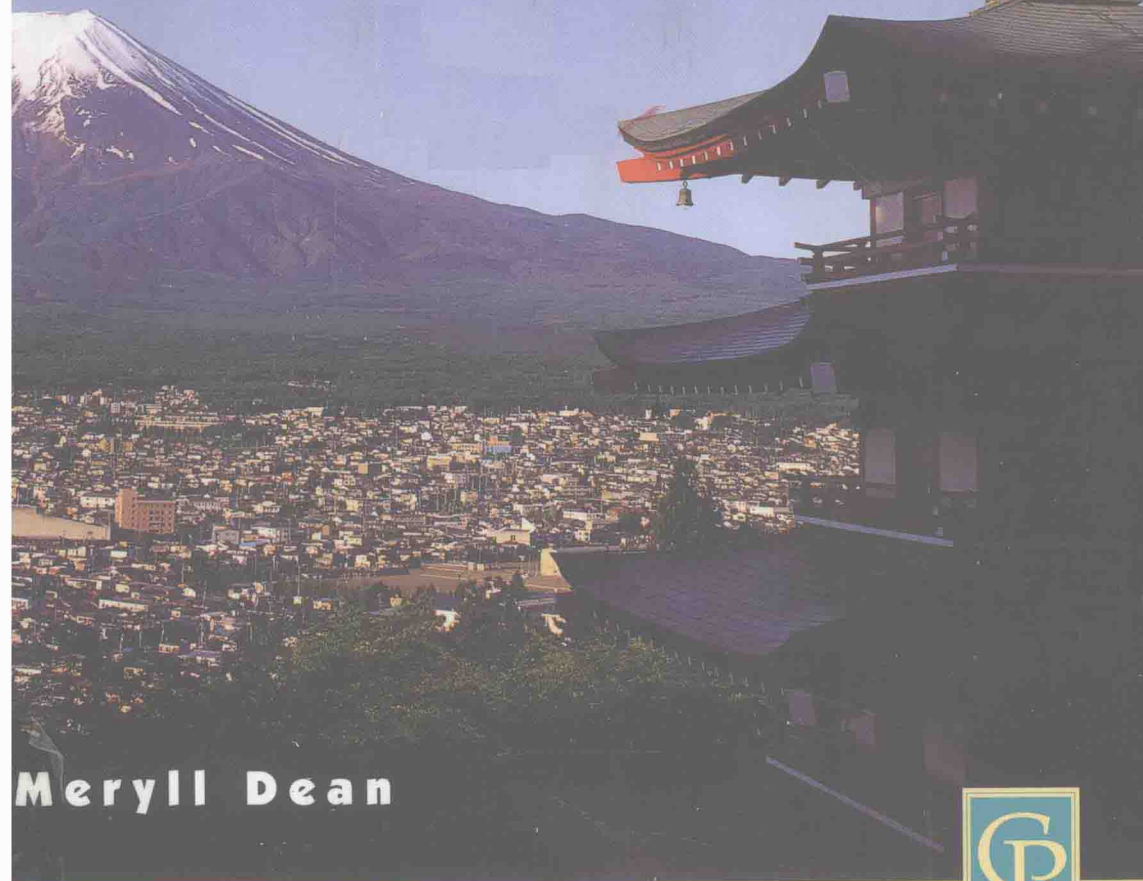


second edition

japanese legal system



Meryll Dean

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JAPANESE LEGAL SYSTEM

Second Edition

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PREFACE TO THE SECOND EDITION

In the five years which have passed since the preparation of the first edition, Japan has undergone a period of challenge and change. Much of this is reflected in the Japanese legal system and the reforms which have already occurred or those which are proposed. At the outset the essential aim of this book was to provide a unique and wide-ranging account of the Japanese legal system which was interdisciplinary in approach but which retained the basic characteristics of content and analysis provided by standard texts on legal systems. The second edition continues this approach.

One of the most significant changes since the first edition has been the growing availability of materials on the Japanese legal system. In particular the internet has had a major impact and to some extent rendered otiose the need to provide comprehensive up-to-date materials in printed form. That, together with comments of reviewers and users of the book, means that the materials have remained broadly the same, save for updating statistical information and the inclusion of extracts from the various proposals for reform. However, Appendix III, which provides a list of useful websites, has been added. Whilst this is not intended to be comprehensive, it gives the reader a start in accessing useful materials relevant to this subject.

