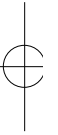


Comparative Law  
*Law and the Legal Process  
in Japan*

Second Edition



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Kenneth L. Port

PROFESSOR OF LAW  
WILLIAM MITCHELL COLLEGE OF LAW

Gerald Paul McAlinn

PROFESSOR OF LAW  
AOYAMA GAKUIN UNIVERSITY

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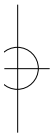
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For Emily, Elissa and Paula  
K.L.P.

For Sachiko, Kenichiro and Miki  
G.P.McA.

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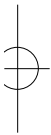
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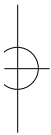
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# Preface to the Second Edition

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The First Edition of this book was written and compiled by Kenneth L. Port. It was published by Carolina Academic Press and appeared in 1996. The book met with critical acclaim and was adopted as a standard text in a number of courses on Japanese and Comparative law in and outside of the United States. However, like any book of this nature, changes in Japanese law quickly rendered substantial parts of the book either obsolete or less demonstrative of the process of law in Japan. Thus, it became obvious that significant changes would be necessary if these materials were to portray accurately the rapid changes both in Japanese law and the role law has played as a tool of transformative social change in Japanese society. At the same time, the central themes and inquiries of the First Edition, namely, what is the nature of law in Japan, how law and the process of law are perceived by Japanese and outside observers, and how law operates in practice remain constant. Readers familiar with the First Edition will find that these fundamental questions about law in Japan continue to appear prominently in the Second Edition.

When Kenneth Port decided to update the book, he asked Gerald Paul McAlinn to assist him with this project. Gerald McAlinn's expertise in corporate and commercial law adds a dimension otherwise missing. In addition to adding a co-author with more of a corporate background, the decision was also made to use more primary source materials. The First Edition was largely a book that represented the status of how American and Japanese scholars understood Japanese law. The aim of the Second Edition is to add a new dimension by presenting Japanese law through the prism of the Japanese judiciary.

In addition to focusing the materials on judicial opinions by the highest Japanese court available on any given subject, more effort was given to including Japanese scholars' views about each topic. It is important to note that American scholars of Japanese law and Japanese scholars of Japanese law do not always agree on the conceptual significance of some aspects of Japanese law. Many American scholars too easily dismiss a foreigner's perspective on American law; however, to their great credit, many scholars, judges and influential decision makers in Japan take the foreign perception of Japanese law very seriously. As such, both views are presented in these materials.

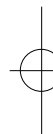
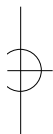
Although resources available on the Internet are rapidly making Japanese law more accessible than it has been, language and other barriers keep a great deal of information regarding Japan, including its law and legal system, unavailable to people who do not speak and read the Japanese language. These materials are intended to present the Japanese system of law and the legal process as understood and manifested by the

Japanese judiciary and by Japanese scholars with, when relevant, input by American and other scholars. Of course, in furnishing a voice to Japanese perspectives on law and the legal process, it was necessary to use a great deal of translated materials. Unfortunately, as anyone familiar with the Japanese language and especially Japanese judicial opinions will readily note, it is not particularly useful to render literal translations from Japanese to English of judicial decisions and sophisticated scholarly articles. Therefore, while striving to be as faithful as possible to the original, the editors have taken liberties in order to present Japanese judicial opinions in language American law schools students and American lawyers can comprehend.

The authors will consider this book to be a success if it causes readers to appreciate the modern, sophisticated, legitimate and complex nature of the legal process in Japan and to realize that there is a great deal more to law in Japan than what is frequently embodied in stereotypes and clichés too often subscribed to, and perpetuated by, Americans and Japanese alike.

