

# Efforts to facilitate access to court and legal professions in Japan<sup>1</sup>

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## I. Introduction

Japan has experienced a dramatic increase in the number of legal disputes since the last century. Accordingly, the roles of lawyers and courts have been increasingly emphasized<sup>3</sup>. Nonetheless, we had not provided a sufficient number of legal professions that play a significant role in dispute resolutions. Courts were not able to address increasing demands toward the judicial system, either. To address this increase, several legal reforms have been made since the beginning of this century, especially since the report of Judicial System Reform Counsel was published in June 2001. This report, based on the idea that the rule of law should be strengthened and that more emphasis should be put on the role of our judicial system, clearly pointed out the importance of judicial system and legal professions. It says that everyone should be able to access our judicial system easily and to get satisfactory, prompt and effective judicial relief suitable for his/her various need. Multiplicity of reform proposals were deliberated, some of which were realized including launch of graduate law schools.

This paper shows some efforts to effectuate the purpose of this report, that is, to facilitate access to judicial system in civil cases, to court and legal professions. The paper proceeds as follows. Part II describes some procedural reforms to facilitate access to information on civil litigation. The code of civil procedure, ((hereinafter abbreviated as CCP), which was first codified in 1890, was completely reformed in 1998 and was reformed several times since then. Especially the reforms in 1998 and 2003 play important roles in making access to the judicial system much easier than before. Indeed, both reforms aimed at improving the process to gather information on litigations, though the former reform preceded the publication of the report. This

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<sup>1</sup> This paper is a preliminary draft for the Japan-Dutch Law Conference in 09/14/2008. I reserve the right to modify and correct this paper after the conference.

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<sup>3</sup> Although quite a few disputes have been still solved outside the judicial system, we have gradually recognized that most disputes should be solved through this system.

paper also refers to the limitation of access.

Part III details the problem of access to legal professions. In Japan, lawyer's attendance is not required to file a suit. However, after and even before going to court, lawyer's assistance is often indispensable. For instance, we might want to know whether or not the disputes we face are ones which can be solved through the judicial system. Or we might also want to know if we should file a suit, if we should settle in stead of filing it, if we have any chance to win, or how much we should pay to solve these disputes. Lawyers will be able to answer these questions. Although the number of lawyers has dramatically increased, a large number of people who live in areas where no or only a few lawyers are found still have difficulty in finding lawyers to ask for their advice. This paper introduces how the Japan Federal Bar Association tries to overcome this problem.

Part IV discusses the historical development and current issues of legal aid in Japan. Even if a sufficient number of lawyers or legal professions are available, in reality, not all people can actually afford to pay costs and fees for them. High costs and fees sometimes have kept us from using the judicial system. Legal aid is necessarily to get rid of this obstacle, and we have provided it indeed.

Part V outlines a newly-born institution which primarily aims at solving the problems described in Part III and IV. Then, Part VI summarizes this paper and points out some problems remaining to be solved.

## II) Access to Information

It has long been recognized that a huge information gap exists between plaintiffs and defendants in some types of modern civil litigation, such as product liability cases, medical malpractice. In these cases, plaintiffs often face difficulty in collecting information and evidence critical to win the cases, such as one regarding the defects of products, cause of injury. This type of problem is commonly recognized in other countries. While a number of legislative reforms have been made in the area of substantive law<sup>4</sup>, a drastic reform in the area of procedural laws had been expected to

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<sup>4</sup> Some legislations and cases shift the burden of proof so that parties who face

assure plaintiff's access to information. Following institutions abroad, such as discovery in the U.S. or the order to produce documents (Anordnung der Vorlegung) in Germany, two major reforms were made in the field of civil procedure. One is a reform in 1998; the other is that of 2003.

i) Reform in 1998

In 1998, the code of civil procedure, which was first codified in 1890 following the German code of civil procedure, was totally revised and modernized. Most rules are more or less attribute to realize easy access to court. Yet, new Rule 220 of CCP is probably one of the most influential and, at the same time, the most controversial rules, because it drastically changed the role of parties from passive one to much active one, by encouraging their active participation in the procedure.

The new Rule 220 says that;

In the following cases, a holder of a document should not deny to produce it, if

- 1) A party who refers to a document him/herself holds it.
- 2) A party who has to prove the fact is able to ask for handover or access to the document,
- 3) A document was made in the interest of a party or regarding a legal relationship between a party and a holder of the document.
- 4) Other than the first 3 cases, a document does not fall into either case below.
  - i) It contains matters listed in Rule 196.
  - ii) It contains secret of public officers whose disclosure will entail the violation of public interest or obstacles for their jobs.
  - iii) It contains matter listed in Rule 197(1)ii, iii
  - iv) It is primarily made for its holder's own use.
  - v) It is a criminal record etc.

