades, and the majority of Japanese people have watched this series, at one time or another. It might be compared to the legends of Matt Dillon, Daniel Boone and similar folk heroes, in American culture. Like the classic Western, the story always follows a certain pattern: in the case of *Kin-san*, the hero disguises himself as a townsman and investigates crimes, and in the course of his investigation, comes to know some honest and good people. When these good people are about to be harmed by some bad person or group, he comes to their rescue and shows off his tattoo in front of them. Later on, when these bad individuals are brought to trial, they deny their wrongdoing. Kin-san, now appearing as a magistrate, pulls of his *kimono* and yells these famous and familiar lines.

understand why they are being punished. I guess leaving things obscure was very expedient for rulers in the feudal age.

This kind of thinking, however, does not hold true in our age of democracy, and I believe democracy is a fairer system. If we are unable to verify the rules of the establishment ascribed to us, in a conceptual sense, the democracy will not, basically, be viable. How can you trust courts when you do not know under which rules your case will be judged? Failure to promptly redress out-of-date laws or unfair legislations, might lead to collapse of the society.

You might have a vague belief that law is free of mistakes. However, there are many laws riddled with mistakes. Let me show you some examples. I did not bring documents today, but I will illustrate how they are formulated. Usually, a provision in a statute should end like this, "In this or that case, it should be like this or that." But I have seen a sentence cut off half way, without a period. Probably, it was a simple typo or something like that. Such texts really exist. Another example is a specific budget-related law, where Article 2 stipulated an expense of a million yen for something. The bill had only Article 1 and 2. However, an amending act stipulating revision of Article 3 was somehow established. This is a serious error. In Japan, no government organization takes charge of editing and publishing the letter of the law after revision. The task is completely left to private publishers. What is issued in the gazette is provisions of an amending act, like "This should be amended to be such and such," not the text with revisions applied. Complete text reflecting revisions by an amending act is published in the Compendium of Laws. Private publishers editing the compendiums may find mistakes in the process of compiling amended law, but they turn a blind eye to the mistakes. There are many other laws with such mistakes. I know another example that happened about two years ago. A certain law was revised twice or three times in a year. A drafter in the government who wrote the first draft overlooked the latest revision and created amended provisions based upon the older version preceding the latest version. That resulted in an amending act not corresponding to the latest one. Such an error could happen where several revisions are made to the same act in a year. I heard that there was another would-be error of that kind last year. Fortunately, a director noticed the mistake before it became a serious problem.

Also, a misprint in the Compendium of Laws once caused a serious accident. In that case, the law itself had no problem. The length of imprisonment period stipulated in a specific provision in the Penal Code was mistakenly printed as a certain amount of years. A judge, who referred to the compendium, believed the defendant deserved the longest amount of years in jail and handed down a misguided sentence based on the incorrect information. The revelation of the error caused a big sensation. The publisher held responsible for the misprint had to cease publication of the Compendium of Laws from the next year.

So, even law records contain mistakes. And we cannot leave those as they are; they need to be corrected.

Human actions are never totally infallible. Human beings do make mistakes. But to err is not necessarily bad. A scientist once won a Nobel Prize for his work after taking a hint from an error in his experiment. Unexpected things often happen, and an error can sometimes be a source of inspiration. The important thing is to be willing to recognize the good things resulting from an error,

in addition to fixing whatever turned out to be a failure. Leaving an error unredressed is the worst choice.

However, without knowing the existence of an error, we cannot do anything to put it right. I may sound repetitious, but let me point this out one more time: any rule of law is so significant that even the smallest mistake should be redressed and we should also know where to amend. Law must be a clear entity in itself. This also applies to a budgetary system, when seeing a budget as a law.

What I have explained so far is often discussed in different areas of general jurisprudence. Different terms are used in different areas, but the underlying principle is the same.

In criminal law, for example, this principle is observed in a doctrine dictating "Nullum poena sine lege. Nullum crimen sine lege (Without a law, there is no punishment. Without a law, there is no crime.)" This is one of the three examples illustrating different applications of the principle as shown on Slide 5. To put it simply, this doctrine, which has several derivative principles, stipulates that a certain conduct cannot be characterized or punished as a crime unless so defined, in advance, by law. Moreover, the definition must be done in an unambiguous way, so that anyone can easily understand what conduct constitutes a crime. This is one of the basic doctrines you learn in Criminal Law.

The second application of the principle is "notice and hearing." This is sometimes seen in a context related to legal procedures, but mainly seen in relation to the Administrative Law. When issuing an administrative order imposing a specific obligation on another party or a restriction on the right of another party, or when making a big change in certain procedures, the government must give enough explanation, as well as hear the opinions from parties concerned, to satisfy established procedures. Without sufficient "notice and hearing," an unexpected administrative conduct would be unfair to the other party. The Administration must listen to the taxpayer's opinion, especially when they are planning a project using taxpayer's money. They are not allowed to use public money at their own discretion to build a gigantic palace, for example. So, the government must first make pertinent information accessible to the taxpayers and then, make efforts to listen to their opinions.

A similar concept has also been introduced in legislation, recently, as a system called "public comment." You will find a lot of hits when you conduct a search on the Internet with "public comment" as a key word. Under the system, when the government is preparing to establish a new law, the public is asked to submit individual opinions. It is a kind of notice and hearing procedure.

As is seen above, not only in administration but also in various other areas does this concept of notice and hearing come into play. It is necessary for the government to give prior notice and listen to public opinion when making a decision that will affect the citizens, use taxpayer money or exert a substantial influence on the right of other people. This is basically the same as giving explicit information.

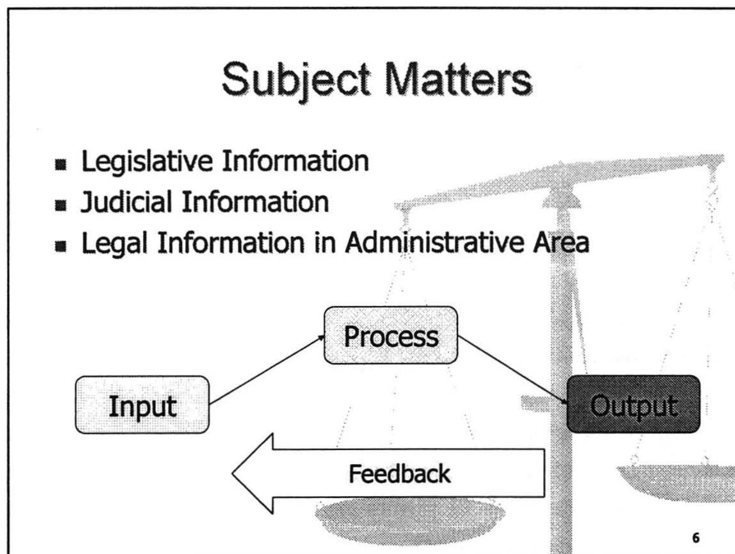
The third application of the principle is "discovery." This might seem to belong to a more personal sphere. Both in civil and criminal procedures, a demand for discovery is filed, requiring the other party to disclose information relating to the litigation following certain requirements, when one concludes that compulsory disclosure of information held by the other party is essential for the sake of fairness. This is generally explained in the context of "fair play," but I think this can be viewed from another angle, too. No trial is in the right, unless it is based upon correct information. Also, assume a

case in which you do not have much valid proof while the other side has abundant proof. Judging from the small amount of proof at hand, you might feel aggrieved by the other party and decide to file a damage suit. Then you could have the other party disclose all pertinent information and realize that the other party was not to blame, causing you to decide not to file a suit, after all. Of course, the reverse could happen, too. Thinking in terms of judicial economics, and operating society in a more reasonable way, the disclosure of important information and its proper understanding would certainly lead to the realization of a less stressful society. So, in my personal view, the issue of discovery can be included in the context of "notice and hearing," although it may not be dealt with in that way commonly.

Subject Matters of Legal Informatics

With time limitations in mind, I will leave abstract topics at this point, and go on to explanations of what legal informatics deals with.

The chart (Input -> Processing -> Output) on Slide 6 is a basic model. Legal informatics deals with "legislative information" and "judicial information" – information about decisions or legal procedures. It also covers "legal information related to public administration," which includes internal rules or decisions for administrative procedures in government agencies. Such rules and decisions are also handled as legal information.



Slide 6; Subject Matters and Basic Model

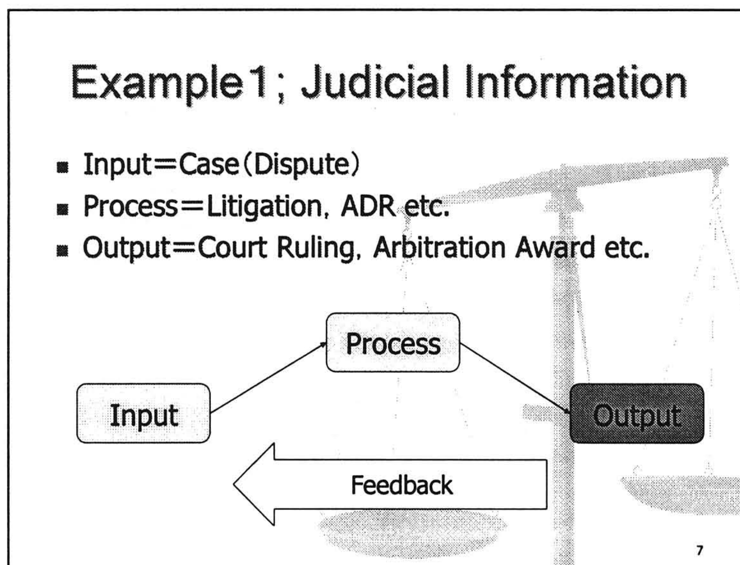
From my point of view, the above three kinds of information, which are the focus of legal informatics, exist as a type of dynamic system, rather than in a static state.

Information generally takes the following path; an input is generated, then processed, and

then, turned into some form of output. The output comes back to the source of the input as feedback. This is the basic pattern. Now, I will show how this flow applies to areas of legal informatics.

Regarding Judicial Information

Firstly, let's take judicial information as an example, since this is the easiest to understand. What corresponds to "input" is a case. Somebody was hit by a car and got injured. Somebody wants to receive a tax refund as he paid more than he should. Somebody is indignant because of another's derogatory remarks...These are cases. A case is an "input" to the court.



Slide 7; Example 1 – Judicial Information

Judicial information is basically "processed" in the machinery of the law. Today, courts are not the only machinery used to resolve disputes. Various systems other than courts, commonly known as "ADR" (Alternative Dispute Resolution), are also regarded as basic tools for dispute resolution. A case comes into a dispute resolution mechanism including ADR, as an "input," where some processing is applied. In the courts, a trial corresponds to "processing." The processing, or trial, is conducted based on the principle that a case must be tried as stipulated by law. What we have to consider is "Under which law is the trial being conducted?" and "Is the case really being tried in strict compliance with the law?" Legal informatics is concerned with these two points. Whatever the situation, some "processing" is applied to the case as "input."

What emerges as "output" for judicial information? For courts, it is a "decision." For other ADRs, it is a "decision of arbitration" or a "judgment of arbitration." In recent years, an international organization called WIPO has been frequently employed as an ADR. WIPO is also known as an

arbitrator in disputes over domain name. Decisions of arbitration made by WIPO are well respected by most parties and thus, have a large influence. On WIPO's website, you can find examples of decisions reached in arbitration cases. Just recently, there was an arbitration case – I forget if it was relegated to WIPO – over a website with the domain name "newzealand.com."[3] The site is owned by a private company, and the New Zealand government filed a claim that the right of using this domain name should be given to the government, as the name is suggestive of the New Zealand government. The claim was rejected, though, on the grounds that ".com" obviously indicates that the site belongs to a commercial corporation. This is a difficult problem, isn't it? Should the domain name be "newzealand.jp," the name could have been ordered to be handed over to the New Zealand government on the grounds that it is evocative of the New Zealand Consulate or Embassy in Japan. So, the decision is rather relative.

Then, what does a "*feedback*" mean? I will explain this, using as illustration, the processes involved in a trial. In many cases, both parties are sufficiently satisfied to close the case at the first level. When one party is not satisfied, however, it can lead to an appeals trial. In that case, the decision of the first trial, which is an output, comes back as a new input into the processing system of the appeal trial. Similarly, a decision made at the appeals trial comes out as an output; if both parties are satisfied, the case is closed at that point; if not, the decision of the appeal trial, or the output, turns into another input, which then goes into the processing scheme of the Supreme Court. In a formal sense, an output, or decision, at the Supreme Court level closes the case entirely. Yet, in a substantial sense, some cases do not end there – they are closed as individual cases, but a Supreme Court decision does not always put a period to the case once and for all. For example, a decision could be proved to be faulty with the discovery of new evidence, several years after it was handed down. With feedback in the form an appeal for retrial, the whole cycle starts up once again. Also, a law upon which a controversial, final sentence is based could be changed, following a social movement insisting that the defectiveness of the sentence should be attributed to certain flaws of the law. In the past, several sentences of the Supreme Court, which had found the defendants guilty, became the focus of public criticism, which maintained that the law was against the Constitution. At a certain point, when public criticism had intensified, the Supreme Court changed its tune and admitted that the provisions at issue were unconstitutional, and eventually nullified them. The most classic example is the amendment to a certain provision, intended to stipulate heavier punishment for ascendant homicide. Such movements can be observed as a complicated, dynamic interaction among multiple feedbacks, putting outputs into another processing system as new inputs. My point here is that legal information is not something static and fixed, like a stone statue, but something constantly in use or in operation. It is a dynamically functioning body in itself. Legal information can be considered such an entity.

