

Issues arising from Free Access to Legal Information - A Japanese perspective -

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[Abstract]

Legal research via the Internet and the expansion of retrieved legal information by such a measure has been causing new problems. For example, privacy issues caused by access to court rulings, a burden on the distribution costs of legal information, conflicts between commercial legal publishers and public legal databases and so on. Further, free access opens the door to a concealed process and facts relating to law; for instance who is proposing a bill, who is judging on a specific case and how, and how a law might be modified by administrative regulations and ordinances and so on. These issues have two aspects: one aspect is a preferable result for many people to an absence of any legal information, but the other aspect is not preferable for the specific people concerned.

I would like to show an overview of these issues and to propose some ideas that may resolve such problems.

[Keywords]

Access Control, Court Case, Court Proceeding, Free Access, Legal Database, Privacy, Publisher, SGML, XML

1. Introduction

The legal process is a kind of social process which is handled by humans. For instance, the court proceedings consist of the accumulated behaviour of the party, lawyer (as an agent or representative of the party or accused), prosecutor, judge and other people who are participating in a specific court action. They are all natural people.

However, in general, the fundamental structure of the legal process can be observed as a connectional model comparable with the data processing process in a computer system (Fig.1). For instance, in the court, filing of a specific case can be deemed as 'data input'; a trial can be deemed as

'data processing'; and a court decision by judge or jury can be deemed as 'data output'. Similarly, in parliament (the congress, the Diet), 'data input' is a demand of legislation from political party or individual people; 'data processing' is an examination of the proposed bill and 'data output' is the enactment of law (Fig.2). Also in administration, 'data input' is a necessity of making administrative direction; 'data processing' is an examination in the Cabinet or the Department and 'data output' is the enforcement of administrative regulations.

