The right to be informed - the obligation for providing information The case of Japanese Information Disclosure Law

角松, 生史
九州大学大学院法学研究院助教授

https://doi.org/10.15017/2300

出版情報：法政研究. 69 (2), pp.265-288, 2002-10-30. 九州大学法政学会
バージョン：
権利関係：

ARTICLE

The right to be informed—the obligation for providing information
The case of Japanese Information Disclosure Law*

KADOMATSU Narufumi[1]

1. Enactment of 1999 Administrative Information Disclosure Law (AIDL)

The Japanese Administrative Information Disclosure Law (hereafter "AIDL") was promulgated in May 1999 and put into effect in April 2001. This paper aims to examine some of the issues discussed during its legislative history and thereafter in order to clarify the features of the law or discussions thereof. It also touches upon the 2001 law on information disclosure by independent administrative institutions, special corporations and similar organizations.

Although the featured law is commonly called the "(Administrative) Information Disclosure Law" *((Gyosei) Joho Kokai Ho)*, officially it bears a rather long title, namely "Law Concerning Access to Information Held by Administrative Organs *(Gyosei Kikan No Hoyu Suru Joho No Kokai Ni Kansuru Horitsu)*. Interestingly, the semi-official translation[2] uses the term "access to information", not "disclosure of information". This choice of terminology may be

* This paper is based upon the author's presentation at the international seminar "Potentials of International Information transfer: Opportunities and Challenges of Global Networking" organized by Förderkreis für West-Ost Informationstransfer e.V., Berlin, Feb. 21-22, 2002. The author wishes to thank Ass. Prof. Dr. Mark Fenwick (Kyushu University) and Mr. Ian Speed (LL.M. Program. Graduate School of Law, Kyushu University) for correcting the English. Needless to say, the author is at fault for all the remaining mistakes.

1 Japanese Names in this paper are given in Japanese order, namely the surname first, followed by the given name.

2 *http://www.soumu.go.jp/gyoukan/kanri/translation3.*

debatable as a literal translation, since the original Japanese term "*Kokai*" includes "*Ko*" (public). However, the choice is to be praised in that it reflects the content of the law more accurately. Indeed, the AIDL is a law that grants an individual citizen the right to access administrative documents, meaning the information disclosure always takes place on an *ad hoc* basis and passively, upon request from the citizen. This feature, which can be contrasted to an *(obligatory) information provision system*, that transmits information actively and systematically, should always be kept in mind. However, for the sake of convenience, this paper uses the term "*information disclosure*" to mean a system that gives citizens the right to access, modeled on the Freedom of Information Act in the U.S.

This paper deals more with basic principles and features of the information disclosure system, rather than going into specific issues of practical importance[3]. It also focuses on the examination of the Japanese system, comparative analysis set aside. Some of the issues dealt with in this paper may have a particular Japanese political/social context in their background, but others, in the author's view, can shed light on the significance of the information disclosure system in general as well as its structural limitations. Also the author hopes that problems peculiar to Japan are also of interest to the readers, as they might demonstrate the difficulty of adapting a global system of information disclosure to a particular socio-political context.

2. Right- Based Arguments: The "Right to Know"

(a) Legislative history of the AIDL

The AIDL was a product of many years of discussion that began in the early 1970s (Kadomatsu 1999, 34-39; Repeta 1999, 2-6). There was an incident in 1972,

[3] Evaluation of its provisions concerning non-disclosure information (Art.5) shall be the major concern from a practical point of view. This issue is, however, omitted in this paper except for the problem of disclosure of one's own information.

in which a journalist Mr. Nishiyama disclosed the content of a certain telegram and was prosecuted for "inducing" national public employees, the source of his information, to reveal secrets (Nishiyama Telegram Case). The case aroused discussion on governmental secrecy and the "Right to Know". In a round table discussion sponsored by a law journal in the same year, academics called for legislation on information disclosure. This is sometimes quoted as the first call for such a law (Schultz 2001, 130 N.12; Uga 2002, 9; Horibe 1992, 37).

Beginning in the late 1970's, there were several attempts to legislate an information disclosure law, which resulted in a "gradualist, voluntary approach" of the government to facilitate disclosure (Boling 1998, 12-14), but the national legislation did not come to fruition. Local assemblies instead took the lead. In 1982, the first local information disclosure ordinances were enacted both at the municipal level (*Kaneyama*) and the prefectural level (*Kanagawa*). Before the enactment of the AIDL, all prefectures and most of the municipalities had such ordinances. Experiences from the information disclosure ordinances contributed enormously in the drafting process of the AIDL.

At the national level, the 1993 political upheaval that ended the single-party rule of the LDP accelerated the legislative process. The newly formed Hosokawa Coalition Cabinet agreed to make information disclosure an important item on the political agenda. The LDP returned to power in less than a year under a Social Democratic Prime Minister, but the process continued. The AIDL legislation was considered to play an important part of the "Administrative Reform" aimed at by the government (Shindo 1998:575). A Special Subcommittee for Information Disclosure (hereafter "the *Subcommittee*"), which was placed under the Administrative Reform Committee (established in 1994), began the drafting process. The *Subcommittee* filed the "Outline for the Information Disclosure Law" on November 1, 1996 (hereafter "the *Outline*"). It also prepared a commentary (hereafter "the *Commentary*") to the Outline. The Cabinet proposed the bill based on this Outline, and the law was finally passed by the

Diet with some amendments in May 1999.