Kenneth L. Port  
St. Paul, MN

Gerald Paul McAlinn  
Tokyo, Japan  
August 2002



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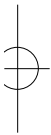
## Editors' Note

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For the sake of conserving space, nearly all footnotes of excerpted law review articles and court opinions have been omitted without indication. Footnotes that do appear may not correspond to the footnote numbering in the original article. For documentation of the contributing authors' various propositions, the reader is encouraged to refer to that original book or article. All diacritical marks have been omitted in Japanese words transliterated into the English alphabet. Japanese names appear in the Western fashion where given names appear first and family names appear second, except to the extent that the Japanese convention is followed in excerpted materials. In some instances, there are multiple possible readings for given names. In such instances we either chose the most common reading or simply provided a first initial. We apologize to those named, in advance, if we have provided an incorrect transliteration of their given name. Finally, all translations done or supervised by the editors in this book are intended as pedagogical tools to elucidate the process of law in Japan. For this purpose, it was necessary to translate the meaning of the cases rather than literally translate only the words the judges wrote. As such, no case or statute originally translated and published herein is intended as an "official" translation, nor should it be relied upon in any way as the absolute, final word by any court of law. In keeping with the objective of providing a view of Japanese law in language Western readers are used to and are more likely to understand, we have taken the liberty of editing some translations, without changing the substantive meanings, previously translated and published by others. Also, Japanese reporters often times do not follow the convention of providing the names of parties to litigation. Judges do not release the names in certain instances. In some instances, without giving any indication that they have done so, judges assign a pseudonym. The favorite male pseudonym is Taro Kono; the favorite female pseudonym is Hanako Kano. The "Kano" pseudonym is only a favorite and not necessarily the only one. ("Ichiro Suzuki" had to be abandoned as a pseudonym for obvious reasons.) As we have no way of telling which party names are pseudonyms and which are not (and the cases do not say), we have left all party names, to the extent provided by the court, as they appeared in the Japanese court's original opinion. If the Japanese courts did not give the names of parties at all, we either discovered the names of the parties through independent means or indicated "party names not provided."

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# Acknowledgments

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The editors would like to express their heartfelt appreciation to those who gave freely of their time and thereby made this project not only better but, in fact, possible. This includes each of the copyright holders of works excerpted in this book. The authors of some of these works and others who made meaningful contributions to the First and/or Second Edition of this book include the following people: David Gerber, John Haley, J. Mark Ramseyer, Dan Foote, Richard Parker, Arthur Rosett, Christopher Simoni, Lawrence Beer, Whitmore Gray, Nobuhiro Nakayama, Hirofumi Ito, Takayuki Shiibashi, Katsuyoshi Kato, Norio Higuchi, Naoko Iyori, Curtis Milhaupt, Yuriko Inoue, Leonard Schappa, Peter Erlander, Dan Rosen, Niels Schaumann, Wayne Logan, Luke Nottage, Leon Wolff, Kent Anderson, Stephan Salzberg, Lawrence Repeta, Mark Levin, Yoshinobu Eizumi, and Misao Toba.

We would also like to express our appreciation to the various students, too many to name specifically here, from the following institutions who raised questions and thereby contributed to the development of the Second Edition: Marquette University Law School, Temple University Law Program in Japan, University of Queensland, and University of Hawaii.

The following people have been instrumental in researching various aspects of this book or by providing draft translations of Japanese court decisions: Pat Flynn, Brian Saucier, Brian Pauls, Rachel Kates, Jill Sonnek, Koh Hinokawa, Eriko Hozumi, Rui Fukazawa, Yukiko Ohata, Lisa Kuwabara, Shiori Suzuki, and Rie Ogawa.

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Once again, the collection of Japanese legal materials donated by Lawrence Beer, originally to Marquette University and subsequently transferred to William Mitchell College of Law, proved invaluable. We are extremely grateful to Professor Beer for his generosity and good cheer.

Finally, we are incredibly indebted to Meg Daniel, Cal Bonde, Linda Thorstad, and Nancy Bolin, employees of William Mitchell College of Law. Nancy provided an appreciated sense of humor and graphical sophistication to the project. Cal and Linda provided critical word processing support only an author can appreciate. Meg provided administrative, clerical, editorial, and intellectual support not often found in an Administrative Assistant. We are especially indebted to these four people who, when everything is said and done, really made this project possible. We are also indebted to Vice Dean Matthew Downs and Dean and President Harry Haynsworth of William Mitchell Col-

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