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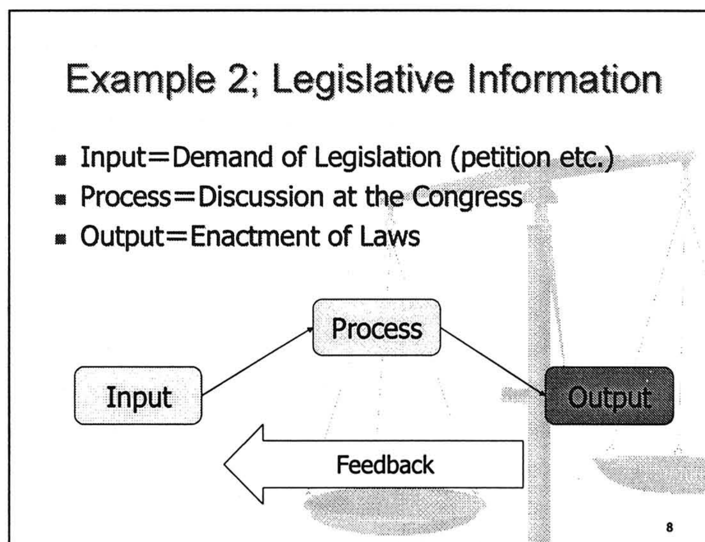
[3] WIPO Arbitration and Mediation Center, ADMINISTRATIVE PANEL DECISION, HER MAJESTY THE QUEEN, in right of her Government in New Zealand, as Trustee for the Citizens, Organizations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade v. Virtual Countries, Inc, Case No. D2002-0754 http://arbiter.wipo.int/domains/decisions/html/2002/d2002-0754.html

Regarding Legislative Information

The same process, as just described for judicial information, can also be applied to legislative information. This kind of processing is done at a legislative body, or an assembly, like the House of Representatives and the House of Councilors for Japan, or, for example, Yamagata Prefectural Assembly or Yamagata Municipal Assembly for Yamagata Prefecture. Smaller legislative bodies are neighborhood associations or town councils. They are a decision mechanism handling "processing." When legislation of a new law or amendment to a specific law is requested, that request is processed in an assembly, and a new law or an amendment law is generated as an "output." Generally, the process ends with an output, but sometimes, the output comes back as feedback, as for example, in the case of an amendment law that is amended once again, after it has been found to be unsatisfactory in implementation. The process of legislative information may seem easy, as explained above, but actually, it is not that simple. This is why I took it up separately from judicial information, as I will now show in Example 2 on Slide 8. What is quite obvious with judicial matters remains rather more unclear in the case of legislative issues.



Slide 8; Example 2 – Legislative Information

Evidently, a trial results from some kind of trouble as "input." One can readily understand the causal relationship between a trial and an event, although one may not know how it will be resolved. Since a decision is clearly presented in the form of a document, the output of how the case unfolds is also very easy to follow.

Now, let's compare the process of legislation with that of a trial.

In recent years, deliberations in government committee meetings or plenary sessions are often broadcast on TV or through the Internet, so we have the opportunity to observe a bill being deliberated on, in real-time. Also, the deliberations are documented as proceedings, which are made

available to the public for searching and viewing at the National Diet Library's website. Thus, the formal aspects of the deliberations are visible to us. So are the resultant statutes, because they are always published in gazettes. This means that the output is also accessible to us, in addition to the processing.

However, some statutes make you wonder who really requested them. It often happens that a bill has been somehow drafted and passed, while it is still unclear who really needs such a law. Of course, someone must have requested such legislation, but one has no indication of who that person might be. In fact, I know a case in which one government official stubbornly insisted on a particular law being established and eventually had his way, while most people were against it. In Japan, this aspect of legislation is left invisible in the current legislative system. One cannot find out who requested a certain law, or amendment law, currently under deliberation at the legislative body. I mean, the "input" is not clearly presented in the current system.

The reason I see legal information in the flow of "input, processing and output," is that I believe that, in perceiving an event in terms of legal information, we cannot understand the meaning of legal information, unless we understand the basic reason why that legal information is processed or output.

As for the previously given example of a trial, one will not be able to accurately evaluate whether the decision made as the output of the trial is appropriate or not, without understanding the trouble triggering the original trial. Whether that particular processing was properly carried out becomes clear only by comparing the input and the output. How can one know if the processing of an input was right or wrong, when information about the input is concealed?

Suppose you are using a computer or a word processor. Typing in the letters "*Yamagata Daigaku*" (meaning Yamagata University) in *hiragana*, you press Convert Key or Space Key. When the *hiragana* letters are converted into corresponding Chinese characters, you tend to think it has been properly processed. However, you would not be able to judge if the word-processing software you are using is functioning well or not, just by seeing four Chinese characters standing for Yamagata University displayed. You can judge how good the program is, only when you find the Chinese characters converted correctly, and also see, with your own eyes, all the input, processing and output done. With only an output presented, you would never know if the processing is appropriate, or if the program is good or not.

The same thing can be applied to the realm of law. To know what is an input or what is an output is crucial. Above all, since the democracy of Japan is based on the doctrine of "Rule-by-Law," it should make us subject to the discipline of law. If information about who originally required passage of certain rules is not provided, one cannot discern what is democratic and what is not. I believe this is the most important point, and, regrettably, the least satisfactory feature of democracy in Japan.

Legal Issues

Now, I would like to move on to discuss some legal issues, as time is running out and we still have much ground to cover.

One of the challenges of the current situation in legal information is that we need to establish some kind of right of access to obtain invisible or inaccessible information. The information about proponents of a certain statute, as discussed previously, does exist anywhere, and thus remains unseen to us because it is not made open to the public. In some cases, the proposal for some legislation might be made in a high-class, Japanese-style restaurant, where hostesses are serving *sake* to the guests. Or, in a criminal case, somebody might offer money to a Diet member, asking for the relaxing of some regulation. Nodding at the bribe money, the politician might exert his influence to instigate change of the regulation.

Information about such instances is concealed from us. We do not have any means to access this kind of background history now, but we must make it accessible, I believe.

Under the Freedom of Information Law, everyone is allowed access to information held by administrative organizations, to some degree. Of course, restrictions are imposed on access to certain kinds of information, but the law sets a clear standard defining the degree of accessibility to various kinds of information. The criterion for accessibility is made explicit. However, information about trials is not included in the scope of this Freedom of Information Law, which deals with administrative information only. Trials are governed by judicial power, not by administrative authority. There is no equivalence to the Freedom of Information Law provided for information under the jurisdiction of court.

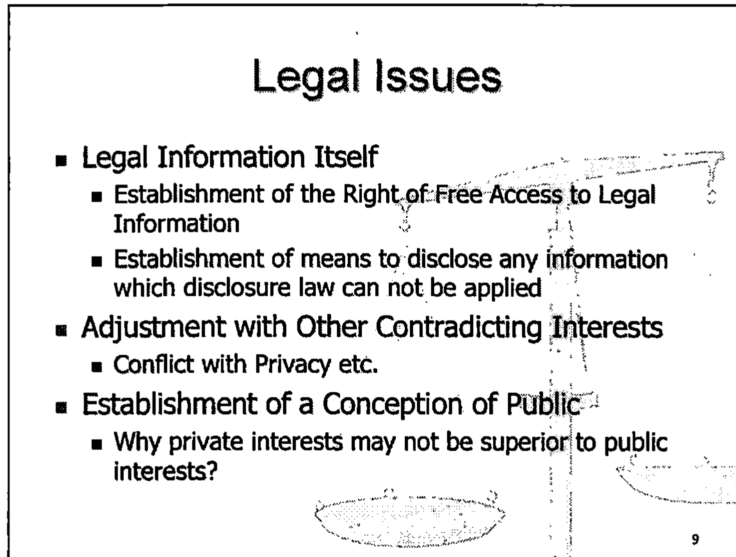
Such being the current situation, don't you think it would be better that court information also be disclosed to the public, since anyone of us might very easily get involved in a legal case, once or twice in life? Imagine when you get ticketed for speeding, for example. You think you will get through with a simple administrative punishment for a traffic offense, but it is possible the case will be brought to trial. Should your case be judged "malicious," you might be even ordered to court. Some of you might see a speeding fine as another kind of tax, but formal trial proceedings are often taken, even for traffic offences. It is just that you are not aware that you may possibly be tried. Besides speeding, in the future you might get involved in trouble over loan transactions, or divorce problems, for example.

Then, how on earth can you possibly judge if a court is reliable enough to try your case, when you are not provided with sufficient information? As you can see, limited access to information carries with it many problems.

This problem of limited access to information also applies to an assembly, which is also out of the scope of the Freedom of Information Law because it is a legislative body, not an administrative body. Thus, it is essential for us to examine and establish procedures to request disclosure of information from judicial or legislative power.

Concept of "Public Domain"

"Adjustment with Other Contradicting Interests," as printed on Slide 9, was a previously discussed topic. Now, let's examine this again, this time from the viewpoint of "public" incorporated.



Slide 9; Legal Issues

Looking back on the legal education I received, and recollecting books I read when I was studying jurisprudence, I think too little attention has been paid to the concept of the public in conventional legal education. I mean, the textbooks examine the protection of individual interest or basic human rights from the viewpoint of individual rights. However, on careful thought, it should be noted that we have to see things from the viewpoint of the public, too, because we are living in a public sphere.

For example, you are allowed to walk on a road because a road belongs to the public space. You are not permitted to walk around on privately-owned land – you can even be sued. A general road is open to us because it is public property. I guess you have Boso-zoku (dangerous hot-automobile riders) in Yamagata, too. Why are they bad? It is because they occupy public roads with hundreds of motorbikes and cars. They monopolize the space which is supposed to be equally available to anybody. Along with their activities come various forms of violence. In other words, they are using a place which should be equally available to us all as public property, for their own, exclusive interests. This is an improper use of a public place, as it is privatization of what originally belongs to the public.

Perceiving law in this context, I believe law exists in the public sphere. It is neither something owned by some private publisher as another corporate asset nor something to be hidden, like a treasure, by some government high-ranking official at his desk drawer. It is an asset within the public sphere, and we all have the right to use it impartially. Law must be available to us any time, as public roads are. We should all have equal access to what is in the public sphere.

When the road is congested, you cannot proceed smoothly. Somehow you have to bear it,

because all the drivers on the road are equally stuck in traffic. Everyone has to exercise patience. It is important to ensure free yet fair availability or access in such a public place. Then again, this world is not composed of "public" factors alone; it has many "private" entities, which belong to a totally different sphere. So, in considering adjustment between one interest and another, it is often easier to find a good solution when you assume that the two are of different natures, rather than weighing the two, with the assumption that they are inherently the same. A number of problems can be approached more adequately by applying the concept of "public domain."

The problem here is, however, that what belongs to the public sphere in a theoretical sense is not deemed so by many Japanese people.

For example, do you, or do you not think proceedings conducted in a court are public property? I think they are. The Constitution guarantees the right to an open trial. Viewing this right from the opposite angle, the public also has the right of monitoring trials, to ensure that judges do not make inappropriate or self-righteous decisions. The open trial system has two aspects. On one hand, the system protects the right of an individual to receive a fair trial by allowing other people to monitor the procedures, thus protecting the individual from unfair treatment by judges or prosecutors. On the other hand, the system is also designed to ensure the right of its citizens to monitor legal proceedings, to which they are not directly concerned, to ensure that they are conducted properly. Originally, trials were carried out in a sort of "kangaroo court" (the term may sound a bit strange here, though) at a public space like an *agora*. Now that trials are given inside a building and thus limiting the number of people allowed to observe court proceedings, anyone should be admitted to observe any trial, in principle.

In the United States, the concept explained above is quite prevalent. When you do a search on the Internet using two keywords "Supreme Court USA" and "transcript," you will get to a site operated by the United States Supreme Court showing video recordings of oral pleadings going on. All the oral proceedings are disclosed entirely.[4] As you know, several TV stations in the United States have live broadcasting of court proceedings. It is based on the belief that community members have an interest in trials and thus, have the right to constantly monitor how judges make decisions. People say they should watch proceedings in order to be assured that they, too, would get a fair trial, should they be brought to trial one day. That is their official position, though they may be watching such TV programs only out of sheer curiosity.

When I visited the Law School of Cornell University two years ago, I met Professor Peter Martin. I think he is one of the greatest scholars in legal informatics. Professor Martin, who is teaching courses in Social Security Act and Civil Law, showed me how he uses trial-related materials in his class. Usually, his staff record live coverage of informative court proceedings on a video tape, which is then used to show to students how a real trial is conducted. Students are also asked to carry on a discussion on the video tape. According to Professor Martin, that is the most fundamental of the fundamental Socratic Method. He told me that the latest material he had used in class was the oral

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[4] Supreme Court of the United States; Oral Arguments
http://www.supremecourtus.gov/oral_arguments/oral_arguments.html

proceedings in the Bush vs. Gore case at the Supreme Court, which had just been aired on TV at that time. I remember him saying, "I had the students discuss what the case was basically about. They had a very good discussion."

Now, I would like to point out to you that you only learn "the letter" when you learn about "trial" or "litigation" at university. Some universities have a moot court, but it is no more than an imitation of a real court. No practical proceedings are conducted there. Anyone who claims he or she understands what a trial is, without having observed some real court proceedings, is a liar in my view. When someone who you know has never got behind the wheel says to you "I can drive," you would call him a liar, wouldn't you? Well, it would have been all right to say that someone "has the knowledge about court proceedings," but having knowledge about a trial does not mean one really knows how a trial proceeds.

In Japan, people believe that they are living in a democratic society, and that any trial will be conducted according to proper procedures under law. It is up to you to embrace such a belief without any critical examination, but can you really accept it when you have no way to verify its rightfulness? We need to have some way to verify that. History tells us that many people were persecuted in secret trials. Hundreds of thousands of people were brought to military trials and executed in secret. Such a historical background led to the establishment of the principle of open court process. Certainly, some may see it disgraceful that his or her personal case is disclosed to the public. Despite such a drawback, the open trial system must be considered far better than being tried in secrecy.

The conception I have presented so far holds true theoretically, but most Japanese tend to be reluctant to regard a trial as being part of a public sphere. It is because they see being put on trial as an embarrassing experience in itself and that it is a shame to have their own private matters exposed. However, Japanese need to change this way of thinking. Shift in mentality may be essential in addressing this problem. Talking about mentality, this topic will be about the Japanese culture, and not limited to the area of legal information. It should be noted that this issue is not only related to culture but also to our way of living. In the global world of today, I assume some of you will find yourselves working in some job overseas, in the future. In order to survive any circumstances in any part of the world, I suggest you consider this point well. If Japanese people insist on sticking to their own particular mentality, they may end up cutting their own throats.

