

Court Decisions between Transparency and Privacy: a Report from an ongoing Swiss Research Project

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The judiciary should provide access to court decisions, while – at least in continental Europe – protecting individual privacy by anonymizing personal information or by other means. However, these two claims, based on fundamental rights, are to a certain extent mutually exclusive. A Swiss research project aims to determine how both requirements can be met. The article gives an overview of the project and shows first results.

The Background

Today the justice systems all over the world are challenged by the antagonism between the public interest for transparency (specifically the right to access to court decisions) and the human right to privacy (in particular the right to be forgotten). This antagonism raises fundamental questions regarding access in an interconnected information society with respect to two groups of stakeholders: how freely should people outside the judiciary (extra judiciary) be able

to access judgments and how should those working within the judiciary (intra judiciary) be able to access former court decisions through electronic archiving?

In Switzerland many courts already publish their rulings on the Internet. The federal courts have to publish their decisions based on legal regulations. For the courts in many of the 26 Swiss cantons the publication of court decisions is still in development. In Switzerland as well as in most other countries of continental Europe the court decisions published on the internet must be anonymized; this is required either by data protection law (rather implicit as explicit) or by organizational law. Parting from this information, it is astonishing that the European Court of Human Rights publishes its rulings fully open on the Internet without any anonymization of the names of persons involved. Up to now there was never any research on how much privacy people

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actually expect concerning court decisions and whether anonymizing court decisions is done by the only reason that law requires it or to fulfil a real need of wide parts of the population.

Currently in Switzerland projects have been launched that aim to create a unified system of *electronic court files*. As a consequence, the Swiss authorities in charge will have to determine in the near future who is granted access to the electronic court files and who can get what sort of information and what data from court files and court decisions.

The human right to privacy is challenged by the *opportunities opened up by data mining techniques* or other techniques supported by artificial intelligence (AI) on one hand. On the other hand, AI-techniques may also help to better anonymizing, considering that in most of the Swiss court the anonymization of court decisions is done either manually or with rather simple tools in Microsoft-Word-documents. At time, nobody knows the risks of de-anonymization of the published court decisions.

The Research Project

The research project “Open Justice vs. Privacy” deals with the anonymization of court decisions in an interdisciplinary way. It is part of the National Research Programme “Digital Transformation” (NRP 77) by the Swiss National Science Foundation (SNFS) and conducted by several institutes of the University of Bern.

In a first module, we aim to *clarify the legal situation* regarding the electronic publication of court decisions. In a doctoral thesis in law there will be an analysis focusing on the relevant *frame of the constitutional and international law* (working with classic legal methods, such as interpretation of the relevant rules and comparative law). The result will be an overview of all conflict zones between data mining technologies and fundamental rights in the field of judiciary, especially concerning the publication of court decisions. In addition there is a Master thesis on the subject of civil responsibility for lacking anonymization of published court decisions.

Secondly, there is work in *Computer Science* to analyse court decisions and determine how artificial intelligence can generate information from disidentified decisions. For this purpose, there was created a dataset containing several

hundreds of thousand Swiss court decisions. There is a lot of research ongoing on Natural Language Procession (NLP) and using NLP. The research includes *attempts for de-anonymization*.

Thirdly, we want to assess the positions of the various actors in the judicial system, i.e. courts, lawyers, litigants, media, society, and investigate the *opinions of experts and the public regarding transparency and privacy*. Currently a survey will be conducted involving a representative number of experts from different disciplines and professions like law, ethics, economics, psychology, ICT, judges, court managers, and the media. In order to know the interests and needs of the general public, the opinion of Swiss people on transparency and privacy in the judiciary will be investigated in a representative survey in summer 2023. Finally, there will be an expert seminar with inputs from representatives of each of the aforementioned disciplines and professions.

First Results

As the research project is still ongoing, the results available at time are but fragments or – to say it in an affirmative way – mosaic stones.

A study of comparative law showed that there is a big difference of the practice concerning anonymizing court decisions between Common Law and Civil Law models. In Civil law model there is either legal or traditional obligation to publish anonymized decisions. This practice can be seen because of – on the one hand – historical traditions of general clauses in implemented laws and, on the other hand current strict data protection law of the European Union. In Common law models (especially in England and Wales) the principle of transparency is of higher relevancy and also judicial trials are – in the eyes of society – rather a public than private matter. It results in publication of judicial decisions, which are not anonymized (with few exceptions). Interesting is also practice of Scots courts, as Scottish model is seen as a “mixed jurisdiction” between Common law and Civil law. Scottish courts tend to publish their decision without prior anonymization but also allow more exceptions to protect privacy.

A Master thesis showed that an insufficient anonymization of court decisions – not in compliance to the law and other rules – in the internet in some cases can lead to state liability. But if there is only pecuniary damage, this cannot be subject

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to civil responsibility. As long as the damage caused by insufficient anonymization can be linked to human action or omission – this is the case as well for manual anonymization as partially automated anonymization using conventional means or AI – it does not change dogmatic aspects of state liability. As soon as AI is used autonomously, the legal situation is unclear and cannot be conclusively assessed.

Up to now the research work in Computer Science showed, that it is not possible to build a general de-anonymization-tool with reasonable financial means. This is very encouraging, because it reveals that the general risk of de-anonymization seems to be low. Some specific attempts of de-anonymization in determined fields as public procurement showed, that de-

anonymization can partially be possible. One gateway to de-anonymization is register numbers like case number, numbers of court-files, license plates or postal codes (zip codes) as identifiers. For the readers of published court decisions such register numbers mostly are not relevant and could easily be skipped.

Outlook

The research project will end in May 2024. Only then we will have the whole of the picture and be able to make final interdisciplinary conclusions (intended to be published in IJCA). And only then the results of the project will show, if there have to be changes made in the practice of anonymizing court decisions by Swiss courts.

