CRYSTALLIZATION, UNIFICATION, OR DIFFERENTIATION? THE JAPANESE CIVIL CODE (LAW OF OBLIGATIONS) REFORM COMMISSION AND BASIC REFORM POLICY (DRAFT PROPOSALS)

Akira Kamo

Abstract

About one hundred ten years after enactment of the Japanese Civil Code, the debate over the reform of contract law has heated up. On November 2009, based on the consultation of the Minister of Justice, the Working Group on the Civil Code (Law of Obligations) was established. One distinctive feature of this reform process is that the academic contribution became a driving force. Shortly before the consultation, several reform proposals were propounded by different research groups. Notably, the Japanese Civil Code (Law of Obligations) Reform Commission proclaimed a sweeping and ambitious reform proposal: the Basic Reform Policy (Draft Proposals). However, not every lawyer felt the necessity of a comprehensive reform, and some bitterly criticized the reform movement. The fierce debate among academics and practitioners brings to light key characteristics of the Japanese Civil Code, several current streams of the Japanese legal scholarship, and the relationship between academe and practice in Japan. Focusing on the Basic Reform Policy (Draft Proposals), this article seeks to describe both legal scholarship advancing Civil Code reform and criticism of reform from practitioners.

Author

Associate Professor, University of Tokyo. I am grateful to Hiroto Dogauchi, Hiroyasu Ishikawa, Shoji Kawakami, Taro Kogayu, Hiroki Morita, Osamu Morita, Hiroyasu Nakata, Masami Okino, Atsushi Omura, Satoru Takenaka, Takashi Uchida, and the editors of the *Columbia Journal of Asian Law* for their helpful comments and valuable criticism on a prior draft. I also thank Nobuyoshi Chujo, Yu Fujiki, and Mari Makishima for their research assistance. Remaining errors are my own.

INTRODUCTION

A. Reform of the Law of Obligations

One hundred ten years after the enactment of the Japanese Civil Code,[1] the debate on contract law reform has heated up. On October 28, 2009, the Minister of Justice consulted with the Ministry of Justice's Legislative Council regarding reform of the Law of Obligations, contained in Book III of the Japanese Civil Code.[2] This meeting resulted in the establishment of a task force devoted to the issue: the Working Group on the Civil Code (Law of Obligations).[3] Book III of the Japanese Civil Code contains general provisions and lists the four types of obligations (contract, *negotiorum gestio*, unjust enrichment, and tort). The committee's activities are substantially limited to revising provisions concerning contract law, some of which are also contained in Book I of the Civil Code. This exclusive focus on contract is justified on the grounds that, although contract law directly bears on the daily lives and economic activities of citizens, it has never previously undergone a fundamental reformation and would benefit from overhaul. Consequently, the contract law should be revised in order to respond to the social and economic changes that have occurred since the original enactment and to ensure that its provisions are easily understood by the public.[4]

One distinctive feature of this reform process is that academic contribution has been a driving force. Shortly before the October 28 meeting, different research groups had already published several reform proposals.[5]

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[1] 民法 [CIVIL CODE] Law No. 89 of 1896 [hereinafter MINPO].

[2] 法制審議会第１６０回会議 [160th Meeting of the Legislative Council of the Ministry of Justice], http://www.moj.go.jp/SHINGI2/091028-1.html (last visited Oct. 21, 2010).

[3] 法制審議会民法（債権関係）部会 [Working Group on the Civil Code (Law of Obligations)] http://www.moj.go.jp/shingi1/shingikai_saiken.html (last visited Oct. 21, 2010). The working group has an English website where readers can download translated documents: http://www.moj.go.jp/ENGLISH/ccr/CCR_index.html (last visited Oct. 21, 2010).

[4] 諮問第８８号 [Consultation No. 88], http://www.moj.go.jp/content/000005084.pdf (last visited Oct. 21, 2010). English versions are also available at http://www.moj.go.jp/ENGLISH/ccr/consultation_no88.html (last visited Oct. 21, 2010).

[5] In addition to the Reform Commission discussed below, two independent research groups merit mention. First, the Research Group on the Reform of Civil Code (民法改正研究会) published several versions of its reform proposals, most recently 民法改正研究会 [Research Group on the Reform of the Civil Code], 民法改正 国民・法曹・学界有志案 [*Japanese Civil Code Reform Proposals (Book I, II and III) Drafted by the Interested Parties*], *in* 民法改正 国民・法曹・学界有志案 [JAPANESE CIVIL CODE REFORM PROPOSALS (BOOK I, II AND III) DRAFTED BY THE INTERESTED PARTIES] 110–239 (2009). As the title suggests, the proposal covers not only the Law of Obligations but also the General Provisions and Law of Property, Books I and II of the Japanese Civil Code. This group held a series of meetings to foster the free exchange of opinions on its proposal among academics and practitioners. *Id.* at 20–108. Unlike the vast investigatory scope of the first group, the second research group focused its attention on prescription, the civil

These proposals were subsequently referenced at the first meeting of the Working Group on the Civil Code (Law of Obligations).[6] Notably, the Japanese Civil Code Law of Obligations Reform Commission[7] (Reform Commission) proclaimed a sweeping and ambitious reform proposal: the Basic Reform Policy (Draft Proposals), or "BRP."[8]

B. The Reform Commission and the Basic Reform Policy

The importance of the BRP is attributed primarily to the authority of members of the Reform Commission. The establishment of the Reform Commission was a response to the February 2006 decision of the Ministry of Justice to launch inquiries regarding the necessity of Civil Code reform.[9] In October 2006, eight professors, along with the Counselor of the Ministry of Justice, who was responsible for drafting the reform bill, gathered to establish the Reform Commission, which ultimately included thirty-three professors. It is unthinkable that the Ministry of Justice advance the reform process without the assistance of these professors. In fact, thirteen professors of the Reform Commission were nominated as members of the Working Group.

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law equivalent of the statute of limitations. The Research Group on Prescription (時効研究会) published its own reform proposal in 2008. 時効研究会 [Research Group on Prescription], 時効研究会による改正提案 [*Reform Proposals by the Research Group on Prescription*], *in* 消滅時効法の現状と改正提言 [THE CURRENT SITUATION AND REFORM PROPOSALS OF THE LAW OF PRESCRIPTION] 290–336 (2008). This group conducted intensive comparative research. *Id.* at 138–288.

[6] 法制審議会民法（債権関係）部会第1回会議 [First Meeting of the Working Group on the Civil Code (Law of Obligations)], http://www.moj.go.jp/shingi1/shingi_091124-1.html (last visited Oct. 21, 2010).

[7] 民法（債権法）改正検討委員会 [Civil Code (Law of Obligations) Reform Commission], http://www.shojihomu.or.jp/saikenhou/ (last visited July 13, 2010).

[8] 民法（債権法）改正検討委員会 [CIVIL CODE (LAW OF OBLIGATIONS) REFORM COMMISSION], 債権法改正の基本方針 [BASIC REFORM POLICY (DRAFT PROPOSALS)] (2009) [hereinafter BRP]. An English translation of the BRP is available at http://www.shojihomu.or.jp/saikenhou/English/draftproposals.html (last visited Oct. 21, 2010). [EDS. This source may also be referred to in English as the "Draft Proposals of the Reform Commission." Each citation is properly rendered as Book #, Part #, Chapter #, Section #, but for improved searchability, the editors have elected to render the citations as above.]

[9] 法務省 [Ministry of Justice], 民法（債権法）の改正について [*On the Reform of the Civil Code (Law of Obligations)*], http://www.moj.go.jp/MINJI/minji99.html (last visited Oct. 21, 2010); *see also* 筒井健夫 [Tsutsui Takeo], 民法（債権法）関係の動向 [*Trends Relating to Reform of the Civil Code (Law of Obligations)*], 848 エヌ・ビー・エル [NEW BUSINESS LAW] 31 (2007); 筒井健夫 [Tsutsui Takeo], 民法（債権法）関係の動向と課題 [*Trends and Topics Relating to Reform of the Civil Code (Law of Obligations)*], 824 エヌ・ビー・エル [NEW BUSINESS LAW] 42 (2006).

On the other hand, although its original members included officials of the Ministry of Justice, the Reform Commission was not specifically commissioned to investigate the necessity of reform or to advance reform proposals made by the government or by the Ministry of Justice:[10] "The Reform Commission is a purely private research group of academics who have been organized on their own volition, and its activities are independent from the Government."[11] The word "Commission" was chosen "to express its final goal of presenting, as a group, a set of coherent proposals apart from the academic convictions of each individual member."[12]

The Reform Commission aimed to propose a basic reform plan that was expected to be officially reviewed as part of the legislative process. Indeed, by the end of March 2009, the Commission finalized the BRP and held the Symposium for Reform of the Civil Code (Law of Obligations) on April 29, 2009.[13] Beginning in December 2009, five volumes of commentary on the BRP were published.[14] Each contained extensive research on the present situation of Japanese law as well as comparative studies. Because of the members' prominence in Japanese legal scholarship and the quality of their research, the BRP was sure to receive detailed consideration by the Working Group on the Civil Code (Law of Obligations), despite being solely the product of academics.

In spite of the engagement of leading legal academics, not every lawyer feels that comprehensive reform of the Law of Obligations (like that prescribed in the BRP) is necessary. Indeed, some practitioners have cast doubt on the necessity of legal reform, insisting that even if such need exists, the scope of reform should be limited to only those provisions that cause practical problems in application.[15] Even in the academic world, the Reform

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[10] The fact that the Reform Commission was sponsored solely by a private institution, the Commercial Law Center, Inc., also gives an indication of its independence from the Ministry of Justice.

[11] 民法（債権法）改正検討委員会 [CIVIL CODE (LAW OF OBLIGATIONS) REFORM COMMISSION], About the Japanese Civil Code (Law of Obligations) Reform Commission and Draft Proposal, http://www.shojihomu.or.jp/saikenhou/English/index_e.html (last visited Oct. 21, 2010).

[12] *Id.*

[13] Presentations and discussions are available. 民法（債権法）改正検討委員会 [Japanese Civil Code (Law of Obligations) Reform Commission], シンポジウム 債権法改正の基本方針 [*Symposium, "Basic Reform Policy (Draft Proposals)"*] (2009).

[14] 民法（債権法）改正検討委員会 [CIVIL CODE (LAW OF OBLIGATIONS) REFORM COMMISSION], 詳解 民法（債権法）改正の基本方針 [COMMENTARIES ON BASIC REFORM POLICY (DRAFT PROPOSALS)] (2009-2010) (5 vols.) [hereinafter COMMENTARIES].

[15] 大阪弁護士会 [OSAKA BAR ASSOCIATION], 意見書 民法（債権法）改正について [OPINIONS ON THE REFORM OF THE CIVIL CODE (LAW OF OBLIGATIONS)] (2009) [hereinafter OSAKA BAR ASSOCIATION]. 山田誠一 [Yamada Seiichi] et al., 債権法改正と金融取引 [*The Reform of the Law of Obligations and Financial Transactions*], 1874 金融法務事情 [J. FIN. & LEGAL AFF.] 28 (2009); 東京弁護士会 [TOKYO BAR ASSOCIATION], 民法（債権法）改正に関する意見書 [OPINIONS ON THE REFORM OF THE CIVIL CODE (LAW OF OBLIGATIONS)] (2010) [hereinafter TOKYO BAR ASSOCIATION], http://www.toben.or.jp/news/opinion/2010/20100309_2.pdf (last visited Oct. 21, 2010).

Commission's activities have been harshly criticized. The legitimacy of the BRP, the role of academics in the legislative process, and the necessity of contract law reform itself have all been cast in doubt.[16] The fierce debate among academics and practitioners[17] brings to light key characteristics of the Japanese Civil Code, several current streams of the Japanese legal scholarship, and the relationship between academe and practice in Japan. Focusing on the BRP, this article seeks to describe both legal scholarship advancing Civil Code reform and criticism of reform from practitioners.

In Section I, I start by analyzing the background of the recent reform movement with the aim of addressing two topics: (1) why the process of law reform has recently started; and (2) the principles on which the BRP is based. Because there is no political pressure, either domestic or international, which itself justifies law reform, the first topic will be explained as a combination of multiple motivations. On the second topic, reflecting the complexity of the motivation for law reform, several possibly contradictory guiding principles are noted. Section II introduces the major proposals of the BRP and reviews criticisms leveled by practitioners. The aim of this work is not to offer an exhaustive description of the BRP, but rather to provide examples of the reform proposal based on the analysis outlined in the previous section and to introduce typical responses to the BRP from practice. This article concludes with an evaluation of the Reform Commission's activities and a perspective on the future of the reform process, which until now has remained unclear.

I. THE BACKGROUND OF THE RECENT REFORM MOVEMENT

While the background to Civil Code reform in Japan is not straightforward, at least three factors are shaping reform: (1) the characteristics of the Civil Code; (2) academic contributions; and (3) the role of the Ministry of Justice. This section shows how and why these factors are driving law reform.