Outlook for the Future

I will conclude my talk with "Outlook for the Future."

I would like you, of the next generation, to be particularly aware that the legal information of a country is not only for its people. This is shown in Slide 10.

For example, no corporation is willing to make a new investment in a foreign country unless they can be sure their corporate activities there, such as opening new branches, will be reasonably protected by law. Imagine a company making a snap decision to operate in another country and later finding themselves in some big trouble. What if their overseas affiliated company were put under the

control of the local government by some seemingly unreasonable policy, or if their claims regarding some business trouble were brushed off by a local court? The investment would appear as absurd as pouring money down the drain. Calculating investment risks would be impossible for such a country. Now, you see that it is very important for a country to provide sufficient information about its legal system and how it is working. Failing to provide such information, a country is likely to be deemed as a high-risk country as a whole, naturally losing value as an investment destination. When investments from other countries decrease, the economy of a country would continue to worsen, let alone help it get over a recession. What I am saying also applies to Japan. I think this country would not be able to get its economy back on a positive track, unless it made clear to the rest of the world how its rules are applied and that they are properly applied.

Another point I would like to discuss is "Factors for Establishing International Relations," as shown in Slide 10. To advocate international collaboration and global friendship is easier said than done. Let me cite a familiar example. When you meet new people, you do not make friends with just anyone, do you? You do not shake hands with someone you do not trust. The basis for trust in a partner differs case by case, or from person to person. You shake hands with someone because you judge that person to be trustworthy, based on your own value system. It is the same with relationships between countries. Even though two countries with totally different social bases might be able to build up a partnership, by entering into some treaty, their relationship would likely fall through at some point in the future. To begin with, one would even be at a loss, about what to do to improve the relationship, without sharing information that validates the reliability of the other party as a partner.

I previously said that Japan needs to make legal information available in order to survive in the international community. Now, you can see that it is actually related to the context of international cooperation, as well.

In Slide 10, I also wrote "Legal information must be available for immediate use." I think I would not have made such a statement 10 years ago. Today, it has become possible to utilize information speedily via networks. We have built up an infrastructure. The remaining problem is that we have very little content, that is, digitized legal information, as such information has traditionally been accumulated on paper. In recent years, various efforts have been made to develop legal information databases, but it is far from being sufficient. We are going to have to improve the environment to put such databases to practical use.

Granted that legal information is made available, a further difficulty arises. Version control. But what is version control? Assume the text is a law that has been subject to hundreds of revisions since its enactment in the Meiji era, now being put into a database. It will be very easy to retrieve the text of the law currently effective, as only the simplest procedures are required. Then, what about retrieving the texts effective two years ago, or 10 years ago? Since a crime committed two years ago must be judged under the provisions effective at the time of the crime, one might need to know the text effective two years ago, not the one currently valid. If proper version control is not administered, it will be impossible to retrieve texts effective two years ago. So, a database system should be equipped with a good version control functionality, to help find a text being effective at a particular point in time. Since the Compendium of Law currently published is not organized in such a way, finding past

provisions requires rather laborious efforts. Also, a database of legal information needs to provide background knowledge or concepts about a law as well as information about examples of application, to meet practical demand.

What I would like to emphasize is that the text in the Compendium of Laws is nothing more than a bunch of letters, if one does not study its meanings or usage by reading pertinent textbooks. You see the meaning of legal education there. Certainly, memorizing the letter of the law is a minimum requirement in learning jurisprudence. I am not saying you have to learn all the provisions by heart, but you are required to remember important provisions, at least. However, you need more than rote learning to make practical use of your knowledge.

For example, you want to drive a car called "Corolla." You cannot drive a real Corolla just by remembering the name. You need to know how to step on the accelerator or shift gears, at minimum, to drive a car. It is the same with law. You cannot use it just by learning the letter of law. You have to learn its usage and meaning, as well. In addition to that, knowing the scope of application of each law is also essential. That is what learning law means. Therefore, textbooks are absolutely necessary.

As for writing good textbooks for legal education, or teaching the meaning of legal provisions, officials of legislatures or courts are going to be too busy to take on that task. So, the task will continue to be committed to university professors or private corporations in businesses related to law.

Legal informatics in the future is going to grow in value, more than ever, in the educational sense, too. This is how I perceive this academic discipline. Thank you.

Legal Information and XML
- An Introduction-

Hiroshi KOMATSU[1]

1. What is XML?

An effort to put XML to practical use began with the issuing, by the World Wide Web Consortium (W3C)[2], of the specifications "Extensible Markup Language (XML) 1.0: W3C Recommendation 10-February-1998" (first version)[3] dated as of February 10, 1998. XML is an abbreviation of "Extensible Markup Language." XML was developed as a successor to HTML, a standard markup language that has been widely used on the Internet.

Originally, HTML as currently used on the Internet, was a simplified version of SGML ("Standard Generalized Markup Language.") HTML is convenient and easy to use, but several problems have been pointed out: the limited elements (so-called "tags," such as <title> or <p>), fixed and inflexible link functions, an inefficient reference system such that a link button in HTML reads in all the contents of the linked pages when activated, and difficulties in reusing a document.

Meanwhile, the higher standard SGML was flexible, but unfortunately, too flexible to offer a corresponding level of functions to browsers. Another problem was that it was too difficult for general use.

Consequently, XML was proposed as a new subset standard of SGML, especially for Internet use. Like SGML, it allows users to define their own tags. As the name "Extensible" shows, XML is characterized by its extensibility. (To be precise, XML is a meta language used to define a markup language. You cannot create XML using HTML, but you can quite easily do the reverse.)

Meanwhile, link functions such as XLink and XPointer have also been introduced along with XML.

As more legal documents and information have become digitized and distributed on the Internet with the development of the so-called "IT revolution" or "e-government," it is becoming apparent that HTML is too limited in formatting and other aspects. Also, the current HTML's link style using <A HREF=""> tag is not functional enough to effectively handle legal information on the

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[1] Hiroshi Komatsu is a practicing lawyer and a member of SHIP project. He has many articles relating to XML and legal information. See 'SHIP project Review 2002', pp. 25-34.
[2] http://www.w3.org/
[3] http://www.w3.org/TR/1998/REC-xml-19980210

Internet.

It is expected that XML will function as a new and powerful "repository" for distributing legal documents such as contracts, or legal information related to statutes, literature or judicial precedents. The enforcement of the Law Concerning Electronic Signatures and Certification Services in April 2001 has provided a legal framework for contracts prepared only in electronic data. Here again, XML is expected to become an essential technology in the area of electronic contracts.

Also, new link functions realized by XLink and XPointer have the potential to provide a totally new method of making a collection of links or developing a database.

If one compares conventional HTML to a surfboard paddling at the beach, XML is like a cruising yacht, fully rigged to sail into the Age of Information.

Well then, how does XML work? Actual examples of XML documents follow.

2. Bibliographic Information

Let's start by making a bibliography database, as an easy and practical example. When you make a bibliography using HTML, one example might be as follows:

我妻栄『民法講義Ｉ－新訂民法総則』(岩波書店、1965年)

HTML tags used in the background of a browser look like this:

```
<TABLE BORDER=1>
<TR><TD>

我妻栄『民法講義Ｉ－新訂民法総則』(岩波書店、1965年)

</TABLE>
```

HTML does not have a set of tags especially designed for handling bibliographic information, so all you can do with it is to configure the presentation and layout of a document. Using this method, however, even if you find the necessary bibliographic information digitized and distributed on the Internet, you will have to do another editing work to reuse the data as bibliographic information or to input it into a database. Alas, how inconvenient and inefficient!

Generally, "bibliographic information" has a logical structure, as shown below, but it is impossible to describe such a structure only with HTML logical tags.

Name of the author
Title
Publisher
Publishing date
Name of the series
Volume number
Edition

If it becomes possible to distribute bibliographic information on the Internet while keeping its logical structure, you will be able to reuse or reconstruct bibliographic information, by applying simple and automatic procedures performed by a computer.

BibTeX

In the academic world of science, a bibliographic database called "BibTeX" has been in use for a long time. This bibliographic database, which is offered by the formatting system called Tex, is a convenient tool, as it allows us to very easily cite references in papers, once a database in BibTeX format is made. In BibTeX, you can describe the logical structure of bibliographic information.

Now let's look at the previous book described in BibTeX.

```
@book{wminposo,
        author    ={我妻　栄}
        title     ={民法総則}
        publisher ={岩波書店}
        year      = 1965
        volume    ={Ⅰ}
        series    ={民法講義}
        edition   ={新訂第１刷}
}
```

Since BibTeX creates a bibliographic database while retaining the logical structure, importing information into the composition system can be completed quite easily. In areas where BibTeX is widely adopted, distribution of information is facilitated with BibTeX functioning as a standard format.

BibTeX is, however, rarely used in the legal world. This is partly because no "style sheet" for legal studies, designed for outputting a text in the TeX system in conformity with the conventional reference style in legal articles, has been in prevalent use, for unknown reason. (Actually, I suspect there has never been such a style sheet prepared.) Also, writing BibTeX is rather laborious, and the

TeX formatting system itself is quite complicated to handle.

Meanwhile, the publishing of legal information on the Web has become very common in Japan, including legal articles, statutes and judicial precedents of various kinds. If nothing is done to improve the situation, HTML's poor description ability will, without doubt, hamper efficient distribution of legal information.

The use of XML, a new WWW standard, will enable us not only to distribute bibliographic information, with a logical structure being preserved, but also to realize a type setting that follows the conventional reference style. Let's see how a text in BibTeX looks, when ported into XML.

3. Example of XML – Bibliographic Database

Now, what does XML look like? Let's look at an actual example here. First, in XML, you have to define tags. This tag definition is called "DTD" or "Document Type Definition." Defining tags for bibliographic information means nothing but converting the logical structure of bibliographic information into a set of markup tags. The logical structure being specified, all you have to do is describe this as a DTD file pursuant to the rules in XML. The following is the DTD of XML for books and articles whose bibliographic information is described in BibTeX. As you can see, it is not so difficult. (By the way, according to W3C[4] recommendation, the design goals of XML dictate that "XML documents should be human-legible and reasonably clear," and "XML documents should be easy to create.")

```
BibXml.dtd

<!--  DTD for the BibXml ver 0.1 by Hiroshi Komatsu 1999 JAPAN -->
<!--
文献情報であることを示す <Bibliography> タグの定義
文献情報には、単行本(Book) と雑誌論文(Article)が含まれる。
-->
<!ELEMENT Bibliography (Book+,Article+)>

    <!--
    単行本 Book> タグの定義
    単行本(Book)は、その要素として Author, Title, Publisher, Year,
    Key, Editor, Volume, Number, Series, Address, Edition, Month,
    Note, Annote を持つ。

    -->
    <!ELEMENT Book (Author, Title, Publisher, Year, Key, Editor,
```

[4] http://www.fxis.co.jp/DMS/sgml/xml/rec-xml.html

```
 Volume, Number, Series, Address, Edition, Month, Note, Annote)>

<!--
雑誌論文 <Article> タグの定義
雑誌論文(Article)は、その要素として Author, Title, Journal, Year,
Key, Volume, Number, Month, Pages, Note, Annote を持つ。
Web 出版を考慮すると、この他に URI, Lastmod なども必要であろう。
-->
<!ELEMENT Article (Author, Title, Journal, Year, Key, Volume,
Number, Month, Pages, Note, Annote)>

    <!--
    各要素タグの定義。各要素には、文字列データが入る。
    -->
    <!ELEMENT Author (#PCDATA)>
    <!ELEMENT Title (#PCDATA)>
    <!ELEMENT Publisher (#PCDATA)>
    <!ELEMENT Year (#PCDATA)>
    <!ELEMENT Key (#PCDATA)>
    <!ELEMENT Editor (#PCDATA)>
    <!ELEMENT Volume (#PCDATA)>
    <!ELEMENT Number (#PCDATA)>
    <!ELEMENT Series (#PCDATA)>
    <!ELEMENT Address (#PCDATA)>
    <!ELEMENT Edition (#PCDATA)>
    <!ELEMENT Month (#PCDATA)>
    <!ELEMENT Note (#PCDATA)>
    <!ELEMENT Annote(#PCDATA)>
```

The following is an XML document describing the previous book, using the DTD above.

```
BibXml.xml

<?xml version="1.0"?>
<!DOCTYPE Bibliography SYSTEM "BibXml.dtd">
<Bibliography>
   <Book>
     <Author>我妻　栄</Author>
     <Title>民法総則</Title>
     <Publisher>岩波書店</Publisher>
     <Year>1965</Year>
     <Volume>Ⅰ</Volume>
     <Series>民法講義</Series>
     <Edition>新訂第１刷</Edition>
   </Book>
</Bibliography>
```

For a description of full-fledged XML developed for bibliographic information, please refer to ISO12083 Book DTD[5] and ISO12083 Article DTD[6].

A set of tags called DocBook, which is widely used for articles and books, also offers tags for bibliographic information. The following figure shows markup in DocBook.

```
<!DOCTYPE bibliography PUBLIC "-//OASIS//DTD DocBook V3.1//EN">
<bibliography>
<title>参考文献</title>
<bibliodiv><title>書籍</title>
<biblioentry>
  <abbrev>民法講義総則</abbrev>
  <author>我妻　栄</author>
  <publisher>
    <publishername>岩波書店</publishername>
  </publisher>
  <title>民法総則</title>
  <edition>新訂第１刷</edition>
  <pubdate>1965</pubdate>
    <seriesinfo>
    <title>民法講義</title>
  </seriesinfo>
</biblioentry>
</bibliodiv>
</bibliography>
```

Actually, this article also uses tagging in DocBook[7]. Some of the advantages of using DocBook is that it is useful in exchanging or reusing bibliographic information, and that links are automatically generated in applicable sentences by using <xref> tags for cross-reference, once you compile a list of references in the DocBook style at the end of your writing. In other words, one can use advanced functions equivalent to those offered by BibTeX.