In short, under the current rule, both plaintiffs and defendants, and even third parties who are not involved in the present litigation, generally cannot refuse to produce documents if requested. This new rule is completely different from the previous one. Under the previous rule, parties who were not responsible for proving the facts did not owe any obligations to produce documents or materials unless specifically required in the code. However, as documents or materials which parties or other persons hold often turns out to be critical to find facts, the current and new Rule especially Rule 220

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difficulty in proving the facts are easily able to access to important evidence. See...

(4) of CCP, makes it clear that parties should not refuse to produce documents unless these are fallen into the exceptions. In other words, both parties are generally obliged to produce documents which are critical to adjudication of the cases<sup>5</sup>.

Not every document is required to be produced in front of the court though. In consideration of the existence of conflicting interest, some types of documents are exempt from being open to public. For instance, documents which contain privilege, secrets of public officers, criminal records need not to be produced.

A couple of reforms have been made to clarify the scope of this exemption in case of public documents and criminal records. At the same time, a large amount of cases relating to Rule 220 have accumulated in the past decade or so. Particularly, the Supreme Court has played a significant role in clarifying the scope of the exemptions<sup>6</sup>. The most controversial exception is perhaps a document for its holder's own use. The purpose of this exemption is to protect privacy, freedom of decision making from unjustifiable disclosure. One case, where a bank refused to produce an approval document for lending, set up a relatively clear definition<sup>7</sup>. A document is one for its holders' own use if 1) the document is made primarily for its holder's (in case of organization, for its insiders' interest), 2) its disclosure would entail irreparable damages, like infringement of privacy, and 3) no exceptional situations exist. Though in this case, a bank was exempt from producing the approval document, there are a bunch of subsequent cases which weigh carefully the conflicting interests and which do not hesitate to order production.

## 2) Reforms in 2003

Rule 220 is only adapted to the pending cases. In other words, the court order to produce documents is required. Yet, parties also need information in advance to prepare the case. Before filing a suit, a preservative measure<sup>8</sup> is often used as a

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<sup>5</sup> The ground of this obligation might be probably difficult to explain; one plausible reason could be, however, that everyone is obliged to cooperate with the court to find facts and solve litigation, as is regulated in Rule 2 of CCP.

<sup>6</sup> Before 1998, the Supreme Court was not entitled to judge procedural matters, as these were regarded as frivolous.

<sup>7</sup> SC decision in 12.11.2003(Minshu53-8-1787)

<sup>8</sup> Rule 234 of CCP

substitute for a measure to access information on litigation in advance<sup>9</sup>, but it was no more than a temporary measure. Lawyers were also able to make inquiries to public or private organizations through bar associations. However, this inquiry did not work well without any sanctions. Therefore, following French Référé or German Selbständige Beweisverfahren, Rules 132-2~9 were added in 2003. According to Rule 132-2, a person who plans to file suits against someone else is entitled to ask them for information and evidence after giving a written notice. This notice should contain a detailed description of the case and the complaint for fear that this measure will be misused only to shop for information without filing a suit.

During the first couple of years though, this innovative measure was not used as widely as had been expected. It is presumably because lawyers did not know this reform, and more importantly, because neither any supervision by the court nor any direct sanction is provided unlike Rule 220. In other words, this rule assumes that both parties and both lawyers voluntarily exchange information, but some lawyers still feel hesitation to disclose critical information beforehand. As this measure can be used not only to prepare for the case, but also to promote negotiation or settlement between parties before filing a suit, it will hopefully be used widely<sup>10</sup>.

### III) Access to Legal Professions

More importantly, to encourage access to judicial system, lawyers must be easily accessible to users of the judicial system, as well as information and evidence on the cases.

Compared with other developed countries though, Japan has been known for a scarcity of lawyers<sup>1112</sup>. The report of Judicial System Reform Counsel therefore says

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<sup>9</sup> In practice of medical malpractice, some courts order medical institutions to produce medical records to preserve them from falsification. However this order actually functions as measures to

<sup>10</sup> Unfortunately, no data about the usage of this new measure seems is found so far.