During the 1990s the *leit-motif* of the Japanese legal system seems to have been 'reform'. First, considerable effort went into the reform of the electoral system and the administrative organisation of government. In 1996 the first election under the new rules took place and in January 2001 a major reform of the bureaucracy was instituted. These changes have been addressed in the revision of Chapter 4. Secondly, during the 1980s the provision of legal services and legal education became a major issue of debate; this led eventually to the establishment of a Judicial Reform Council in 1999 which aimed to investigate these and other related issues. The Final Report was published in July 2001 and has necessitated a complete revision of Chapter 5 and a substantial part of Chapter 6. Thirdly, again in 1999, a Constitutional Review Commission was established with the aim of promoting debate and examining ideas for constitutional reform. Although their work will not be completed until 2005, the debate which this has generated is reflected in the revision of Chapter 7.

With journals, legal publications, newspapers, and a variety of government information now available in electronic format it was decided not to disrupt the essential coherence of the text and materials by introducing new sources. Many of the materials which might have been considered for inclusion are therefore referred to in the footnotes. In addition, the text has been expanded in many places to take account of new developments and to obviate the need for introducing new materials. I am grateful to the reviewers of the first edition for their comments and for the helpful insights of my undergraduate students and other users of the book, all of whom have helped formulate the content and approach of the second edition. However, I wish to give particular thanks to Kent Anderson of the Faculty of Law at the Australian National University who gave me a detailed critique and analysis of the first edition which proved invaluable in the writing of the second edition. His knowledge and insight of the subject together with his experience as a teaching 'end user' was of immense benefit to me, and for that I thank him.

Whilst researching this edition I was helped in a myriad of ways by innumerable people, but I would like to single out a few who have made a considerable contribution to this edition. I am particularly grateful to those judges and legal professionals who have visited me at Lewes Magistrates Court as part of the Study Abroad research programme of the Supreme Court of Japan. Their interest in my own work has proved stimulating and extremely helpful. I am particularly grateful to Judge Kenji Shimotsu for providing a flow of factual information on the legal profession and facilitating my work at the Legal Training and Research Institute in Tokyo. I am also grateful for the support and assistance of Judge Kenji Yasunaga, Judge Masahiro Tomoshige and Judge Takenobu Someya. All provided invaluable information and insight. However, the opinions expressed and the responsibility for any errors are entirely those of the author. I am also grateful to the Japan Federation of Bar Associations for help with my research at an early stage in the project and more recently for providing up-to-date information on the legal profession. My time as Visiting Professor at Kwansei Gakuin University provided an invaluable research opportunity and the help and assistance of Professor Takashi Maruta and my research assistant Mami Iemoto was much appreciated. I would also like to thank my secretary, Jane Dean, whose skill and professionalism helped me through some of the more difficult administrative tasks which such a venture entails. I am also indebted to Jennie Roberts for her assistance in research as well as her encouragement, good humour and support. Finally, thank you to my husband David, without whom none of this would have been possible and to whom no amount of gratitude would be sufficient.

Meryll Dean
January 2002

PREFACE TO THE FIRST EDITION

This book is the culmination of nearly 10 years of work which started when my husband was posted to Tokyo and came to fruition, as a book, through the planning and design of undergraduate and postgraduate courses on the Japanese legal system. As a comparative lawyer whose main interest had been in Europe, the move to Tokyo provided an unparalleled opportunity to familiarise myself with a different legal system and culture. To that extent I owe a debt of gratitude to James Capel & Co who, unknowingly, started what was to become an enduring relationship with Japan and her people, which was eventually to develop into the focus for my research.

The aim of the book is to provide a distinctive contribution to the study of comparative law by presenting a wide-ranging account of a legal system which is often overlooked, is certainly difficult to access, yet belongs to a nation which influences, leads and shapes political, commercial and industrial developments throughout the world. Although this book is in one sense a culmination it is, in another, only the beginning. By providing a relatively comprehensive account of the modern Japanese legal system, I hope that a wider audience will be given a timely introduction to a fascinating and different legal culture which will undoubtedly be at the forefront of global developments as we enter the 21st century.