A. Characteristics of the Japanese Civil Code

1. Drafting Policies of the Civil Code

One characteristic of the Japanese Civil Code is simplicity. The Drafting Policies of the Civil Code,[18] adopted in 1893 by the Code Investigation

[16] *See generally* 吉田邦彦 [Yoshida Kunihiko], 近時の「民法改正」論議における方法論的・理論的問題点 [*Methodological and Theoretical Problems of the Recent Civil Code Reform Movement*] 1368 ジュリスト [Jurist] 106 (2008).

[17] *See also* 山本豊 [Yamamoto Yutaka] et al., 民法（債権法）改正問題の検討 [*Studies on the Basic Reform Policy (Draft Proposals)*], 72 私法 [J. PRIVATE L.] 103 (2010).

[18] 法典調査ノ方針 [*Drafting Policies of the Civil Code*], reprinted in 穂積陳重立法関係文書の研究 [RESEARCH ON THE LEGISLATIVE MATERIALS COLLECTED BY HOZUMI NOBUSHIGE] 120-121 (福島正夫 [Masao Fukushima] ed., 1998) [hereinafter *Drafting Policies*].

Commission, provided that the Code should include only general rules and those rules applicable to disputable cases, omitting details (Article 11). Further, definitions and illustrative provisions would also be excluded (Article 13). Thus, the Japanese Civil Code contains relatively few provisions. These policies, which determined the essential character of the Japanese Civil Code, were introduced because of two factors: time constraints and the drafters' critical attitude toward the then-existing Civil Code, now known as the "Old Civil Code."

The Old Civil Code was developed with the principal goal of creating a social structure that would enable Japan to compete with Western powers.[19] From the 1880s, drafting of the Old Civil Code began with the invaluable assistance of Professor Gustave Emile Boissonade, a Frenchman. Codification in Japan was also connected with an attempt to abrogate "unequal treaties" signed in the 1850s by the Tokugawa Shogunate, which conferred extraterritoriality to Western nations.[20] The introduction of a Western-style legal system was a prerequisite for the abrogation, for it was asserted that the lack of a modern legal system in Japan made extraterritoriality necessary to safeguard the rights of Westerners in Japan.[21] Against this background, the Old Civil Code was approved in 1890 and set to come into force on January 1, 1893. Nevertheless, the Old Civil Code suffered criticism both for its premature enactment, and also because it was colored by individualism.[22] In 1892, the Imperial Diet suspended the enactment of the Old Civil Code until the end of 1896 and also voted to draft a new Civil Code by modifying the Old Civil Code.[23]

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[19] Just after the fall of the Tokugawa Shogunate in 1867, the newly established Japanese government began to draft the Japanese Civil Code. Shinpei Eto (1834-74), the first Minister of Justice, who considered the Civil Code the basis of modern civilized society, commissioned his staff to translate the French Civil Code into Japanese.

[20] *See* Michael Young & Constance Hamilton, *Historical Introduction to the Japanese Legal System*, *in* JAPAN BUSINESS LAW GUIDE ¶ 1-700 (Mitsuo Matsushita ed., 1988).

[21] In 1887, the draft of the Jurisdiction Treaty, which permitted the hiring of foreign judges, evoked considerable controversy. Prime Minister Hirobumi Ito (1841-1909) declared negotiation toward treaty revocation to be suspended after the completion of the codification.

[22] 法学士会 [ALUMNI ASSOCIATION OF THE UNIVERSITY OF TOKYO, FACULTY OF LAW], 法典編纂ニ関スル法学士会ノ意見 [OPINIONS ON THE CODIFICATION] (1889), reprinted in 民法典論争資料集 [MATERIALS FOR THE CONTROVERSY OVER THE CIVIL CODE] 14 (星野通 [Hoshino Toru] ed., 1969); 穂積八束 [Hozumi Yatsuka], 民法出テヽ忠孝亡フ [*Collapse of Loyalty and Devotion in Japanese Society as a Result of Enactment of the Civil Code*],.5 法学新報 8 [CHUO LAW REVIEW] xx (1891), reprinted in 民法典論争資料集 [MATERIALS FOR THE CONTROVERSY OVER THE CIVIL CODE] 82 (星野通 [Hoshino Toru] ed., 1969). This controversy could also be explained by the distaste of the lawyers who studied English law at Kaisei Gakko, the forerunner of the Imperial University of Tokyo, toward the French characteristics of the Old Civil Code.

[23] *Drafting Policies*, *supra* note 18, § 1.

The drafters of the new Civil Code worked under immense time pressure. They were initially given only three years during which to finalize their work, though the Old Civil Code was available as a model from which to work. As a result of this schedule, the drafters decided to make the provisions of the Civil Code simple, leaving plenty of room for legal development through practice and scholarship.

In addition to time constraints, there was also the issue of the drafters' antagonistic attitude toward the policies that shaped the Old Civil Code. Boissonade wrote explanatory provisions to help Japanese officials understand the civil law tradition that Japan had previously lacked. The Old Civil Code thus contained numerous definitions and illustrative provisions. The drafters of the current Civil Code denounced this approach and sought to make the new Civil Code more conceptually refined. For example, Masaakira Tomii, one of the three main drafters, criticized the intricacy of the Old Civil Code, which he attributed to French legal scholarship, and applauded the intellectual sophistication of German jurisprudence.[24] Thus, the Code Investigation Commission decided to remove explanatory and axiomatic provisions from the Civil Code. As a result, the Japanese Civil Code does not include such provisions, which lawyers take for granted, making it difficult for people without legal training to fully understand the structure of the legal system based on the Civil Code.

2. Legal Development After the Enactment of the Civil Code

As anticipated by the drafters of the Civil Code, practitioners and academics have played important roles in fleshing out the provisions of the Code. As shown in the following subsection, in considering the social demands of Japanese society, lawyers have developed legal rules and doctrines outside the Civil Code, some of which were not taken into account when the Civil Code was enacted. Some provisions of the Civil Code have been interpreted in a manner that is inconsistent with the original meaning, and others have been invalidated through interpretation.

These legal developments provide the motivation for the reform of contract law. The Mission Statement of the Reform Commission states: "[The] courts have created a vast array of norms outside of the Code through its application. The diffusion of these norms has brought about uncertainty as to how they should be applied."[25] The crystallization of legal development into the Civil Code is one of the goals of law reform.

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[24] 富井政章 [Tomii Masaakira], 貴族院旧民法延期案に関する富井先生の賛成演説 [*Professor Tomii Masakira's Speech in Support of the Act Postponing the Enactment of the Old Civil Code in the House of Peers (1892)*], *in* 富井政章先生追悼集 [MEMOIRS OF PROFESSOR TOMII MASAAKIRA] 154, 158–63 (杉山直治郎 [Sugiyama Naojiro]. et al. eds., 1936).

[25] 民法 (債権法) 改正検討委員会 [Japanese Civil Code (Law of Obligations) Reform Commission], Mission Statement (Oct. 7, 2006), http://www.shojihomu.or.jp/saikenhou/

3. Change in Principle Regarding Codification?

The crystallization of legal development, however, cannot in itself justify legal reform, because if stability of legal administration can be achieved through practice, codification is not essential. In this regard, exponents of fundamental reform have proclaimed a new principle in codification: "the Civil Code for Citizens."

Because the Civil Code depicts the basic framework of civil society, it should address itself to ordinary citizens.[26] Given this fundamental idea, it is desirable that those legal rules currently in force should be codified as much as possible and in plain language. Dispersing relevant provisions throughout the Civil Code and in external sources of legislation should be avoided. Moreover, the expression "citizens" is sometimes interchanged with "consumers" because citizens often appear as consumers in modern society. This may lead to the claim that the Civil Code should include consumer-friendly provisions, thereby providing impetus for law reform.

In this way, the meaning of "the Civil Code for Citizens" is ambiguous. However, it is the underlying idea behind the BRP. Indeed, some of the proposals are difficult to understand without the benefit of this slogan.

B. The Underlying Legal Thought of Academic Activities

1. Continuous Efforts Toward Civil Code Reform

The second factor that is currently driving law reform is academic contributions. Well into the 1990s, law professors had organized working groups to propose Civil Code reform.[27] In 1998, the centenary of the Civil Code, a symposium was held at the Annual Conference of the Japan Association of Private Law, the largest academic association in Japan. The research group conducting the symposium published collected papers, highlighting those topics in need of reform.[28] Even after the symposium, some professors continued to work on the law reform, organizing a study group and

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English/missionstatement_e.html (last visited Oct. 21, 2010) [hereinafter Mission Statement].

[26] 内田貴 [UCHIDA TAKASHI], 債権法の新時代 「債権法改正の基本方針」の概要 [THE NEW ERA OF THE LAW OF OBLIGATIONS: AN OUTLINE OF THE BASIC REFORM POLICY (DRAFT PROPOSALS)] 6–17 (2009) [hereinafter UCHIDA, DRAFT PROPOSALS].

[27] For the academic activities toward Civil Code reform, see generally 内田貴 [Uchida Takashi], いまなぜ「債権法改正」か？ (上) [*Why is it Necessary to Reform the Law of Obligations Now? Part 1*], 871 エヌ・ビー・エル [NEW BUSINESS LAW] 16, 17–18 (2009) [hereinafter Uchida, *Why Reform?*].

[28] 山本敬三 [KEIZO YAMAMOTO] et al, 債権法改正の課題と方向 [THE TOPICS OF REFORM OF THE LAW OF OBLIGATION AND THEIR COURSE OF ACTION] (1998).

publishing reform proposals not only on the Law of Obligations,[29] but also on the Law of Security Rights[30] and Family Law.[31] Moreover, in October 2006, another academic group held a symposium on contractual liability at the Annual Conference of the Japan Association of Private Law.[32] Two years later, two symposia were held on the Civil Code reform and prescription, providing the reform proposals referred to by the Working Group on the Civil Code (Law of Obligations).[33]

These ongoing academic activities represent the basis of contract law reform, and it is safe to assume that there are several current streams of legal thought in Japanese legal scholarship that underlie these activities.

2. The Rise and Fall of Legal Realism in Japan

First, mention should be made of the role of legal realism in Japan. The realist movement prevailed in Japan after World War II. In his presentation at the Annual Conference of the Japanese Association of Private Law in 1953, Professor Saburo Kurusu of the University of Tokyo confessed to harboring deep suspicions toward lawyers and their activities.[34] This revelation ignited controversy regarding the legitimacy of legal interpretations and the political responsibilities of lawyers.[35] Echoing Kurusu's presentation, skepticism

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[29] 内田貴 [Uchida Takashi] et al., 特別座談会 債権法の改正に向けて [*Special Forum, Toward Reform of Law of Obligations*], 1307 ジュリスト [JURIST] 102 (2006), 1308 ジュリスト [JURIST] 134 (2006).

[30] 内田貴 [Uchida Takashi] et al., 特別座談会 担保法の改正に向けて [*Special Forum, Toward Reform of Law of Security Rights*], 1213 ジュリスト [JURIST] 48 (2001), 1214 ジュリスト [JURIST] 36 (2001).

[31] 内田貴 [Uchida Takashi] et al., 特別座談会 家族法の改正に向けて [*Special Forum, Toward Reform of Family Law*], 1324 ジュリスト [JURIST] 46 (2006), 1325 ジュリスト [JURIST] 148 (2006).

[32] 潮見佳男 [Shiomi Yoshio] et al., 契約責任論の再構築 [*Rebuilding Contract Liability Theory*], 1318 ジュリスト [JURIST] 81 (2006); 山本豊 [Yamamoto Yutaka] et al., シンポジウム 契約責任論の再構築 [*Symposium: Rebuilding Contract Liability Theory*], 69 私法 [J. PRIVATE L.] 3 (2007).

[33] *See* 民法改正研究会 [Research Group on the Reform of the Civil Code], 民法改正 国民・法曹・学界有志案 [*Japanese Civil Code Reform Proposals (Book I, II and III) Drafted by the Interested Parties*], *supra* note 5; *see also* 時効研究会 [Research Group on Prescription], 時効研究会による改正提案 [*Reform Proposals by the Research Group on Prescription*], *supra* note 5.

[34] 来栖三郎 [Saburo Kurusu], 法の解釈と法律家 [*Legal Interpretation and Lawyers*], 11 私法 [J. PRIVATE L.] 16 (1954), reprinted in 1 来栖三郎著作集 [COLLECTED PAPERS OF KURUSU SABURO] 73 (2004).

[35] Kurusu, advocating sociological jurisprudence, later investigated business customs inherent in Japanese society to demarcate the range of appropriate legal interpretations.

regarding legal rules and doctrines dominated Japanese legal scholarship in the 1960s, centering on the University of Tokyo. Takeyoshi Kawashima (perhaps best known as the author of *Japanese Legal Consciousness*),[36] seemingly influenced by American legal realism,[37] downplayed the importance of judicial construction—the technique of how to rationalize the case outcome based on the letter of the law or legal doctrines.[38] These critical attitudes toward judicial construction were shared with the dominant legal theories of this time. Well into the 1970s, it was widely accepted that balancing the interests of the concerned parties is of greater importance than judicial construction when solving legal issues.[39] This realist movement contributed to revealing the social values and economic demands of Japanese society, which were not captured in provisions of the Civil Code.