As seen from the above, Japan was not a late starter in this area, but nevertheless reached the goal of national legislation rather slowly. However, because of the slowness, it is notable that a considerable amount of theoretical discussion was undertaken in the legislative process, as well as learning from the experience of other countries and local ordinances. For good or bad, many issues that have previously been settled in the process of practical implementation (by administrative practice or case law) are expressly regulated in the law itself.

(b) Contents of the AIDL

The AIDL Art.3 stipulates that "any person" may request the disclosure of documents, and therefore the "right" to request disclosure (*Kaiji Seikyu Ken*) is explicitly granted. This forms the very core of the whole statute (Uga 2000, 36). All "administrative documents" (Art.2 Para 2) are subject to disclosure so long as they are not classified as "non-disclosure information" (Art.5).

The head of the administrative organ must make a decision whether to disclose the document within 30 days, which may be prolonged to 60 days when there are justifiable grounds (Art 9, 10). If the disclosure is totally or partially rejected, the requester can file a complaint according to the Administrative Complaints Inquiries Law. In such a case, the head of the administrative organ must make a reference to the Information Disclosure Review Board, an independent body established within the Cabinet Office. The report of the Board is provided to the claimant and made public (Art.34). The report has no legal binding power, but it is likely that the government will follow the report in the vast majority of cases (Schultz 2001, 166; Kadomatsu 1999, 47). The requester[4] can also file a suit[5] against the rejection.

---

[4] When the document contains information concerning a third party, the third party may also file a complaint or a suit.

(c) The "Right to Know"

The key phrase that prompted the discussion on the information disclosure legislation was "the right to know"*(Shiru Kenri)*. As early as in 1969, the Supreme Court mentioned the concept in the context of freedom of the mass media.

> *"(I)n a democratic society the reports of the mass media provide the people with important materials on which to base their judgments as they participate in the nation's politics and they serve the people's "right to know". Consequently, it goes without saying that the freedom to report facts, along with the freedom to express ideas, is grounded in the guarantees of Article 21 of the Constitution, which provides for freedom of expression. Moreover, in order that the contents of the reports of such mass media may be correct, the freedom to gather news for informational purposes, as well as the freedom to report, must be accorded due respect in light of the spirit of Article 21 of the Constitution. "(Hakata Station Film Case)*[6]

In this case, the legality of the lower court's order to present a part of a news film for evidential use was in question. Although the court rejected the contention of the broadcasting companies in the particular case, the *dicta* of the court was observed by a contemporary foreign observer as "much advanced when compared with the decisions on government secrecy by the highest courts in other leading democracies" (Brown 1977:117). "The right to know" was also mentioned by the Supreme Court in the above Nishiyama Telegram case[7], quoting the Hakata Station Film decision.

The concept of "the right to know", which stresses the recipient side of the freedom of expression (Art.21, The Constitution of Japan) is understood by most

---

[5] Revocation Litigation, which corresponds to "Anfechtungsklage" in Germany (Administrative Case Litigation Law Art.2, 8)

[6] Sup.Ct. 1969.11.26 Keishu 23-11-1490 (Itoh/Beer 1978:248)

[7] Sup.Ct. 1978.5.31 Keishu32-3-457(Beer/Ito 1996:543). The Supreme Court took the position that courts can decide whether there is substantial necessity for the information concerned to be kept secret (Substantial secret theory). In the particular case, the defendant was convicted.

academics to guarantee not only the freedom to receive and gather information, such as in the Hakata Station case or the Nishiyama Telegram case, but also the right to have access to governmental information, at least in the abstract. (Matsui 2001, 28-29)[8] According to this understanding, the AIDL can be considered the materialization of this abstract "right to know". Indeed, the concept remained the impetus for the long-continuing movement toward the legislation.

It has been a customary legislative technique in Japan to state the purposes of the statute in Article 1. This "purposes clause" is understood to serve as a guideline for interpretation. There was discussion as to whether to include the phrase "right to know" in the purpose clause of the AIDL, however the *Outline* decided not to do so. The *Commentary* explains that while the Subcommittee recognizes the important role that the "right to know" played in raising public consciousness and facilitating the disclosure system, the concept allows too much room for interpretation. This decision became perhaps the most controversial aspect of the law, but it is open to discussion whether or not the inclusion would have made any practical difference. Some scholars argue that the inclusion of the "right to know" could have an effect on the interpretation by courts of the scope of non-disclosure information[9]. Others argue: assuming the right is in the abstract guaranteed by the Art.21 of the Constitution, the abstract right can control future legislation or the judiciary even without the inclusion in the purpose clause (Hasebe 1999:136). Shiono, the deputy chief of the Subcommittee argues that it was doubtful whether the legislator can make a decision about the "right to know", a constitutional concept, without deferring to the judiciary. The decision of the Subcommittee does not mean denial of the right to know.[10]

Although the author is rather persuaded by the latter argument, it should

---

[8] Sakamoto, a proponent of libertarian constitutional thought in Japan, is critical of such a view (Sakamoto 1995, 101-102).

[9] See the views of academics quoted in Repeta 1999, 20-21; Schultz 2001, 149.