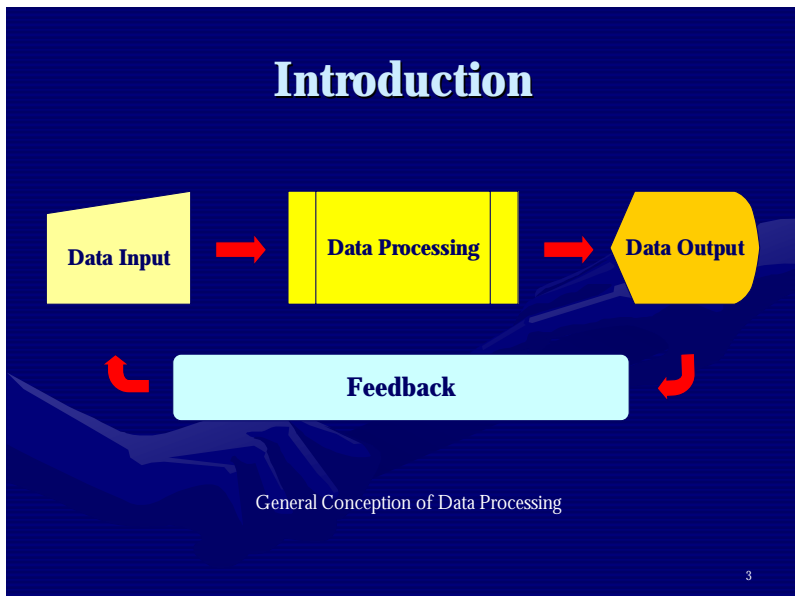


Fig.1: data processing process in a computer system

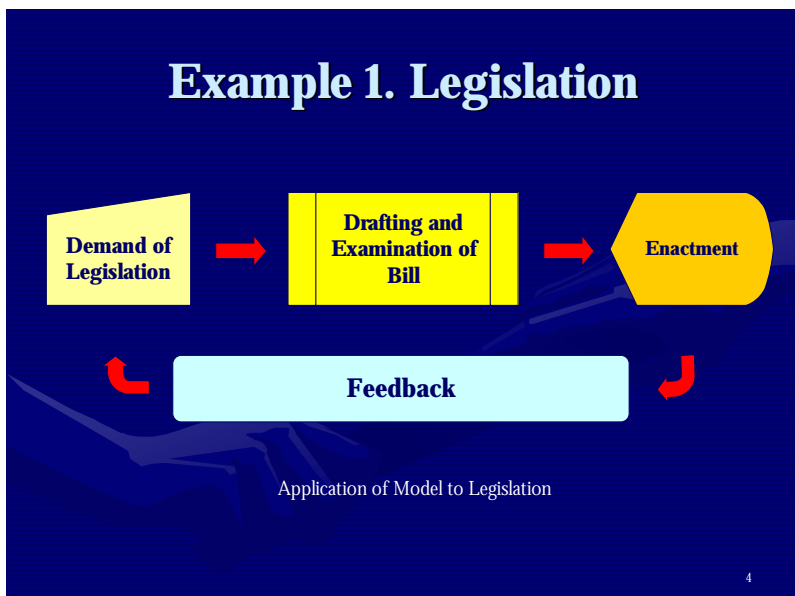


Fig. 2: Legislation process

Such a point of view for observation can be named the data processing model. While there are

many types of privacy issue through the data processing of legal information, some of them can be observed and examined on the basis of this model.

2. Virtue of Free Access – the Fundamental Function of a Democratic Country

In the life cycle of legal information inside the court proceedings, the right of free access has a significant meaning and social function, especially in a democratic country.

First of all, if no one has his/her own value system, he/she 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 he/she should use for his/her own criteria (Fig. 3).

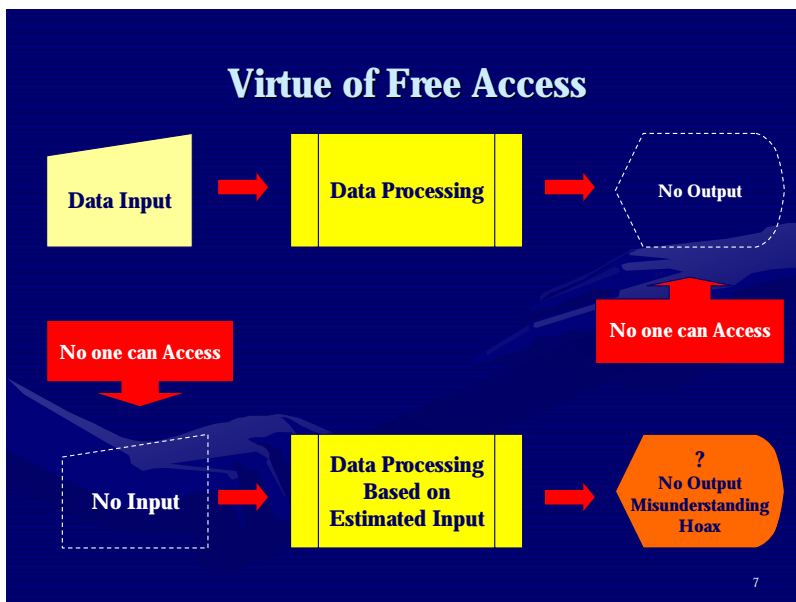


Fig. 3: No output means no input

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 someone devises his/her 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.

Of course, 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.

To continue and maintain the democratic social basis, all information on rules which consist of basic social rules shall be made available to everybody who is a member of such a society. Laws, court cases and administrative ordinances are the main sources of such important social rules.

Due to this, free access right is one of the most important human rights as a political right of a

nation. If no one can access such information then he/she will never be able to construct his/her own opinion relating to his/her country and its handling for the future. Similarly, no one can criticize a specific court order and judge's decision¹.

3. Legislation Process – Public Door to a Concealed Chamber

Legislation is the first step of law making. This is a kind of common sense. In fact, in many countries, new legislation would be published and informed via the Law Book or Gazettes. In Japan, all legislation shall be made public through the National Gazettes which shall be published by the government. Traditionally, these Japanese Gazettes have been published as printed matters. Recently, the Japanese Gazettes have been published also as digital contents on the Web (provide, photo PDF only). Publication of laws can be considered as a part of the output process of the total legislation process.

However, the processing process (examination process) and input process (acceptance of enactment demands) of the total legislation process remain not obvious for ordinary citizens.

In most democratic countries, discussions in the parliament have been made public through several channels. In Japan, some important parts of discussions in the National Diet have been on the air via TV, radio and the Internet. Also congressional records have been published by the National Diet. But discussions at the Diet Committees have not been fully clarified and published. Thus people can only recognize some portion of discussions at the Committees.