The pendulum has since swung back the other way. Writing in the late 1980s, Yoshio Hirai, Professor at the University of Tokyo, criticized the dominant theories at that time by emphasizing the importance of legal argumentation as a process through which statements on a legal issue are continuously subjected to critical discussion, with statements evaluated under legal tests and discussed.[40] As a result of Hirai's polemic articles and ensuing

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For a compilation of the research he undertook, see 来栖三郎 [KURUSU SABURO], 契約法 [THE LAW OF CONTRACTS] (1974).

[36] 川島武宜 [KAWASHIMA TAKEYOSHI], 日本人の法意識 [JAPANESE LEGAL CONSCIOUSNESS] (Charles R. Stevens trans., 1974) (1967).

[37] Tsuneo Matsumoto, *Anglo-American Law Research in the Study of Civil Law in Japan*, *in* THE IDENTITY OF GERMAN AND JAPANESE CIVIL LAW IN COMPARATIVE PERSPECTIVES 125 (Zentaro Kitagawa & Karl Riesenhuber eds., 2007).

[38] Kawashima had insisted that the task of legal scholarship was to forecast the future development of judicial precedent by determining the correlation between the standardized facts of a case and its outcome. He later acknowledged the limits of forecasting case outcomes and his proposed sociological jurisprudence. For the development of his methodology, see 川島武宜 [KAWASHIMA TAKEYOSHI], 「科学としての法律学」とその発展 ["JURISPRUDENCE AS A SCIENCE" AND ITS LATER DEVELOPMENT] (1987).

[39] Two pioneering advocates were Ichiro Kato and Eiichi Hoshino. 加藤一郎 [Kato Ichiro], 法解釈学における論理と利益衡量 [*Logic and Balancing of Interests in Legal Interpretation*], 15 現代法 [MODERN LAW] (碧海純一 [Aomi Junichi] ed.) 25 (1966), reprinted in 民法における論理と利益考量 [LOGIC AND BALANCING INTERESTS IN INTERPRETATION OF PROVISIONS IN CIVIL CODE] 3 (1974); 星野英一 [Hoshino Eiichi], 民法解釈論序説 [*Introduction to Interpretation of Provisions in Civil Code*], *in* 法哲学年報 1967 [ANNUAL OF LEGAL PHILOSOPHY 1967] (Japan Association of Legal Philosophy ed.) 75 (1967), reprinted in 1 民法論集 [COLLECTED PAPERS OF HOSHINO EIICHI] 1 (1970). They differed in their opinions regarding the degree of importance to be attached to judicial construction. For a comparison of the two works, see Matsumoto, *supra* note 37, at 125–26.

[40] For the leading article, see 平井宜雄 [Hirai Yoshio], 法律学基礎論覚書 [*Memoranda on the Foundation of Jurisprudence*] 916 ジュリスト [JURIST] 96 (1988), 918 ジュリスト [JURIST] 102 (1988), 919 ジュリスト [JURIST] 70 (1988), 920 ジュリスト [JURIST] 82 (1988),

discussions, the realist movement in Japan received a severe blow.[41] Although a wide range of interpretive theories still exists, scholars of the succeeding generation generally came to pay more attention to legal concepts and doctrines than did those of the previous generation, which contributed to enhancing the falsifiability of the legal argument. Based on the achievements of the legal realist movement, scholars of the new generation have made efforts to renew legal concepts and doctrines or create new ones to grasp the realities of contemporary society. It is the scholars of this generation who established the Reform Commission in an attempt to codify the rules and doctrines developed by court judgments and academic research. This transition in legal thought is one of the reasons that contract law reform has recently been initiated.

3. The Harmonization of Contract Laws

The second characteristic of the legal thought underlying academic contributions to contract law reform is consideration of international trends. Law reform in European countries and the emergence of international treaties and model laws have influenced Japanese jurisprudence.

With the introduction of Western legal systems, Japanese legal scholars have paid considerable attention to legal developments in Western Europe and the United States. In particular, they have attached great importance to the laws of Germany and France, as shown by several leading articles in the 1960s.[42] A series of legal reforms enacted in these Western counties have been introduced into Japan. For instance, from the 1980s, Japanese scholars

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921 ジュリスト [JURIST] 79, 923 ジュリスト [JURIST] 72 (1988), 926 ジュリスト [JURIST] 73 (1989), 927 ジュリスト [JURIST] 86 (1989), 928 ジュリスト [JURIST] 94 (1989), reprinted in 法律学基礎論覚書 [MEMORANDA ON THE FOUNDATION OF JURISPRUDENCE] (1990). Hirai's idea of legal argumentation was profoundly influenced by Karl Popper's view on science.

[41] For a response to Eiichi Hoshino, see 平井宜雄 [Hirai Yoshio], 法解釈論の合理主義的基礎づけ [*Toward a Rational Foundation for Legal Dogmatics*], 107 法学協会雑誌 [J. JURISPRUDENCE ASS'N, UNIV. TOKYO] 727, reprinted in 続・法律学基礎論覚書 [FOLLOW-UP TO MEMORANDA ON THE FOUNDATION OF JURISPRUDENCE] 5 (1991). 平井宜雄 [Hirai Yoshio], 判例研究方法論の再検討 [*Reexamining the Methodology of Research on Judicial Precedents*], 956 ジュリスト [JURIST] 61 (1990), 960 ジュリスト [JURIST] 41 (1990), 962 ジュリスト [JURIST] 136 (1990), reprinted in 続・法律学基礎論覚書 [FOLLOW-UP TO MEMORANDA ON THE FOUNDATION OF JURISPRUDENCE] 44 (1991).

[42] Notably, 星野英一 [Hoshino Eiichi], 日本民法典に与えたフランス民法の影響 [*Influence of the French Civil Law on the Japanese Civil Code*], 3 日仏法学 [ANNUAL OF FRANCO-JAPANESE LAW ASSOCIATION] 1 (1965), reprinted in 1 民法論集 [COLLECTED PAPERS OF HOSHINO EIICHI] 69 (1970). *See also* 北川善太郎 [KITAGAWA ZENTARO], 日本法学の歴史と理論 [HISTORY AND THEORIES OF JAPANESE JURISPRUDENCE] (1968).

investigated reform proposals regarding the German Civil Code,[43] and the enactment of the new German Civil Code in 2002 stimulated a number of academic studies.[44] In the 1990s, scholars paid much attention to the new Civil Code of the Netherlands,[45] and recently, the innovative draft proposals regarding French contract law arouse their interest.[46] These legal reforms in Europe have given scholars in Japan the impression that the traditional regime of contract law, as introduced in Japan more than one hundred years ago, has become unable to grasp the reality of modern economic society and should therefore be reviewed and modernized.

International treaties and model laws have also attracted special attention from Japanese scholars. In particular, the United Nations Convention on Contracts for the International Sales of Goods (CISG)[47] and the UNIDROIT Principles of International Commercial Contracts (PICC)[48] are frequently referred to in discussions on contract law reform. In addition, the Principles of European Contract Law (PECL),[49] which was later dissolved and absorbed into

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[43] 西ドイツ債務法改正鑑定意見の研究 [STUDIES ON EXPERT OPINIONS ON AND PROPOSALS FOR REFORM OF THE LAW OF OBLIGATIONS IN WEST GERMANY] (下森定 [Shitamori Sadamu] et al. eds., 1988) investigates the reform proposals in GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS [EXPERT OPINIONS ON AND PROPOSALS FOR REFORM OF THE LAW OF OBLIGATIONS] (Bundesminister der Justiz [Minister of Justice] ed., 1981–1983) (3 vols.), and ドイツ債務法改正委員会草案の研究 [STUDIES ON THE FINAL REPORT OF THE REFORM COMMISSION ON THE LAW OF OBLIGATIONS] (下森定 [Shitamori Sadamu] & 岡孝 [Oka Takashi] eds., 1996) introduces the draft in ABSCHLUßBERICHT DER KOMMISSION ZUR ÜBERARBEITUNG DES SCHULDRECHTS [FINAL REPORT OF THE REFORM COMMISSION ON THE LAW OF OBLIGATIONS] (Bundesminister der Justiz [Minister of Justice] ed., 1994).

[44] *See, e.g.*, 半田吉信 [HANDA YOSHINOBU], ドイツ債務法現代化法概説 [OVERVIEW OF THE ACT OF MODERNIZING THE LAW OF OBLIGATIONS] (2003).

[45] *See, e.g.*, 潮見佳男 [Shiomi Yoshio], ヨーロッパにおける契約責任・履行障害法の展開 [*Development of the Contractual Liability and Remedies for Non-Performance in Europe*], 47 阪大法学 [OSAKA L. REV.] 205, 211–43 (1997), reprinted in 契約責任の体系 [SYSTEM OF LAW ON CONTRACTUAL LIABILITY] 1 (2000).

[46] AVANT-PROJET DE REFORME DU DROIT DES OBLIGATIONS ET DE LA PRESCRIPTION [DRAFT PROPOSALS FOR REFORM OF LAW OF OBLIGATIONS AND PRESCRIPTION] (Pierre Catala ed., 2006). Even before these draft proposals were published, Japanese scholars paid close attention to the reform movement in France. *See, e.g.*, 金山直樹 [Kanayama Naoki], フランス民法典改正の動向 [Movement for the Civil Code Reform in France], 1294 ジュリスト [JURIST] 92 (2005).

[47] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter CISG].

[48] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004) [hereinafter PICC].

[49] PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000–2003) (3 vols.) [hereinafter PECL].

the Draft Common Frame of Reference (DCFR),[50] was thoroughly examined because of its influence on law reform in Europe. To some scholars, these treaties and model laws appear to give direction to the harmonization of contract laws. For example, one speaker at the 1998 Annual Conference of the Japan Association of Private Law proposed a new system for the cancellation of contracts, referencing CISG, PICC, and PECL.[51] The Mission Statement of the Reform Commission also expressly mentions harmonization of contract laws as a possible justification for contract law reform in Japan.[52] In this context, the fact that Japan finally ratified CISG in 2008 can be counted as a factor necessitating legal reform, because the existence of considerable inconsistency between legal rules governing international and domestic transactions is not ideal.

Not surprisingly, however, this rationale is not widely accepted in Japan. The introduction of a new regime, even if theoretically valid and conceptually refined, is not sufficiently justified yet, as it may impose considerable costs on those who are familiar with the current system and may cause confusion in society. In fact, practicing lawyers had already argued against the necessity of harmonization before the BRP was published.[53]

However, this criticism does not represent an insurmountable obstacle to the proponents of reform, who consider international trends alone insufficient reason for legal reform, and who emphasize the importance of investigating the rules adopted by foreign legislatures, treaties, and model laws when considering law reform. According to these advocates, foreign rules should be adopted by Japanese law if and only if they offer a solution reflecting the actuality of life in Japan.[54] In this sense, the BRP contains proposals that conform to international trends.

4. Supplying the Japanese Model

Closely connected with harmonization, although possibly arguing against its consideration, is the claim that the new legislation should aim to supply a model of the Civil Code independent from the European tradition. According to the Mission Statement of the Reform Commission, "While the 'Civil Law' which Japan inherited through the process of 'Rezeption' was predominantly

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[50] PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (Christian von Bar et al. eds., 2008) [hereinafter DCFR].

[51] 能見善久 [Nomi Yoshihisa], 履行障害 [*Remedies for Non-Performance*], *in* 山本敬三 [YAMAMOTO KEIZO] et al., *supra* note 28, at 132–33.

[52] Mission Statement, *supra* note 25.

[53] 東京弁護士会 [TOKYO BAR ASS'N], 民法改正に関する意見書 [OPINIONS ON THE REFORM OF THE CIVIL CODE] (2008), available at http://www.toben.or.jp/news/opinion/2008_12/1208.html (last visited Jan. 17, 2010).

[54] For the requirements of contract cancellation, see UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 96.

founded on and rooted in European society, the Japanese assimilation of civil law over the past century has resulted in the development of original theories and practices. It should be worthwhile to attempt a projection of the future model of the Law of Obligations based on the particular experience of this Asian country." [55] Although the Mission Statement emphasizes "the development of original theories and practices," it does not fully explain the necessity of presenting a Japanese model.

One explanation for the necessity of a Japanese model involves the character of Japanese law as one of mixed jurisdictions. Over more than one hundred years, Japan was introducing not only the legal institutions and concepts of the European civil law jurisdictions, but also those of common law countries, while at the same time making efforts to synthesize them. This experience may provide a model that is useful when considering a legal system appropriate for a contemporary borderless society.

Moreover, the presence of Japanese law on the international scene should be mentioned.[56] In addition to law reforms in Europe, new Civil Codes have been emerging in Far East Asia. For example, the Chinese Contract Act was enacted in 1999, and the Law of Property in 2007. In South Korea, although an attempt at Civil Code reform was stymied because of criticism from academic lawyers, discussion on law reform, which would have been completed within four years, resumed in 2009. Against the background of these movements, motivation has grown for presenting the Japanese model in the legal reform process of other states.[57]

The assertion regarding the presence of Japanese law is not implausible when considering the state of Japanese legal scholarship in Asia. From the end of the twentieth century, the Ministry of Justice, in cooperation with the Ministry of Foreign Affairs and the Japan International Cooperation Agency, has provided legal assistance to developing Asian countries in order to establish modern legal systems.[58] These activities were successful in assisting with the drafting of basic private laws in Vietnam and Cambodia, with the close involvement of Japanese scholars.[59] Legal developments in Japan were important in these codification processes, and Japanese law, largely derived from the European legal tradition, has come to represent the mother system for these Asian countries. This experience has confirmed the importance of

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[55] Mission Statement, *supra* note 25.

