# REZENSIONEN / REVIEWS

## J. MARK RAMSEYER

***Second-Best Justice: The Virtues of Japanese Private Law***

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Since the publication of some famous papers on dispute resolution in Japan by *Takeyoshi Kawashima* and *John H. Haley* in the 1960s and 1970s, there has been a steady discussion among legal comparatists and scholars of Japanese law in and outside of Japan about the reasons for the astoundingly low numbers of civil lawsuits in Japan. In this book, *J. Mark Ramseyer* once again turns his attention to that subject and explores the reasons for it in various fields of private law.

Among scholars of Japanese law and readers of this Journal, it is probably unnecessary to introduce the author. *Ramseyer* is one of the best-known and most-distinguished non-Japanese experts on Japanese law. He spent most of his childhood in Japan and studied Japanese history in graduate school in the United States before he turned to law. Some years after graduating from Harvard Law School he returned to Japan as a Fulbright student at the University of Tōkyō. He is currently the Mitsubishi Professor of Japanese Legal Studies at Harvard University Law School. His research is primarily focused on Japanese law, from a law and economics perspective.[1]

*Ramseyer*'s book consists of eight chapters, together with notes, references, and an index. The title of Chapter One ("Doing Well by Making Do") immediately indicates the main result of his analysis. In this book *Ramseyer* does not criticize the Japanese legal system for its low rate of lawsuits or reasons behind it, but rather views the phenomenon mainly as the consequence of a legal system that is well-functioning, in particular because of the good work of the Japanese courts. The subsequent chapters each mostly deal with the low filing rate in a particular field of private law. Chapter Two ("A Tort System That Works") explores the dispute resolution practice in Japan with regard to traffic accidents. In Chapter Three ("A System with Few Claims") *Ramseyer* tries to explain the low number of product liability cases in Japan. Chapters Four ("Few Claims, but for a Different Reason: Medical Malpractice (I)") and Five ("Medical Malpractice (II)") deal with the relationship and the interdependencies between allegedly few medical malpractice lawsuits, legal practice, and the particular structure of the Japanese

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1 Based on the author's biography on the webpage of Harvard University, Law School (Harvard Law School) at *http://hls.harvard.edu/faculty/directory/10697/Ramseyer*.

health care system. In Chapter Six ("Wrong but Predictably Wrong") *Ramseyer* shifts his viewpoint and casts light on some fields of law where the courts – in his opinion – are making more erroneous decisions, in particular in labor, landlord-tenant, and consumer finance cases, but tries to explain why this in practice did not matter so much. In Chapter Seven ("A Second-Best Court") *Ramseyer* focuses on the general structure and particularities of the judicial administration in private law matters in Japan. Chapter Eight offers a "Conclusion".

*Ramseyer*'s main conclusion is clearly reflected in the title of the book and undoubtedly draws upon of a very American view of an ideal justice system. According to *Ramseyer*, Japanese courts might not be ideal courts, and Japanese judges might not serve full justice in all individual cases in which they decide; nevertheless, and ultimately, the Japanese justice system on average achieves more justice with greater efficiency than the US legal system, which he views as being based on an "obsession with individualized justice" (p. 241) and "messianic aspirations" (p. 240). In this respect, Japanese courts do not serve "first-best justice" (connoting a fictional ideal of perfect justice), but come very close by serving "second-best justice"; and, in addition, come much closer to it than the US justice system does. In his concluding words the author claims:

> "We [the Unites States] run a legal system apparently designed to reach precisely the right answer in precisely every case. Japanese judges let things be at 95 percent. We aspire for more – but sometimes actually accomplish very little. Japanese judges make do with less – but actually do very well" (p. 242).

Such a statement is remarkable for several reasons. First, *Ramseyer* here expresses a degree of discontent with his own country in dealing with issues of law and justice that is not overly common among US lawyers today. Second, and in stark contrast, despite of some critical observations mainly made in Chapters Six and Seven (see below), *Ramseyer* generally appraises the Japanese way of dealing with civil justice as close to perfect. While this reviewer wishes to abstain from commenting on the US legal system – the first aspect of *Ramseyer*'s statement – with respect to the second, one would have to say that a reassessment of the Japanese legal system from the European and German point of view would certainly come to a much less enthusiastic conclusion. What *Ramseyer* lauds as "virtues of Japanese private law" are, at least partly, common features of the German and continental European legal tradition on which the Japanese administration of justice in private matters and the law of civil procedure are to a significant extent founded.