<sup>11</sup> This fact does not necessarily mean that Japan is a primitive in the country in legal services. Alternately, other legal professions including in-house lawyers, shiho-shoshi, have played a critical role in providing legal service..

<sup>12</sup> According to p.288 of JURIST No. 1198, the total number of lawyers in Japan in 1997 was approximately 20,000, remarkably small in comparison with 940,000 in the

that the substantial increase in population of lawyers is an emergent issue. Though the situation, especially that in the metropolitan areas, has been dramatically improved through constant expansion of successful applicants of the national bar exam before and after the publication of the report<sup>13</sup>, many other local communities still have had only no or a few lawyers, contrary to our previous expectations. Rather, a gap in the number of lawyers per capita between metropolitan and rural communities seems to be wider than before.

Seriously, quite a few communities had no or only one lawyer there regardless of a recent increase in the total number of lawyers. These communities are called “zero one chiiki (zero/one areas)”. The number of zero/one areas was, for instance, 75 in 1993<sup>14</sup> and 78 in 1996, which consists of 40% of the total communities in Japan<sup>15</sup>. Eminently, zero areas gather in Hokkaido, the northern island of Japan. Therefore, to overcome this problem has been considered to be the top priority. The report of Judicial System Reform Counsel explicitly says that zero/one areas should be eliminated. A newly codified act, “Sogo Horitsu Shien Ho(Total Legal Support Act)”, as is discussed in Part IV, also clearly aims at eliminating these areas. Long before, however, Japan Federation of Bar Association (hereinafter abbreviated as JFBA) and other local bar associations had already tried to reduce zero/one areas. Noteworthy is the foundation of Himawari<sup>16</sup> public law firms. These law firms are founded in less populated areas based on financial support from bar associations<sup>17</sup>. Several lawyers are sent to each law firms every 2 or 3 year. As of July 2008, 67 firms have been founded as public law firms. They are assumed to be temporarily ones, but if lawyers

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U.S., 82,000 in UK, 111,000 in Germany and 35000 in France. Even if the total population is taken into consideration, (20,000 in Japan, 438,000 in US, 175,000 in UK, 170,000 in Germany and 76,000 in France)

<sup>13</sup> For instance, in 1975 the number of successful applicants was 472, but in 2003, it rose to 1,000. (p.281 of JURIST No. 1198) According to the data provided by JFBA, the total number of registered lawyers as of September 2008 is 25,000. See.

[http://www.nichibenren.or.jp/ja/jfba\\_info/membership/index.html](http://www.nichibenren.or.jp/ja/jfba_info/membership/index.html)

<sup>14</sup> [http://www.nichibenren.or.jp/ja/special\\_theme/kaso\\_henzai.html](http://www.nichibenren.or.jp/ja/special_theme/kaso_henzai.html)

<sup>15</sup> At the general meeting of JFBA held in May 1996, it is declared that lawyers' deficiency should be resolved by 2001(so called Nagoya Declaration)

<sup>16</sup> literally Himawari means Sunflower; however this is also regarded as a symbol of justice and fairness. Therefore it is used as a symbol of lawyers.

<sup>17</sup> These law firms are able to obtain financial support to establish and open the firms up to 10 million yen, equivalent to 100,000 USD.

prefer, they could be converted into permanent ones<sup>18</sup>.

This effort is taken over by Hou Terasu described in Part V and have greatly contributed to elimination of zero/one areas.

#### IV) Access to Legal Aid

Another problem in Japan is legal aid. Perhaps undeniably, financial supports should be given to people who cannot afford to pay costs and fees to use the judicial system to dispute resolution. Especially the structure of legal costs specific to Japan also pushes up the demand for legal aids. According to Rule 61 of CCP, losing parties owe litigation costs and fees of both parties ultimately, but both parties have to pay these costs in advance. Furthermore, parties are responsible for their own lawyers' fees; a losing party is not responsible for the lawyer's fee of the opponent party<sup>19</sup>.

To support the former litigation costs, the court is able to grant an extension of their payment (Rule 82~96 of CCP), for people who do not have sufficient funds to pay these costs and those who have some possibilities to win the cases. On the contrary, JFBA historically supported lawyers' fees, which sometimes run into a large amount. In 1952, JFBA fully founded the establishment of the Japan Association for Legal Aid. Later in 1958, the government started to subsidize this association. However, this legal aid has a couple of problems.