[56] UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 31–34.

[57] Takashi Uchida, Senior Advisor of the Ministry of Justice and Secretary General of the Reform Commission, emphasized the importance of enhancing the "brand power" of the Japanese Civil Code. Uchida, *Why Reform?*, *supra* note 27, at 22–23.

[58] For international cooperation activities conducted by the Ministry of Justice, see International Cooperation Department, Ministry of Justice, http://www.moj.go.jp/ENGLISH/MEOM/meom-01-05.html (last visited Nov. 10, 2010).

[59] Three members of the Reform Commission were engaged in drafting the Cambodian Civil Code.

Japanese law in Asia and may support the assertion regarding the presence of Japanese law on the international scene.

However, presenting the Japanese model gives rise to several problems. The necessity of maintaining a Japanese presence in the international scene may be questioned. Practitioners engaged primarily in domestic transactions are not sympathetic to such ideas. More importantly, however, the exact meaning of the Japanese model is itself a point of controversy. On one hand, legal institutions based in the Civil Code have taken root in Japanese society. In this sense, although they were inherent in the European legal tradition, they may be said to have become elements of the Japanese model. On the other hand, legal concepts and doctrines that developed outside the Civil Code indicate the singularity of Japanese law. However, they were often affected by foreign jurisprudence, given its influence on Japanese jurisprudence. Therefore, the factors influencing the Japanese model are not immediately clear.

C. The Role of the Ministry of Justice

In addition to academic contributions, the Ministry of Justice has played an important role in the reformation of the Law of Obligations. Beginning in the 1990s, the ministry embarked on a program to amend and consolidate the basic laws on civil matters.[60] The legal reform began with procedural law. The new Code of Civil Procedure was enacted in 1996, the Civil Rehabilitation Act in 1999, the Corporate Reorganization Act in 2002, and finally the Bankruptcy Act in 2004. In parallel, the Ministry of Justice sought to reform substantive laws. For instance, in 2003, provisions in Book II of the Civil Code were amended to make the enforcement of security rights more efficient. The Companies Act was enacted in 2005, and in 2006 the new Trust Act was established, modernizing the Japanese trust system. The reform of contract law is regarded as an integral factor in a series of reforms concerning civil affairs.[61]

Over time, the Civil Affairs Bureau, which was responsible for these reforms, increased the size of its workforce to respond to legislative demands. The Ministry of Justice has appointed young practitioners and researchers as attorneys or research fellows with responsibility for drafting legislation and negotiating with political parties or other ministries and agencies of government. The increase in staff numbers at the Civil Affair Bureau enabled the Ministry of Justice to launch a reform of the Law of Obligations.

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[60] *See generally* Consolidation of Basic Laws on Civil Matters, Ministry of Justice, http://www. moj.go.jp/ENGLISH/issues/issues08.html (last visited Nov. 11, 2010).

[61] UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 16–17.

D. Guiding Principles of the BRP

Based on the above observations, we now seek to answer the following questions: First, why has the process of law reform started recently? Second, on what principles is the BRP based?

The need for reform of contract law was primarily justified by the nature of the Japanese Civil Code, as well as by legal developments following its enactment. In this sense, the necessity of reform may have existed for some time. This potential necessity for reform was propelled forward by two groups: a body of scholars supportive of re-codification and the Ministry of Justice, which has achieved a series of legal reforms and increased its staff numbers. The coincidence of these factors actualized the movement for contract law reform.

An investigation of the background to law reform leads to several guiding principles behind the BRP. First, crystallization of legal development after enactment of the Civil Code is one of the goals of law reform. In this regard, the need for legal transparency is emphasized under the slogan, "Civil Code for Citizens." The new Civil Code is expected to enable ordinary citizens to understand the framework of contract law. Ideally, an examination of the Civil Code will enable those people with basic legal knowledge to determine the relevant rules applied to the legal issues that they confront in their daily lives. Second, the harmonization of contract laws was taken into account in a discussion about the new Civil Code. Assuming an international trend toward the harmonization of contract law, it is claimed that the provisions of international treaties and model laws should be referred to when arguing the case for law reform; furthermore, if Japan should deviate from its provisions, this deviation should be justified. Finally, also mentioned was a model of the Civil Code as independent from the European tradition. It was encouraged that a unique model, based on the particular experience in Japan, would be presented in the discussion regarding contract law reform.

The above considerations, which may contradict each other, are reflected in the proposals of the BRP, thereby making it difficult to grasp the overall picture of the BRP. The following section considers how these guiding principles apply to the BRP, with reference to specific examples.

II. MAJOR PROPOSALS OF THE BRP

A. Clarification of Legal Principles and Concepts

To enhance legal transparency, the Reform Commission suggests codifying legal principles that are fundamental to Japanese contract law but that are not provided for in the present Civil Code. For example, the BRP includes a proposal on the freedom of contract, which acknowledges the right of citizens to conclude a contract and to determine its contents.[62] The

[62] BRP, *supra* note 8, 3.1.1.01 (Principle of freedom of contract).

principle of consensualism is also expressed in order to clarify that there are in principle no other requirements than the parties' agreement,[63] and the BRP explains the contents of an agreement that is sufficient to form a contract.[64] Regarding contractual remedies, the BRP confirms that specific performance is considered a principal remedy.[65] These proposals aim to elucidate generally accepted principles;[66] consequently, they are unlikely to draw practical criticism.[67]

Moreover, the BRP contains many definitions of legal concepts; the necessity of such definitions was rejected by the drafters of the current Civil Code. In addition to "consumer," "business operator," and "economic operation," which are considered below, the BRP defines legal concepts relating to the formation and effect of contracts,[68] causes for extinguishing obligations,[69] special contracts,[70] and others.[71] These definitions are intended to help people understand the basic Japanese legal framework.[72]

Parties may freely conclude a contract and determine its contents.

[63] *Id.* 3.1.1.02 (Principle of consent).

A contract shall be entered into simply when the parties reach an agreement except when otherwise provided for in laws and regulations or where otherwise agreed by the parties.

[64] *Id.* 3.1.1.07 (Agreement forming the contract).

(1) A contract comes into existence when an agreement has been reached on the matters that should be stipulated in light of the intention of the parties and the nature of the contract.

(2) Notwithstanding the provision of the preceding paragraph, if an additional agreement is required to form the contract pursuant to the intention of the parties, the contract comes into existence when such agreement has been reached.

[65] *Id.* 3.1.1.53 (Claims and the power of demand).

The obligee may make a demand to an obligor for the performance of an obligation.

[66] 2 COMMENTARIES, *supra* note 14, at 4–5, 8–9, 187–88.

[67] See OSAKA BAR ASSOCIATION, *supra* note 15, which includes no objection to these proposals.

[68] For example, writing, 3.1.1.04, defect in things delivered, 3.1.1.05, offer, 3.1.1.12, and acceptance, 3.1.1.21.

[69] Setoff, 3.1.3.21, novation, 3.1.3.33, central counterparty settlement, 3.1.3.37, and release, 3.1.3.40. Also, impediments to prescription, 3.1.3.51.

[70] Sales, 3.2.1.01, exchange, 3.2.2.01, gifts, 3.2.3.01, lease, 3.2.4.01, loan for use, 3.2.5.01, loan for consumption, 3.2.6.01, finance lease, 3.2.7.01, service contract, 3.2.8.01, contract for work, 3.2.9.01, mandate, 3.2.10.01, quasi-mandate, 3.2.10.02, mediated contract, 3.2.10.19, intermediary contract, 3.2.10.20, deposit, 3.2.11.01, employment, 3.2.12.01, partnership, 3.2.13.01, life annuity contract, 3.2.14.01, and settlement, 3.2.15.01.

B. Embodiment of the Good Faith Clause

From the viewpoint of legal transparency, it is important to codify the legal rules developed outside the Civil Code. In this respect, the BRP contains proposals that put the principle of good faith in concrete form. Because of the simplicity of current provisions in the Civil Code, judicial precedents have been established via interpretation of the good faith clause, Article 1.2 of the Civil Code.[73] The Reform Commission proposes codifying these judicial precedents into the Civil Code.

First, the BRP formulates the principle of good faith as follows:

> 3.1.1.03 (Relations of claims and obligations and the principle of good faith)
> (1) An obligor must act in accordance with good faith when performing an obligation.
> (2) An obligee must act in accordance with good faith when exercising the right.
> (3) Other than (1) and (2), with regard to the relations of claims and obligations, the parties shall assume the duty of acting in accordance with good faith.

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[71] For example, contracts through general conditions, 3.1.1.25, transfer of the contractual status, 3.1.4.14, and guarantee, 3.1.7.01.

[72] In this regard, it is worth remarking that some definitions of the BRP intend not just to define legal concepts, but to purify them. For example, novation, one of the causes for extinguishing obligations, is defined as "a contract which changes the object of the obligation" concluded by parties who manifest intention to extinguish the obligation. This definition excludes the extinguishment of obligation by changing of the parties, which has been considered as a subcategory of novation under the current law. Under the BRP, this operation is expected to be achieved by the assignment of claims or assumption of obligations. BRP, *supra* note 8, 3.1.3.34 (Effect of a contract in substituting the obligor or the obligee). By rearranging the scope of legal concepts, the BRP aims to establish reasonable categorization between adjacent legal institutions. 3 COMMENTARIES, *supra* note 14, at 90–93.

Definitions of special contracts also reveal the inclination toward purifying legal concepts. Because of the variety of service contracts in real life, the four named contracts in the current Civil Code, contract for work, mandate, deposit, and employment, are not sufficient to cover all types of service contracts. To fill the gap, judicial precedent has enlarged the concept of quasi-mandate in order to apply provisions of mandate to contractual relationships which do not fall into the four types of special contracts. While the BRP clarifies the concept of four existing contract types, it introduces a new category of contract, service, which is expected to cover other relationships. COMMENTARIES, *supra* note 14, at Vol. 5, 4–7. For details on criticism, see TOKYO BAR ASSOCIATION, *supra* note 15, at 22–23.

[73] MINPO, *supra* note 1, art. 1, para. 2. Paragraph 2 provides that "[t]he exercise of rights and performance of duties must be done in good faith." The English translation of the Japanese Civil Code is available at Japanese Law Translation, http://www.japaneselaw translation.go.jp/law/detail/?id=1928&vm=04&re=02&new=1 (last visited Nov. 11, 2010).

On the presumption that both parties to the contract have a duty to act in accordance with good faith, the BRP then sets down individual rules.

As a corollary to the freedom of contract, one is free to decide whether to enter into a contract and is not liable for failure to reach an agreement. If she violates the principle of good faith however, she incurs liability for damages.[74] Under the influence of German law, Japanese scholars have discussed this liability as an application of *culpa in contrahendo*, and the Japanese Supreme Court has acknowledged this liability for some time.[75] The BRP suggests the necessity of codifying these established precedents[76] consistent with the new German Law of Obligations and international model laws.[77]

Parties in contract negotiations also have a duty to provide information and give an explanation regarding those matters that might influence the contract decision of the other party, in accordance with good faith.[78] Based on an analysis of court judgments, the BRP enumerates factors that should be taken into account when deciding whether there has been a breach of duty: "the nature of the contract, the status of each party, the conduct in the

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[74] BRP, *supra* note 8, at 3.1.1.09 (Liability for damages caused by persons unfairly breaking off negotiations).

(1) A party is not liable solely on the grounds of having broken off the contract negotiations.

(2) Notwithstanding the provision of the preceding paragraph, if contrary to good faith a party either continues negotiating even when there is no prospect of the contract being concluded or rejects conclusion of the contract, the party is liable for the damage incurred through the other party trusting in the contract being formed.

[75] *See* K.K. Osawa Horo Seisakusho v. K.K. Fuji, 1082 HANREI JIHO 47 (Sup. Ct., 1983); Sumiya v. Ikeda, 1137 HANREI JIHO 51 (Sup. Ct., 1984); K.K. Sokai Tsusho v. Teikyo Heisei Daigaku, 1949 HANREI JIHO 30 (Sup. Ct., 2006); K.K. Kanamori Seisakusho v. K.K. Nihon Shuppan Hanbai, 1964 HANREI JIHO 45 (Sup. Ct., 2007).

[76] Although the issue of the nature of this liability, whether contractual or delictual, has been discussed animatedly among scholars, the BRP does not mention this discussion. COMMENTARIES, *supra* note 14, at 40.

[77] Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 311 ¶ 2; PICC, *supra* note 48, art. 2.1.15; DCFR, *supra* note 50, art. II.-3:301.

[78] BRP, *supra* note 8, 3.1.1.10 (Duty of provision of information/duty of explanation of the negotiating parties).