*Ramseyer*'s main line of argument is summarized both in Chapter One and in his conclusion in Chapter Eight, and described in detail in the chapters in between. According to his view, there is hardly any ground for serious criticism. The courts in Japan were not slower than those in the US and retaining a lawyer was not more expensive than in the US. The Japanese legal system works perfectly adequately, and if compared to the US also much better (at pp. 2, 240–241). Generally, Japanese courts do not aim at

achieving individualized justice in all cases, but rather follow rules and procedures that aim at getting a problem "mostly right" and thereby giving better overall results than trying to get it "exactly right" (at pp. 6, 3, 241) all the time. This statement is obviously not only directed at US lawyers in order to stimulate self-reflection, but at the same time also at people such as *Haley* who have criticized or still criticize Japan for institutional barriers to justice in civil matters.

In many fields of law, *Ramseyer* states, Japanese courts use public formulae and standardized tables to calculate the claim amount, for instance with regard to victim's damages in traffic accident, product liability, and medical malpractice cases (at pp. 6–7, 21–33, 60, 143, 239–240). Those formulae and tables can also be used by parties before filing a lawsuit for calculating and predicting the likely outcome of a lawsuit in the civil courts, in order to settle the case out of court "in the 'shadow' of the litigated outcome", and thereby saving the money they would otherwise have paid their lawyers (at pp. 6, 239, 240) if they had filed a lawsuit. *Ramseyer* argues that this explains to a great part the low number of civil lawsuits in Japan.

Furthermore, with specific regard to product liability law, *Ramseyer* argues that despite the fact that modern products are safe and thus defective products generally cause few injuries, there were fewer cases in Japan than in the US because Americans file many lawsuits only because American courts have an erroneous tendency to reward plaintiffs who file fraudulent claims instead of punishing them and their lawyers for facilitating such abuse (at pp. 7, 65–70, 240). Accordingly and generally, Japanese people not only bring fewer actions before the courts in this legal area, they also generally refrain from filing product liability claims out of court (at pp. 7, 240).

In the field of medical malpractice, *Ramseyer* identifies the poor public health insurance system in Japan as a further reason for the smaller number of claims filed in and out of court. To keep costs low, *Ramseyer* argues, the national health insurance reimburses only few complicated and sophisticated medical treatments. For Japanese doctors there is hence no financial incentive for such sorts of treatment and their practices mainly focus on the simple routine procedures where they are reimbursed at relatively higher levels while bearing only a low risk of malpractice. Ultimately, the Japanese national health insurance system generally reduces the number of malpractice claims (at pp. 7, 84–86, 87–90, 123–124, 125, 158–163, 240).

It is not the first time that *Ramseyer* has presented this line of argument. He reiterates and refines his viewpoints from the last thirty years.[2] Most chapters are also based on his own past publications, as the author himself mentions in his "Acknowledgements" (p. xii). Hence, almost all of *Ramseyer*'s statements and conclusions drawn in this book have al-

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2 See for example J. M. RAMSEYER, Reluctant Litigant Revisited: Rationality and Disputes in Japan, in: Journal of Japanese Studies 14 (1988) 111, 114 et seq.; J. M. RAMSEYER / M. NAKAZATO, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, in: Journal of Legal Studies 18 (1989) 262, 268 et seq.

ready been discussed extensively in the world of Japanese Law, in particular on its English-language continent. It is, however, commendable that the author in this book provides the reader with a nutshell of the persistent arguments in support of his complex theory.