One is budget deficiency. In contrast to UK<sup>20</sup>, where the government subsidy is said to be the sum almost equally to 20 billion yen annually, our government subsidy amounted only to 200 million yen in 1999. This is because providing legal aid was not recognized as a duty of our government; the activity of the association was largely dependent on bar associations and the government only partially subsidized it. To overcome this problem, Minji Horitsu Fujō Ho (Act for Civil Legal Aid) codified in 2000 explicitly says that the government has a responsibility to improve the legal aid.

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<sup>18</sup> Currently, 19 public law firms have been converted into permanent law firms.

<sup>19</sup> This system is completely different from the U.S. system where a losing party needs to pay lawyers' fees of both parties. Several attempts to introduce US system into Japan were all unsuccessful.

<sup>20</sup> UK is now facing a serious budget problem due to expansion of legal aids though. See Section VI).

Following this act, Legal Aid Foundation is newly founded as a public corporation, which is responsible for legal aid. The scope of legal aid is also expanded; legal aid is given for the fees for memo preparations, as well as the fees necessary for lawyers to represent their clients. Consequently, legal aid was granted in more cases thereafter<sup>21</sup>. Nonetheless, legal aid was still far from being desirable one, because this new act was heavily independent on bar associations both personally and financially.

Another problem was its severe requirement. An application should meet three requirements for legal aid to be granted. 1) An applicant cannot pay lawyer's fee because of lack of funds, 2) an applicant has some possibility to win or settle the case, and 3) an application does not violate the purpose of legal aid. The application whose primary purpose is in revenge or advertisement is therefore not allowed. Moreover, in principle, parties have to reimburse the costs to the association. The extension or exemption of payment is rarely granted.

V) Sogo-Horitsu Shien Ho(Total Legal Support Act in 2004) and Hou Terasu(Legal Terrace).

The purpose of the Total Legal Support Act in 2004 is to make access to court, other institutions for dispute resolution, lawyers and other legal professions much easier by unifying the legal service previously given individually by JFBA or local bar associations and by offering the legal services all over Japan. Based on this act, the Center for Japan Legal Aid was founded in October 2006 in the form of independent administrative organization, which is often called Hou Terasu (Legal terrace)<sup>22</sup>. Hou Terasu has its head office in Tokyo, with branch offices are all over Japan.

Hou Terasu provides several kinds of service described below (Rule 30I of Total Support Act);

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<sup>21</sup> In 2005, the number of cases where legal aids were granted for representation was 56000, 4 times as large as in 2000.

<sup>22</sup> Strictly speaking, it is different from ordinal independent administrative organizations in the sense that its activity is under the supervision of the Supreme Court.

- i) To provide legal information,
- ii) To provide legal aids for civil cases,
- iii) To provide legal service in zero/one areas, through regular dispatch of lawyers to these areas,
- iv) To assist criminal victims<sup>23</sup>.

Here are the detailed explanations about the above three jobs,

i) Provide Legal Information

Hou Terasu established a system of providing legal information about available legal institutions for dispute resolution, available lawyers/legal professions etc. to its users over the phone, e-mails and internet. For example, from 50 to 80 operators are always ready for answering inquiries over the phone at a calling center in Tokyo. People who ask for legal information are able to call to this center from all over Japan. This call center is not allowed to give legal advice based on individual situations; however, it is able to give its users general information on legal consulting systems. More importantly, this service is provided for free. The users have to pay only the price of a phone call. In addition, this center is able to provide with common and uniform answers regardless of where users live. Of course, each branch office is also ready to give information specific to its areas. The same type of service is also available through e-mails. General information on law firms and lawyers are also available on the website of Hou Terasu (<http://www.houterasu.or.jp/>).

ii) Legal Aid

Hou Terasu, which is also subsidized by the government, takes over the job to provide legal aid previously done by bar associations. The eligibility for legal aid remains as strict as the previous one and the fees should be reimbursed later, but some improvements are also found.

First of all, in Hou Terasu, the scope of legal aid was expanded; in addition to the fees for memo preparations and representations, legal consultations are also financially aided. Moreover, aid is given for legal consultations, regardless of the possibility of win or settle is not required to get legal aids. (Reimbursement is not required, either). Therefore, usually, upon request of legal aid, free legal consultation is given first. Then

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<sup>23</sup> This paper skips the detailed description about this service.

aid for memo preparation or representation is taken into consideration, if additional process turns out to be necessary for dispute resolution. Legal aid in Hou Terasu also requires insufficiency of funds; however, this requirement is eased so that at least the bottom 20% of the total population meets it<sup>24</sup>.

