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JAPAN'S CIVIL CODE REFORM PLAN – SEEN FROM A WESTERN PERSPECTIVE

Stefan WRBKA·

1. Introduction

Since its enactment in 1896 (Books I-III) and 1898 (Books IV-V) the Japanese Civil Code (民法; *minpō*; hereinafter *JCC*) has only once been subject to a major reform—after World War II, when its Books IV (Family Law) and V (Inheritance Law) were substantively revised to align family and inheritance law issues with Western standards[1]. In late 2009 the Japanese Ministry of Justice installed the 'Working Group on the Civil Code (Law of Obligations)' (法制審議会民法 (債権関係); *hōsei shingikai minpō (saiken kankei)*) (hereinafter *Civil Code Working Group*) with the purpose to review the provisions of Book III JCC ('Law of Obligations'), and to come up with a draft for a revised Book III. This move can be seen as a consequence of several academic initiatives that had already been discussing the issue of a possible JCC reform since the early 2000s and had arrived at the conclusion that the time was ripe for a thorough reform.[2]

· Associate Professor at the Faculty of Law, Kyushu University, Japan; LL.M. (Kyushu University), Mag. iur. and Dr. iur. (University of Vienna).

[1] See, however, '*The (Claimed) Need to Reform the JCC and the Composition of the Civil Code Working Group*' and '*What the Interim Draft Proposal Did Not Do*' below, where I explain that—in addition—several minor adjustments have been made over the years. For details on the reform(s) of both, Books IV and V, see, e.g., Rokuya Suzuki, *Die Modernisierung des japanischen Familien- und Erbrechts*, 19 RABELSZ 104 (1954): For details on the reform(s) of Book IV JCC see, e.g., Jörn Westhoff, DAS ECHO DES IE – NACHWIRKUNGEN DES HAUSSYSTEMS IM MODERNEN JAPANISCHEN FAMILIENRECHT (1999); Mikihiko Wada, *Die Abschaffung der Institutionen des "Hauses" (ie) unter den Besatzungsmächten – oder: Das Koseki, ein Januskopf*, 12 RECHT IN JAPAN 105 (2000). For details on the reform(s) of Book V JCC see, e.g., Petra Schmidt, DIE ENTWICKLUNG DES JAPANISCHEN ERBRECHTS NACH DEM ZWEITEN WELTKRIEG (1993); Takeo Ota, *Die Erbrechtsreform nach dem Zweiten Weltkrieg – besonders die Reform von 1980*, 4 RECHT IN JAPAN 79 (1981) .

[2] Several groups are worth mentioning in this context, most notably the Japanese Civil Code (Law of Obligations) Reform Commission ('民法（債権法）改正検討委員会'; *minpō (saikenhō) kaisei kentō iinkai*; hereinafter *JCC Reform Commission*) (for details see http://www.shojihomu.or.jp/saikenhou/English/index_e.html; visited 22 June 2014) and the Research Group on the Civil Code Reform (民法改正研究会; *minpō kaisei kenkyūkai*). Both groups discussed a possible, compehensive reform of the law of obligations. In addition, there were several working groups

The purpose of this article is to take a brief look at the present discussions at the Civil Code Working Group level and to comment on the 'completeness' of the reform project. The article will start with a short outline of the genesis of the JCC. Subsequently, I will explain the background of the reform debate before highlighting some selected core issues with respect to the most recent result of the deliberations, i.e., the 2013 Interim Draft Proposal on the Reform of the Civil Code (law of obligations) (民法（債権関係）の改正に関する中間試案; *minpō (saiken kankei) no kaisei ni kan suru chūkan shian*)[3] (hereinafter *Interim Draft Proposal*). The article concludes with comments on some issues that are *not* covered by the reform project.

2. The JCC and the Background of the Reform Discussions

2.1 The Drafting of the JCC

Soon after the fall of the *Tokugawa* shogunate and the restoration of the imperial rule in 1868, Japan realised that steps had to be taken if one wanted to escape from the risk of suffering the same fate that many other Asian countries had been experiencing. To prevent exploitation and colonialisation by Western powers, Japan decided to modernise itself. A comprehensive legal reform with the help of Western experts was seen as a proper way to accomplish this. One of the projects the plan to introduce a modern private law regime in the form of a civil code based on European models. After a first, unfortunate attempt that had resulted in a poor translation of the French *Code civil*, *Gustave Boissonnade*, a French scholar was invited to prepare a new draft. To be more precise, *Boissonnade* was asked to draft a civil code with the exception of the parts on family and inheritance law—these areas were prepared by Japanese drafters. Also this second attempt eventually failed. It was heavily criticised for mainly two reasons. First, although German and English jurisprudence had gained increasing support among influential Japanese scholars, neither one was taken into consideration, leave alone incorporated in the draft. The draft (like the first one) was heavily influenced by French jurisprudence. Second, especially the areas prepared by the Japanese drafters, i.e., the areas of family and inheritance law, were considered as too progressive and Western by the ruling elite. Most notably, the traditional 'house system' (家制度; *ie seido*), a system that was characterised by a strong patriarchal structure and gender inequality, was not implemented in the draft. Instead, the relevant parts of the draft were to a large extent based on gender equality and the equality of the spouses inspired by Western countries.