[10] Okudaira/Shiono 1997, 10-11.

also be noted that there was a certain amount of hostility among some bureaucrats towards the concept[11]. We can also say that it is ironic that the Subcommittee avoided stipulating the "right to know" because of its vagueness but instead included the "accountability" of the government or the "people's sovereignty", which is indeed a fundamental concept in the Constitution of Japan, but at the same time very abstract, vague and controversial. (Munesue 2001, 307; Matsui 2001, 36).

Here the author would like to point out a somewhat different aspect of the problem. The rationale for the "right to know", or the freedom of expression in general, can be found in its function to serve democracy and also to support autonomy of the individual. In either case, "in order to express his or her opinion on a particular problem, a person must have ample information related to it" (Hata/Nakagawa 1997:129). Hence, it is the premise, for the right to be meaningful, that people are able to get *ample information*[12].

Take environmental law as an example. The U.S. Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 Section 313 mandates the disclosure to the Environmental Protection Agency of the presence and release of certain toxic chemicals, with the agency, in turn, making this information available to the public (42 USCS §11023). In this case, the phrase "right to know" is used to express the citizen's right of access to a certain kind of information, and the information flow from the companies via the EPA to the public is guaranteed by the scheme set up by the law.[13]

This kind of control of information flow is not guaranteed by the AIDL. As in many other countries[14], the object of disclosure in the AIDL is "administrative *documents*[15]", not *information*[16]. One can only request documents *held* by

---

[11] Kadomatsu 1999:40

[12] See also Munesue's remark concerning the "information weak". infra p.657.

[13] In Jul.13 1999, Japan has enacted the PRTR (Pollutant Release and Transfer Register) law, which is equipped with a similar scheme.

[14] Administration Disclosure Law in the Netherlands is a famous exception.

[15] "Document" under the AIDL means not only a paper document but includes drawing and "electromagnetic record". (Art.2 Para.2)

the administration. When no documents have been created, or when the documents have already been discarded, the AIDL does nothing about that.

On reflection, the right to disclosure under the AIDL is not a right that can control how administrative organs should *gather or process* information. It can only demand that the *product* of the information process, stored in the *medium* (documents), be disclosed. The law is, from the outset, not a system that directly regulates *information flow* but a system that makes a rule how *the stock of information* shall be treated. The AIDL is not a stand-alone system that guarantees the "right to know" as a prerequisite for democracy or for individual autonomy.

However, we must quickly add several points here in order to avoid misunderstanding. First of all, the Subcommittee was well aware of the fact that the AIDL would mean nothing if not accompanied by proper management of documents[17]. According to the *Commentary*, information disclosure law and management of documents are as inseparable as "a pair of wheels". The AIDL Art.37 stipulates that the heads of administrative organs shall establish rules regarding the management of administrative documents as provided for by Cabinet Order[18].

Secondly, "administrative documents" in this law do not mean only the end product of information processing. In contrast to the majority of local disclosure ordinances, the AIDL does not require that the document have already been "circulated and approved" *(Kyoran/Kessai),* namely having undergone a decision making procedure. A document held by the administrative organ for *organ-*

[16] "The basis of the information disclosure system in Japan is, in reality, "(public) documents", even when the keyword "information" is placed as a label. On this premise, the system is designed, established and put in practice." (Ide 1998a:198)

[17] It was the HIV document scandal that facilitated the legislation of the AIDL at the final stage. Hemophilia patients, who had been infected by HIV-contaminated non-heat-treated blood products, demanded the disclosure of related documents, but the Ministry of Health and Welfare denied their existence. However, after a search was ordered by the newly appointed Minister *Kan Naoto*, the documents were soon "discovered".

[18] "The guideline for the management of administrative documents" (2000.2.25) was agreed among ministries, according to the standard set by the Art.16 Para.1 of the Cabinet Order for the Enforcement of the AIDL.

izational use suffices (Art.2 Para.2). Therefore the documents prepared or obtained during the process of dealing with a particular matter are also subject to disclosure, so long as the disclosure would not risk unjustly harming the frank exchange of opinions, the neutrality of decision making and so on. (Deliberative Process Information.[19] Art.5 Item (5))

Thirdly, there are some local ordinances that try to include the responsibility of the government to prepare certain kinds of information. The information disclosure ordinance of Niseko, a small town in Hokkaido, is unique in this aspect. The ordinance grants "any person" the right to request "information on the municipal policy"(Art.5). If the requested information does not exist, the administrative organ may either decide not to disclose because of non-existence or *prepare or obtain documents* on the municipal policy and disclose them to the requester (Art.13)[20]. The ordinance expects that preparing such documents would improve the style of document management.

Fukuoka, the biggest city in Kyushu with over a million residents, amended its information disclosure ordinance in Mar. 2002. The amendment stipulates several categories of information to be actively made public (Art.36 para.2). When the administrative agency rejects a disclosure request on the ground of non-existence of documents, the agency shall strive to provide information that corresponds to the request (Art.11 para.3). The local Information Disclosure Review Board can not only investigate complaints about disclosure, but it also has the right to make active proposals concerning active information disclosure, information provision, and management of administrative documents (Art.23 para.3).

---

[19] The expression "decision making process information", which had been used in many local ordinances, was intentionally avoided.

[20] The latter measure is taken only when it is considered to be "beneficial for the town", and inevitably there exists administrative discretion.

3. Obligation-Based Argument: "Accountability of the Government"

(a) People's Sovereignty

Art. 1 of the AIDL uses the phrase "accountability" as the purpose of the law: information disclosure ensures that the government is accountable to the people, which is in accordance with the principle of people's sovereignty. As mentioned above, the phrase was chosen as a substitute for the "right to know".