Moreover, the input process of legislation is located in the foggy forest. Who demanded specific legislation? In most cases, these elements are not unclear for ordinary people. However, is this really democratic?

Under the Constitution Law, Japan adopts the parliamentary system of government. Due to such a constitutional structure, most bills have been drafted and proposed to the National Diet by the government and its ministry officials. But often, the real drafter of the specific bill is anonymous. In fact, the examination process of bill drafting has usually been unclear too².

To prompt the democratic environment, we have to focus on the input part and processing part of the total legislation process more and more. For the purpose of such focusing, the computer assisted legislation system is one of the most hopeful technological measures in this era. For example, the Tasmanian legislation System in Tasmania State of Australia³, the PAL system in New

¹ Norman Dorsen and Prosser Gifford (ed.) [2001], *Democracy and the Rule of Law*, CQ Press

² See Makoto Ibusuki, *Japanese Law on the Internet: Its Realities and Possibilities*
<http://elj.warwick.ac.uk/jilt/00-1/ibusuki.html>

³ See Tasmania Legislation
<http://www.thelaw.tas.gov.au/>
and Timothy Arnold-Moore, Jane Clemes, *Connected to the Law: Tasmanian Legislation Using*

Zealand⁴ and FINLEX system in Finland⁵ are very useful and hopeful measures for such a purpose. These electronic legislation systems are based on SGML technology or XML technology.

4. Commercialism – Burden of Distribution Costs

The court decision is a kind of output part of the total court process.

In general, court cases are published as official case books. In many countries, such official case books have been issued by the Supreme Court of the country. On the other hand, in some countries, such case books have been distributed by the Ministry of Justice (e.g. Finland).

At the same time, many private companies have published commercial based case books and their commentaries. In the era when the Internet did not exist, such publication by private publishers could be a very useful and functional social mechanism. Sometimes acquiring an official publication was not so easy, and often the official publication was not so easy to understand. Of course, publication by private companies needs a payment for their distribution fee and profit. But such costs could be rationalized by a need for widespread distribution of laws and cases through limited paper ways.

However, today is the era of the Internet. Of course today, private companies are provided not only paper case books but also digital court data recorded in their database systems. Users of such database systems shall pay for their use. However, even if the data retrievable in such systems were collected from official court database system with no fee, such users shall pay. Is this a right manner or not?

We have to examine a change of the social role of commercial based publishers, while we have to consider the social function and duty of courts in the Internet era⁶.

5. Court Cases and Legal Database Systems – Privacy vs. Free Access

Everybody shall be able to access court cases too on the basis of free access right. However, in

EnAct

<http://elj.warwick.ac.uk/jilt/00-1/arnold.html>

⁴ See PAL project

<http://www.legislation.govt.nz/>

⁵ See FINLEX

<http://www.finlex.fi/english/index.html>

and Document Management System

<http://www.cs.jyu.fi/~airi/docman.html>

⁶ See Herbert Burkert, *Commercialization of Legal Information – A Tale of two countries*, SHIP project Review 2003-a, pp. 41-67

<http://ship.mind.meiji.ac.jp/lib/2003-a.pdf>

some situations, privacy issues can be caused by such free access⁷.

5.1 Privacy Issues in the Ordinary Trial Court Procedures

The court process involves many privacy issues.

Of course, a trial shall be held on the basis of traditionally adopted important rules. For instance the trial shall be open to the public. In such a situation, some people may think of the trial as a special forum where everything is open and there is no privacy. In the US and UK, such a historical tendency is obvious. For instance, a specific case can be specified by the court party names of the case (e.g. Plaintiff vs. Defendant). In such countries, privacy issues can take place in special situations, for instance, rape cases and exploitation of children cases. Also in such countries, the names of victims (e.g. raped women and exploited children) and specific witness (e.g. in drug cases and murder cases relating to dangerous illegal groups such as the Mafia) can be modified to anonymous in official case books.