In answer to this criticism, a third attempt was made. This time the drafters were asked to pay stronger tribute to the jurisprudence of different Western countries and—with respect to family and inheritance law issues—to implement traditional Japanese values. The result of this, the finally adopted JCC, is characterised by a reflection of different

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that conducted more sectoral research – see, in particular, the Research Group on the Prescription Rules (時効研究会; *jikō kenkyūkai*) (Naoko Kano, *Reform of the Japanese Civil Code – The Interim Draft Proposal of 2013*, 18 ZJAPANR / J.JAPAN.L. 249, 253 at note 11 (2013).

[3] The text of the Interim Draft Proposal is available at, e.g., http://www.moj.go.jp/content/000112242.pdf. Commented versions are available at, e.g., http://www.moj.go.jp/content/000112244.pdf and http://www.moj.go.jp/content/000112247.pdf (all in Japanese) (visited 22 June 2014).

models and conceptions. It basically follows the German *Pandekten*-system, which might lead to the impression that the JCC is just a copy of the German BGB (although it should be mentioned that the order of books is different[4]). This view is, however, imprecise and neglects the fact that Books I-III JCC follow and were inspired by different European examples, most notably—in addition to the German BGB drafts—by the French *Code civil*[5], and that Books IV and V JCC, i.e., the books on family and inheritance law, eventually implemented traditional Japanese values[6].

2.2 The (Claimed) Need to Reform the JCC and the Composition of the Civil Code Working Group

As far as the influence by the French and German models is concerned, one should further mention one important aspect—the JCC (to be more precise, its Books I-III)—is/are far less detailed than its French and German counterparts. The number of provisions in the relevant parts of the JCC is only approximately half the number of the two European counterparts. On top of that, most of the Japanese provisions are comparatively short and offer vast room for interpretation. *Takashi Uchida* explains the differences between the JCC and the German and French codes with three arguments: (1) a lack of time on the Japanese side due to the internal pressure to present a modern civil code as soon as possible; (2) concerns that several Western provisions would not have been compatible with the Japanese tradition, culture and society; and (3) the rapid modernisation process of Japan, which asked for as flexible rules as possible.[7]

The relative shortness of the JCC and the incompleteness of several of its provisions meant that additional sources and ways to develop core private law rules were needed. The judiciary played a key role in this context. Traditionally, many judges (as well as legal scholars) had favoured German jurisprudence (because of its allegedly highly

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[4] In the JCC the law of obligations follows after the book on property law. In the German BGB the law of obligations comes first.

[5] As, for example, *Hiroshi Oda* (with reference to several other private law scholars) explains, '[i]t is more correct to say that the drafters intended to produce an ideal system by taking the best of the German and French Codes' (Hiroshi Oda, JAPANESE LAW[3] (2009)). In a similar vein is the following comment by *Nobushige Hozumi*, one of the central figures in the drafting process of the JCC: 'We now possess a Civil Code based upon the most advanced principles of Western [and not only German] jurisprudence' (Nobushige Hozumi, THE NEW JAPANESE CIVIL CODE: AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE 73 (1904)). Answering the question whether the drafters really chose 'the best' or 'most advanced' of both codes (and other European examples) goes beyond the scope of the present analysis (and admittedly is a matter of taste). For comments on the interplay between European civil codes and the JCC see, e.g., the contributions in THE IDENTITY OF GERMAN AND JAPANESE CIVIL LAW IN COMPARATIVE PERSPECTIVES (Zentaro Kitagawa and Karl Riesenhuber eds., 2007).

[6] For some English language-details on the third wave of drafting (especially with respect to its early stages) see, e.g., Takashi Uchida, *Contract Law Reform in Japan and the UNIDROIT Principles*, UNIF. L. REV. 705, 706-707 (2011). *Uchida* highlights the role of three Japanese scholars in the drafting process: Masaakira Tomii, Kanjiro Ume and Nobushige Hozumi. All three spent extensive time in Europe and actually commenced the drafting work there. For an extensive German language-analysis of the drafting process of the JCC see, in particular, Christoph Sokolowski, DER SO GENANNTE KODIFIKATIONSSTREIT IN JAPAN (2010) or—for a shorter overview—Hans-Peter Marutschke, EINFÜHRUNG IN DAS JAPANISCHE RECHT[2] 90-92 (2010).