There had been skepticism that the direct accountability of the government to a certain individual would not be compatible with the parliamentary system in Japan. However, the information disclosure legislation in such Westminster Charter countries as Australia, Canada and New Zealand (1982) and later the U. K. (2000) diminished the persuasiveness of this skepticism[21].

Art. 3 grants "any person" the right to request disclosure regardless of nationality or residence.[22] Although this decision was welcomed by the public, it is difficult to be derived from the concept of people's sovereignty. The *Commentary* explains this as an argument of policy, not of principle: while there are no positive reasons for excluding foreigners, it is desirable from the viewpoint of policy for Japan to open to the world an information window.[23]

Although the very English term "accountability" was expressly used during discussions (ARC Secretariat 1997, 68; Schultz 2001: 148), the Subcommittee chose the Japanese phrase "*Setsumei Sekimu*" (obligation to explain) to translate

---

[21] The *Commentary* does not show a clear-cut position on this skepticism. "The establishment of a system through which administrative organs fulfill their accountability to the people would contribute to more effectively realizing the management of the government based upon the idea of popular sovereignty under the government structure of the present constitution"

[22] This was another notable feature of the legislation compared with the many local ordinances that limit eligibility.

[23] Pointing out this part of the Commentary, Ide sees manifestation of "the right to know as a human right" in the "any person" clauses in the AIDL. He contends that this "human right" should not be obscured by emphasizing "people's sovereignty" (Ide 1998b, 125). According to Okudaira, "any person" clause, which is remarkable in view of the Japanese tendency to persist eligibility by nationality, is a manifestation of the universal character of information disclosure system. The central government failed to propose a system that is "unique to Japan", although they wished to do so (Okudaira 1996, 20-21).

the concept. However, when the government is considered to have an obligation to explain its conduct to the people, only passively disclosing existing documents (upon a citizen's request) is not enough. It would be obliged to actively and systematically prepare and present certain information to the people. As mentioned above, an information disclosure system alone would not serve such a purpose. Art. 40 of the AIDL stipulates that the government shall strive to enhance the measures to provide information, in order to comprehensively promote disclosure of the information. However, this article only abstractly stipulates the "duty to strive".

(b) Independent Administrative Institutions (IAI) and Special Corporations

In March 1997, a fire broke out at a nuclear waste reprocessing plant in Ibaraki Prefecture and radiation leaked outside. After the incident it became apparent the Power Reactor and Nuclear Fuel Development Corporation (*Donen*), a semi-governmental special corporation that runs the facility, covered up information on the accident. Misusage of its budget was also revealed. The corporation had also formally fabricated evidence when there was an accident with its high-speed reactor "*Monju*"[24].

Special Corporations (*Tokushu Hojin*), corporations that were founded directly by laws or founded through special establishing acts brought about by special laws,[25] have played an important part in Japan's political economy. Especially in the 1960s, when the national economy grew rapidly, these corporations performed various semi-governmental functions. However, in 1997, the final report of the Administrative Reform Council pointed out that for some

[24] See also Boling 1998, 18; Tsuruoka/Asaoka 1997:237. In October 1998, the corporation was reorganized into the Japan Nuclear Cycle Development Institute.

[25] In Japan, commercial corporations can be established according to the Commercial Law or the Law on Companies with Limited Responsibility. Public interest corporations can be established on the basis of Civil Law. Recently new categories of corporations have been legalized such as the Non-Profit Organization Law or the Intermediate Corporation Law (*Chukan Hojin Ho*). "Special law" means here that the corporations are not established according to these general schemes but by the provisions of special laws.

corporations: (1) the social need for them had diminished, (2) they hindered the activities of private enterprises, and that the corporations and others also had problems in (3) too strong a connection with ministries[26] or (4) ineffective financial management.

Following the occurrence of many scandals concerning special corporations, there were demands for the inclusion of those special corporations into the scheme of the AIDL in the legislative discussion. The *Outline* did not include them in the scheme of the AIDL on the ground that the Special Corporations are diverse in character (the *Commentary*). Instead, the AIDL Art.42[27] stipulates that the government shall take necessary measures, including enacting legislation, for disclosure in accordance with their character and type of business.

Following prior comparative research[28], the Special Corporation Information Disclosure Study Committee (hereafter "the *Study Committee*") was established. Meanwhile, Independent Administrative Institutions, a new scheme of public corporations modeled on the British "agency"[29], were introduced, and disclosure of their information was also discussed. Based on the Committee's Opinion (Jul.27, 2000) (hereafter "the *Opinion*")[30], the "Law Concerning Access to Information Held by Independent Administrative Institutions etc." was enacted (promulgated: Dec.5, 2001. hereafter "IAI-IDL")[31].

The scheme of the IAI-IDL is virtually identical to that of the AIDL. However, it is notable that Art.1 (purpose clause) also mentions explicitly

---

[26] Many such corporations welcome retired bureaucrats into their senior positions ("AMAKUDARI" (descent from heaven)) Duck 1996, 1696-1699.

[27] The original version in May 1999. Amended due to the enactment of the IAI-IDL.