Secondly, the screening process for applications is accelerated. Hou Terasu abolished a collegial system previously used. Instead, generally only two examiners judge applications. Additionally, it adopted a written evaluation in place of oral hearings.

### iii) Hou Terasu Law Firm

Hou Terasu has many branch offices all over Japan<sup>25</sup>, where staffs regularly work to give legal information. Furthermore, so called Hou Terasu law firms are founded especially in less populated areas, where full-time lawyers work for giving both free and fare-paying services such as legal consultations. Hou Terasu law firms are different from public law firms in the sense that they are financially supported by the government, not by bar associations. However, both types of law firms have the same purpose to eliminate zero/one areas.

Full-time lawyers at these law firms are often called as “staff lawyers”. They usually give free legal service including legal consultation to which legal aids are provided. However, additionally, Rule 30(1)(iv) also clearly allows them to take on other kinds of jobs at reasonable fees, to provide a wide range of legal service in previous zero/one areas.

Staff lawyers are supposed to work at Hou Terasu law firms temporarily though. For example, a lawyer whose years of experience does not exceed 10 years, is able to work at the law firms for three years with possibilities of renewal. In contrast, a lawyer with more experience is able to work there only for two year, with possibilities of renewal likewise. In either case, a staff lawyer receives a salary of the almost

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<sup>24</sup> For instance, a family of four is eligible for legal aids if the monthly income is less than 299,000 Japanese yen (approximately equal to 2800 USD).

<http://www.houterasu.or.jp/nagare/youkenkakunin/#a>

<sup>25</sup> Every prefecture has at least one branch office in it. Each office launched its own website in January 2008 which successfully provides people with information on the nearest branch offices etc.

same amount of a judge or a prosecutor hired at the same time.

Hou Terasu now encourages newly admitted lawyers to work at Hou Terasu law firms. Before working at law firms, however, they need to complete one-year training at training law firms(Yousei Jimusho). Now, two types of training are prepared;

Type I) a training law firm hires a newly admitted lawyer to give him/her an one-year training. In this case, the law firm pays a salary during the training.

Type II) Hou terasu hires a volunteer lawyer and send him/her to a training law firms. During the training, Hou Terasu pays a salary.

Due to constant efforts made by both public law firms and Hou Terasu Law Firms, as of June 2008, zero area completely disappears from Japan. Only 24 areas remain as one areas.

#### V) Summary

This paper overviewed some efforts to assure access to judicial system in civil cases. Rule 220 of CCP in 1998 changed our litigation culture from one to hide information to win into one to disclose all information to seek for a better resolution. Courts now have responsibilities to make much clear rules on the exceptions of this rule, by carefully weighing conflicting interest. At the same time, Rule 132-2 is also expected to be used more often not only for preparing the cases, but also for encouraging an alternative dispute resolution.

Regarding the problem of zero/one areas, we have seen a remarkable improvement. However, a couple of problems still remain to be solved. The area with two or more lawyers doesn't necessarily provide satisfactory legal service to each user. Therefore, we have to overcome substantive deficiency of lawyers both in metropolitan and rural areas by increasing the number of lawyers per capita. Plus, we have to provide constant supply of lawyers in public law firms or Hou Terasu law firms. Though both Hou Terasu and bar associations are struggling with this issue, a limitation inevitably exists. As the report of Judicial System Reform Counsel encourage lawyers to engage themselves in public-interest activities (pro bono activities), law firms,

especially large-sized firms, are now expected to work hard to train lawyers who volunteer as staff lawyers and help them to secure new jobs when completing their missions.

Legal aid has been improved, but will need more improvement. Unlike a previous institution which is financially dependent on bar associations, the government now gives financial support to legal aid provided by Hou Terasu, and continuously is going to expanding this support. At the same time, we also have to foresee anticipated problems which a rapid expansion of support by the government will entail from the experience abroad. If we take a look at the experience abroad, for instance UK, which has been well-known for its generous legal aid, is now forced to promote ADR to cut the cost of legal aid, because the cost is soaring<sup>26</sup>. So as not to force people to use legal service of bad quality just because of a budget problem, we might also have to review lawyer's fee itself ultimately, as well as expanding legal aid.

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<sup>26</sup> Lecture of Lord Wolf in Yale Law School in Sep 2007 “How to change litigation culture” <http://www.law.yale.edu/news/3388.htm>, <http://cs.law.yale.edu/blogs/podcasts/archive/2007/02/14/how-to-change-the-litigation-culture.aspx>