[7] Uchida, *supra* note 6, at 707.

developed legal theory and legal philosophy[8]) and thus interpreted the rules of the JCC, in principle, in a predominantly 'German way'.[9] The (re)interpretation of JCC provisions in line with German jurisprudence was considered a proper way to prevent a 'fossilisation' of private law rules. However, at the same time, the generally active role that the judiciary played in the development of private law led to certain transparency issues. Many court-made rules were not transformed into provisions of the JCC and thus remained relatively 'invisible'. This does not mean that no new written rules were enacted. But most additions and changes—the post-World War II reform of Books IV and V JCC is a prominent exception—were made with the help of *special* laws, i.e., outside of the scope of the JCC. Relatively recent examples for this are the 1994 Product Liability Law (製造物責任法; *seizōbutsu sekinin hō*)[10] and the 2000 Consumer Contract Law (消費者契約法; *shōhisha keiyaku hō*)[11].

Over the years scepticism had grown. The JCC was considered as not being modern enough anymore. The law was found too incomplete and the wording on various occasions too vague, confusing and not in line with case law.[12] The wish for a civil code reform was further fuelled by private law reform considerations and already running projects in other parts of the world—Japan wanted to keep pace with international trends.

Against this background, the Ministry of Justice finally came to the conclusion that it was time to seriously consider a (partial) revision of the JCC. The main wish was to come up with a draft of a new Law of Obligations that would be transparent, modern and (as far as possible) comprehensive. For this purpose the Ministry of Justice installed the aforementioned Civil Code Working Group, a group composed of approximately 40 members that commenced its work in November 2009. [13] The group is quite diverse in its composition. It is made up by law professors, officials from the Ministry of Justice, judges, attorneys, as well as by interest representatives from consumer and business circles.[14]

The deliberations have (thus far) proceeded at quite a high pace. One of the reasons for this is surely the fact that several members of the Civil Code Working Group, including its chairperson, *Kaoru Kamata*, had previously played active roles in the preceding

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[8] See, e.g., Oda, *supra* note 5, at 91.

[9] On this issue see, e.g., Uchida, *supra* note 6, at 707; Marutschke, *supra* note 6, at 92-94. For some concrete examples of this Germanisation see, e.g., Kiyoshi Igarashi, EINFÜHRUNG IN DAS JAPANISCHE RECHT 5-6 (1990), where he discusses inter alia the examples of default rules and tort law. In the context of discussing the necessity of a JCC reform one of the members of the Civil Code Working Group referred to this as follows: 'How long do we leave the situation that there is no other choice but to explain to the students who are going to study law and the foreigners who wish to refer to Japanese law that provided articles and practice are different in Japanese law?' (see the working group's material titled 'Points to remember for the Civil Code (law of obligations) reform (Summary of opinions at the 1st Meeting)', 1, *available at* http://www.moj.go.jp/content/000056822.pdf) (visited 22 June 2014).

[10] Law No. 85, 1994.

[11] Law No. 61, 2000. It should be noted though that the phenomenon of special laws is nothing recent in Japan. Special laws were already given the preference over amendments of the JCC at earlier stages – see, e.g., the Law on the Registration of Real Property in 1899 (不動産登記法; *fudōsan tōki hō*).

[12] In a similar sense, e.g., Kano, *supra* note 2, at 252-253; Uchida, *supra* note 6, at 707-708.

[13] An English-language overview of the (typically monthly or bi-weekly) sessions is available at http://www.moj.go.jp/ENGLISH/ccr/CCR_00002.html (visited 22 June 2014). The summaries of proceedings are—with some delay—regularly updated.

[14] See, e.g., the list at http://www.moj.go.jp/content/000068987.pdf.

academic research groups on a possible reform of the JCC. In particular the Civil Code reform draft ('Basic Policy of the Reform of the Law of Obligations'; 債権法改正の基本方針 *saikenhō kaisei no kihon hōshin*; hereinafter *JCC Reform Commission Draft*)[15], a draft that was prepared by the JCC Reform Commission[16] (under *Kamata's* lead), facilitated further discussions. In addition, it was the JCC Reform Commission's extensive and comprehensive analysis of Books I (General Principles) and (in particular) III JCC (Law of Obligations) that provided the Civil Code Working Group with invaluable expert opinions. Nevertheless, as, for example, a study by *Sōichirō Kozuka* proves, the Civil Code Working Group—not least because of its relatively diverse composition—took a different approach than the purely academic research groups and looked at the project from different angles.[17] Especially the practical feedback from formerly unrepresented stakeholder groups, such as by interest representatives from the business and consumer circles, broadened the discussions. One should further note that special focus has been put on comparative legal studies. The working group has been analysing a large number of national civil codes and international instruments, such as the UNIDROIT Principles of International Commercial Contracts[18], the UN Convention on Contracts for the Sale of Goods (CISG) (to which Japan acceded in 2008[19]), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).[20]