But Japan adopted a different way in which a specific case can be specified only by the docket number of the case (e.g. no.WA-1000-2003 Tokyo District Court). In such countries, case specification using the party's name itself can be considered as a kind of damaging of privacy of the party. This might be due to a special historical reason, that is, Japanese people have not been familiar with European court systems and court traditions. In such a society, what is privacy itself shall be examined and recognized more and more.

By the way, recently in many countries, court cases have been recorded in a case database and published on the Web too. This may be a sort of revolution. As a result, new privacy issues have arisen caused by automatic retrieval mechanisms (e.g. by Google search). We have to address such a new problem.

5.2 Privacy Issues in the Classified Court Procedures

Many countries have special court proceedings for family cases (e.g. divorce, adoption of child and succession) and juvenile cases. In such cases, demand for privacy protection from the parties and other people concerned would usually be stronger than such demands in ordinary civil actions. Evidently such an interest for privacy protection in family court cases and juvenile court cases is right.

Many countries have a kind of classification rule to distinguish such special cases from other ordinary cases. In Japan, of course different laws and court rules shall be applied to such family

⁷ See Chris Puplick, Court Ruling and Privacy Issues, SHIP project Review 2003-a, pp. 8-40
<http://ship.mind.meiji.ac.jp/lib/2003-a.pdf>

cases and juvenile cases from ordinary civil trial cases and criminal trial cases.

Therefore, in such classified cases, the privacy protection rules shall be established in the field of legal database systems.

However, even if a specific case has an attribute of a family case or juvenile case, the case should be open to the public depending on the case and historical condition⁸.

Today, there is no rule for a legal database system to control such classified cases in Japan. In fact, family cases and juvenile cases have not been published on the Web Site of the Supreme Court of Japan in general.

Perhaps the Supreme Court of Japan has been drafting and operating an internal classification rule or guideline for the publication of such special court decisions as family court decisions and juvenile court decisions. However, no classification rule is available to the public at all. Due to such a confidential manner, no one can criticize the classification standard accurately. We have no way to recognize what standard has been adopted by the Supreme Court of Japan to distinguish the cases to be published to the public from the cases to be masked from the public.

At any rate, on such classified cases as family cases and juvenile cases, we have to have a careful consideration to avoid any privacy infringement. At the same time, we have to keep the right of free access to legal database systems, especially court case database systems. Probably this is the most difficult problem to be resolved in the context of the privacy protection.

5.3 Some Ideas for Resolution

These problems can be resolved by two ways. One is by a technological measure and the other is good rule making by the court.

However, the request and goal shall be given by the rule for privacy protection prior to choose any technological measures, and the technological measure shall be selected and introduced to realize such rule.

5.3.1 Technological measure

XML technology enables the publication of every type of court case by introducing the style

⁸ Osaka High Court judgment (29 Feb. 2000; Hanrei-Jiho no.1710 p.121) decided that the publisher could publish the name of a 19 year old man who was accused a serious murder, and such publication does not constitute any damage to the fame of the accused. At that time, while publishers urged the importance of free speech and free access right, many scholars thought that such publication would be illegal against the Juvenile Law of Japan. Because Article 61 of the Juvenile Law of Japan provides that no one can publish any such story or photo by newspaper or magazine that includes the name, address, age or face of an accused person who committed a crime when he/she was less than 20 years old.

sheet technology. The same text of a specific case can be displayed with different expressions depend on the difference of users. For instance, by using such technology and the access control technology, professional lawyers can read the original text of a specific case; on the other hand, ordinary people can read the same text in which the accused name and party name is exchanged for meaningless characters or anonymous.

My colleagues and I (especially Mr. Hiroshi Komatsu) examined the effectiveness of such a measure (Fig. 4). And our SHIP project has been developing a legal database system which has a kind of access control function and display restriction function on the condition of anonymous⁹.