*Ramseyer* is therefore certainly familiar with the arguments that can be made against him. Considered from the viewpoint of the US legal system, which is in general very different from that of Japan, *Ramseyer*'s argument seems in many respects to be plausible. But the US legal system itself has so many peculiarities that it is difficult to take it as a basis for an objective assessment of Japan. The US legal system is in fact not only very different from the legal system in Japan, but also from almost all legal systems in Europe, which mostly have a continental European civil law tradition. The US system even differs significantly from that of the UK, although to a lesser degree. Therefore, what seems to be somehow obvious from the US viewpoint may not be so convincing if considered from that of the European civil law tradition, which is also the basis of the Japanese private law system.

Indeed, Germany is as developed a country as Japan and the US. The German legal practice also makes extensive use of standardized tables for quantifying damage claims in traffic accidents (and other claims of a common nature). Although these tables and charts do not bind the courts (they also do not in Japan), they constitute valuable reference tools for judges and other legal professionals in their daily work. Nonetheless, the number of legal actions in Germany is many times higher than that in Japan. Germany is certainly not regarded as a country with a particularly low litigation rate. Besides, the high number of court decisions in Germany and the general tendency of the lower courts to follow higher courts' decisions (similar to Japan, but for probably different reasons than those implied by *Ramseyer* in Chapter 7, p. 207) adds to the certainty of any particular lawsuit's outcome, which is, this reviewer dares to say, at least not lower than that in Japan. Despite this, as the relatively high number of lawsuits in Germany clearly indicates, the Germans (often referred to as German "wranglers (*Streithansel*)") do settle their cases much less (even in the shadow of a predictable outcome) than the Japanese. It must be said, however, that the outcome of a lawsuit is in neither Japan nor Germany fully predictable. The German courts also cannot be regarded as overly "obsessed with individual justice", whatever this may mean. German judges have to handle many cases at the same time. They therefore also have had to develop certain routines to make ends meet.

Moreover, the situation in Germany is also very different to that in the US and similar to that in Japan in relation to *Ramseyer*'s additional reasons for the low number of product liability cases. In fact, if there really is a general tendency in the American courts to sometimes reward plaintiffs who file fraudulent claims, that would be a very peculiar aspect of the US legal system, and its absence in Japan would certainly not constitute a valid reason for the particularly low litigation rate, because such a tendency is in general also not present in the many European countries, at least to this reviewer's knowledge. In medical malpractice cases, on the other hand, the Japanese public health system may in fact contribute to the small number of lawsuits in Japan, but this argu-

ment is limited to those particular cases and does not explain the generally low number of lawsuits in Japan.

Even if one looks simply at Japanese consumer loan related cases, *Ramseyer*'s reasoning becomes doubtful. Due to several judgments of the Japanese Supreme Court in 2004, 2006, and 2007, and finally due to law reforms in 2006 and 2010, it has become very clear whether a person in a specific case can claim the return of overpaid interest from money lenders on the ground of unjust enrichment (based on Sec. 703 Civil Code (民, 法 *Minpō*)). Thus, in those cases where people have paid the interest agreed upon, but where the contract is (at least partly) void as a result of existing mandatory legal provisions, it is now relatively easy to predict whether a money borrower can successfully claim for the return of overpaid interest from a money lender. If one follows *Ramseyer*'s argument, one would expect that the high predictability of the outcome of a lawsuit in those cases would also lead the parties to settle the case without filing a lawsuit. However, in the years after 2004, the number of lawsuits in Japan dealing with a claim for the return of overpaid interest grew extraordinarily. From 2007 to 2011, the number of such first instance lawsuits in the Japanese district courts in Japan exceeded the number of all other first instance district court cases combined (e.g. in 2008: 144,468 of 235,508 cases).[3] One wonders why *Ramseyer* does not himself addresses this contradiction to his own theory, since he also discusses the high number of lawsuits in this field of law, but in a slightly different context (in Chapter Six, "judicial errors", at pp. 198–204).