(1) If in the contract negotiations, there is a matter relating to the contract which will influence the decision of the other party as to whether or not to conclude the contract, the parties shall, in light of factors such as the nature of the contract, the status of each party, the conduct in the negotiations, or the existence and contents of an arrangement between the parties reached in the process of negotiations, provide information and give an explanation in accordance with the principle of good faith.

(2) A person who violates the duty in (1) is liable for the damage which would not have been incurred had the other party not concluded such contract.

negotiations, or the existence and contents of an arrangement between the parties reached in the process of negotiations." In this light, the BRP aims to crystallize legal developments in Japan.[79]

One consequence of the requirement that a creditor must act in good faith is apparent in the case of a creditor failing to accept the delivery of goods or services. The debtor may make a claim for damages caused by the failure of acceptance, or may cancel the contract itself, not only where a creditor bears the duty of acceptance, but also where she violates the principle of good faith.[80] Although there exists a difference of opinion regarding the nature of the creditor's liability, this type of liability is widely accepted in Japan. The BRP seeks to enhance the degree of legal transparency by codifying this liability.

C. New System of Contractual Remedies

On the subject of contractual remedies, which traditionally have been profoundly influenced by German law and jurisprudence, the BRP proposes a new system, apparently taking into account the harmonization of contract laws. However, this proposal does not indicate that the BRP intends to reproduce provisions in treaties or model laws. While sharing the fundamental ideas of such provisions, the BRP advances proposals that reflect legal practice in Japan.

1. Initial Impossibility

First, as with the PICC[81] and DCFR,[82] the BRP advances the idea that initial impossibility does not in itself invalidate a contract.[83] Despite the absence of

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[79] 2 COMMENTARIES, *supra* note 14, at 44-45.

[80] BRP, *supra* note 8, at 3.1.1.88 (Damages and cancellation caused by violation of duty by the obligee).

> In cases where the obligee bears the duty of acceptance or any other duty to act in accordance with the principle of good faith, if the obligee violates this duty the obligor may make a claim for damages to the obligee in accordance with the rules relating to non-performance of an obligation and may cancel the contract which incurred the obligation.

[81] PICC, *supra* note 48, art. 3.3.

[82] DCFR, *supra* note 50, art. II.-7:102.

[83] BRP, *supra* note 8, 3.1.1.08 (Impossibility of performance/impossibility of expectation existing at the time of conclusion of the contract).

> Even if the performance of the contractual obligation was already impossible to perform at the time of conclusion of the contract or it was otherwise unreasonable to expect the obligor to perform as such in light of the intent of

an express provision, Japanese legal scholarship received the doctrine of initial impossibility from German law and jurisprudence, according to which a contract is invalid where at the time of the contract's formation, performance of an obligation is impossible.[84] When a party takes on the risk of impossibility, however, it is difficult to justify invalidating the contract simply because of its initial impossibility.[85] In fact, the new German Civil Code,[86] influenced by international model laws, has already adopted this idea.[87] The BRP clearly states that initial impossibility by itself does not affect the validity of a contract, although initial impossibility prevents the creditor from demanding that the debtor meet the stated obligation,[88] and instead enables the creditor to claim for damages or rescind the contract on the grounds of mistake.[89]

2. Damages

The BRP proposes to introduce a new regime of debtor's liability for damages composed of two phases: (i) judging the requirements for liability; and (ii) deciding the scope of damages according to the foreseeability rule.

i. Requirements for Liability

According to the BRP, the party in breach is liable for damages caused by "non-performance of obligation."[90] This proposal initially appears to set down

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the contract, such contract is valid provided that the parties have not agreed otherwise.

[84] For the Japanese assimilation of initial impossibility from German law, see Zentaro Kitagawa, *Japanese Civil Law and German Law: From the Viewpoint of Comparative Law*, *in* THE IDENTITY OF GERMAN AND JAPANESE CIVIL LAW IN COMPARATIVE PERSPECTIVES 19–21 (Zentaro Kitagawa & Karl Riesenhuber eds., 2007).

[85] COMMENTARIES, *supra* note 14, at 37–38; UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 65–66.

[86] Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 311a.

[87] See REINHARD ZIMMERMANN, THE NEW GERMAN LAW OF OBLIGATIONS, HISTORICAL AND COMPARATIVE PERSPECTIVE 62-66 (2005).

[88] BRP, *supra* note 8, 3.1.1.56 (Cases where a demand for performance may not be made).

> In cases where performance is impossible or, in light of the intent of the contract, the obligor cannot reasonably be expected to make the performance, the obligee may not make a demand to the obligor for performance.

[89] Although there is no proposal, the BRP acknowledges the rescission of contract on the ground of the initial impossibility. COMMENTARIES, *supra* note 14, at 38.

[90] BRP, *supra* note 8, 3.1.1.62 (Damages caused by non-performance of an obligation).

a self-explanatory rule, although there are several important implications. Under this proposal, there is no distinction among subcategories of non-performance, and all forms of non-performance are subject to a single rule. This idea has already been adopted in the current Civil Code:

> Article 415 (Damages due to Default)
>
> If an obligor fails to perform consistently with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in cases it has become impossible to perform due to reasons attributable to the obligor.

The first sentence provides that the failure "to perform consistently with the purpose of its obligation" as a unitary requirement for the damages, and the second sentence applies it to the case of impossibility. Nonetheless, Japanese jurisprudence introduced the trichotomy of non-performance from German law: impossibility, delay in performance, and imperfect performance, or positive breach of contract (*"positive Vertragsverletzung"*),[91] which then thoroughly permeated Japanese practice.

However, subsequent research into the Japanese reception of German dogma revealed no clear reason for the attribution of absolute priority to German doctrines, and now this view is widely accepted in academia.[92] Based on academic achievement and following recent international trends,[93] the Reform Commission suggests adopting "non-performance of obligation" as a unitary concept.

The BRP would then create a two-step analysis for finding "non-performance of obligation": first, identifying the scope of obligation, and second, judging the exemption from damages. The scope of the obligation is demarcated by the amount of risk the debtor accepted in the contract. To decide this, a court can evaluate whether the debtor promised to achieve a given result or simply to use reasonable care and skill.

The second stage is concerned with exemptions from the requirement to perform. The BRP states two kinds of exemptions:

> 3.1.1.63 (Grounds for exemption from damages)

> The obligee may demand compensation from the obligor for damage incurred through non-performance of an obligation.

[91] For Japanese reception of the trichotomy of non-performance from German law, see Kitagawa, *supra* note 84, at 21–23.

[92] For a general outline, see 早川真一郎 [Hayakawa Shinichiro], 不完全履行、積極的債権侵害 [*Imperfect Performance and Positive Breach of Contract*], *in* 4 民法講座 [PAPER SERIES ON THE CIVIL CODE] 49 (星野英一 [Hoshino Eiichi] et al. eds., 1985).

[93] CISG, *supra* note 47, art. 79; DCFR, *supra* note 50, art. III.-3:701.

(1) If an obligation is not performed due to causes which had not been accepted by the obligor with regards to the contract, the obligor shall not be liable for damages under 3.1.1.62.
(2) If the obligor has the right of defense provided for in 3.1.1.54 or 3.1.1.55, the obligor shall not be liable for the damages provided for in 3.1.1.62. The two defenses mentioned above are simultaneous performance, 3.1.1.54, and insecurity, 3.1.1.55.

Section 1 reveals an important aspect of the BRP: fault by the debtor is not required.

As we have seen, the first sentence of the Article 415 of Japanese Civil Code does not mention the debtor's fault. The second sentence certainly provides the "attribution" to the debtor as a requirement for damages, but it is not clear what "attribution" means. In an attempt to clarify the word's meaning, Japanese scholars introduced fault-based liability doctrine ("*Verschuldungsprinzip*") from German jurisprudence, under which a debtor is liable only for damages attributable to her fault. Moreover, scholars did not limit this doctrine to the case of impossibility of performance but expanded it to all kinds of non-performance. The fault-based liability doctrine was thus established as a general principle for damages.

Although this doctrine is generally accepted in practice, it may not be easily administrable in the judicial process.[94] If the obligation is to achieve a given result, failure to do so would be sufficient to require the debtor to pay damages, and there would be no need to consider the debtor's fault. On the other hand, if the debtor is obliged merely to use reasonable care and skill, she is liable if she has not exercised such reasonable care and skill. Based on these considerations, the BRP intends to introduce rules reflecting the actual judgment process, under which the exemption from the damages is allowed, only when the causes, which the debtor had not accepted, hampered the performance of obligation. Exemptions in this sense need not be judged when the debtor's obligation is to use reasonable cares and skill because judgment on the exemptions is absorbed into judgment on the debtor's obligation.[95]

ii. Scope of Damages

In deciding the scope of damages, the BRP suggests a revival of the foreseeability rule. Article 416 of the Japanese Civil Code,[96] which descended

[94] UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 83.

[95] 2 COMMENTARIES, *supra* note 14, at 253.

[96] MINPO, *supra* note 1, art. 416 (Scope of damages) provides as follows:

(1) The permissible scope of the demand requirement for damages arising from failure to perform an obligation shall be the damages which would ordinarily arise from such failure.

from the famous English case *Hadley v. Baxendale*,[97] contains a foreseeability rule, but Japanese legal scholars introduced the German "adequate causation" principle, under which recoverable losses are those caused by non-performance that would have occurred in the ordinary course of events. To avoid confusion in the interpretation of Article 416, the BRP proposed that the scope of damages be limited to the foreseeable consequences of failure to perform.[98]

Although this rule has also been adopted by international model laws,[99] the BRP deviates slightly from these laws regarding the point in time when the damages should be foreseen. For example, according to the Article 7.4.4 of PICC, the scope of damages is decided "at the time of the conclusion of the contract." In contrast, whereas damages triggering compensation must generally have been foreseen by the contract parties at the time of conclusion of the contract, the BRP allows the creditor to demand compensation from the debtor for damages if the debtor foresaw or should have foreseen the damages "after the conclusion of the contract up until the point of non-performance of the obligation" unless she took reasonable measures to prevent them. For more than ninety years, the Japanese Supreme Court has followed the rule that the scope of damages is judged at the time of non-performance; the BRP intends to codify this interpretation into the Civil Code.[100] This rule is supported by the idea that once parties have entered into the contract, they should be responsible for those losses revealed after conclusion of the contract. It has been pointed out that this idea corresponds to the reality of Japanese legal practice.[101] Considered in this light, the BRP's proposals on damages aim to establish a new regime that conforms to practice in Japan by referring to international trends.

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(2) The obligee may also demand compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.

[97] Hadley v. Baxendale, 156 Eng. Rep. 145 (Ct. Exch. 1854).

[98] BRP, *supra* note 8, 3.1.1.67 (Scope of damages).

(1) With regard to a claim accruing based on the contract, the obligee may make a demand to the obligor for compensation of damage as the result of non-performance which, at the time of conclusion of the contract, both parties foresaw or should have foreseen.

(2) Even in cases where the obligor foresaw or should have foreseen the damage after the conclusion of the contract up until the point of non-performance of the obligation, if the obligor did not take reasonable measures to avoid the damage, the obligee may make a demand to the obligor for such compensation.

[99] PICC, *supra* note 48, art. 7.4.4; DCFR, *supra* note 50, art. III.-3:703.

[100] Enu Emu Webu Nawara v. Kurohara, 24 DAIHAN MINROKU 1658, 1666–67 (Sup. Ct., 1918).

[101] UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 92–93.

However, this regime has been bitterly criticized by practitioners, who are concerned that it will undermine the stability of legal practice.[102] Even though the doctrines to which the practitioners are accustomed do not precisely reflect standard legal practice, they can operate under these doctrines; therefore, they see no immediate need for law reform.

This type of objection reveals that legal development in academia is not identical to that in practice. Even a doctrine that is widely supported by scholars will not necessarily receive the approval of practitioners. This difference results in varying degrees of enthusiasm for law reform among practitioners and academics, creating a potential obstacle for law reform.

3. Cancellation of Contract

In the proposed provisions on cancellation of contract, the BRP suggests a new set of rules in an attempt to reflect both the state of legal practice in Japan and international trends. First, the BRP agrees with CISG, PICC, and DCFR that cancellation is a legal mechanism that allows a contract party to be released from the contract when it becomes unreasonable to bind her to it. Hence, even if non-performance is excused and the breaching party is not liable for damages, the aggrieved party has the right to terminate the contract if there is "serious non-performance of the contract."[103] This proposal and the

[102] OSAKA BAR ASSOCIATION, *supra* note 15, at 94–99; TOKYO BAR ASSOCIATION, *supra* note 15, at 14–15.

[103] BRP, *supra* note 8, at 3.1.1.77 (Requirements of accrual of the right to cancellation).

(1) If there is a serious non-performance of the contract on the side of one of the parties to the contract, the other party may cancel the contract.

(a) A serious non-performance of the contract shall be when one of the parties to the contract does not perform an obligation and as a result the other party loses reasonable expectation with regard to the contract.

(b) In cases where, through the nature of the contract or manifestation of intention of the parties, the object of the contract cannot be achieved unless the obligation is performed by a specified date or within a certain period, when that time has passed without one of the parties performing the obligation, this shall fall under a serious non-performance of the contract.