3. Some Comments on the Interim Draft Proposal

3.1 What the Interim Draft Proposal Did Do

[15] An English language-version is available at http://www.shojihomu.or.jp/saikenhou/English/index_e.html (visited 22 June 2014).
[16] See *supra* note 2.
[17] For details see Sōichirō Kozuka, *Comparison of the Draft Proposals ('Basic Policy for the Reform of the Law of Obligations') by the private Reform Commission and the Interim Report by the Working Group of the Legislative Council under the Ministry of Justice*, available at http://blogs.usyd.edu.au/japaneselaw/2013_Comparison%20of%20the%20Draft%20Proposals%20and%20Interim%20Report.pdf.
[18] For an analysis of the influence of the UNIDROIT Principles on the Interim Draft Proposal see, e.g., Uchida, *supra* note 6.
[19] For a discussion of the CISG from a Japanese perspective and the role of the CISG in the current JCC reform discussion see, e.g., Kunihiro Nakata, *Reform of the Japanese Civil Code – The Interim Draft Proposal of 2013*, 18 ZJAPANR / J.JAPAN.L. 203, 208-214 (2013).
[20] On the influence of both the PECL and the DCFR on the deliberations in the Civil Code Working Group see, e.g., Nakata *supra* note 19, at 213-214. The range of the studied international and foreign national materials is indeed remarkable, but does not come as a surprise, if one considers that the driving idea behind the project is to present a state-of-the-art draft with modern, transparent and clear provisions. *Uchida* even goes as far as to claim that 'the reform of the JCC may serve as one model for future worldwide unification of contract law, given that the results stand at a crossroads of comparative law including French, German, and Anglo-American law' (Uchida, *supra* note 6, at 717). This view might seem a bit (over-)optimistic, considering the extensive research carried out in other parts of the world (note: just see the research conducted with respect to the possible introduction of a Common European Sales Law and older, relevant materials, e.g., the DCFR or the PECL). Nevertheless, it clearly shows the ambitiousness of the working group.

At the time of writing this article, the deliberations in the Civil Code Working Group were still ongoing. One cannot expect a first concrete proposal before 2015 (at the earliest)[21]. Nevertheless, the Interim Draft Proposal indicates the influences on a possible proposal and provides us with some ideas on how the Law of Obligations would (or could) be changed.

At this stage, i.e., at the stage of the Interim Draft Proposal, one can basically differentiate between four different types of considerations and plans. First, one can identify suggestions that aim to broaden the JCC in the sense that the incorporation of the suggestions would echo concepts already widely accepted by the judiciary and/or academia that are, however, *still missing* in the JCC. An example for this first category of considerations relates to the concept of mental capacity in the context of the capacity to contract. The wording of the current JCC only deals with rules on the commencement of guardianship, curatorship or assistance for people with a (constant) lack of mental capacity[22] and the consequences of acts of such people (once the guardianship, curatorship or assistance is ordered by the competent family court)[23]. It fails, however, to provide *general* or *basic* rules on legal acts by people who lack sufficient mental capacity. Put differently, the question whether the lack of mental capacity has an impact on the capacity to conclude contracts is not *generally* answered by the JCC (but only as a consequence of guardianship, curatorship or special assistance). Despite the absence of clear rules in the JCC, the concept of a lack of the capacity to contract (resulting from a lack of mental capacity) is generally accepted. Acts by people lacking sufficient mental capacity are being considered void.[24] The Interim Draft Proposal tries to clarify this by incorporating it into Article 2 Interim Draft Proposal.

Second, the Civil Code Working Group suggests several *changes of existing rules* of the JCC. A good example for this relates to time limitations for claims. The general limitation period under the JCC is ten years (Article 167(1) JCC).[25] However, Articles 166 et seq. contain numerous exceptions to this general rule in the form of shorter periods for special scenarios. These scenarios include cases involving inter alia claims related to medical services, services provided by lawyers and services in the context of construction works. The necessity to maintain such a remarkably broad catalogue of exceptions has—in particular from the perspective of transparency and reasonableness—been heavily criticised by many stakeholders.[26] Although the Civil Code Working Group has not (yet) been able to agree on a *specific* alternative model—agreement has been reached on the general necessity to simplify and standardise prescription periods. Two different models are currently discussed in this respect—the introduction of one general, objective prescription period of five years that would commence at a clearly defined point of time on the hand and a combination of a general, subjective rule of three or five years