[28] "Research on information disclosure of special corporations", *http://www.soumu.go.jp/gyoukan/kanri/990707e.htm*

[29] IAIs are corporations established by law for the purpose of carrying out projects that are necessary for the public good. These projects do not have to be under the direct management of the government, but are often those that would not be carried by private companies alone, and those that are most effectively carried out by a single institution to achieve the stated objectives. (General Law Concerning IAIs, Art.2)

[30] *http://www.soumu.go.jp/gyoukan/kanri/tokukou_mokuji.htm*

[31] It is unique from the viewpoint of comparative law to regulate information disclosure of administrative organs and government-related corporations by separate laws. Although their contents do not differ, the government chose to enact another law on technical legal grounds (Uga 2000, 28-29).

"providing information on the activities of IAIs etc." The law is said to see the access right to information and information provision system as "a pair of wheels" (Uga 2002, 177). Art.22 stipulates that IAIs etc. should provide people certain information on the organization, operation, and finance as stipulated by Cabinet Order.

The foremost issue in the legislation was, not surprisingly, the scope of the law, namely which corporations would be subject to information disclosure. As mentioned above, the rationale for disclosure in the AIDL was found in "accountability" of the "government" to the "people as the sovereign". The IAI-IDL utilizes the same logic. The *Opinion* makes it clear that the purpose of the IAI-IDL is to fulfill the accountability of the government to the people.

In order to attain this, *the Opinion* therefore states, *corporations that constitute a part of the government* should fall under this law, since they are directly accountable to the people.

> *"It is not only administrative organs that perform governmental activities. They are carried out also by various actors and in various manners. Those actors that can be considered to constitute a part of government are, for themselves, accountable to the people in the same way as administrative organs..... Various special corporations, serving various policies, cannot* en bloc *be considered to constitute a part of the government."*

However, what corporations can be categorized as "a part of the government"? The *Opinion* contends that it is a problem of how we interpret the intent of the law that establishes the corporation, which is generally judged by the following two criteria: either (1) corporations whose highest position (chairman of the board of directors etc.) is appointed by ministers of the cabinet and/or (2) corporations in which the government invests should be regarded as such. It was clear that all IAIs (60) shall fall under the law. For the Special Corporations (86) and Licensed Corporations (96)[32] the *Opinion* examined them individually according to the above criteria[33].

These criteria focus more on the corporate organization and its relationship to the government than on the nature of activities it carries out. It was the logical conclusion of the "part of the government" approach. However, there is also a criticism of this approach, which contends that the government/non-government classification does not necessarily correspond with whether the people want to know about the activities. The criticism also refers to "the right to know"[34]. During the discussion by the Study Committee, it was discussed whether the right to access could be derived not from people's sovereignty but from "public interest character" (*Kokyosei*) of the corporations. However, the idea was abandoned because the "public interest character" would be too broad a concept, which could be applied to pure private companies such as electricity or gas companies[35].

The latter approach would mean placing the government/non-government distinction in a relative context. Nakagawa hints at the possibility of this approach.

> *"Such matters as governance and accountability can be an issue for any corporations or organizations. Take the example of the Company Law or the Security Transaction Law. They establish the rules that aim at the adequate governance or accountability of joint stock companies etc., regulating the organization and relationship between directors, auditors, and stockholders. .....Governance or accountability has various issues. Some issues cannot be applied uniformly to organizations only because they are "govern-*

---

[32] Licensed Corporations (*Ninka Hojin*) have the same feature as special corporations in that they are based not on the general scheme of Civil or Commercial Law, but on special laws. However, unlike special corporations they are neither established directly by law or nor by acts of public officials. They are established by private promoters and licensing by the minister is required for the establishment.

[33] However, the *Opinion* had to make rather complicated exceptions. For example, NTT Company (holding company) and Kansai Airport Company are joint stock companies, but the substantial part of the stocks of each are owned by the government. (*Tokushu Kaisha*, Special Companies). The *Opinion* decided to include the latter but exclude the former, since the NTT stocks are listed on the stock exchange (cf. Uga 2000:30).

[34] Matsubara Satoru, in: Akiyama et al 2000, 5, 7. Matsubara participated in the Study Committee but not as an advisor (*Sanyo*).

[35] Akiyama Mikio, in: Akiyama et al 2000, 6.

mental organizations". .... If we are to discuss about the adequate style of governance or accountability, we cannot judge it only from the features of the establishing laws[36]*. We must look at the activities the organizations perform, which is the normal viewpoint in corporate laws in general (Civil and Commercial Law, Religious Corporation Law, Private School Law, Social Welfare Activities Law, NPO Law etc.)....." (Nakagawa 2000, 476, 494)*[37]

Interestingly, the phrase "part of the government" was omitted from the final version of the IAI-IDL. The final purpose of the law is to ensure "that Independent Administrative Institutions etc. are accountable to the people for their activities" (Art.1). The above criteria are not mentioned in the law[38]. Therefore, from only the provisions of the law, it is difficult to see why those corporations are chosen and why they are accountable to the people. One cannot help getting a tautological impression from the law.

It should also be noted that, when compared with the AIDL, the IAI-IDL puts more weight on information provision measures. "Information provision concerning activities of IAIs etc." is included in the purpose clause (Art.1). Art. 22 stipulates that IAIs etc. should provide documents, drawings, or electromagnetic records that contain information on their organization, activities and finance, including their evaluation or the record of audit. It also mandates IAIs etc. to provide information on corporations in which the IAIs etc. invest.

(c) A Crossroad ?－Disclosure of one's own personal information

Art.5 Item 1 (personal information) exempts "information concerning an

[36] Hashimoto calls this kind of "establishing law-oriented legal positivism" (Hashimoto 2002, 34, 54).