Japan is a country about which the words homogeneous and unique are often used, but it is all too easy to be misled, if not persuaded, by stereotype and misconception. By using a diversity of academic sources, from political scientists, anthropologists, sociologists and historians through to lawyers, it is hoped that the reader will gain an insight into the Japanese polemic. The issues of uniqueness and homogeneity are challenged through the medium of comparative discourse, as opposed to textual judgment. Each chapter offers an outline of the subject matter and introduces the issues, but leaves the reader to develop their own critique through the materials. On occasion, what might seem repetitive may in fact be a presentation of culturally opposing views on the same topic, or represent analyses by writers from different academic disciplines. In short the book provides a cross-cultural, multi-disciplinary approach to the Japanese legal system.

During my research I became aware that it was more challenging to obtain even the simplest piece of information on the Japanese legal system than to find the most complex about almost any other country in the developed industrial world. Japan is a country of contradictions, at once familiar and alien, accessible yet inaccessible, a conundrum which has been reflected in the compilation of this book. The diversity of sources has led to insights as well as inconsistencies. These range from simple things such as the difference between American and English spelling and the difficulty of translating Japanese words and names, to the more fundamental problems of dates and terminological inexactitudes. I have not attempted to rationalise these inconsistencies, rather, where possible, to explain them. It is hoped that taken as a whole, the book will provide a sufficient understanding of the basic structures and essential differences between other legal cultures and that of Japan.

Whilst researching and writing this book I have been helped in a variety of ways by more people than can be named here. However, I owe a particular debt of gratitude to Professor Takashi Maruta without whose inspiration and encouragement this work would never have been started and whose support has at all stages been invaluable. My time at Konan University as Visiting Professor was particularly productive and gave me

the opportunity both to reflect and research. I would like to thank all colleagues and friends who helped and contributed during my stay. I am also indebted to Professor Masayuki Murayama whose interest in, and comments on, earlier work helped me to believe that a project of this sort was both important and possible. Research for this book was carried out in Japan and England and I wish to thank Judge Katsumi Chiba of the Supreme Court of Japan for providing much needed material and Machiko Konno for her hospitality and help with negotiations during my visits to Tokyo. Thanks must also go to Joan Benning of Sussex University Library who performed miracles in obtaining information from all over the world. Richard Vogler's advice and comments on early drafts were most helpful. Throughout the project I have received invaluable support from Beverley Walker. Her eagle eye and incisive comments kept me on my toes and in general she lifted my spirits and provided much appreciated encouragement. Finally, thanks are due to my husband, David, whose culinary skills have sustained me and computer wizardry saved me on a number of occasions. His infinite patience, sense of humour and wise counsel provided the support and encouragement which made it all possible.

Meryll Dean
February 1997

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CONVENTIONS AND COMMENTS

Due to the range of sources referred to in this book, a number of contradictions may appear. In the text, every attempt has been made to be consistent, but the materials may be at variance. Thus, the following conventions have been observed in the text:

- 1 Where direct translation is used the source is *Kenkyusha's New Japanese-English Dictionary*, Editor in Chief, Koh Masuda, 4th edn, 1974, 16th impression, 1987.
- 2 The text of the Codes and the 1946 Constitution are taken from the official English translation published from time to time by Eibun Horei Sha Inc as EHS Law Bulletin Series – *Roppo*.
- 3 Japanese names are written in Western order, with the personal name first and surname second. It should be noted that some materials adopt the Japanese order of surname first followed by personal name.
- 4 In texts containing Japanese words it is the practice to include macrons to aid pronunciation. However, due to technical difficulties and for the sake of consistency all macrons have been removed.
- 5 English spelling has been used in the commentary but where American source material has been used no changes have been made. Due to variations in translation some discrepancies may exist, eg Shimpei or Shinpei, the forename of Minister of Justice Ito during the Meiji era (see Chapter 2) and Kenpo, or Kempo as the word for Constitution.
- 6 References to the two modern Constitutions may vary. The Meiji Constitution was promulgated in 1889 and came into effect in 1890. The 'new' or Showa Constitution was promulgated in 1946 and came into effect in 1947. Throughout the text reference is made to the Meiji Constitution and the 1946 Constitution; however, as will be apparent in the materials, practice may vary between authors.
- 7 Where there is reference to a statute, the word 'Law' is used rather than 'Act'.
- 8 Footnote and bibliographic references have been taken out of materials unless specifically requested by the publishers. Similar editing has taken place at the request of publishers in relation to quotations within certain materials.

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