[21] See, e.g., Kano, *supra* note 2, at 260.
[22] Articles 7, 11 and 15 JCC respectively.
[23] Articles 9, 13 and 17 JCC respectively
[24] See, e.g., Kano, *supra* note 2, at 255; Oda, *supra* note 5, at 123.
[25] Article 167(1) JCC. For comments on the Japanese system of prescription periods see, e.g., Makoto Nagata, *Das Verjährungsrecht in Japan – Entstehungsgeschichte, objektive und subjektive Elemente, in* DEUTSCHLAND UND JAPAN IM RECHTSWISSENSCHAFTLICHEN DIALOG 203 (Philip Kunig and Makoto Nagata eds., 2006).
[26] In this sense also Kano, *supra* note 2, at 256.

combined with an absolute, objective period of ten years on the other.[27] Undeniably, parallels can be drawn to the trends in Western countries and the discussions of simplification, as more recently expressed by the DCFR[28] or the CESL Proposal.[29]

Third, several suggestions of the Interim Draft Proposal refer to cases where there are *neither rules in the JCC nor clear, coherent case law-developed rules*. Just like the second category of suggestions, this third category is heavily influenced by Western developments. The main difference to the second category, however, is that in this third category an implementation of the suggestions would lead to the insertion of new legal standards (previously neither found in the JCC nor coherently in case law) into the JCC and not just to an amendment of existing rules. A prominent example is the plan to introduce a provision concerning the requirements that must be fulfilled to declare standard clauses part of a contract. There are currently no rules similar to provisions that can be found in Western jurisdictions, e.g., in § 864a Austrian Civil Code (ABGB) or § 305 German Civil Code (BGB)—neither in the JCC nor developed by case law.[30] Thus far, courts deal with the question on a case-by-case basis.[31] The Interim Draft Proposal addresses this issue extensively by proposing clear rules on the conditions that must be fulfilled to declare standard terms part of a contracts and their general interpretation.[32]

Fourth, a final category of considerations relates to issues that are still heavily discussed in the sense that the working group has *not yet been able to reach a fundamental agreement*. One example of a highly contested area is the field of consumer contract law. As explained earlier, consumer contract issues are currently regulated outside the JCC in a special law—the JCCA that had been enacted shortly before the German reform of the German law of obligations (*Schuldrechtsreform*) integrated consumer contract issues into the BGB. Many Japanese law professors, especially those who belong to the 'older' generation, can be considered as Germanophile in the sense that they have enjoyed legal education and/or research in Germany. This in combination with the example set by the German *Schuldrechtsreform* might be one of the reasons for the strong academic support for integrating the provisions of the JCCA into the JCC. At the early stages of the deliberations the integrative approach actually seemed to enjoy great support—the discussions in the working group were initially based on an earlier academic draft for a possible JCC revision, the earlier mentioned JCC Reform Commission Draft that suggested to incorporate the provisions of the JCCA into the JCC. In the course of the discussions, however, opponents of the integrative approach gained (at least for the time being) the upper hand. The Interim Draft Proposal thus leaves consumer contract law issues aside. Nevertheless, the topic is not off the table yet. It must

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[27] See Article 7(2) Interim Draft Proposal.

[28] See III. – 7:201 DCFR (general rule of three years) and III. – 7:307 DCFR (absolute rule of ten years in general and thirty years for claims for damages for personal injury).

[29] See Part VIII CESL Proposal for details. Article 179 CESL Proposal includes a general, short/objective period of two years and a long or absolute period of ten years (30 years in case of personel injury).

[30] The JCCA only deals with the issue of unfair contract terms, but not with the basic question whether terms—in principle—form part of a contract – see Articles 8-10 JCCA for details.

[31] See, e.g., Kano, *supra* note 2, at 258, where *Kano* calls the case law 'flexible' and explains that 'the only measures for a denial of the effect of such clauses have been general provisions such as public order and morals, good faith, etc., or a partial invalidity of substantially unfair standard clauses through an 'interpretation' of them.' This, however, does of course not tell us more about the general conditions that must be fulfilled to declare standard clauses part of a contract.

[32] See Article 30(2) Interim Draft Proposal.

be expected that the integration/fragmentation issue will be further heavily discussed on the way to a JCC reform proposal.

3.2 What the Interim Draft Proposal Did Not Do

In the previous chapter I briefly explained the work of the Civil Code Working Group and gave some examples that showed how the deliberations are progressing. At the same time the short overview can be understood as a definition of the Japanese Government's understanding of a modern civil code. The emphasis is clearly put on the law of obligations. Taking comparable international research into consideration, one has to say that the law of obligations is undeniably a very popular field to be reviewed whenever private law reform plans are discussed. However, if one considers that one of the main driving factors behind the installation of the Civil Code Working Group (and the reform plans in general) was that the Ministry of Justice was looking for ways to modernise the JCC, then one must admit that the current reform plans somewhat fall short of achieving this. While it is correct that the law of obligations would be updated, a *true* civil code modernisation would require that the JCC undergoes a comprehensive, and not only a sectoral reform.