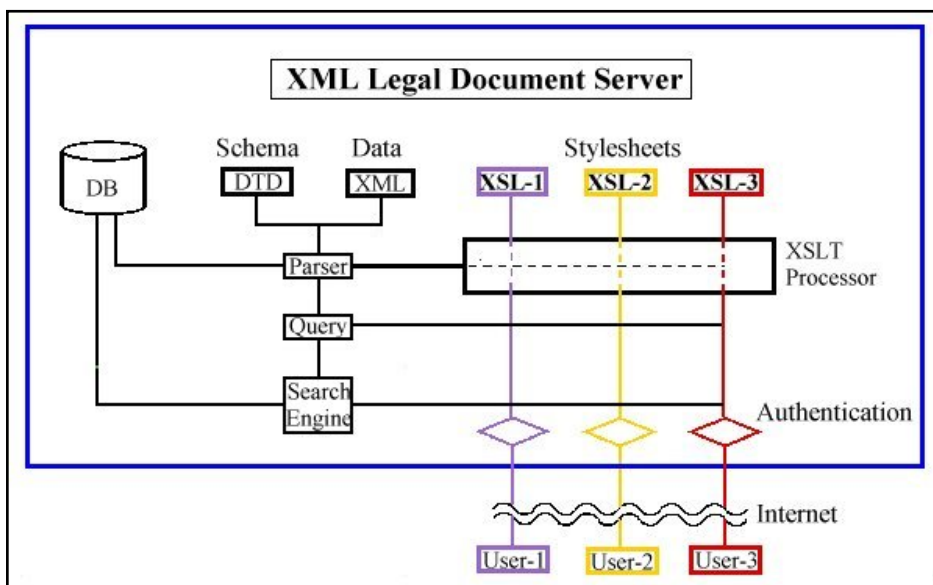


Fig. 4: XML legal document Server by Mr. Komatsu (SHIP project)

5.3.2 Rule making

In relation to the privacy protection in the legal database systems, most problems may be reduced to the problem of access control¹⁰. Of course, it is a technological matter to develop a system for controlling access. However the standard for access control itself is not a technological matter. This is a kind of rule making.

And such a standard shall be published and be open to criticism. In democratic countries, it is very important that everybody can recognize and examine whether such a public standard is right or wrong, effective or ineffective as well as useful or useless to protect privacy interest.

In the context of the Japanese legal situation, therefore such standard rules shall be developed

⁹ Hiroshi Komatsu, *Legal Information and XML*, SHIP project Review 2003-a, pp.102-130, 2003 <http://ship.mind.meiji.ac.jp/lib/2003-a.pdf>

¹⁰ Sally Kay, *Security and Authentication for the Court Process*, Law via the Internet 2001

with good consideration, and published officially by the Supreme Court of Japan.

6. New Problems

However everyone can use Data Matching Technology (Fig. 5), for instance, by Google Search and other similar Web search systems, by greedy Business Handling using CRM system or by inspection by governments or police agencies and so on.

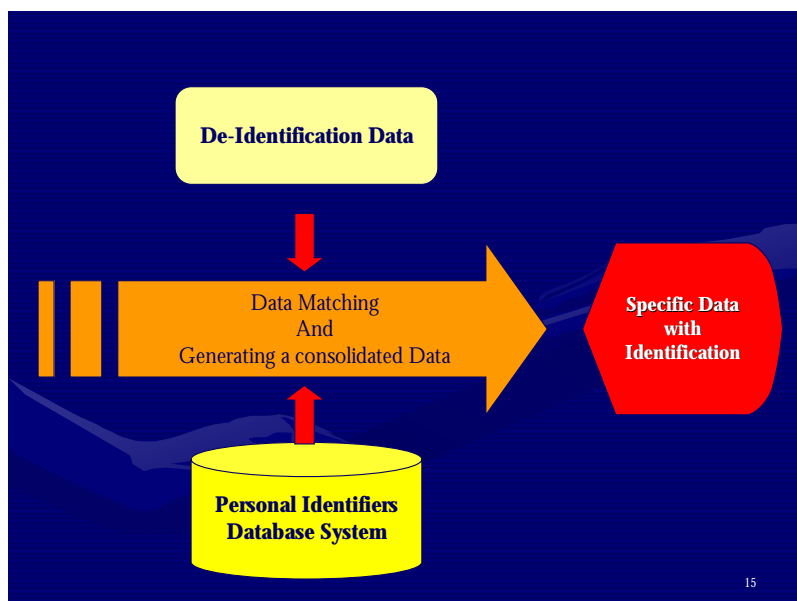


Fig 5: Data matching System

This is the important issue to be resolved in the near future. We have to focus on EU Directive on Privacy Protection in the Electronic Communication Sector (2002/58/EC).