(2) In cases where one of the parties to the contract does not perform an obligation, if the other party has demanded performance stipulating a reasonable period of time and non-compliance with the demand constitutes a serious non-performance of the contract, the other party may cancel the contract.

(3) With regard to a contract concluded between business operators, in cases where one of the parties to the contract does not perform an obligation, if the other party demands performance stipulating a reasonable period of time and no performance is made within this period, the other party may cancel the contract. This shall not apply if non-compliance with the demand does not constitute a serious non-performance of the contract.

proposal on damages both reject a distinction between non-performance and fault-based liability doctrine.[104] The BRP defines "serious non-performance of the contract" as occurring "when one of the parties to the contract does not perform an obligation and as a result the other party loses reasonable expectation with regard to the contract." This concept closely resembles "fundamental breach of contract" in the CISG[105] and "fundamental non-performance" in the PICC[106] and DCFR.[107]

On the other hand, the BRP intends to retain the two types of cancellation stated in the current Civil Code: cancellation with demand (Article 541) and without demand (Articles 542, 543). Correspondingly, the BRP allows the aggrieved party to cancel the contract "[i]n cases where one of the parties to the contract does not perform an obligation, if the other party has demanded performance stipulating a reasonable period of time and non-compliance with the demand constitutes a serious non-performance of the contract." Here, in judging whether cancellation is permissible, courts can take into account the circumstances after non-performance ("non-compliance with the demand"). Unlike CISG Article 49 (1) (b), cancellation with demand in the BRP is not limited to the case of a delay in performance, but is also allowed in the case of imperfect performance. Because this stance is widely accepted in Japan, the BRP intends to deviate from the model supplied by the CISG.[108]

Some practitioners appear to favor the introduction of "serious non-performance of the contract" as a requirement for cancellation while maintaining the two types of cancellation.[109] However, some have raised concerns that the scope of contract cancellation would be limited by these suggested revisions because they seem to impose an aggravation requirement for cancellation.[110] In addition, the revisions have potential for confusion. Critics claim that because of the potential for manipulation, it is difficult to foresee how the revisions would be interpreted in court judgments.[111]

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[104] 2 COMMENTARIES, *supra* note 14, at Vol. 2, 299, 312–14. Hence, the BRP proposes at the same time to abolish provisions concerning the risk allocation which are applied to the case where performance becomes impossible on a ground for which the debtor is not responsible. *See* BRP, *supra* note 8, at 3.1.1.85 (Deletion of the provisions concerning the assumption of risk).

> Article 534, Article 535, and Paragraph 1 of Article 536 of the present Civil Code shall be abolished.

[105] CISG, *supra* note 47, art. 64.

[106] PICC, *supra* note 48, art. 7.3.1.

[107] DCFR, *supra* note 50, art. III.-3:502.

[108] 2 COMMENTARIES, *supra* note 14, at 299–300.

[109] OSAKA BAR ASSOCIATION, *supra* note 15, at 105–06.

[110] TOKYO BAR ASSOCIATION, *supra* note 15, at 15.

[111] OSAKA BAR ASSOCIATION, *supra* note 15, at 105–07; TOKYO BAR ASSOCIATION, *supra* note 15, at 15.

D. Shorter Periods and Simpler Regimes of Prescription

While the Reform Commission is cautious regarding negative effects on practice that may arise with the introduction of the new system, it also sees the need for improvement. By abolishing some of the provisions in the Civil Code and rejecting current practice, the Reform Commission intends to establish new legal institutions, an appropriate goal of law reform. In this light, reform proposals on extinctive prescription and assignment of claims merit mention.

Under the influence of the French Civil Code, Japanese law has adopted a unitary concept of prescription that covers both acquisitive and extinctive prescription. Provisions concerning prescription are grouped together in Book I of the Civil Code. The Japanese Civil Code retains a ten-year period as the regular period of extinctive prescription for obligations in Article 167 Paragraph 1 but recognizes shorter periods of one to five years for many important claims in Articles 169 to 174 and 724.[112] Nonetheless, because the scope of a shorter period is not necessarily definite, the relevant period is sometimes difficult to determine.[113] Moreover, the justification for such a distinction is said to be untenable.[114] Therefore, the BRP includes fundamental reform proposals under the new concept of "prescription for a claim,"[115] which appears to conform to the "trend towards shorter periods and simpler regimes."[116]

The BRP suggests abolishing the existing shorter periods of prescription[117] and sets general periods of prescription that consist of two types,[118] although

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[112] The Japanese Commercial Code also lays down the five-year period for obligations arising from commercial relationships. 商法 [COMMERCIAL CODE], Law No. 48 of 1899, art. 522.

[113] 3 COMMENTARIES, *supra* note 14, at 159–60.

[114] *Id.* at 160–62.

[115] The reason that the Reform Commission introduced the new concept instead of extinctive prescription involved two proposals as to the effect of the expiration of the prescription period, as discussed below. According to one proposal, the expiration of the prescription period does not mean the extinction of an obligation; rather, it allows a debtor to refuse the performance of the obligation. 3 COMMENTARIES, *supra* note 14, at 155.

[116] DCFR, *supra* note 50, art. III.-7:201 n.III.

[117] BRP, *supra* note 8, 3.1.3.45 (Handling of the provisions on short-term extinctive prescriptions).

> (1) Articles 169 to 174 of the present Civil Code shall be abolished.
> (2) Article 724 of the present Civil Code shall be abolished.
> (3) With regard to other provisions of the present Civil Code stipulating provisions which differ from 3.1.3.44, the Commission considers that it is preferable to abolish them in principle, but it reserves a room for further consideration on each provision.
> (4) With regard to provisions relating to extinctive prescription in the Commercial Code, the Commission considers that it is preferable to abolish Article 522 and other related provisions of the Commercial Code

the special periods are retained in some cases.[119] The relatively long ten-year period begins from the date on which a creditor is able to exercise a claim. The shorter period commences at the date on which a creditor knows of the debtor and the cause for accrual of a claim and is able to exercise the claim. The BRP proposes three choices for the shorter period: three, four, or five years. The BRP regime—a combination of a longer period with objective commencement and shorter periods with subjective commencement[120]—corresponds overall to the trend of law reform in Europe[121] and an international model law.[122]

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insofar as possible, but these revisions shall be left to later consideration for the reform of the Commercial Code.

[118] BRP, *supra* note 8, 3.1.3.44 (Principles on the commencement time of the prescription for a claim and the prescription period).

(1) Unless otherwise provided in the Civil Code or other laws, the prescription period for a claim shall expire after [10 years] have elapsed since the time of being able to exercise the claim.
(2) Even before the lapse of the period in (1), if the obligee (or in cases where the obligee is a minor or an adult ward, the legal representative) comes to know of a cause for accrual of a claim and identifies the obligor, the prescription period for the claim shall expire through the lapse of [3 years/4 years/5 years] since the time of knowing of the fact or being able to exercise the claim, whichever comes later.

[In cases where the prescription period of (2) is three years:]

(3) Notwithstanding (1), if the obligee (in cases where the obligee is a minor or an adult ward, the legal representative) comes to know of a cause for accrual of a claim and identifies the obligor within [10 years] of the time of being able to exercise the claim, the period of claim prescription shall not expire until [3 years] have passed since knowing of such fact.

[119] The BRP contains the following exceptions for prescription period: 3.1.3.46 (Special provisions on calculation of commencement times in cases where the obligor is required to draft records on the claim or comply with inquiries); 3.1.3.47 (Exceptions to claims recognized through final and binding judgments and suchlike); 3.1.3.48 (Prescription period for a claim of periodic payments); and 3.1.3.49 (Prescription period of a claim for damages owing to infringement of personal interests). BRP, *supra* note 8.

[120] One deviation of the BRP from the international trend is that the BRP requires actual knowledge of the accrual of a claim and the debtor. This is supposed to clarify when the shorter prescription period starts. COMMENTARIES, *supra* note 14, at Vol. 3, 171.

[121] New provisions of the French Civil Code lay down the five-year general period and the twenty-year maximum period while recognizing exceptions for several claims. C. CIV., arts. 2224, 2232. The German Civil Code, on the other hand, has a general prescription period of three years, which starts at the end of the year when the creditor should become aware of the facts giving rise to the right and the identity of the debtor. It is limited to a maximum period of ten or thirty years. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, §§ 195, 199.

[122] According to the DCFR , the shorter period begins to run from the time when a debtor has to effect performance or the time of the act which gives rise to the claim. DCFR, *supra* note 50, arts. III.-7:201, 203. Nonetheless, since the running of the period is suspended as long as the creditor could not reasonably know of the identity of the

On the other hand, postponement of the prescription period is permitted on various grounds in order to protect the interest of the creditor.[123] First, contract parties may change the length of the prescription period and the time when it commences within a certain range.[124] Both shortening and lengthening of the prescription period are allowed. Second, three types of impediments to prescription are stated: renewal of the prescription period, suspension of the running of the prescription period, and extension of the expiry date of the prescription period.[125] In particular, when parties agree to negotiate a claim, the running of the prescription period is suspended.[126] Through these

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debtor or the facts giving rise to the claim (art. III.-7:301) and there are caps on the length of periods that are not in principle subject to the suspension (art. III.-7:307), the regime resembles that of the BRP on the whole.

[123] COMMENTARIES, *supra* note 14, at Vol. 3, 162, 164.

[124] BRP, *supra* note 8, 3.1.3.50 (Setting a prescription period through agreement).

> (1) The obligee and the obligor may, through an agreement, change the commencement time of the prescription period or the length of the prescription period provided for in 3.1.3.44(2) up until the time of accrual of the claim.
> (2) The commencement time stipulated through the agreement of (1) shall be from after the time the claim could be exercised.
> (3) The prescription period stipulated through the agreement of (1) shall be for more than [6 months/1 year] of the time of being able to exercise the claim but less than [10 years] (the same period as 3.1.3.44(1)); provided, however, that this does not apply if otherwise provided for by law.
> (4) The agreement in (1) made between a business operator and consumer is void if it has contents which are more disadvantageous to the consumer than in cases according to the provisions of law.

[125] BRP, *supra* note 8, at 3.1.3.51 (Types and definitions of prescription impediments relating to prescription of claims).

> The impediments to prescriptions of claims shall be divided into the three types of renewal of the prescription period, suspension of the running of the prescription period, and extension of the expiry of the prescription period.
> (a) "Renewal of the prescription period" means that the previous prescription period terminates through the occurrence of certain grounds and the running of a new prescription period commences.
> (b) The suspension of the running of the prescription period means that the running of the prescription period is temporarily suspended through the occurrence of certain grounds and after the grounds have terminated, the running of the prescription period recommences and the prescription period expires through the passing of the remaining period.
> (c) The extension of the expiry of the prescription period means that, in cases of there being certain grounds, the expiry of the prescription period is extended from the time of the grounds terminating or being extinguished until a certain period has passed.

[126] BRP, *supra* note 8, at 3.1.3.60 (Suspension of the running of the prescription period of a claim due to an agreement on discussions).

arrangements, it is expected that the prescription period be applied differently according to individual circumstances; this fundamental idea is consistent with recent international trends in law on prescription.[127]

As to the effect of expiry of the prescription period, the BRP advances two proposals: to extinguish an obligation, and to allow a debtor to refuse the performance of an obligation.[128] Although the latter proposal has been adopted by international model laws,[129] the majority of the BRP members supported

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(1) If an agreement is reached between the obligee and the obligor to the effect of holding discussions relating to the claim, the running of the prescription period of the claim shall be suspended from such time.
(2) If a notification reaches the obligee from the obligor to the effect of rejecting the continuation of the discussions or [3 months/6 months] have passed since the last discussion (excluding cases where an agreement has been reached on continuing the discussions), the running of the prescription period shall recommence from such point.
(3) In cases of (2), the prescription period shall not expire until [6 months/1 year] have passed since the time of recommencement of the running. A demand notice for performance made within the [6 months/1 year] shall not have the effect of extending the expiry of the prescription period.

[127] For instance, the change of prescription period within a certain range by agreement is allowed under the French Civil Code, German Civil Code, and the DCFR. C. CIV., art. 2254; Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 202(2); DCFR, *supra* note 50, arts. III.-3:703, III.-7:601. The postponement of expiry of prescription period is stipulated in the German Civil Code and DCFR. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 203; DCFR, *supra* note 50, art. III.-7:304.

[128] BRP, *supra* note 8, 3.1.3.68 (Effect of the expiry of the prescription period of a claim).

[Proposal A]
(1) If the prescription period pertaining to a claim expires, the obligor may invoke the claim prescription.
(2) The invocation in (1) may be made either in or out of court.
(3) If the invocation in (1) is made, it may not be revoked.
(4) If the invocation in (1) is made, the claim shall be extinguished retroactively from the day of commencement of calculation.

[Proposal B]
(1) If the prescription period pertaining to a claim expires, the obligor may refuse the performance of the obligation relating to the claim and the performance of the obligation of interest, the obligation of compensatory damages for delay, and any other obligation which accrues incidentally to the claim.
(2) The refusal of performance in (1) may be made either in or out of court.
(3) If the refusal of performance in (1) is made, it may not be revoked.
(4) If the refusal of performance in (1) is made, a request may not be made for performance or any other method of actualizing the claim. Any guarantee claim, real-right security or any other right to secure the performance of the obligation which was refused shall be extinguished.