I first started writing this article in HTML. I was forced to go through some very burdensome manual work; creating a table of contents, preparing pagination by chapter, reassigning paragraph numbers, and making navigation bars, cross references and a list of links. The DocBook application has enable me to automate all these toils. Undoubtedly, XML enhances intellectual productivity.

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[5] http://www.xmlxperts.com/xmlbookdtd.htm
[6] http://www.idealliance.org/iso12083/xmlarticledtd.htm
[7] http://www.oasis-open.org/docbook/xml/4.1.2/

4. Ubiquitous Knowledge Space by XML

The spread of the Internet has accelerated digitization of information, enabling us to access all sorts of information from our desktops. Keeping up with the trend of the times, more and more legal information is currently distributed on the Internet. It is the foundation of democracy that everybody is in a position to learn "what is law" with ease. Certainly, this trend should be welcomed.

For the time being, information on the Internet will continue to increase at an exponential rate, accompanied by rapid expansion in information terminals and telecommunication lines. In such an environment, anyone can obtain as much information as desired anytime, anywhere. Here arises a significant problem, though. It has become increasingly difficult to find what one really needs in this plethora of information.

In the pioneer days, search engines on the Internet used to help us efficiently find sites that offered exactly what we were looking for, but these days, it is getting more difficult to find what we really need, from the copious sites on the hit list provided by a search engine. The number of web sites is growing exponentially. As of February 2001, the number of web servers around the world had reached 28 millions. [9] Speed-up and price reduction in CPUs, as well as the spread of broadband connection, will definitely accelerate this trend.

Unnecessary information is nothing but noise. The more the Internet spreads and grows, the more the S/N (signal-to-noise) ratio will worsen. In a sense, we will be thirsting in a vast sea of information.

Inarguably, it is crucial to make available to the public, as much as possible, digitized legal information such as statutes, precedents and articles, as this is the very foundation of democracy in a digital era. However, it is more than obvious that the current way of providing texts or link information by HTML, along with the already large volume of legal information, is creating a situation of "losing sight of the tree because of the forest."

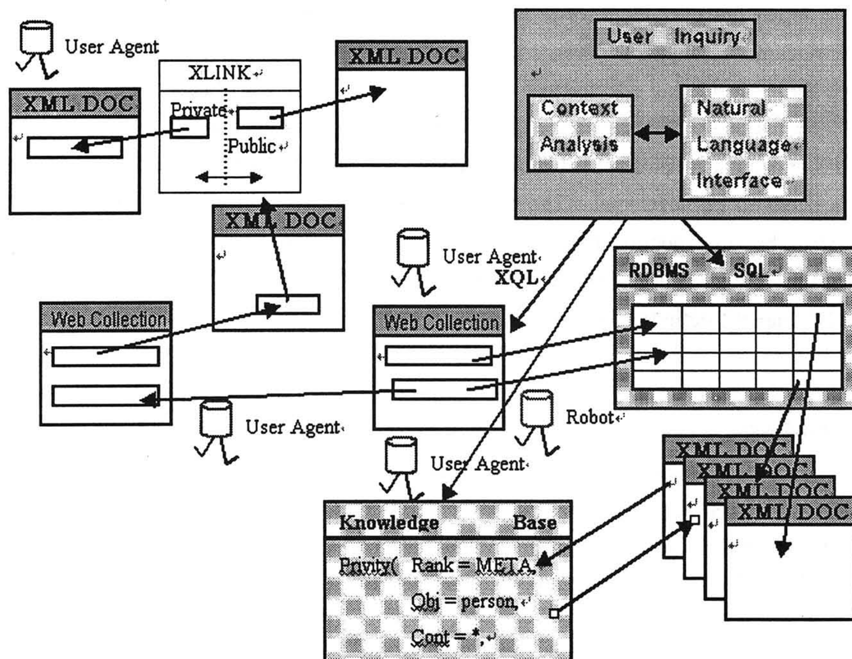
What is now most needed is the ability to retrieve, instantly, information best suited to the needs of the individual user. In other words, reconstruction of the Internet as a "ubiquitous knowledge space" is essential. To achieve this goal, we need to first decompose information accessible on the Internet into components of the knowledge space, and then, work to reassemble them. Current search engine robots simply find an HTML text and extract keywords from it and input these into a database. Data collected in such a way lacks information showing in which context the HTML text should be referred to. One of the disadvantages of HTML, the inability to describe the logical structure of a text appropriately, looms as a large bottleneck here.

From this perspective, XML's ability to retain the logical structure of a text in a more

appropriate manner plays an important role in reconstructing a knowledge space.

In addition, XML will function as an effective tool in that it facilitates distribution of information by improving interoperability of various language-level "infrastructures," such as a morphemic dictionary, meta thesaurus, lexicon, semantic network, declension structure dictionary, etc., necessary to compose a knowledge space.

Efforts to make the Internet a truly ubiquitous knowledge space have already begun. Achieving this will require integration of massive resources and component technologies. Since it is impossible to provide an entire picture of this huge structure at this point in time, I will present a partial blueprint, specifically focusing on the interoperability and information distribution that can be implemented by the proper use of XML.



5. Standard Schema

In using XML, it is important for each industry or group to create standard tags and to ensure conformity to the established tags, because an XML document that is not based on a certain standard schema is difficult to distribute and cannot be easily applied to style sheets or applications. Most of the benefits of using XML will then be undermined.

Furthermore, considering that links contribute to building up a sort of "depth of culture," it is important that the type and the structure of XML tags used in a linked document are the most prevalent ones in the area where the document is used. To put it in another way, one can link XML documents easily and flexibly if they are based on a standard schema.

This is the reason why a standard schema suited to the nature of the information should be established and spread as soon as possible, especially for public assets such as legal information.

For public administration documents, the Ministry of Public Management, Home Affairs, Posts and Telecommunications has published "Electronic Official Document DTD[8]" on its web site. This DTD is for SGML, but it seems that future technological transition to XML has also been taken into consideration in designing this DTD. [10][11][12][13]

In Japan, however, there seems to exist no published DTD or schema specifically designed for judicial documents. Japanese courts are continuing their efforts to publish judgment information on the Web site. Considering effective use of information, convenience of data search and protection of private information, XML is the most appropriate technology to adopt for this purpose. To pave the way for the endorsement of XML in this area, an XML schema especially designed for judicial documents needs to be developed. The process will require reengineering throughout the entire judicial system, because adoption of XML not only involves implementation of a technology standard but demands review of an organization or a society as a whole, as part of the process of specifying implicit rules, namely, definition of XML tags.

In Legal XML[9] [14], an open-source project promoted in the United States as well as in Europe and Australia, a number of lawyers and technical experts are cooperating to develop a XML schema for legal information. Originally, the project was begun as an effort to create an electronic court filing system. Now, it is involved with the defining of tags for all kinds of legal documents, including statutes and contracts, and is attracting wide public attention.

6. XLink and XPointer

As I mentioned in the previous chapter, XML has introduced new link functions called *XLink*[10] and *XPointer*[11]. XLink associates XML documents explicitly. XPointer specifies an object to be associated by XLink, or a link target.

---

[8] http://www.somucho.go.jp/gyoukan/kanri/dtd01.htm
[9] http://www.legalxml.org/
[10] http://www.w3.org/TR/xlink/
[11] http://www.w3.org/TR/WD-xptr

XLink/XPointer differs from link functionality in HTML in the following ways:

- XML documents and link information can be kept in separate files
- A link target can be specified by an XML document's structure
- One-to-many links can be created
- Mutual links can be created
- XLink has a function for linking type specification, and thus can explicitly define the behavior of a link.

This document is not intended to give a comprehensive explanation of XLink specifications, so I will just focus on new, powerful and convenient functions; those which were not available in HTML.

Inline and Out-of-line

To create a link in HTML, you have to insert link information into the HTML document from which you wish to link. Such a link type is called an "inline link." In XML, you can use not only inline links but also "out-of-line links," which allows you to insert link information in a file separate from the source XML document. This out-of-line linking ability is quite significant in publishing a document on the Web.

As an example, let's assume we are processing the text of a statute for distribution on the Web. It will be helpful for the readers if you provide links to referential texts, other provisions to be applied, pertinent government or ministry ordinances, and other types of material such as legislative documents, relevant judicial precedents and bibliographic information. It is also desirable to link FAQs, a glossary of technical terms to make the legal text more comprehensible to the public, and safe harbor rules. However, with HTML, you have to insert link information in the statutory text itself. Also, each commentator might want to add different link information, which then would require rewriting of the HTML document by each individual commentator. Even when you find an official HTML text published on the Web, you have to create another HTML document just for the sake of adding link information. In this way, once the original official text is modified to insert link information, the authenticity of the text will be lost. Even the digital signature technology will not solve this problem of authenticity. Here we see the limitation of HTML.

In contrast, using the out-of-line link functionality of XLink, each commentator will be able to insert his or her link information added externally to the official text, after converting the text into a plain XML document that simply describes the chapter-paragraph structure using XML tags. By putting a digital signature[12] to the official XML document, the authenticity of the original text can still be guaranteed, while allowing individual commentators to link, on the Web, their commentary to the

[12] http://www.w3.org/TR/xmldsig-core/

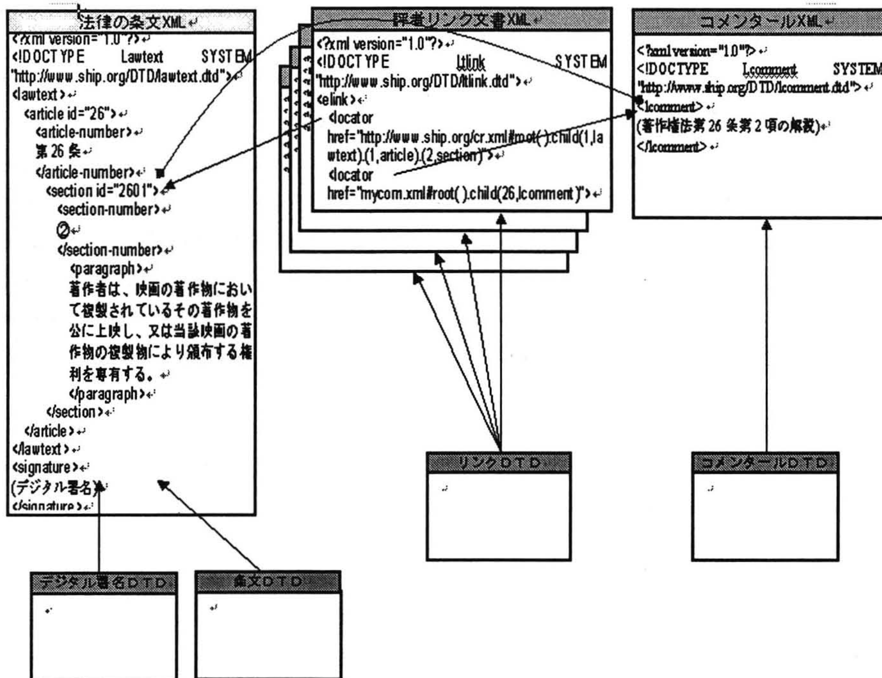
statute on their own responsibility. It can be easily imagined that intellectual activities in cyber space will be far more enlivened than they are now. It will also enhance the "density of information."

As for general use, this out-of-line link ability of XLink is also expected to be useful as providing so-called "groupware" functionality.

XPointer

The out-of-line link as explained above necessarily requires XPointer to work. XPointer is a language that supports identification of a link target, a processing called "addressing." Comparing this to a HTML link tag, such as <A HREF="http://www.w3.org/"> for example, XPointer is equivalent to the part after "HREF=".

In HTML, what can be specified as a link target is a whole HTML document or otherwise an anchor (<A NAME> tag) embedded in advance in the HTML document to which you wish to link. Of course, you can display a specific portion of a document by using CGI to pass parameters, but such procedures are under the external control of the HTML program. Therefore, with HTML alone, it is impossible to create a link to a particular part of an HTML document that has no anchor embedded.



With XLink, you are able to specify a very detailed target link, such as "the third paragraph of the text," or for a statute, "the first sentence of the second paragraph in Article 8." To make such a

link function available, however, the document to be linked must be, first of all, created as an XML document structured by using a standard or published DTD. XPointer utilizes the DTD tags, which imply the tree structure upon the document, to do the addressing. One step further, it is possible to specify a particular string pattern that appears in a certain point in the tree structure. For example, you can make a link to "the word 'right' that first appears in the provision of the second paragraph in Article 8," without using a CGI program or without anchors embedded in the source document and the document to be linked. This powerful "addressing" function of XPointer enables users to efficiently make out-of-line links as previously mentioned.

7. XML and Meta Data (omitted)

RDF and semantic web
Dublin Core
RSS
Sharing of link information
Web service
WSDL/UDDI

8. Text Transformation by XSLT

One of the characteristics of XML is that it is capable of separating the logical structure of a document from the presentation style. With text data marked with XML tags, you can present a document in various styles, by specifying different styles for the same data. Furthermore, a style transformation function called XSLT realizes advanced text transformation formerly unimaginable with word processors, such as the extraction or sorting of only a portion of a document's data.

This function has made it possible to use the same text data but display different information based on a user's access authority, when publishing a document containing private information. Such functionality will be very useful in publishing court documents and official documents on the Internet.

Also, XSLT helps perform highly advanced processing of text data. For example, it will be much easier to extract specific information from a multitude of corporate information, such as financial statements, to prepare comparative data between corporations.

Here, I will demonstrate two examples of XSLT transformation: how to display or mask certain personal data contained in a decision paper, and how to make a list of concerned parties mentioned in the judgment.

First, install an XSTL processor. In a Windows environment, Instant-Saxon is the easiest to use and the most sophisticated. In a platform with Microsoft Internet Explorer, XSLT transformation can be performed by simply running saxon.exe in a DOS window after decompressing a ZIP file.