With two examples I would like to show how Japan stays—or at least: for a long time has stayed—(far) behind legal standards and neglected developments in the West. Both examples relate to areas not being addressed by the reform plans: inheritance law on the one hand and family law on the other. In principle, the Japanese Government has been (and still is) very reluctant to carry out reforms in these fields. This does not mean that (after the major, post-World War II reform of Books IV and V JCC) there has never been a revision of inheritance and family law provisions. But the reforms that have taken place were only the consequence of heavy pressure from the judiciary (declaring certain provisions of the JCC unconstitutional) and from external commentators (incl. the international community).

The first example refers to inheritance rights of children born out of wedlock. For a very long time (actually even at the time the Ministry of Justice announced its 'modernisation' plan) Article 900 JCC, i.e., the provision that regulates the statutory shares in inheritance, differentiated between legitimate children, i.e., children born in wedlock, and illegitamte children, i.e., children born out of wedlock. Until the end of 2013 Article 900(4) JCC read as follows: 'If there are two or more children … the share in the inheritance of each shall be divided equally; provided that the *share in inheritance of a child out of wedlock shall be one half of the share in inheritance of a child in wedlock*' (emphasis added).[33]

Despite international trends towards establishing equal shares in inheritance for children born in and born out of wedlock[34] and heavy criticism from the international

[33] Translation taken from http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=civil+code&x=0&y=0&ia=03&ky=&page=5, a service by the Japanese Ministry of Justice (visited 22 June 2014).

[34] Austria, for example, harmonised the inheritance rights of children born in and out of wedlock with its Right to Inheritance Revision Act in 1989 (BGBl I 1989/656; *Erbrechtsänderungsgesetz 1989; ErbRÄG 1989*); for details see, e.g., Rudolf Welser, *Die Erbrechtsreform 1989*, NZ 137 (1990); Bernhard Eccher, *§ 730, in* ABGB PRAXISKOMMENTAR BAND 3[4] § 730 Paras. 2 et seq. (Michael Schwimann and Georg Kodek

community[35], the Japanese government had not shown any interest in revising the rules. *Masayuki Tanamura*, for example, explains this with the deeply-rooted, traditional perception of an ideal family. *Tanamura* argues that the legislator's reluctance to remedy the unequal treatment of legitimate and illegitimate children was due to 'conventional family values'[36] and the fear that equal treatment would be a threat to 'the legitimacy of legal marriage and … [would] encourage adultery'.[37] The predominance of the concept of married parents in Japan is best seen by the fact that the number of children born of wedlock is comparatively low—1.0% in 1985[38], 1.9% in 2003[39] and 2.2% in 2011[40]. Earlier judgments of the Japanese Supreme Court (最高裁判所; *saikō saibansho*; hereinafter *Supreme Court*) approved the opposition by the government. In a—for a long time—leading decision the Supreme Court argued that Article 900(4) JCC was not unconstitutional, because its rationale to treasure the concept of marriage was justified and the legislator did not forget to pay due tribute to the inheritance rights of children born out of wedlock.[41]

In Fall 2013 the Supreme Court—once again—had to deal with the inheritance shares of children born out of wedlock-issue of Article 900(4) JCC and the question of the article's constitutionality.[42] This time, however, the Supreme Court arrived at a different solution and (unanimously) declared the relevant parts of Article 900(4) unconstitutional. In short, the Supreme Court argued that times have changed over the years and that—not least because of the rise in numbers of children born out of wedlock—treating children born out of wedlock and children born in wedlock unequally would infringe the constitutional principle of equality. It was a mix of the clear Supreme Court judgment, criticism from various sides and the increase of cases of children born out of wedlock that finally 'convinced' the government to react. Surprisingly soon after the publication of the Supreme Court judgment, the Parliament adopted a revision of Article 900(4) JCC on 4

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eds., 2013). The German Right to Inheritance Equalisation Act (BGBl I 1997/84, 2968; *Erbrechtsgleichstellungsgesetz; ErbGleichG*), for example, led to a first, comprehensive alignment of the statutory shares in inheritance with respect to children born in and out of wedlock in Germany; for details on § 1924(4) BGB, the 1997/1998 reform and later alignments see, e.g., Rolf Stürner, *§ 1924*, *in* BÜRGERLICHES GESETZBUCH – KOMMENTAR[15] § 1924 Para. 3 (Othmar Jauernig et al. eds., 2014); Dietmar Weidlich, *§ 1924, in* BÜRGERLICHES GESETZBUCH[73] § 1924 Para. 8 (Otto Palandt et al. eds., 2014).