[129] PICC, *supra* note 48, art. 10.9; DCFR, *supra* note 50, art. III.-7:501. *See also* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 214.

the former, which maintained the status quo in the current Civil Code. There were several reasons for this decision,[130] but the basic idea was to avoid any confusion and negative side effects that might arise from changes to existing rules.

Practitioners have objected to these proposals because they doubt the need to simplify and shorten the prescription periods on the grounds that the current system is firmly established in Japan.[131] In contrast, some legal practitioners feel the need to lengthen the prescription periods. In this light, the proposal regarding suspension due to agreement on discussions has attracted support from practitioners, although they insist that the criteria should be clarified.[132] As to the subjective commencement applied to the shorter period, concerns have been raised regarding the negative impact on non-contractual claims, claims accrued on the basis of *negotiorum gestio* or unjust enrichment.[133] As expected, the practitioners object to the proposal to change the effect of prescription.[134] Again, we see varying degrees of enthusiasm for law reform among practitioners and academics.

E. Registration System for the Assignment of Monetary Claims

In addition to proposals on prescription, the BRP includes reform proposals on assignment of claims; this reform may require considerable changes in practice. Notably, a registration system is proposed for the assignment of monetary claims.

Under the current Civil Code, the assignment of a claim is deemed effective with regards to third parties only if notice to or acknowledgment by a debtor is made with a written document bearing a fixed date.[135] Although this

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[130] 3 COMMENTARIES, *supra* note 14, at 252.

[131] OSAKA BAR ASSOCIATION, *supra* note 15, at 138–39.

[132] *Id.* at 144–45.

[133] TOKYO BAR ASSOCIATION, *supra* note 15, at 20.

[134] OSAKA BAR ASSOCIATION, *supra* note 15, at 146–47; TOKYO BAR ASSOCIATION, *supra* note 15, at 20–21.

[135] MINPO, *supra* note 1, art. 467.

> Article 467 (Requirement for assertion of assignment of nominative claim against third parties)
>
> (1) The assignment of a nominative claim may not be asserted against the applicable obligor or any other third party, unless the assignor gives notice thereof to the obligor or the obligor has acknowledged the same.
> (2) The notice or acknowledgement set forth in the preceding paragraph may not be asserted against a third party other than the obligor unless the notice or acknowledgement is made using an instrument bearing a fixed date.

rule is derived from the French Civil Code,[136] Japanese law lacks a system by which the date of arrival of a document to a debtor is publicly authenticated. The date on the document evidences only the date when the document was notarized. As a result, when deciding the order of priority between the assignee and competing claimants, this rule does not work as well as the original system.[137] For this reason, judicial precedents have been established that in the case of multiple assignments of the same claim, the assignee whose assignment is first made known to the debtor has priority over other assignees.[138]

This system is based on the presumption that an intending assignee can ask the debtor whether she has received prior notice. But the debtor is not obliged to answer the assignee's inquiry, in which case the system fails. In addition, even if a debtor is cooperative, if more than two notices arrive at the same time[139] or when the sequence of arrival of notices cannot be verified,[140] she will be unable to determine which assignee has priority. The precedents for such cases seem to favor prorating the sum of the claims,[141] but the overall picture regarding the order of priority remains vague.

In criticizing the present situation, the Reform Commission proposes to establish a registration system for the assignment of monetary claims.[142] It is expected to clarify the order of priority among competing claimants, thereby facilitating the transactions of claims. Indeed, a registration system has already been introduced in part by special legislation for the assignment of monetary claims made by judicial persons such as corporations,[143] achieving measurable

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[136] C. CIV, art. 1690. For the history of Japan's reception of the French system, see generally 池田真朗 [Ikeda Masao], 民法四六七条における一項と二項との関係 [*The Relationship between Section 1 and 2 of Article 467 of the Civil Code*], 139 法学研究 [J. L. POL. & SOC'Y, KEIO UNIV.] 25 (1978), reprinted in 債権譲渡の研究 [STUDIES ON THE ASSIGNMENT OF CLAIMS] 51 (2d ed. 2004).

[137] 3 COMMENTARIES, *supra* note 14, at 290-91.

[138] Nakamura v. Nikko Shin-yo Kinko, 28 MINSHU 174 (Sup. Ct., 1974).

[139] Wada v. K.K. Hitachi Seisakusho, 34 MINSHU 42 (Sup. Ct., 1980).

[140] Japan v. K.K. Ikko, 47 MINSHU 3334 (Sup. Ct., 1993).

[141] *Id.* at 3337.

[142] BRP, *supra* note 8, 3.1.4.04 (Perfection requirements against a third party other than the obligor with regard to the assignment of a claim).

> (1) An assignment of a monetary claim may not be asserted against a third party other than the obligor unless the assignment of the claim is registered.
> (2) An assignment of a non-monetary claim may not be asserted against a third party other than the obligor unless a fixed date is acquired for the assignment contract.

[143] 動産及び債権の譲渡の対抗要件に関する民法の特例等に関する法律 [Act on Special Provisions of the Civil Code in Relation to Requirements for Perfection of Transfer of Movables and for Assertion of Assignment of Claims], Law No. 104 of 1998, art. 4. On

success. The Reform Commission expands this system to the assignment of monetary claims in general,[144] noting the need to establish "measures to make registration of the assignment of a monetary claim with a natural person as the assignor possible" and to alleviate "the burden for procedures in the case of applying for multiple registrations and on methods of responding to other practical requests."[145]

Although a filing system for notice of assignment was one of the three substantive priorities suggested by the United Nations Convention on the Assignment of Receivables in International Trade,[146] recent international model laws have not followed this course. For example, the DCFR adopted a rule that gives priority to the assignee of whose assignment a debtor is first notified if she neither knew, nor ought to have known, of the prior assignment.[147] While recognizing these situations, the Reform Commission ventures to endorse the registration system in an attempt to develop an advanced model for the future.[148] One advocate argues that Japan's advanced technology makes possible the introduction of this unprecedented system.[149] Here, the uniqueness of Japanese law, rather than harmonization, comes to the fore.

Practitioners recognize the problems in the current system and feel the need for law reform.[150] Nonetheless, they have criticized the registration

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the other hand, because this act does not rule out the application of the Civil Code, there emerged the possibility that provisions both of the Civil Code and of the special act are applied to the assignment of claims made by judicial persons. This possibility also justifies law reform. 2 COMMENTARIES, *supra* note 14, at Vol. 3, 291.

[144] 3 COMMENTARIES, *supra* note 14, at Vol. 3, 293-94. The reason that non-monetary claims are excluded is that they are not frequently assigned; requiring registration is a severe burden on their assignments. *Id.*

[145] BRP, *supra* note 8, 3.1.4.07 (Registration of a claim assignment).

> (1) The claim assignment shall generally be registered based on the provisions of law relating to the special provisions of the Civil Code concerning perfection requirements of the assignment of movables and claims. But the Commission concluded that, aside from establishing measures to make registration of the assignment of a monetary claim with a natural person as the assignor possible, consideration shall be given to methods of alleviating the burden for procedures in the case of applying for multiple registrations and on methods of responding to other practical requests.
> (2) The attachment of a claim does not require registration.

[146] United Nations Convention on the Assignment of Receivables in International Trade, Annex, Sec. 1, Dec. 12, 2001, 41 I.L.M. 776.

[147] DCFR, *supra* note 50, art. III.-5:121.

[148] 3 COMMENTARIES, *supra* note 14, at Vol. 3, 289-90.

[149] UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 156.

[150] OSAKA BAR ASSOCIATION, *supra* note 15, at 155; 中根敏勝 [Nakane Toshikatsu], 検討委員会試案の実務影響を考える 債権譲渡・法定利率 [*The Influence of Basic Reform*

system for being impractical. It is difficult to establish a system that enables citizens to register their assignment of claims given the initial costs and privacy concerns.[151] Even if a registration system were possible, costs of registration would soar, hampering the assignment of claims. In this respect, it is sufficient to add provisions relating to discharge from a debtor,[152] which the BRP also advances in an elaborate proposal.[153] It may be safely concluded that practitioners are skeptical about the introduction of a new registration system at the cost of the convenience afforded by the current system.

F. Consolidation of Provisions in the Commercial Code and the Consumer Contract Act

An investigation of individual legal institutions led the Reform Commission to reconsider the structure of the Civil Code. This reconsideration

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Policy (Draft Proposals) on Practice, Assignment of Claims and Legal Rate of Interest], 1874 金融法務事情 [J. FIN. & LEGAL AFF.] 140 (2009); TOKYO BAR ASSOCIATION, *supra* note 15, at 11–12.

[151] OSAKA BAR ASSOCIATION, *supra* note 15, at 155.

[152] OSAKA BAR ASSOCIATION, *supra* note 15, at 155–56; Nakane, *supra* note 150, at 140.

[153] BRP, *supra* note 8, at 3.1.4.06 (Payment of an assigned claim).

(1) In cases where neither the notification of (1) nor the notification of (2) in 3.1.4.05 was made with regard to the assignment of a claim, the obligor shall make a payment to the assignor as its obligee.
(2) In cases where the notification of 3.1.4.05(1) or (2) was made with regard to the assignment of a claim, the obligor shall make a payment to the assignee of the assignment; provided, however, that if there is a conflict in the notification, the rules in the following items shall be followed:
    (a) In cases where there is a conflict in the notification prescribed in 3.1.4.05(1), the obligor shall make a payment according to the chronological order of the registration and the fixed date.
    (b) In cases where there is a conflict in the notification prescribed in 3.1.4.05(1) and it is not possible to decide the chronological order of the registration and the fixed date, the obligor may make a payment to either of the assignees. In such case, the obligor may also be exempted from the obligation by depositing the part of the conflict in the assignment.
    (c) In cases where there is a conflict in the notification of 3.1.4.05(1) and the notification of 3.1.4.05(2), the obligor shall make a payment to the assignee of the assignment associated with the notification prescribed in (1) as the obligee.
    (d) In cases where there is a conflict in the notification prescribed in 3.1.4.05(2), the obligor may also make a payment to either of the assignees. In such case, the obligor may also be exempted from the obligation by depositing the part of the conflict in the assignment.

also involved the enhancement of legal transparency. In this regard, we consider two topics: (1) the scope and (2) the compilation of the Civil Code.

As with the French Civil Code, the Japanese Civil Code presumes the existence of a person with a certain amount of wealth who is able to make rational judgments regarding whether to deal with others as a constituent of civil society. This concept of the abstract person demarcates the scope of the Civil Code. Rules applicable only to relationships among merchants are provided in the Commercial Code,[154] not in the Civil Code. In addition, because the actors in civil society are assumed to have a generally equal capacity, it is not the objective of the Civil Code to protect consumers from asymmetry of information and imbalance of bargaining power with business operators. Provisions aiming at consumer protection are included in special legislation such as the Consumer Contract Act.[155] As a result, provisions applicable to daily transactions are dispersed throughout various pieces of legislation. Given the idea that the Civil Code should address itself to ordinary citizens, this situation is not desirable. The Civil Code should include all the important provisions and provide citizens with a basic legal framework.[156] Accordingly, the Reform Commission seeks to consolidate those provisions in special legislation with those of the Civil Code, employing two strategies to achieve this goal.

The first strategy is to widen the scope of the Civil Code. In order to introduce into the Civil Code rules governing commercial relationships and those aimed at consumer protection, it is necessary to define "consumer" and "business operator" in the Civil Code. According to the BRP, a consumer is "an individual who concludes a contract for activities other than a business activity (or a professional activity)" and a business operator is "a juridical person or other organization" or "an individual who concludes a contract for a business activity (or professional activity)."[157] A consumer contract is characterized

[154] 商法 [Commercial Code], Law No. 48 of 1899.

[155] 消費者契約法 [Consumer Contract Act], Law No. 61 of 2000.

[156] 1 COMMENTARIES, *supra* note 14, at 14–16.

[157] BRP, *supra* note 8, 1.5.07 (Definition of consumer/business operator).

> (1) In order to distinguish the applicable subjects of the special provisions relating to consumer contracts, the provisions for the definitions of consumer and business operator shall be placed together as a pair.
> (2) With respect to the definitions of consumer/business operator, they shall be based on the following standpoints.
> (a) Consumer: an individual who concludes a contract for activities other than a business activity (or a professional activity).
> (b) Business operator: a juridical person or other organization. An individual who concludes a contract for a business activity (or professional activity).
> (3) When utilizing the concept of a business operator for a contract other than a consumer contract, the above definition shall be used, and when there is a necessity to narrow down the requirements, the wording "as a commercial (operation)," "within the scope of a commercial (operation),"

as a contract concluded between a consumer and a business operator.[158] Based on these definitions, the BRP suggests consolidating all the relevant provisions in the Consumer Contract Act; for example, a consumer is allowed to claim particular causes to rescind the manifestation of intention[159] and special

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or other wording shall be added.

[158] BRP, *supra* note 8, 1.5.08 (Definition of consumer contract).

(1) As used in this Act, a "consumer contract" is a contract concluded between a consumer and a business operator.
(2) The provisions prescribed with regard to a consumer contract do not apply to labor contracts.