Download Instant-Saxon from :

http://users.iclway.co.uk/mhkay/saxon/instant-saxon.zip

How to use:

- Decompress instant-saxon.zip using an unzipping program such as lhasa. Place decompressed *saxon.exe* in a directory with PATH.
- Assume that saxon.exe is placed in directory C:/SAXON, and you are trying to transform an XML document titled XMLdoc.xml located in the same directory into an output document titled output.html. Also assume that the applicable transformation rules are described in a file named XSLTstyle.xsl. In this case, type in the following command in a DOS window.

```
C:> cd ¥SAXON
C:> saxon XMLdoc.xml XSLTstyle.xsl > output.html
```

Decision Paper XML and XSLT

With all the tools prepared, the next step is to prepare the XML document data and an XSLT style sheet. The sample document data is taken from an actual decision paper (all proper nouns are changed to fictitious names.)

A decision is prepared in accordance with the code of legal procedures and certain conventional rules. Thanks to its logical nature, it is easy to insert tags in conformity with the structure of a decision paper. Mark parts containing private information, such as proper nouns, with <priv> tags, and then, according to the personal information protection level, assign attribute value (level) to each tag. In this way, you can control the information disclosure level for each viewer of this data, based on his or her position or status.

To transform an XML document, describe a transformation rule for each tag of the XML document on an XSLT style sheet. For example, the presentation of one's name should differ according to one's status as defendant, judge or third party, so it is necessary to specify a transformation rule for each <name> tag on a case-by-case basis, in this context. The following XSLT will present a decision paper as it is in the original copy, without masking any words.

```
<?xml version="1.0" encoding="UTF-8"?>
<!DOCTYPE 刑事判決書 SYSTEM "keijihanketu.dtd">
<裁判書>
<付記情報>
        <原典>                                      </原典>
        <見出し>浦和地方裁判所川越支部第一部平成11年9月8日判決</見出し>
        <手続経過>
                <経過>確定</経過>
        </手続経過>
</付記情報>

<本体>
        <事件番号>平成一一年（わ）第九三号</事件番号>

        <表題>判決</表題>
        <被告人>
                <本籍>東京都千代田区外神田一丁目一番地</本籍>
                <住居>
                        <住所>東京都千代田区外神田一丁目一番一号</住所>
                </住居>
                <職業>無　職</職業>
                <氏名 pseudonym="乙野　次郎">
                        <氏>甲野</氏>
                        <名>太郎</名>
                </氏名>
                <年齢>
                        <生年月日>
                                <年><元号>昭和</元号><和暦年>五〇</和暦年></年>
                                <月>一</月>
                                <日>一</日>
                        </生年月日>
                </年齢>
        </被告人>

        <前文>右のものに対する<事件名>わいせつ物公然陳列事件</事件名>について、
        当裁判所は、<立会検察官><官名>検察官</官名><氏名><氏>大谷</氏><名>貴光</
        名></氏名></立会検察官>出席のうえ審理し、次のとおり判決する。</前文>

        <主文>
                <p>被告人を懲役一年六月に処する</p>
                <p>この判決確定の日から三年間右刑の執行を猶予する。</p>
        </主文>

        <理由>
                <罪となるべき事実>
                        <p>被告人は、パソコン通信ネットワーク「フロンティア」を
                        開設し、運営　していたものであるが、<氏名 subject="共
                        犯者"><氏>中田</氏><名>一郎</名></氏名>及び<氏名 subject
                        ="共犯者"><氏>上田</氏><名>二郎</名></氏名>と共謀の上、
                        わいせつな図画を不特定多数のパソコン通信利用者に閲覧させ
                        ようと企て、平成九年三月上旬ころから同年七月中旬ころまで
                        の間、右「フロンティア」の開設場所である<priv level="1">
                        東京都千代田区外神田一丁目一番一号></priv>所在の<priv le
                        vel="1">エフエルビル三〇二号</priv>の<priv level="1">有
```

```
<?xml version="1.0" encoding="UTF-8" ?>
- <xsl:stylesheet version="1.0" xmlns:xsl="http://www.w3.org/1999/XSL/Transform"
    xmlns="http://www.w3.org/TR/REC-html40">
    <!-- (C) Hiroshi Komatsu 2000 JAPAN all rights reserved   -->
    <xsl:output method="html" indent="yes" encoding="UTF-8" />
  - <xsl:variable name="now" xmlns:Date="/java.util.Date">
      <xsl:value-of select="Date:toString(Date:new())" />
    </xsl:variable>
  + <xsl:template match="/">
  + <xsl:template match="付記情報">
  + <xsl:template match="見出し">
  + <xsl:template match="本体">
  + <xsl:template match="事件番号">
  + <xsl:template match="表題">
  + <xsl:template match="被告人">
  + <xsl:template match="本籍">
  + <xsl:template match="住居">
  + <xsl:template match="職業">
  - <xsl:template match="氏名">
    - <xsl:choose>
      - <xsl:when test="parent::*[name()='被告人']">
        - <p>
            <xsl:text></xsl:text>
            <xsl:apply-templates select="氏" />
            <xsl:text></xsl:text>
            <xsl:apply-templates select="名" />
          </p>
        </xsl:when>
      - <xsl:when test="parent::*[name()='裁判官']">
          <xsl:apply-templates select="氏" />
          <xsl:text></xsl:text>
          <xsl:apply-templates select="名" />
        </xsl:when>
      - <xsl:otherwise>
          <xsl:apply-templates select="氏" />
          <xsl:apply-templates select="名" />
        </xsl:otherwise>
      </xsl:choose>
    </xsl:template>
  <xsl:template match="氏|名">
```

Use of SAXON

```
C:> saxon sf.xml sf.xsl > t1.html
```

[Document processed with XSLT][13]

Transformation into Pseudonym

The next XSLT will present private information contained in the same XML document which needs to be protected, such as the name of the defendant, using pseudonyms and masked letters.

[13] http://icrouton.as.wakwak.ne.jp/xml/primer/t1.html

Please note that the description in the <name> tag has been changed. Using XSLT, you can get different presentations from the same XML document.

```
  <?xml version="1.0" encoding="UTF-8" ?>
- <xsl:stylesheet version="1.0" xmlns:xsl="http://www.w3.org/1999/XSL/Transform"
    xmlns="http://www.w3.org/TR/REC-html40">
    <!-- (C) Hiroshi Komatsu 2000 JAPAN all rights reserved -->
    <xsl:output method="html" indent="yes" encoding="UTF-8" />
  + <xsl:variable name="now" xmlns:Date="/java.util.Date">
  + <xsl:template match="/">
  + <xsl:template match="付記情報">
  + <xsl:template match="見出し">
  + <xsl:template match="本件">
  + <xsl:template match="事件番号">
  + <xsl:template match="表題">
  + <xsl:template match="被告人">
  + <xsl:template match="本籍">
  + <xsl:template match="住居">
  + <xsl:template match="職業">
  - <xsl:template match="氏名">
    - <xsl:choose>
      - <xsl:when test="parent::*[name()='被告人']">
        - <p>
            <xsl:text></xsl:text>
            <xsl:value-of select="@pseudonym" />
          </p>
        </xsl:when>
      - <xsl:when test="parent::*[name()='裁判官']">
          <xsl:apply-templates select="氏" />
          <xsl:text></xsl:text>
          <xsl:apply-templates select="名" />
        </xsl:when>
      - <xsl:otherwise>
          <xsl:apply-templates select="氏" />
          <xsl:apply-templates select="名" />
        </xsl:otherwise>
      </xsl:choose>
    </xsl:template>
  - <xsl:template match="氏">
    - <xsl:choose>
      - <xsl:when test="ancestor::*[name()='被告人']">
        - <span class="priv" isa="@subject">
            <xsl:value-of select="ancestor-or-self::*[@pseudonym]
              [1]/@pseudonym" />
          </span>
        </xsl:when>
      - <xsl:when test="ancestor-or-self::*[@subject][1]/@subject='共犯者'">
        - <span class="priv" isa="@subject">
```

Use of SAXON

```
C:> saxon sf.xml sf2.xsl > t2.html
```

[HTML document after transformation (pseudonym version)][14]

[14] http://icrouton.as.wakwak.ne.jp/xml/primer/t2.html

Extraction of Specific Data

By specifying the particular context of a document on an XSLT style sheet, you can extract or sort data. Let's prepare a list of pseudonyms that correspond to all the concerned parties mentioned in the decision paper. If you tried to do the same thing, using the string processing of a text file or macro functions of a word processor, it would be enormously difficult. With XML and XSLT, it is very simple.

```
  <?xml version="1.0" encoding="UTF-8" ?>
- <xsl:stylesheet version="1.0" xmlns:xsl="http://www.w3.org/1999/XSL/Transform" xmlns=
   html40">
   <!-- (C) Hiroshi Komatsu 2000 JAPAN all rights reserved  -->
   <xsl:output method="html" indent="yes" encoding="UTF-8" />
 - <xsl:variable name="now" xmlns:Date="/java.util.Date">
     <xsl:value-of select="Date:toString(Date:new())" />
   </xsl:variable>
 - <xsl:template match="/">
   - <html>
     - <head>
         <xsl:apply-templates select="見出し" />
         <link rel="stylesheet" href="Estyle.css" type="text/css" />
       </head>
     - <body>
       - <div align="center">
           <xsl:text>[      Legal XML Database Prototype 2000 $Id: exname.xsl,v 1.2 200
             Exp hk $]</xsl:text>
         - <h2>
             <xsl:value-of select="//事件番号" />
           </h2>
         - <h2>
             <xsl:value-of select="//事件名" />
           </h2>
           <h3>関係者一覧</h3>
         - <table border="1">
           - <tr>
               <th bgcolor="gainsboro"></th>
               <th bgcolor="gainsboro">氏 名</th>
               <th bgcolor="aquamarine">仮 名</th>
             </tr>
           - <xsl:for-each select="//氏名[not(preceding::*/氏=氏)]">
             - <tr align="center">
```

Use of SAXON

```
C:> saxon sf.xml exname.xsl > t3.html
```

[HTML document after transformation (list)][15]

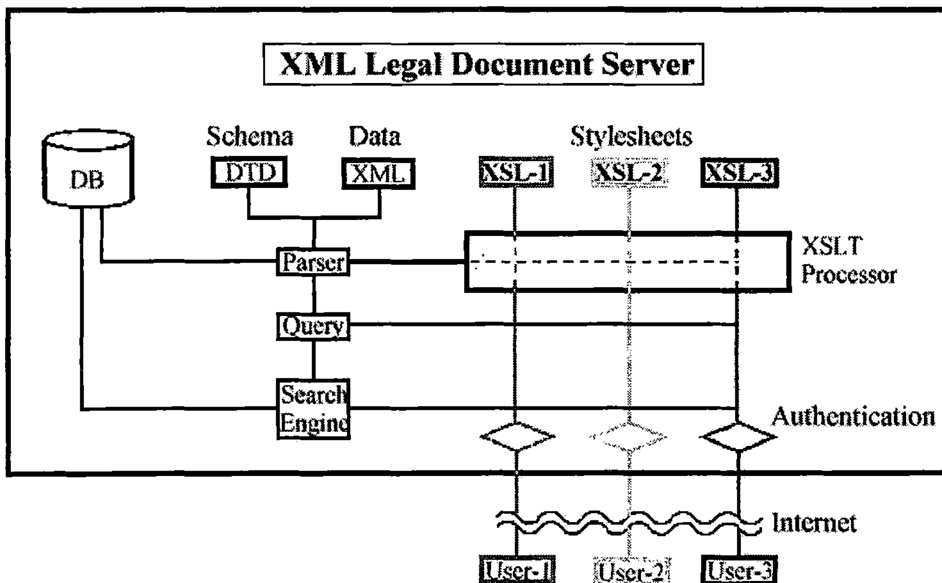
[15] http://icrouton.as.wakwak.ne.jp/xml/primer/t3.html

9. XML and Private Information Protection

Server-based Access Control

As we have seen, it is possible to obtain different presentations of the same XML data, for example, private information contained in an XML document, by using the document transformation functionality of XSLT. The application of this functionality will provide a certain level of private information protection. If you prepare an XSLT style sheet specifically configured for each access authority level, then the same XML document can be displayed according to a viewer's access authority, without adding any change to the document itself.

The following chart is the overview of a server that employs different XSLT style sheets based on a viewer's access authority.



This system operates effectively only when confidentiality rules are imposed on all the users who have access to sensitive information, because the protection of private information would be endangered if a user should leak a copy of the data.

Demonstration of an Implemented System

An access to a prototype of the XML server, as explained above, is available from this page. The "level 1" displays the original text of the decision paper, the "level 2" displays the document with the names of the concerned parties replaced by pseudonyms, and the "level 3" covers several parts of

the text that seem inappropriate for minors to read. (All the names in the original text are fictitious for the purpose of this demonstration.)

"Level 1" users are able to access all the data, while "level 2" users are permitted to view only level 2 and 3 information. "Level 3" users are permitted to access level 3 information only.

Access to level 1 and 2 information requires the input of the following ID and password.

Link	level1 original decision text[16]	level1 list of concerned parties[17]	level2 with pseudonym[18]	level3 with masking[19]
ID	level1		level2	Not needed
Password	level1		level2	Not needed

All of these are generated from the same XML document. [Original data of the XML document][20]

Encryption-based Access Control

Then, what kind of private information protection system will be the most effective when document data is to be distributed around on the Internet?
In many electronic business transactions in which the same contract data circulates among several parties, the need arises to change the information content to be disclosed to each party. For example, during an online shopping transaction using a credit card, a customer might want his or her credit card number disclosed only to the credit card company, but not to the retailer.

With XML data, it is technically viable to meet such demands because XML allows the selective encrypting of information marked with certain tags. As for court decision information, the risk of data leakage, something which cannot be addressed by the server-based access control, will be solved by encrypting parts of a document related to personal information and distributing several types of encryption keys corresponding to different access levels. (Of course, even in this case, private information protection would be exposed to risk if encryption keys were to be leaked.)