[37] According to Funada's (2001, 754) understanding, the *Opinion* itself did not pick up corporations from the viewpoint whether or not they constitute administrative subjects (*Gyosei Shutai*) but by the approach that is unique to the information disclosure system: whether the corporations have such special organizational or managerial features that necessitate the same level of accountability as administrative agencies. Hashimoto (2002, 53) also agrees to such a view.

[38] It was probably difficult to mention the criteria within the law since it allows exceptions.

individual" from disclosure. So long as the information could possibly lead to the identification of a specific individual, it is exempt from disclosure (Schultz 2001, 138). The AIDL Subcommittee refrained from using the term "privacy", which is used by some local ordinances, since the precise content is not entirely clear, neither legally nor in the common social idea (the *Commentary*).[39] Notwithstanding this, it is widely acknowledged that the intent of this exemption is to protect personal privacy (Matsui 2001, 187).

Now, here comes another problem. When a person requests information that concerns his or her own information, how should the request be treated ? There are no express provisions on the law concerning this, but the *Commentary* denies the disclosure in such a case. It contends that the problem should be dealt with within the framework of personal information protection law and not within the framework of the information disclosure system (Schultz 2001, 156; Kadomatsu 1999, 43)[40].

This was a problem that had already been noticed by courts on several occasions in connection with local ordinances. Let me highlight one case. A woman in Hyogo prefecture gave birth to a baby with the assistance of an obstetrician but the baby died soon after birth. Being suspicious of maltreatment, she requested disclosure of the itemized account of the medical practice, which was possessed by the prefecture because of the health insurance payment.

---

[39] There are three exemptions to this disclosure exemption, namely (a) public domain information and (b) the information recognized as necessary to be made public in order to protect a person's life, health, livelihood or property are to be disclosed. In addition, when the information concerns performance of duties by public officials, the position (but not the name) of the officials and the content of the performed duties shall be disclosed, even when such a disclosure leads to identification. (The *Commentary*, Kadomatsu 1999, 43.)

[40] The present "Law Concerning the Computerized Personal Information Held by Administrative Organs" in Japan allows individuals to have access to their own information, but the law deals with only computerized information and it exempts medical and educational information from being accessed. The government proposed a new bill on personal information protection to the Diet. The bill contains (1) basic principles of personal information protection that apply both to governmental organizations and private enterprises as well as (2) general obligations of private enterprises that deal with personal information. However, the bill has not passed the Diet, mainly because of the opposition that fears possible infringement of the freedom of the media. The government also submitted a bill concerning all personal information held by administrative organs and by IAIs and Special Corporations, which faced the same fate.

The request was denied, so she filed a suit against the denial. Kobe District Court denied her claim.[41] The court reasoned that the non-disclosure information clause in the prefectural ordinance is supposed to distinguish information (a) that shall be disclosed to anyone (any national, any resident) (b) that shall not be disclosed to anyone. Therefore, so long as the information is regarded as privacy information, no matter who is the claimant, it should not be disclosed. The information classified as (a) is, in other words, only the *common property of the residents that has public or social importance*. The court emphasized the fundamental difference of the information disclosure system and the personal information protection system in their basic principles, features, and legal construction.

However, the Osaka High Court reversed the decision[42]. According to the decision, the Information Disclosure Ordinance proclaims *the principle that all public documents shall be disclosed*. The intent of the privacy clause is that, as an exception, the disclosure principle must make way for the protection of individual privacy. Where there is no need to protect individual privacy, returning to the principle, the information shall be disclosed.

Recently, the Supreme Court upheld the High Court decision[43]. The court stressed the fact that the prefectural personal information protection ordinance was not enacted at that time. According to the court, the information disclosure system and the personal information protection system are not incompatible, but rather supplement each other in order to have public information disclosed. Therefore one can request the disclosure of one's own personal information, *so long as the personal information protection system is not yet adopted*, and so long as the information disclosure ordinance does not explicitly exclude such a request[44].

---

41 Kobe District Court 1995.11.27 Gyoshu 46-10/11-1033
42 Osaka High Court 1996.9.27 Gyoshu 47-9-597
43 Sup.Ct. 2001.12.18 Minshu 55-7-1603

This issue concerns the fundamental understanding on what information disclosure really means. Is it a system that is only designed to produce public domain information for the functioning of democracy ? Or can we allow other purposes such as personal information protection (control of one's own information) to be achieved by the system ? The District Court supports the former position. The latter is supported by the High Court.

Munesue endorses the latter view. He points out that the function of the information disclosure system is not only to serve the abstract "public forum". The system can be seen as a tool to achieve "fairness" within a particular context of social relations in a pluralistic society (Munesue 2001, 33-35)[45]. This argument, which paves the way for the disclosure of one's own personal information, is linked to his basic understanding of information disclosure. According to Munesue, information disclosure not only serves democracy, but also individualism. In the information society, free access to minimum information is a necessary precondition for the existence as a person, or the free development of personal character *(die freie Entfaltung der Persönlichkeit).* On the other hand, the actual information society tends to facilitate information monopoly. In such a situation, the administration has an obligation to provide minimum information that is necessary for the personal existence of the "information weak", which is the rationale for the "right to know". From this perspective, he criticizes the decision of the AIDL Subcommittee not to mention the right to know (Munesue 2001, 295-298).