[35] For details see, e.g., Colin Jones, *Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen Through Two Supreme Court* Cases, 9 EAST ASIA LAW REVIEW 99, 108-109 (2014).

[36] As cited by Tomohiro Osaki, *End of Unequal Inheritance Lauded – Though Long in Coming, Ruling a Big Win for People Born out of Wedlock*, THE JAPAN TIMES ONLINE, 5 September 2013, *available at* http://www.japantimes.co.jp/news/2013/09/05/national/end-of-unequal-inheritance-lauded (visited 22 June 2014).

[37] *Id.*

[38] Supreme Court decision of 4 June 2008, 2006 (Gyo-Tsu) No. 135, Minshu Vol. 62, No. 6.

[39] *Id.*

[40] Supreme Court decision of 4 September 2013, 2012 (Ku) Nos. 984 and 985, Minshu Vol. 67, No. 6. Expressed in total numbers the number of children annually born out of wedlock had nearly increased by two thirds—from 14,000 to 23,000—between 1995 to 2011 (see Osaki, *supra* note 36). Compared to this 40.7% of children born in the US in 2011 were born out of wedlock (see B.E. Hamilton et al., 'Births: Preliminary Data for 2011', 14 Table 7, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_05.pdf (visited 22 June 2014).

[41] Supreme Court decision of 5 July 1995, 1991 (ku) No. 143, Minshu Vol.49, No.7.

[42] 2012 (ku) Nos. 984 and 985.

December 2013. In the revised provision the passage on children born out of wedlock is deleted. With respect to the statutory shares in inheritance of children[43] Article 900(4) JCC now reads as follows: 'If there are two or more children … the share in the inheritance of each shall be divided equally.'[44]

A second example of an area where the legislator has remained very passive relates to custody-consequences resulting from divorce. Japan takes a quite drastic approach. The underlying provision for the most common scenario of cases that can have an effect on child custody, i.e., for divorces by agreement[45], Article 766(1) JCC, stipulates that parents shall mutually decide on the custody over a child.[46] The provision has to be understood as giving the parents the chance to decide on either the father or the mother, but not to agree on joint custody.[47] This understanding is mirrored by the practical steps that need to be taken to divorce by agreement.[48] Usually, i.e., if the parents are able to agree on the consequences, mutual divorce does not involve courts and can be done quite easily by filling in and submitting a standardised special divorce form—the *rikon todoke* (離婚届)—to the competent administrative authority.[49] Column 5 of this form is titled 'name of the underage child(ren)' (未成年の子の氏名; *miseinen no ko no shimei*) and deals with the issue of custody rights. The parents have to decide about the future custody of their child(ren) by choosing between two boxes—one box titled *otto ga shinken wo okonau ko* (夫が親権を行う子; 'the child follows the husband's parental authority'), the other one *tsuma ga shinken wo okonau ko* (妻が親権を行う子; 'the child follows the husband's parental authority'). There is no box for joint custody. Instructions on how to fill in the *rikon todoke*-form explain that the parents have to choose one of the two boxes. Choosing both is not listed as an option in the instructions and—to the best of my

[43] Article 900(4) JCC further covers statutory shares in inheritance of ascendants and siblings.

[44] For an earlier example of a Supreme Court-pressured revision of a provision related to children born out of wedlock see, e.g., the judgment of the Supreme Court in 2006 (Gyo-Tsu) No. 135. The case addressed the question of the citizenship of children born out of wedlock with a Japanese father and a foreign mother and former Article 3(1) Nationality Act. In case such children were acknowledged by the father *after* birth, they were entitled to obtain the Japanese citizenship only if the parents got married. The Supreme Court held this provision unconstitutional (note: again with principle of equality-arguments, as it differentiated between an acknowledgement before and after birth—only in the latter case had the parents to get married). This decision forced the legislator to align the requirements in a way that under the revised Nationality Act marriage of the parents is not a requirement for children born out of wedlock to obtain the Japanese citizenship anymore.

[45] Roughly 90% of Japanese divorces are made by agreement. For Japanese language-data see the statistics of the Japanese Ministry of Health, Labour and Welfare (厚生労働省; *kōseirōdōshō*) at http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/rikon10/01.html (visited 22 June 2014).

[46] Article 766(2) JCC adds that the competent family court shall make a decision in those cases in which an agreement cannot be made. Pursuant to Article 771 JCC Article 766 applies mutatis mutandis in the case of court-decided divorce.