Partial encryption of XML data has actually seen strong demands. The standard specifications are, however, still in the development stages. [3]

10. XML and Electronic Signature

[16] http://icrouton.as.wakwak.ne.jp/pub/cgi/xml/level1/sf.cgi
[17] http://icrouton.as.wakwak.ne.jp/pub/cgi/xml/level1/ex.cgi
[18] http://icrouton.as.wakwak.ne.jp/pub/cgi/xml/level2/sf3.cgi
[19] http://icrouton.as.wakwak.ne.jp/pub/cgi/xml/sf4.cgi
[20] http://icrouton.as.wakwak.ne.jp/xml/primer/sf.xml

Data Integrity of XML Documents

In handling documents in text files or word processor's document files, there are several ways to check if two documents are identical. You can compare the files themselves using a "diff" command, or contrast message digests to verify that they are identical. Authentication of electronic documents can be completed by adding a digital signature to a document file.

In XML, however, presenting the same information in different styles is allowed in the XML specifications from the beginning. [1][4] For example, there are no fixed rules for the order of tag attribute descriptions. So, a simple comparison between two document files will not be sufficient for XML, because two files can have identical information content even if they are not "identical" in terms of byte codes.

Since the XML technology aims at improving the interoperability of data, XML data itself is designed in a way to allow processing by different systems in the course of its distribution. Thus, it is necessary to judge if information contained in an XML document actually remains identical even if the presentation is changed as part of processing.

Canonical XML.

W3C[21] has issued a recommendation titled Canonical XML[22] as a standard for normalizing XML data. [5] As for the attribute ordering mentioned above, lexicographic order is imposed on attributes in the canonical form. To determine whether information content of two XML documents that have apparently different presentations is actually identical, one can make canonical forms of the XML documents and then compare those canonical forms for equivalence.

Digital Signature on XML Documents

An XML digital signature is generated by encrypting, with a private key, a message digest of XML data that has been converted into a canonical form. [5][6]

Since the differences in presentations caused by different application processors are canonicalized after the conversion, one can easily judge whether information content is identical or not. Another advantage of using an XML in key encryption is that you can attach a digital signature to only a portion of a document, a procedure which cannot be carried out with the document file of a word processor or a text file. This ability helps satisfy the requirements of online electronic transactions, as each concerned party is then able to put his or her signature in the appropriate section in a contract

[21] http://www.w3c.org/
[22] http://www.w3.org/TR/xml-c14n

document that circulates on the Internet.

An example of an XML digital signature:

```
<Signature Id="MyFirstSignature"
 xmlns="http://www.w3.org/2000/09/xmldsig#">
   <SignedInfo>
   <CanonicalizationMethod
    Algorithm="http://www.w3.org/TR/2000/CR-xml-c14n-20001026"/>
   <SignatureMethod
    Algorithm="http://www.w3.org/2000/09/xmldsig#dsa-sha1"/>
   <Reference URI="http://www.w3.org/TR/2000/REC-xhtml1-20000126/">
     <Transforms>
       <Transform
         Algorithm="http://www.w3.org/TR/2000/CR-xml-c14n-20001026"/>
     </Transforms>
     <DigestMethod
      Algorithm="http://www.w3.org/2000/09/xmldsig#sha1"/>
     <DigestValue>...メッセージダイジェスト...</DigestValue>
   </Reference>
 </SignedInfo>
   <SignatureValue>...電子署名データ本体...</SignatureValue>
   <KeyInfo>
    <KeyValue>
      <DSAKeyValue> ...公開鍵...
        <P>...</P><Q>...</Q><G>...</G><Y>...</Y>
      </DSAKeyValue>
    </KeyValue>
   </KeyInfo>
</Signature>
```

Remaining Problems

As is stated in the "Canonical XML Version 1.0: W3C Recommendation" published as of March 15, 2001, two XML documents whose canonical forms are identical, are not necessarily identical in a strict sense. Also, nothing warrants that two XML documents that are determined to be identical in a certain context have the same canonical forms. [5]

This indicates that an XML digital signature, which depends on equivalence of canonical forms, fundamentally has certain limitations.

On the other hand, an example of document transformation using XSLT clearly indicates that the original information of an XML document and the information presented through a style sheet are not necessarily identical. There is no guarantee that the two are identical. Assuming that the

binding force of a legal action derives from the "intention" of an agent, the lack of guaranteed equivalence between the presentation of a document the agent has recognized or managed to recognize and the information of XML data to which a digital signature is to be inserted, could cause a serious problem.

It is necessary to fully realize that digital signature, which should function as a safeguard for electronic commerce, has the inherent limitations and risks that I have explained in this chapter.

11. Universal Citation and XPath

In the United States, judicial precedents are usually cited from the law reports published by the West Publishing Company, based on a citation manual called the "Bluebook." [17]

However, this conventional citation method has a number of problems, such as its inability to deal with digitized case information and its dependence on a specific commercial publisher. Also, it has been pointed out that allowing a single commercial company to monopolize legal information has serious disadvantages.[18]

Meanwhile, one of the problems with digitized literature is that it is difficult to locate the information cited within a document, because a digital document does not have a "page" concept, as in literature printed on paper (the so-called "pinpoint problem"). [19]

To overcome these problems, a new citation method called Universal Citation, was developed [20], and now has been adopted at some state Supreme Courts, including that of Wisconsin, and at Supreme Courts in Canada and Australia. [21]

Also, the High Courts and the Courts of Appeal in England and Wales have adopted a type of paragraph number citation system called "Neutral Citation" since January 11, 2001. [22]

The Universal Citation System uses a paragraph-by-paragraph quotation method in order to provide pinpoint citation without being dependent on "paper-based" case reports published by the West Publishing Company. This paragraph-based citation system makes it easier to judge the appropriateness of citation, because it points to cited information instantly. This function contributes to improving the efficiency or accuracy of discussion. [18] To make use of Universal Citation, however, you need to number each paragraph in a decision paper. This indicates that a citation system is not just a matter of the citation style but involves all the dimensions related to legal matters.

This Universal Citation system, which depends on the paragraph unit, a basic component of a document, has a close affinity with the XML, with its capability of describing the logical structure of

a document. By utilizing XLink/XPointer's pinpoint linking function, as we saw in the previous chapter, as well as XPath's function to structurally specify a location of data within a document, which will be discussed later on, the pinpoint problem in digitized legal information can be technically solved.

Universal Citation and Markup by XML

First, let's look at a decision paper supporting the Universal Citation System. The 41st Paragraph in this decision is displayed as "*Mitsubishi v. Milwaukee County, 2000 WI 16 & 41*" following the syntax of Universal Citation. This represents "the 41st paragraph in the 16th decision at Wisconsin Supreme Court in 2000."

Paragraph numbers are attached to original decision papers by courts. At first, there was a concern that paragraph numbering might increase the administrative burden of court officials, but the problem seems to have been cleared up easily and without incurring any additional cost, by comparatively simple measures such as using word processor macro functions. [18]

Wisconsin State offers a case information retrieval service on the Web, but, unfortunately, the pinpoint citation ability is not available, because the system uses HTML files and word processor files. The lack of such an application is wasting the great benefits of Universal Citation.

Now, let's put XML markups to Paragraph 41 of this decision paper. The paragraph marks and headers are to be displayed using XSL or XSLT, as they are style information.

```
<Paragraph id="Mitsubishi_v._Milwaukee_County_2000_WI_16_41"
 number="41">

I conclude that Wis. Stat. § § (Rules) 804.01(3) and 804.01(6) permit
a person, including the media, to intervene in an action for the limited
purpose of asking the court to order pretrial discovery material to
be filed in the court and to order access to the filed pretrial discovery
material. I further conclude that the circuit court must exercise its
discretion in determining whether to allow access to all, part or none
of the pretrial discovery material that is filed. Judicial restriction
on access to filed pretrial discovery material is valid, under the
rules, when good cause is shown, including potential harm to
commercial, economic, privacy or reputational interests of parties or
nonlitigants and the possible prejudice to the parties' fair trial
rights. Federal courts that have examined the analogous federal rules
have reached conclusions similar to the ones I reach. 19

</Paragraph>
```

All preparations completed, the next step is to try effecting pinpoint citation of the digitized source material, by using XPath.

XPath

As a way to specify parts of an XML document, there is a technical specification called XPath (XML Path Language.) [23]

XPath allows one to specify, in a structural way, locations or areas in an XML document. For example, the 41st Paragraph is pointed to as below. (The Universal Citation does not always give a number to each logical paragraph, but it sometimes allots a number to a group of paragraphs. So, an attribute specification should be used here instead of XPath's position functions.)

To intuitively understand this concept, it would be easier if one imagines the file system used in personal computers. Both the file system and XML documents have a tree structure. For example, in MS-Windows, the "title" folder located in the "head" folder is represented as "/head/title," while in XPath, an XML <title> tag enclosed between <head> tags is represented as "/head/title." "Title" tags whose "number" attribute is 99 (<title number="99">) are then specified as "/head/title[@number="99"]". When any title tag within the tree structure will do, type in "//title" to locate one. This should help you understand the concept of paragraph specification as described above.

This XPath enables search of information quoted in a target document on a paragraph to paragraph basis. By combining XPath with URIs (Uniform Resource Identifier,) the addressing function of XLink, namely, XPointer, becomes viable. Thus, in XML, it is possible to provide a link function in conjunction with a search function.

Perl Implementation of XPath Module

A module[23] that implements XPath search operation by using Perl language has been released in the open source format. Using this, we can perform a simple paragraph search.

The paragraph you want will be displayed when you specify an XPath search expression and a file name for execution.

```
C:¥> xpath.bat Mitsubishi_v._Milwaukee_County_2000_WI_16 ¥
//Patagraph[@number=41]
Found 1 nodes:
```

[23] http://xml.sergeant.org/xpath.xml

```
-- NODE --
<Paragraph id="Mitsubishi_v._Milwaukee_County_2000_WI_16_41"
number="41">
I conclude that Wis. Stat. § § (Rules) 804.01(3) and 804.01(6) permit
a person, including the media, to intervene in an action for the limited
purpose of asking the court to order pretrial discovery material to be
filed in the court and to order access to the filed pretrial discovery
material. I further conclude that the circuit court must exercise its
discretion in determining whether to allow access to all, part or none
of the pretrial discovery material that is filed. Judicial restriction
on access to filed pretrial discovery material is valid, under the rules,
when good cause is shown, including potential harm to commercial,
economic, privacy or reputational interests of parties or nonlitigants
and the possible prejudice to the parties' fair trial rights. Federal
courts that have examined the analogous federal rules have reached
conclusions similar to the ones I reach. 19
</Paragraph>
```

As a further step, incorporation of the XPath system in a full-text search engine will lead to the development of a system that maximizes the power of Universal Citation. It is expected that indexing by paragraph will dramatically enhance the precision rate, compared to the conventional indexing by document.

Traditional legal information databases have used the indexing method of to specify distance between words. However, this method is not only difficult to use but also problematic, in that the precision rate remains lower because it ignores demarcations between sentences or paragraphs. XML describing the logical structure of a document will enable a more advanced search system that can perform searching, by focusing on a phrase within a sentence, or by utilizing word cooccurence probability within a paragraph.

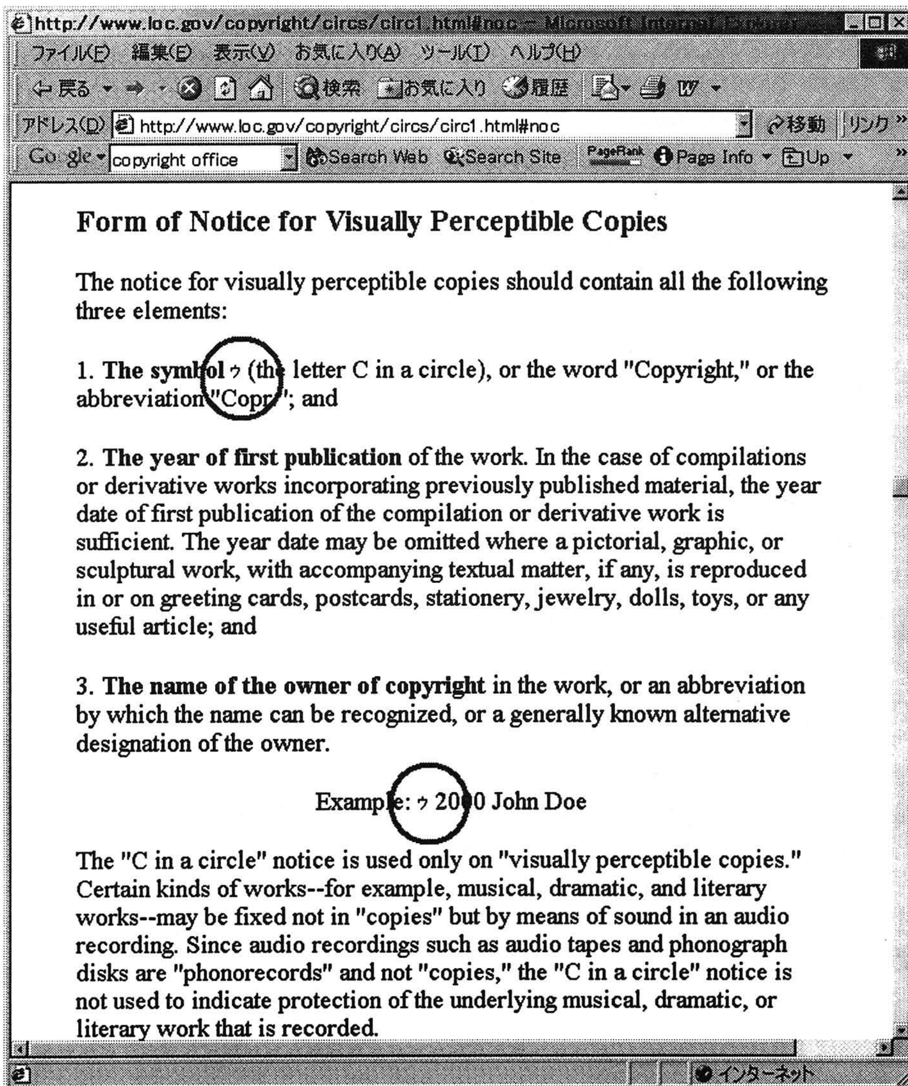
12. Multiple-language Document in XML

Legal information often involves the use of multiple languages. For example, any official text of treaties entered into by the Japanese government is usually written both in Japanese and the language of the other country (as well as English, if the language of the other country is not English.) Also, quotations of literature from around the world require different citation styles, as conventionally used in each language or cultural sphere.