In Munesue's view, "the government" is once again placed in a relative context. We should not only see an abstract relationship between "the government" and "the individual", but also pay attention to the context of the problem

---

[44] This rather eclectic position of the Supreme Court is nevertheless interesting, because the court may be understood to distance itself from the position of the AIDL Subcommittee.

[45] Shibaike also allows disclosure of one's own personal information. He understands that the present information disclosure system has a comprehensive character that can include personal information, which can also be the subject of personal information protection (Shibaike 1991, 97).

in concrete social relations. This corresponds with Nakagawa's view[46] that the system of governance or accountability differs according to the nature of the corporate activities. It should also be noted that Munesue links the right-based argument to this relative context[47].

Nakagawa treats the problem from a somewhat different perspective. He points out the importance of the role allocation between the information disclosure system and the (obligatory) information provision system. It goes without saying that the latter presupposes the disclosure of information to the public as the unspecified multitude of individuals. The information provision system is the primary system that serves accountability to the public. The information disclosure, passive in its nature, should be seen as a complementary system for the accountability that allows for the individual and contextual treatment of the information.[48]

4. Concluding Remarks

Throughout this paper, the author has tried to describe the features of the information disclosure system, using the information provision system as a point of comparison. With its passive and *ad hoc* character, information disclosure may not be a system that guarantees a sufficient amount of information necessary as a prerequisite for the "right to know" of an individual. Seen from the perspective of the government, the information disclosure alone is not enough to fulfill its "obligation to explain".

Public administration, as an organization, can be seen as a system that gathers, processes, possesses, and distributes information. Information disclosure focuses only on the information[49] possessed by the administration and

---

[46] Note 37, supra.

[47] The text here relies heavily to the analysis in Nakagawa 1998.

[48] Nakagawa 1998 (2), 59-60. It should however be noted that Nakagawa leaves large room for legislative discretion, not necessarily sympathizing with the Constitutional right-based arguments. Nevertheless, he does not think that the AIDL denies disclosure of one's own information, because he recognizes no binding power to the drafters' intention (the *Commentary*) in interpreting the law (Nakagawa 1998(2), 69-70).

mandates that the information be disclosed to the requester. It does not directly regulate gathering and processing of information[50]. It does not regulate distribution after the information has been conveyed to the requester, leaving it entirely up to the requester how the obtained information is utilized.

When considered from the perspective of the adequate governance of the system, the function of information disclosure as a tool must always be evaluated in combination with other tools, such as the information provision system, administrative procedure regulations[51], the public comment procedure[52], the policy evaluation system[53].

However, we should add two remarks. Firstly, in some particular areas, information disclosure does have a substantial, even radical effect. It was the activities of "Citizen's Ombudsperson", voluntary local watchdog groups, that brought information disclosure once again to the center of public attention. (Kadomatsu 1999, 36). Using information disclosure ordinances, the monitoring activities of these groups discovered misusages of public money, for example for entertaining central government bureaucrats. The activities changed Japanese administrative practice significantly (Repeta 1999, 22-41)[54]. Recalling a famous metaphor of "sunlight as a disinfectant" (Brandeis) or likening the AIDL to a "strong medicine"[55] would be, in this context, quite appropriate. Information disclosure can be a very effective monitoring tool[56], not only for use by the citizens, but also in the context of a politics-bureaucracy relationship[57].

---

[49] Strictly speaking, the focus of the law is the "document", medium in which information is stored (supra p.668).

[50] However, the decision of the AIDL to include not only finalized documents but all documents under "organizational use" may have an effect on the decision making (information processing) process.

[51] Administrative Procedure Law (Nov.12, 1993)

[52] Cabinet Decision (Apr.1, 1999)

[53] Policy Evaluation Law (June 29, 2001)

[54] Critical analysis by Shindo 1998, 559-566.

[55] Remark by Prof. Shiono, deputy chief of the AIDL Subcommittee at the press conference (Fujiwara 1998, 72 (Note 42)).

[56] Interestingly, the *Outline* proposed to put the phrase "monitoring of and participation in administration by the people" in the purpose clause, but it was replaced by "people's accurate understanding and criticism" at the final stage. See Schultz 2001, 150.

Secondly, in the author's view, "monitoring" administrative activities may be a part of the people's rights and duties *as a sovereign*, but probably not the central part of them. The information disclosure system should be evaluated in the sense of how it contributes to discussions and deliberations in the public sphere.

We have confirmed so far that information disclosure is a passive system that functions only upon request by citizens, not systematically treating information. It is a system that regulates only existing documents. However, seen from a different perspective, these shortcomings of administrative disclosure can turn out to be its unique feature.

Shibaike compares information provision and information disclosure and provides the following remarks. "Information provision allows large administrative discretion in sorting out the provided information. In addition, provided information does not have to be "raw" (primary) information. Therefore, an information disclosure system, upon request, would have the unique advantage of obtaining information not provided by the information provision, or in order to verify the provided information by the raw information". Ide stresses that "accountability" is not just an "explanation" of deeds or results or giving reasons to them. The concept means to make objective facts or results public, and to leave the judgment thereof to the people (=trustor) (Ide 1998b, 126-128).

Information disclosure is a system that does not care about the "purpose" or "meaning" of information, or the positive effect of disclosing particular information[58]. That means that people can individually ascribe different meanings on the obtained information[59]. Differences in the ascribed meanings may sometimes be governed by the context of social relations[60] in which those individuals

---

[57] See Schultz 2001, 147. Critical analysis by Shindo 1998.