[159] BRP, *supra* note 8, 1.5.18 (Special provisions on consumer contracts – misconception based on the provision of a conclusive evaluation).

(1) At the time of the business operator soliciting for the conclusion of a consumer contract, if through providing the consumer with a conclusive evaluation on uncertain items with regard to the goods, rights, services or other things which were the object of such consumer contract, the consumer was under the misconception that the details of the conclusive evaluation so provided were definite and, through such misconception, manifested an intention to offer or accept the consumer contract, such manifestation of intention may be rescinded.
(2) If a third party provided the consumer with the conclusive evaluation in (1), the manifestation of intention to offer or accept such consumer contract may be rescinded only when falling under one of the following items:
    (a) Such third party serves as the representative or some other person of such business operator and the business operator is the person who should bear responsibility for such act; or
    (b) At the time of the consumer manifesting the intention to offer or accept the consumer contract, the business operator knew or could have known that the third party had provided a conclusive evaluation.
(3) A representative for the consumer pertaining to the conclusion of the consumer contract (including sub-agent and those persons who are appointed as sub-agents through two or more layers) is deemed to be the consumer with regard to the application of (1) and (2).
(4) The rescission of the manifestation of intention for the offer or acceptance of a consumer contract pursuant to (1), (2), and (3) may not be asserted against a third party without knowledge or fault.

BRP, *supra* note 8, 1.5.19 (Special provisions on consumer contracts – distress).

(1) When a business operator solicits the conclusion of a consumer contract, unless it falls under one of the following acts, if the business operator continued solicitation despite the consumer's indication that the solicitation was unwanted, and if the solicitation forced the consumer to offer or accept such contract, such manifestation of intention may be rescinded.
    (a) The consumer indicated a desire to the business operator to the effect that the business operator leave the residence or the place

defenses in the case of credit granted by a third party.[160] On the other hand, the concept of "business operator" is too broad to substitute for the defining concept of the current Commercial Code. Therefore, the BRP propounds a stricter requirement: economic operation, which is defined as "repeated continuous operation whose object is to obtain income equal to or larger than expenditure."[161] By using these concepts, the BRP suggests inserting provisions of the Commercial Code into the Civil Code, some of which grant business operators rights,[162] and others that impose obligations.[163]

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where the business was being conducted but the business operator did not leave such place; or

(b) The consumer indicated a desire to the effect that it wished to leave the place where such business operator was soliciting for conclusion of the consumer contract but the business operator did not allow the consumer to leave such place.

(2) 1.5.18 (2), (3), and (4) shall apply mutatis mutandis to (1).

[160] BRP, *supra* note 8, 3.2.6.10 (Requirements for linking of defense).

> In cases where the consumer concludes a contract to purchase goods or a right or a contract to receive the provision of onerous services (hereinafter referred to as a "supply contract") with a business operator (hereinafter referred to as "supplier") and concludes a contract for a loan for consumption with a third party which is a business operator different from the supplier (lender), if the supply contract and the contract for the loan for consumption are [financially] effectuated as a unity and, if such an agreement existed beforehand between the supplier and the lender as the one where the supply contract and the contract for the loan for consumption would be effectuated as a unit, the purchaser and other such persons may assert the grounds which accrue vis-à-vis the supplier against the lender.

[161] BRP, *supra* note 8, 3.1.1.06 (Concept stipulating the scope of application of the provisions to be applied to the designated business of business operators).

> With regard to the scope of application of the proposals in Book III where the application shall be limited to certain kinds of acts out of the activities of the business operators, the application shall be demarcated by the concept of "economic operation." "Economic operation" means repeated continuous operation whose object is to obtain income equal to or larger than expenditure.

[162] The BRP adopted claims for remuneration of a business operator, which is now provided in Commercial Code art. 512. BRP, *supra* note 8, 3.2.8.04 (Claim for remuneration of the business operator).

> If a business operator agrees to render a service for the other party within the scope of its economic operation, the other party is presumed to have agreed to pay reasonable remuneration for the service.

[163] Additional obligations are imposed on business operators in the case of deposits without remuneration. BRP, *supra* note 8, 3.2.11.04 (Duty of care of the depositary relating to retention).

> (1) The depositary shall assume the duty of retaining the deposited thing

The second device employed to consolidate special legislation with the Civil Code is the generalization of the consumer protection clauses. As some provisions in the Consumer Contract Act are considered to embody the values that should be held true for contracts in general, they should be consolidated without limitation into the Civil Code. For example, the BRP proposes that the provisions on misrepresentation (Consumer Contract Act art. 4) should be generalized and added to the Civil Code to be applicable to all contracts.[164]

Although these proposals are supported by the new conception of the Civil Code, practitioners engaged in consumer contracts have raised doubts. They fear that the provisions consolidated in the Civil Code would be interpreted in a different way from their original meanings and that the level of consumer protection would be reduced,[165] whereas generalization of the consumer protection clauses would enable business operators to enjoy protection with regard to transactions with consumers.[166] Moreover, because consumer protection clauses should be revised according to changes in the social situation, their consolidation into the Civil Code would hinder frequent reforms.[167] In this regard, it is noted that the Consumer Affairs Agency was established on September 1, 2009, to centralize the administration of consumer protection,

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with the due care of a prudent manager.

(2) If a person has received a deposit gratuitously, it shall assume the duty of retention of the deposited thing with the same care as it would have towards its own property; provided, however, that this shall not apply if a business operator received the deposit within the scope of its economic operation.

[164] BRP, *supra* note 8, 1.5.15 (Misrepresentation).

(1) With regard to a manifestation of intention made to the other party, in cases where the other party made a representation which differed from fact regarding matters which would ordinarily influence the decision of the person manifesting the intention as to whether or not to make the manifestation of intention, and such person manifested an intention based on an incorrect understanding of the facts, such manifestation of intention may be rescinded.

(2) ...

(3) ...

* Cases falling under Article 4, paragraph 2 of the Consumer Contract Act (failure of notification of a disadvantageous fact) would constitute the "misrepresentation" denoted here, and therefore rescission would be permitted in accordance with 1.5.15. One individual noted that it would be preferable to explicitly state this.

[165] OSAKA BAR ASSOCIATION, *supra* note 15, at 5–6, 10; TOKYO BAR ASSOCIATION, *supra* note 15, at 2.

[166] OSAKA BAR ASSOCIATION, *supra* note 15, at 11.

[167] OSAKA BAR ASSOCIATION, *supra* note 15, at 6; TOKYO BAR ASSOCIATION, *supra* note 15, at 2–3. On the other hand, Uchida argued that the Civil Code should undergo frequent reform in the future. UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 24–25.

being responsible for revising the Consumer Contract Act.[168] However, if the provisions of the Consumer Contract Act were consolidated into the Civil Code, they would come under the purview of both the Consumer Affairs Agency and the Ministry of Justice, and this would reverse the policy of centralized administration of consumer affairs and inhibit necessary law reform.[169]

G. Compilation of the Civil Code

The final topic to be addressed is that of the compilation of the Civil Code. The Reform Commission investigated the rearrangement of provisions to enhance legal transparency and improve the Civil Code.

Emulating the Saxonian Civil Code,[170] the Japanese Civil Code has adopted a five-book "Pandekten" system that consists of General Provisions (Book I), Law of Property (Book II), Law of Obligations (Book III), Law of Family (Book IV), and Law of Succession (Book V). A distinctive feature of the Pandekten system is that it provides abstracts of the general principles common to individual legal relationships at the beginning of each section. As a result, provisions relevant to sales contract are dispersed throughout the Civil Code. For instance, mistake, fraud, and duress are covered in Book I, Chapter 5, Section 2; contractual remedies, such as expectation damages and specific performance, are listed in Book III, Chapter 1, Section 2, Subsection 1; cancellation of contract is detailed in Book III, Chapter 2, Section 1, Subsection 3; and the duties of the seller are located in Book III, Chapter 2, Section 3. This kind of compilation makes it difficult for nonprofessionals to understand the framework of contract law.[171] Accordingly, the Reform Commission discussed abandoning the Pandekten system and grouping the provisions of contract law under one section.

Although there are several relevant issues,[172] the main concern was the arrangement of provisions for judicial acts in Book I of the Civil Code.[173] Because these provisions are assumed to be primarily applied to contracts, it was originally proposed that they should be in the section on the formation of contracts. This proposal was based on the history of legal education in Japan.

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[168] 消費者庁 [Consumer Affairs Agency], http://www.caa.go.jp/en/index.html (last visited Nov. 12, 2010).

[169] OSAKA BAR ASSOCIATION, *supra* note 15, at 8; TOKYO BAR ASSOCIATION, *supra* note 15, at 3.

[170] Das Bürgerliche Gesetzbuch für das Königreich Sachsen [Civil Code for Saxony Kingdom], Mar. 1, 1865.

[171] 1 COMMENTARIES, *supra* note 14, at Vol. 1, 131.

[172] The arrangement of provisions for consumer contracts, agencies, and claim prescriptions was also discussed. 1 COMMENTARIES, *supra* note 14 19–20, 34–35; UCHIDA, DRAFT PROPOSALS, *supra* note 26, at 231–34.

[173] 1 COMMENTARIES, *supra* note 14, at Vol. 1, 32–34.

Because the shortcomings of the Pandekten system have been apparent for some time, Japanese scholars have devoted considerable efforts to explaining the legal rules of the Civil Code in a functional way. They have published textbooks and treatises aimed at reconciling the structure of the Civil Code with the functional explanation of legal rules; these academic efforts constitute the centerpiece of legal education in Japan.[174]

The proposal to recompile the Civil Code prompted considerable discussion among members of the Reform Commission. Opponents emphasized the doctrinal and practical value of judicial acts as a legal concept. First, while assuming mainly a contractual relationship, the legal concept of judicial acts has a wider scope, covering unilateral manifestation of intent such as cancellation of contract and testament. Therefore, in light of the systematic consistency of the Civil Code, provisions for judicial acts belong in Book I of the Civil Code in order to govern the various legal relationships.[175] Second, and more importantly, 110 years after the enactment of the Civil Code, attorneys in Japan are accustomed to judicial acts as a general concept. In addition, there exists other legislation premised on the existence of provisions for judicial acts in Book I of the Civil Code. The removal of provisions for judicial acts from Book I of the Civil Code would have a profound effect on legal practice in Japan. It has been argued that the current structure of the Civil Code has taken root in Japanese legal practice and that the concept of judicial acts has become a significant part of the Japanese legal culture.[176] The Reform Commission ultimately decided to document the opinions of both sides of the argument.[177]

These arguments illustrate the dualism of legal development in Japan and reveal the basic difficulty in supplying a model for the Civil Code. Japanese law was established and developed on the basis of the European concept of a civil code. Leaving aside reform proposals on individual legal institutions, it is therefore difficult to present Japanese uniqueness by forming a new conception of the Civil Code.

CONCLUSION

The investigation in the previous parts of this article reveal how three guiding principles of the BRP influenced the individual reform proposals, how these proposals became intertwined with each other, and how they are evaluated by practitioners. The crystallization of legal development in Japan, which underpinned all the proposals of the BRP, was supported by the idea

[174] *Id.* at 32.

[175] Another solution under consideration was to insert provisions for unilateral judicial acts separately. Lacking sufficient studies on the uniqueness of unilateral manifestation among judicial acts, the Reform Commission elected not to adopt this solution.

[176] 1 COMMENTARIES, *supra* note 14, at Vol. 1, 18, 33.

[177] Three possibilities of the compilation are included in 1 COMMENTARIES, *supra* note 14, at 21–25.

that the Civil Code should describe the basic framework of civil society and be understandable to ordinary citizens. Codification of this kind also serves to demonstrate the originality of Japanese law. Practitioners recognized the necessity of law reform in this sense and appreciated proposals to codify the legal rules developed by court judgments outside the Civil Code. However, they were reluctant to go further. Practitioners are generally skeptical of proposals introducing a new legal system and changing the structure of the Civil Code, even though these proposals could present the uniqueness of Japanese law. In addition, the course of legal development in academia is different from that in practice. This discrepancy is most vividly demonstrated by the criticism of proposed reforms promoting harmonization. Academic research supported certain legal rules and doctrines adopted by international treaties and model laws abroad. These academic achievements constituted legal development in Japan; however, not all of these achievements were shared with practitioners.

Based on these considerations, it seems reasonable to conclude that some of the proposals of the BRP are infeasible. However, this does not mean that the efforts of the Reform Commission were in vain. Leaving aside the fact that its research results would probably be exploited in the legislative process, the Reform Commission provides a forum for the exchange of opinions among lawyers and academics on what the Civil Code is, what it should be, and why and the degree to which the Japanese legal system differs from foreign systems. It is this kind of argument which the Japanese people, who received the concept of the Civil Code for political reasons more than one hundred years ago, need to pursue.

Although it remains unclear when the legislative process will be finalized, the Working Group on the Civil Code (Law of Obligations) is scheduled to publish a list of topics requiring reform in the spring of 2011 and to call for public submissions. At that time it will be known, at least in part, the extent to which the fundamental ideas of the BRP have been met with approval.