However, standard character codes used in Windows and other systems are not capable of simultaneous display of multiple languages. For example, the copyright mark © on many of the U.S. Web sites turns into a garbled character on browsers of Japanese specifications and is displayed as a single-width katakana " ｳ ." Such notation does not satisfy the copyright protection requirement.

Also, a single-byte "\" mark in Japanese is displayed as a "₩" mark in the Korean character code set. Many of you might have experienced difficulty displaying a pond symbol or a euro symbol. Considering the security of electronic commerce, this is one of the number of significant problems that need to be addressed.

Discussing problems of character codes further is not in the scope of this article, but it is possible to properly display multiple languages in a single document by using UTF-8, one of the UNICODE encoding methods. [25]



Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all the following three elements:

1. **The symbol** ゥ (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and

2. **The year of first publication** of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; and

3. **The name of the owner of copyright** in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Example: ゥ 2000 John Doe

The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works--for example, musical, dramatic, and literary works--may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

In XML, a function to designate a language using the "xml:lang" attribute enables more

sophisticated display of different languages [1]. With the help of the language designation function, one can compile documents written in multiple languages, such as a treaty, into a single XML document and then make a comparative display of two or more languages, or have the text presented in one language of preference, as may be necessary. This function is an essential one in constructing a legal information database.

[Example: XML document of Japan-U.S. Tax Treaty][24]

In the above XML example, a user can change the level of grain of comparative display, as well as switching between a single-language mode and a dual language mode. This is also a unique feature of XML.

13. Legal Information Database and XML (omitted)

Data structure of legal information

An example of structuring text of commonwealth law of Australia by "jo (article)" unit [26]

Temporal logic and XML

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How to Conduct a Search for Japanese Translation of Foreign Laws

Osamu MIURA[1]

1. Introduction

Let me briefly introduce myself. I am Osamu Miura from the National Diet Library. My main duties are handling primary sources of statutory materials and parliamentary documents. I usually perform these duties at the Statutes and Parliamentary Documents Room. If you have a chance, please visit our website[2]. The site is part of the National Diet Library's website and has been in operation since February 2001.

Today, I have been asked to talk about conducting search for Japanese translation of foreign laws. First, I will touch upon problems inherent in translation of foreign law, and then, specifically explain how to find translated documents. Lastly, I will introduce our "Bibliography on Japanese Translation of Foreign Laws [Database]," which we are now developing.

Since I have not had an opportunity to learn about the specific needs of all of you here today, regarding translation of foreign law, my talk may not touch upon your specific questions. Yet, I hope in the discussion afterwards you will raise any questions or points that you may still need clarified. I am more than willing to help you understand and hope you find my speech both informative and interesting.

2. Problems inherent in Translation of Foreign Laws

I will deliver my talk following the outline presented on the first page. First of all, I would like to explain the problems inherent in translation of foreign laws. Some inevitable problems arise, when translating from one language to another.

First, please note that there exists no organization or individual who is formally responsible for preparing translations of foreign laws. All translation is done purely voluntarily by individual organizations or researchers. Therefore, not every law of every country or region around the world is translated into Japanese.

Secondly, there is always a considerable time lag between original documents and translated ones because translation work usually takes a substantial amount of time and cost. As for mechanical translation, I'm not quite sure how it would compare in efficiency.

Now, first let me emphasize that all existing Japanese translation of foreign laws should be deemed no more than provisory, unofficial translation. There is no "official translation", even among those prepared and edited by public organizations, for example, government agencies such as the

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[2] http://www.ndl.go.jp/horei_jp/index.htm

Ministry of Justice or Ministry of Foreign Affairs. Nothing guarantees the accuracy and reliability of translated texts. Certainly, individual publishers and editors check the accuracy of translations when publishing those texts, but of course, they still cannot be authorized as official translations.

Some private publishers have published Japanese translations of foreign statute books (for example, "The Statute Books of the People's Republic of China" by *Gyosei*), but those publications are limited to major statutes in major countries or neighboring countries.

Commercially significant laws, such as the Tax Law, the Civil Law and the Corporation Law, which have more ramification than other areas of law, in terms of corporate activities, tend to be not only massive in volume but also subject to frequent revisions, making it far more difficult to keep translation work up to date.

With the rapid progression of internationalization, laws related to family relationship and inheritance, such as the Family Law and the Law of Succession, have become more significant than ever. Here again, it is difficult to find the latest translation. Often we can only find some old or partially translated materials.

The problems I have mentioned so far are inherent, when working with translations of foreign laws, due to the innate characteristics of such material. Besides these problems, certain other difficulties arise when many translations exist. I'd like to point out a number of these, which, I believe, should be kept in mind by those planning to engage in translation of foreign laws. The first problem is that some translated texts do not give essential information about their origin. In many cases, the history of a statute – the process of enactment or revision – is not clearly indicated in those translations. As a result, it is difficult to locate the most important information needed in a text of statutes, that is, the point of time at which the text came into force.

The second problem concerns rare languages – in the handout, I wrote "special languages," but please correct the term, as it seems inappropriate. As for text written in a rare language, it is often first translated into English and then, based on the English translation, translated into Japanese. In such cases, some texts do not indicate that they were retranslated from English texts, first having been translated from another language by another translator. Retranslated texts are much more susceptible to error as they go through the translation process twice.

The third problem is the variance in Japanese translations, depending on individual translators. Each translator renders a translation that he or she believes the most appropriate, and of course, no two translations turn out to be identical. The title of a statute alone may vary widely, sometimes being translated literally from the original title, sometimes having been more liberally paraphrased, and the context of the statute having been taken into consideration. In some cases, it may

have seemed appropriate to use a more common wording for the title. Thus, if a statute has several translations, it has as many variations in its translated texts. This then leads to a problem of identification. A translated title does not always help us identify which statute of which country the original text (primary source) is taken from.

To illustrate this point more clearly, let me take up the case of the recently controversial issue labeled "A protection system for inside informants." Yesterday (Oct. 18), the Tokyo District Court handed down a ruling on the severance pay due to a person acting as whistle-blower in a private corporation. Currently in Japan, there is a movement dedicated to establishing a law stipulating the legal protection available to whistle-blowers.

In the U.S. Federal Law system and in some states in Australia, laws prescribing such protection have already been enacted. In English, the original title is "Whistleblowers Protection Act," which is translated into Japanese as "*Naibu Kokuhatsusha Hogo Ho*" or "*Hoissuru Blowa* (katakana transcription of "whistle-blower") *Ho*." These Japanese titles make it relatively easy to work out what the law is about.

Meanwhile, this kind of protection system has also been legislated in the United Kingdom and South Korea. In the U.K., the original title is called "Public Interest Disclosure Act 1998," and the corresponding translations in use in Japan include "*Koeki Kaiji Ho,*" "*Koeki Kokai Ho,*" and "*Kokyo-rieki Kaiji Ho*." In Korea, a provision specifying the protection of insider informants is included in a law known as "corruption fighting law," which is applied to those in public service. In these examples, we cannot readily recognize from the title what the law is about – we need to examine each text.

I'll give you another example. Recently, I received a reference inquiry asking if we had any Japanese translation of the "*Kokuseki Ho* (nationality law)" in France. Since I did not find the translation in the database of the Bibliography on Japanese Translation of Foreign Laws, which I will talk about later, I took another approach and discovered that no independent law called "Nationality Law" exists in France, as provisions regarding nationality are now incorporated into the French Civil Code. After discovering this, I was able to find the corresponding translation. It is very troublesome for us when an inquirer is not sure if the country in question actually has a law named like its Japanese counterpart. To use a simple illustration, it is like asking if there is a Japanese translation of "the Constitution" of the United Kingdom. You can see how such a question would be baffling to us.

Although Japanese translations have problems of the kind I have just explained, obviously most people do prefer translated versions, as they are easier to understand. Should the original text be written in a rare language, people need translation all the more. So, when you use translated materials, please keep in mind the problems I have mentioned. While recognizing this fact, I hope you do make good use of existing translations, recognizing the labor and efforts of the pioneers. However, it is essential that you do not trust everything indiscriminately. Critical examination is needed, and you should refer to the original text, when any question arises with the translation.

Before coming here today, I read a book titled "How to Search Foreign Law," which was published by the University of Tokyo Press in 1974. Unfortunately, I did not find it directly helpful to my talk today, as this book is about how to search source material, but it does give some account about

Japanese materials in relation to foreign laws. It is a bit long, but let me cite a section from it. This is from page 18, written by Professor Hideo Tanaka about Anglo-American Law.

There is quite a lot of material written in Japanese about Anglo-American Law. Frankly, it is not uncommon to find incorrect statements in these works. Some of these are not incorrect in a true sense, but very difficult to understand because the writer did not write with a full understanding of the subject. Some give a distorted overview of the picture, as they communicate only a part of the entire picture, whether or not by conscious design. (In the West, "half truth" is strongly criticized as misleading – or, even more harshly, as cunning, but the Japanese seem to have a perhaps too lenient view of this practice.) Keeping this in mind, it is advisable to browse through any pertinent material written in Japanese, when you start working on Anglo-American Law. It will at least be helpful in finding other sources. (<omitted>) This may seem a matter of common sense, but some otherwise admirable works contain errors about Anglo-American Law that are entirely obvious to anyone referring to literature written in Japanese. This often happens when a scholar from overseas visits Japan, people question him about matters that have already been introduced in Japan, and become over zealous about his answers, making him a new authority on the subject.

3. How to Conduct a Search

From here on, I will talk about today's main topic, how to search for translation of foreign laws. First, use the same method as when searching for general legal literature: that is, pulling up materials that seems relevant, referring to various bibliographies or bibliographic databases. This search method is explained in a number of books, so I will not focus on this topic. I recommend that you refer directly to such books. I hear that the book titled "Legal Research," to which Professor Natsui has contributed, will soon be published, and I believe that you will be able to find additional useful instructions on how to search for legal literature there. In the appendix of your handout, on Page 2, I listed "basic tools for searching legal literature." It is not an exhaustive list, and I did not take enough time to elaborate, so it will just give you a general idea about what kinds of tools you can make use of. The list is categorized into several groups: bibliographies on printed matters are divided into book and magazine categories, and electronic publication is divided into the two categories of "package media" and "network publication." They represent the tools available for use in searching legal materials.

However, it is important to understand the weak points of each type of bibliography or database. For example, the Japanese Periodicals Index created by the National Diet Library has previously not documented bulletins published by junior colleges. The bibliography has other small rules, such as not to record articles shorter than two pages. So, in using this Japanese Periodical Index, it would be essential to check a separate

bibliography of junior college bulletins or to browse bibliographies that comprehensively list articles shorter than two pages.

Generally, in bibliographies of journal articles, certain limitations are always imposed on the titles of journals or documentation periods. "Current Legal Information" published by *Daiichi Hoki Shuppan*, is a monthly bibliographic journal which seems to document the widest range of legal journals, but it covers only articles published after its inception in April 1981. So, you cannot find anything published before that date. Also, the journal does not offer comprehensive bibliography of legal literature, as it records articles from specific journals only.

When you are studying laws of a certain country, bibliographies of writings on that particular country or region are also available. For example, "Developing Countries in Japanese Writings: an Annual Bibliography," published by the Institute of Developing Economies, IDE Library, contains a large volume of writings in Japanese on developing regions, though the bibliography is not limited to legal areas. Of course, you can find titles of law-related documents under an independent category called "legal writings." This bibliography covers a considerably wide range of developing regions from Asia to the Middle East, Africa, Latin America to Oceania. Another example is "A Catalog of Japanese Books and Articles on Spain," created by Shoji Bando. This material may be useful in studying Spanish laws.

Some legal bibliographies are organized by specific areas. I believe that "Bibliography on Anglo-American Law: Books and Articles Published in Japan" and "Bibliography on Industrial Property" are arranged that way. For example, when you are studying foreign patent laws, you will need to refer to Bibliography on Industrial Property. In addition to these bibliographies, making as wide a multilateral search as possible will help you gain more comprehensive search results.

The bibliographies and databases I have mentioned so far record a set of bibliographic data for each book or article. Thus, in most cases, one cannot know from the data presented in these bibliographies if the material is simply a commentary on law or actually one containing translation. For translated materials, it is difficult to find if it is a translation of a partial or entire text of a law, or when the original text was made. In such a case, you will have to refer to the original work listed in the bibliography. Even when you study the original, you might find yourself disappointed at the lack of sufficient information, as I have mentioned previously.

Further search will require considerably more effort in cost and time, if the work is not at hand for reference or there is no library available in the neighborhood. You will need to obtain the material on your list, which you have prepared by the procedures above. In doing so, you will have to examine each piece of material to determine whether it satisfies your current needs, or if it does not, whether it is possible to use other material as supplement. Also, as described in the aforementioned "How to Search Foreign Law," a bibliography attached to an individual writing sometimes turns out to be helpful.

4. Bibliography on Japanese Translation of Foreign Laws as Database

Several bibliographies on Japanese translation of foreign literary works have already been published, but there are very few, if any, bibliographies that exclusively contain translation of foreign laws. One of the few examples is the "List of Japanese Translations of Foreign Laws" published several times in the 1990s in a journal called "Foreign Legislation," which was edited by the National Diet Library. Compiled from the type of bibliographies and databases mentioned above, it uses Japanese translations collected at the National Diet Library together with corresponding legal material from different countries and regions (limited to those collected at the library). Added to the list was information such as the original title of a law, the form of the law, the law number, the source of the original text, the date of enactment or revision, the name of the translator, whether it is a partial or complete translation, the presence of commentaries, the title and the page of the material in which it is published, and the call number at the National Diet Library. This list exclusively handles Japanese translation of foreign laws.

Unfortunately, this list does not exhaustively cover all areas because it was created to accord with specific themes corresponding to feature articles of each issue of the journal. Also, an updated version has not been published for several years now. By now, the list has become an historical document.