[58] In the judgment of non-disclosure information, it does care about the *negative* effect of disclosure for administrative purposes. Exceptionally, a positive meaning, relevance to the protection of life, health etc will be considered, in order to override non-disclosure grounds (Art 5 Item 1(a), Item(2))

[59] Discussions on the disclosure of one's own personal relation are related to this.

are placed, however we may be permitted to think that ascribing a meaning to something is a central part of what it is to be human beings. Communication in the public sphere would require such diversity, if we believe in its development, and in democracy being something different from both technocratic control using figures or leaving control to the effectiveness of market mechanisms.

〈Bibliography〉

(In Western Languages)

Beer, Lawrence W/ Ito, Hiroshi 1996: The Constitutional Case Law of Japan, 1970 through 1990, University of Washington Press

Boling, David 1998: Access to Government-Held Information in Japan: Citizens' "Right to Know" Bows to the Bureaucracy, 34 Stanford Journal of International Law 1

Brown, Ronald G 1977: Government Secrecy and the "People's Right to Know" in Japan: Implications of the NISHIYAMA Case, 10 Law in Japan 112

Duck, Ken 1996: Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market and Market Governance, 19 Fordham Int'l L.J. 1686

Gassman, Jürg 1990: Geheimnisschutz, Informationsfreiheit und Medien im japanischen Recht, Carl Heymann

Horibe, Masao 1992: Making "Freedom of Information" Laws in Japan, 20 Hitotsubashi Journal of Law and Politics 33-45

Itoh, Hiroshi/Beer, Lawrence W. 1978: The Constitutional Case Law in Japan, Selected Supreme Court Decisions, 1961-70, University of Washington Press.

Kadomatsu, Narufumi 1999: The New Administrative Information Disclosure Law in Japan, 8 Zeitschrift fuer Japanisches Recht 34-52

---

[60] Munesue 2001, 34

Repeta, Lawrence 1999: Local Government Disclosure Systems in Japan, NBR (The National Bureau of Asian Research) Executive Insight Vol.16, *(http://www.nbr.org/publications/executive_insight/no16/index.html)*

Schultz, David Moses 2001: Japan's Information Disclosure Law: Why A Law Full of Loopholes is Better than No Law At All, 27 Law in Japan 128

(In Japanese)

Administrative Reform Committee (ARC) Secretariat（行政改革委員会事務局）1997：『情報公開法制―行政改革委員会の意見』第一法規

Akiyama/Tajima/Funada/Matsubara/Miyake（秋山/田島/舟田/松原/三宅）2000：「座談会・特殊法人等の情報公開制度をめぐって」ジュリスト1187、2-26

Fujiwara, Shizuo（藤原静雄）1998：『情報公開法制』弘文堂

Funada, Masayuki（舟田正之）2001：「特殊法人等の情報公開制度」塩野古稀『行政法の発展と変革』上、有斐閣、739-764

Hasebe, Yasuo（長谷部恭男）1999：「行政情報の公開と知る権利」長谷部『憲法理論のフロンティア』、岩波書店、135-158

Hashimoto, Hiroyuki（橋本博之）2002：「行政主体論に関する覚え書き―情報公開制度との関連で」立教法学60、30-59

Ide, Yoshinori（井出嘉憲）(ed.)1998：『講座情報公開』、ぎょうせい

Ide, Yoshinori 1998a：「情報公開制度と文書管理」Ide 1998、197-248

Ide, Yoshinori 1998b：「公開パラダイムの受容と変容」Ide 1998、107-134

Matsui, Shigenori（松井茂記）2001：『情報公開法』有斐閣

Munesue, Toshiyuki（棟居快行）2001：『憲法学再論』信山社

Nakagawa, Takehisa（中川丈久）1998：「情報公開制度における本人開示について（上）（下）」自治研究74(7)、67-85；74(8)、54-74

Nakagawa, Takehisa 2000：「米国法における政府組織の外延とその隣接領域」金子古稀『公法学の法と政策（下）』、有斐閣、473-497.

Okudaira, Yasuhiro（奥平康弘）1996：「中間報告を読んで―ある憲法研究者の感想」ジュリスト1093、19-25

Okudaira, Yasuhiro/Shiono, Hiroshi（奥平康弘/塩野宏）1997：「座談会・情報公開法の制定に向けて」法律時報69(1)、11-23

Sakamoto, Masanari（阪本昌成）1995：憲法理論III、成文堂

Shibaike, Yoshikazu（芝池義一）1991：「情報公開制度と権利保護」法律時報63(12)、92-99

Shibaike, Yoshikazu 2000：「特殊法人の情報公開に関する報告書の検討」ジュリスト1187、37-42

Shindo, Hyo（進藤兵）1998：「市民参加と情報公開」Ide 1998：557-589

Uga, Katsuya（宇賀克也）2000：「特殊法人、独立行政法人、認可法人等の情報公開」ジュリスト1187、27-36

Uga, Katsuya 2002：『新・情報公開法の逐条解説』有斐閣

Tsuruoka, Kenichi/Asaoka, Mie（鶴岡憲一/浅岡美恵）1997：『日本の情報公開法』花伝社

Uzaki, Masahiro（右崎正博）1998：「情報開示請求権と『知る権利』」Ide 1998、137-165