[47] In a similar vein, e.g., Norimasa Nozawa, *Scheidungsrecht und gesellschaftliche Realität in Japan, in* RECHT UND GESELLSCHAFT IN DEUTSCHLAND UND JAPAN 104 (Peter Gottwald ed., 2009).

[48] See, however, Mikiko Otani, *別居・離婚に伴う子の親権・監護をめぐる実務上の課題 (bekkyo/rikon ni tomonau ko no shinken/kango wo meguru jitsumujō no kadai; Practical Issues with Respect to Parental Authority/Child Custody in the Context of Separation/Divorce)*, JURIST 19, 21 (11/2011), where *Otani* argues that agreeing on joint custody would theoretically be possible (although this possibility is not widely recognised in practice).

[49] For details see Article 1(1) Japanese Family Registration Law in combination with Article 76 of said law and Article 763 JCC.

knowledge—never happens in practice. The situation regarding court determined divorce consequences looks similar—to the best of my knowledge joint custody is, in principle, not granted by courts.

A different family law example that—from a Western perspective—stands for a certain 'oddness' is related to visiting rights of a parent who does not hold custody rights. For a very long time the JCC did not contain any rules on this issue. This was a problem in particular in the aforementioned divorce cases. Divorce necessarily led to the loss of custody rights of one parent without compensating this with visiting rights.[50] Things slightly changed when Japan decided to join the Hague Convention on Child Abduction (hereinafter *Hague Convention*)[51]. In the course of the preparations for the ratification, Japan amended Article 766 JCC in 2011 and added one more consequence that the parents can agree on—'visiting' (面会; *menkai*). However, reading the newly worded Article 766 JCC in combination with the other provisions of the JCC that address the parent-child relationship one must say that this provision does not grant parents an explicit right in the sense that visiting rights basically exist and could only be excluded if the child's best interest requires to do so. The 2011 revision of Article 766 JCC might be one slight improvement—as the term 'visiting' is now mentioned in the JCC—, but additional changes would be required to establish a true visiting right for parents.[52]

4. Conclusion

The JCC (at least Books I-III) might—at the time of its enactment—have been an appropriate civil code that met Japan's need to modernise itself. However, over the years it had become quite obvious that it was too incomplete and not up-to-date anymore. Case law helped to some extent to close gaps and develop the code further, but at the same time led to a certain lack of transparency. Against this background the Ministry of Justice made the long overdue decision to install the Civil Code Working Group in 2009. Without doubt, this working group and preceding purely academic research groups have positively influenced the overall debate on a private law reform.

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[50] Although the judiciary seems granting such rights possible in some exceptional cases, the basic understanding is that visiting rights do not generally exist (see, e.g., Yuji Matson, *Crossing Borders: Japan's Move Toward Ratifying the Hague Convention on International Child Abduction*, 5 JOURNAL OF INTERNATIONAL LEGAL STUDIES, 1, 7 (2012). The easiest explanation for the absence of explicit (or basic) visiting rights and the reluctance of the judiciary to develop any such right might be seen in the fact that—at least according to some commentators in this field—both the Japanese society and judiciary had (for a long time) been convinced that maintaining a relationship between the child and the parent who lost his/her custody rights would have negative effects on the child's personal development (see, e.g., Colin Jones, *In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*, 8 ASIAN-PACIFIC LAW & POLICY JOURNAL 166, 236 (2007); Ellman, *Comparing Japanese and American Approaches to Parental Rights: A Comment on, and Appreciation of, the Work of Takao Tanase*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927746, visited 22 June 2014).

[51] For details on Japan joining the conference see, e.g., Stefan Wrbka, *Japans Beitritt zum Haager Kindesentführungsübereinkommen – Ein wirksamer Schritt gegen Kindesentführungen durch einen Elternteil nach Japan?*, ZFRV 126 (2014).

[52] In this context it will be interesting to see whether the Hague Convention (which uses the concept of 'right of access' (see, e.g., Article 1(b) Hague Convention)) will have any major impact in this respect.

However, it must be regretted that the Ministry of Justice focuses only on the Japanese law of obligations and is not courageous enough to launch a broader reform that could lead to a *comprehensive* revision of the JCC. Admittedly, some issues not addressed by the current reform plans have been sectorally updated—mostly as a consequence of international pressure and/or Supreme Court judgments. But not all of these amendments can be called really successful, at least they cannot be considered as the final step towards modernisation. The question thus remains whether the policy-makers really aim at a far-reaching improvement. If the answer is yes, then there is clearly the need to broaden the discussions.

Nevertheless, it must be said that the decision to install the Civil Code Working Group was a first, welcome step. I am very looking forward to more concrete results and hope that the current developments will lead to the launch of additional steps to pace the way towards a *truly* modern civil code.