Since the mid-1990s, the facilities at the National Diet Library have finally become more automated, thanks to the spread of the Internet. As a result, each section of the library is now equipped with computers. Before that, we prepared a bibliography of Japanese translations, we had to write down, by hand, all necessary information for each item on a card, and then type a draft bibliography based on those cards with a word processor. Now that personal computers have become available, we have gradually implemented electronic solutions, and have been able to shift to a database system.

Next, I would like to talk about how we search translated materials at the library to collect information for the database of our Bibliography on Japanese Translation of Foreign Laws. In this case, we search for any existing Japanese translation of foreign laws, rather than for a translation of a specific law of a specific country or region. As for books, the search is done as part of our book selection, as one step before putting new books on the shelves. In the library, newly arrived books are first laid out in a space called "selected book corner," by the order of their call numbers. We check each of these – browse the title, and if the book seems to contain translation, actually open the book to

check the table of contents or the text itself. If any translated text is found, relevant information is accordingly recorded.

As for articles in journals – just as and for books, since a book selection process alone cannot cover all angles, we use the monthly Current Legal Information journal I had talked about. It is easy to extract necessary information from this journal because writings related to foreign laws are marked as such. Examining each title, we make up a list of works that appear to contain translation and eventually look for the works in the stack room. When the works are found, they are recorded in our bibliography database.

Manually checking each single piece of literature takes a lot of time. Due to limitations of time, as well as for the reasons I touched upon earlier, it often happens that we cannot extract all necessary information at one time. To increase database search efficiency, it will become necessary to assign a more detailed classification or subject line to each piece of data, rather than the simple classification currently assigned. Currently, we use this database as an administrative tool in our section, as well as when responding to inquiries from library visitors or questions made in writing or by phone.

As our next step, I hope that in the future we will be able to offer the type of service where visitors are able to freely use computers installed in the reference room for their searches. Ideally, we would like to offer this service via the Internet to the public. However, there are several obstacles to realizing that goal, and we have not reached the stage where we can announce such a service being available.

Since the National Diet Library is open to the general public, providing free use of computers to visitors involves certain problems that must first be solved, especially in light of security. Also, providing database service on the Internet requires construction of an infrastructure containing a server system. The security problem will become far more difficult to handle, since the number of Internet service users will be much larger than that of those who visit the library to use the database service. So, there is a long way to go before this service will be ready for public use.

Also, data entry, which is allotted to each of us on the staff, inevitably introduces possibilities of human error, though we use every precaution every time we input data. Furthermore, there is a considerable volume of information yet to be entered, so a careful review is necessary before releasing the database service to the public. For the same reason, revisions are essential, as well.

At the present time, it is possible for you to make an inquiry by phone, which we will answer after searching the database, providing your inquiry is about one or two items. However, if you have a lot of questions or are not sure of the correct name of the law you are looking into, I suggest that you make a query (reference) in writing, because searching the database in such a case is not always easy, and thus, it may be difficult to decide if the search result adequately corresponds to your inquiry.

Bear in mind that references in writing need to be made via a university library or a public library. In addition, it will take some time to reply to the query. This may seem a bit complicated, but

this way, we can handle problems caused by varied versions of translation, as mentioned earlier, using not only our database, but also the original text of the law in question, providing it is in the collection of the National Diet Library. It also allows us to search other bibliographies such as those mentioned earlier, and other databases, if necessary. Also, it is possible to provide information about related documents, if a corresponding Japanese translation cannot be found at that point.

5. Conclusion

In concluding, I would like to emphasize a few main points. It is clear that no foreign law is translated under perfectly systematic and official conditions. All the Japanese translations of foreign laws have been made privately by "someone." For example, there is a law called "Internal Revenue Code" in the United States. It is part of the United States Code, an original text that has more than 3,300 pages in its 2000 version. I believe that a complete translation of this law does not currently exist, nor is it likely to be completed in the future.

Generally, when you need information about a foreign law, you should first refer to the original text to ascertain the original title, the date of enactment/revision and law number, and after that, look for a corresponding translation or commentary articles even when they may be slightly dated. When you find a translation, the best way would be to refer to only what you believe you can trust as fact.

Lastly, various texts of law are now offered on the Internet. When you read an attached help file or user's guide carefully, you will always find a disclaimer somewhere to the effect that the text provided there is not an authoritative text. You can find this disclaimer even in a text of a law written in its original language, or even in texts provided by governmental organizations – the Diet, government agencies or courts, in the case of Japan. This signifies that, ultimately, those printed in legal publications published in paper by the government – "Gazette" and "Statue Book" in Japan, constitute authorized texts of law. The concept of electronization may become easier to understand if you see the process as one type of translation.

I thank you for your attention today.

Appendix 1

1st Joint Symposium at Meiji University on May 1999

Programs with summary

1: Legal information and legal practice

Yasuyuki, Fujita (Attorney at Law)

This report presents an influence of information technology to legal practice in Japan, and some expectations to future activities of Legal Informatics Association with thinking about some image on legal environment in information era.

2: Patent Practice and Legal Information

Hiroaki Takeyama (Patent Attorney)

This report presents outline of the legal information on patent practice of Japan, and the usefulness of patent publication.

3: XML and its application to Legal Informatics

Hiroshi, Komatsu (Attorney at Law)

This report presents outline of the specifications and functionality of XML ("Extensible Markup Language"), which are expected to be useful from the view point of legal informatics, and envisages certain applications of XML in the legal domain.

4: On Web Resource Management

Satoshi Wada (Meiji University, School of Politics and Economy)

Collection of information by co-operation works must be important to justify legal information area that would be more developing in future. This report presents some examples to manage linking information by co-operation works, and some new ideas to apply XML technology into such management.

5: Outline of Social and Human Information Platform Project (SHIP

Project)

Takato Natsui (Meiji University, School of law)

SHIP project was organized in 1999 to develop a practical platform system for information database systems in social science area. This project is funded by Meiji University and Japanese government. We are studying XML technology, and intend to apply this new technology to database engineering area, especially to legal information. Also we are examining many relating issues. For example, intellectual properties around database such as copyright, privacy protection of information included in legal information database systems, patents including business model patents for legal education, responsibilities of information service providers and so on. We would like to report our discussions and efforts publicly by paper reviews and Web contents.

Appendix 2

2nd Joint Symposium at Osaka University on May 1999

Programs with summary

1: Protecting Personal Information in Network Societies - Observations on the United States Model

Fumio, Shinpo (Adjunct Researcher)

This report presents outline of present situation, law and legal systems on privacy data in computer networks, and explains efforts and their characteristics to protect privacy data.

2: EU Data Protection Directive and Globalization of Data Protection Law

Tsuneharu Yonemaru (Ritsumeikan University)

This report presents outline of EU Data Protection Directive and its influence to Japanese Law and privacy protection systems.

3: The protection of privacy in the information society: A consumer perspective

Toshiya Bando (KYOTO-GAKUEN University)

This report presents main discussions that were argued in the 7th international conference of IACL (International Association for Consumer Law) 1999, and consumer protections in information network area related to EU Data Protection Directive.

4: Status and Issues on Personal Data Protection in Japan - Focus on JIS Q 15001

Masatomo Suzuki (Japan Information Service Industry Association)

This report presents how privacy data is protected in the course of computer data processing, and the circumstance around data protection, and JIS Q 15001 as one of the privacy protection standards.

5: On the Research and Development of Legal XML in the U.S.A.

Hiroshi Komatsu (Attorney at law)

To construct legal system reasonably in present era, it should be realized not only to be able to retrieve legal information through Internet but also to be able to use any electronic records in any process of legal procedures. This report presents some of the newest and important examples relating application of XML technology to legal information processing (mainly in USA), and direction that should be adapted by us as a reasonable way.

6: Legal Informatics: Teaching and Research

Noboru Kado (Osaka University)

7: The Internet as a Medium to Freedom of Information: Disclosure, Mass Media, Request of Information

Kohki Tachiyama (Yamaguchi University)

8: Can we give a name to shooting star? - Citation for internet materials

Makoto Ibusuki (Kagoshima University)

9: SHIP-Project and the Future of Legal Informatics

Takato Natsui (Meiji University)

Appendix 3

3rd Joint Symposium at Meiji University on May 2000

Programs with summary

Part I

1: Religious Technology Center v. Netcom Case - Liability of ISP on Copyright Infringement caused by anyone of the Third Party

Rikihiro Fukushima (Kumamoto University)

This case study presents comparative study of Netcom Case with Playboy Enterprises Case, Sega Enterprises Case and Central Point Software, Inc. Case, and standards adopted by US courts for responsibility of service providers.

2: Protection and Management of Copyright by Technological Measures

Tatsuhiro Ueno (International Institute for Advanced Studies)

This report presents copyright protection of digital contents by using copyright management system and copyright protection technology. And, this report notes an overriding and affects on copyright law by information technology relating digital contents.

3: Conflicts between Protection and Use of Digital Information Technology

Kazuaki Hidaka (Attorney at Law)

[Summary Omitted.]

4: Protection of Database by Law – sui generis rights

Osamu WATANABE (Niigata University)

It is one of very hard questions to decide whether database works without any originality should

be protected by copyright law or fair competition law. This report presents a new legal right model (sui generis rights), limitation model (fair competition law), tort model and contracts model for protection of such database works, and shows some characteristics on sui generis right in German laws.

5: Present Trends on the Intellectual Property Protection in Cyber Area

Kenji Naemura (Keio University)

This report presents main trends around intellectual properties in present day, for example, copyright, database protection, and domain name protection. In addition these, this report refers NRC (National Research Council)'s new report "Digital Dilemma".

6: On Business Model Patents

Hiroaki TAKEYAMA (Patent Attorney)

This report presents about so-called Business Model Patent, its characteristics, its patentability, research of such patents, its affection to other legal area, and current correspondence to such patents by patent offices in USA, Europe and Japan.

7: SHIP project: Report of the year 1999 activities and Plan in the year 2000

Takato Natsui (Meiji University)

This report presents activities of SHIP project in 1999 and offers new plans in 2000.

8: Discussions: Intellectual Property in the Cyberspace

Part II

1: Merits and Demerits of Legal Information as Network Contents

Makoto Okamoto (Web editor)

This report presents an outline of present situation on legal information as network contents on the basis of the Web research through a past year. Merits by legal information would proportion with levels of abilities of users and amity to such information. Merits of legal information may easily be able to be transformed into demerits. Merits and demerits have some close connections to each other.

2: Beyond the Barriers: The present and the future of the environment of legal information

Makoto Ibusuki (Kagoshima University)

This note presents some analysis on legal information in generation process, distribution process and editing process of legal information, and argues that there are 3 high walls against any legal information in Japan – accessibility, usability and reliability.

3: Amendment of Statutes and XML Based Legal Database System

Satoshi Wada (Meiji University)

To markup legal information, HTML language has only poor ability as markup language. If any legal documents are enough structured then XML language has great capability. SHIP project develops new history management system by XML technology for statutes and their amendments. This report presents a prototype of the system, its detailed explanations and its theoretical backbone.

4: Application of XSLT to Legal XML Documents for Privacy Protection

Hiroshi Komatsu (Attorney at Law)

This report presents a necessity to protect privacy data in any court order documents, and a prototype of an automatic masking system as an application of XML and XSLT technologies.

5: Presentations and Discussions: Legal Information Database

Presentations:

Diichi-Hoki as a legal publisher (Japan)
Hanrei Times as a court reports magazine publisher (Japan)
TKC as a legal database provider based on Internet (Japan)
Lexis-Nexis as a legal database provider based on Internet (USA)
G-Search as a patent database provider based on Internet (Japan)

Appendix 4

4th Joint Symposium at Meiji University on May 2001

Programs

1: Social Functions of the Academic Legal Database System

Takato Natsui (Meiji University, Japan)

2: The Library's Functions in the Legal Information Environment

Jun-ichi Yamamoto (University of Library and Information Science, Japan)

3: The Legal Information Institute (LII) - Providing Catalysis, Innovation, and Integration in a Complex Legal Information Environment

Peter W. Martin (Cornell Law School, USA)

4: Philosophy, Practice and Future of Free Access to Law: An Explanation of AustLII

Graham Greenleaf (University of New South Wales, Australia)

5: Discussions: Social Roles of Legal Information Database

Chair: Prof. Ibusuki, Makoto

Panel: Prof. Peter Martin Prof. Graham Greenleaf Mr. Takao Hasuike
Prof. Jun-ichi Yamamoto Prof. Takahito Nátsui

Appendix 5

5th Joint Symposium at Meiji University on April 2002

Programs

1: Markup for automating legislative processes

Timothy Arnold-Moore (SIM, Australia)

2: DTD in legal XML - problems, resolution and examples in SHIP project products

Hiroshi Komatsu (Attorney at law, Japan)

3: Session 1 Discussions

Chair; Makoto Murata (IBM-Japan, Japan)
Panel;
Timothy Arnold-Moore, Hiroshi Komatsu, Akira Kawamata (Japan XML user group, Japan)

4: Designing University Organization to Advance the Digitization of Education

Kazuo Sakai (Professor at Meiji University Law Faculty, Japan)

5: THE GLOBAL LEGAL INFORMATION NETWORK

--International Cooperation for the Exchange of Legal Information

Constance A. Johnson (the Library of Congress of USA; Law Library Section)

6: Tasmanian legislation system - Purpose of development and social function

Jane Clemes (Tasmania State government, Australia)

7： Legislative Database Systems at the House of Representatives
–An Overview and Their Future

Masayuki Ohta
(Legislative Bureau at House of representative, National Diet of Japan)

8： “Industrial Property Digital Library (IPDL)”
-Japan Patent Office's IP information service via the Internet-

Yoshihiro Fuji (Patent Office, Japan)

9: Session 2 Discussions

Chair; Makoto Ibusuki
Panel; Constance A. Johnson, Jane Clemes, Masayuki Ohta, Toshihiko Ohoshima(Legislative Bureau at House of councillors, National Diet of Japan), Yoshihiro Fuji, Naoaki Yano (Asahi Research Institute, Japan), Shinichirou Nakayama(National Diet Library, Japan).

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