It is also doubtful whether the Japanese civil justice system really functions as well as *Ramseyer* suggests. Even after the implementation of the far-reaching law reforms of the 2000s (司法制度改革, *Shihō seido kaikaku*), there are still some institutional barriers to litigation in Japan. Although *Ramseyer* may be right in his statement that Japanese lawyers (attorneys-at-law) are not more expensive than American lawyers (at pp. 60–61), if compared to the cost of instructing lawyers in Germany, however (particularly in cases where the amount in dispute is low), Japanese lawyers seem to be quite expensive. One wonders how relatively expensive Japanese lawyers might be in comparison to other developed countries in Europe and elsewhere. It is also the general impression of Japanese people that Japanese lawyers are very expensive and, in addition, that the level of lawyers' fees is often difficult to predict, which is considered to generally influence whether people seek a lawyer's advice or retain a lawyer to pursue their legal interests.[4] Furthermore, the number of lawyers is still very small if compared to many other devel-

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3 See SAIKŌ SAIBAN-SHO [Japanese Supreme Court] (ed.), *Saiban no jinsoku-ka ni kakaru kenshō ni kansuru hōkoku-sho (dai 6-kai)* [6th Report on the Survey regarding the Acceleration of Court Proceedings] (Supreme Court 2015) 3 (table there).

4 NAIKAKU KANBŌ HŌSŌ YŌSEI SEIDO KAIKAKU SUISHIN-SHITSU (ed.), *Hōsō jinkō chōsa hōkoku-sho (an)* [(Draft) Report on the Number of Jurists] (as of 16 April 2015) (2015) 46.

oped countries,[5] and most lawyers have settled in the big cities (particularly Tōkyō, Ōsaka and Nagoya), which makes it difficult for people, especially in the countryside, to retain a lawyer.[6]

*Ramseyer*'s argument, nevertheless, is probably to a certain extent right. The use of charts and tables for calculating damage amounts in tort cases may add to high out-of-court settlement rates in Japan, especially if there is also a functioning out-of-court conciliation body, as it is in the case with traffic accidents. However, it is doubtful whether these arguments really are sufficient to generally explain the low number of lawsuits in Japan. It seems to be more convincing to assume that a variety of reasons contribute to a complex situation in Japan, among them also socio-cultural factors as well as institutional factors. *Ramseyer* should put his theory to a test by comparing Japan not only to the US, but also to a number of European countries. The peculiar US legal system alone is probably not a valid basis to draw general conclusions on the Japanese civil justice system.

In Chapter Six, *Ramseyer* changes the focus of his analysis slightly and explores some other fields of law – labor law (pp. 165–188), landlord-tenant disputes (pp. 188–197), and consumer finance law (pp. 198–204) – where he thinks that the Japanese courts often make typical errors of judgment and where the Japanese legal system therefore also has its weaknesses. He argues, however, that this does not matter much because Japanese judges err "in a distinctively predictable way" (p. 205). Here again, *Ramseyer* argues that the high predictability of the outcome of a lawsuit contributes to a tendency among the Japanese to pursue out-of-court settlements to save themselves the money they otherwise would have to spend on lawyers' fees (p. 205). As we have seen, however, in the field of consumer finance law at least, this argument is contradicted by *Ramseyer*'s own observations regarding the clearly high litigation figures in this area (p. 199).

Other observations in Chapter Six can also be disputed. *Ramseyer* here states that Japanese judges in these fields make errant choices in a particular way, apparently attempting to help those who they think are the "weaker party". Thereby, he argues, Japanese judges fail to consider the effect that their decisions have on future behavior. Moreover, the errors are "stuff of simple freshman microeconomics" (pp. 164–165, 204). As a result, Japanese judges hurt the very people they claim they wanted to help (p. 204–205): in the field of labor law by fostering an increase in "irregular workers", "unemployment", etc. (pp. 178–185); in the field of landlord-tenant law by creating an "unwillingness to rent land, houses, and apartments", etc. (pp. 195–197); and in the field of consumer finance by "destroying the consumer finance industry" (pp. 199–200). Here, *Ramseyer* exhibits a perspective somewhat typical of the common American *Weltan-*

5 HŌMUSHŌ [JAPANESE MINISTRY OF JUSTICE] (ed.), *Hōsō jinkō ni kansuru kisoteki shiryō* [Basic Documents on the Number of Jurists] (revised version, Hōmushō 2013), at *http://www.moj.go.jp/content/000108947.pdf*; last visited on 16 June 2016) 4, 60.

6 T. II, Young Migrants from Big Cities: Measures for Dealing with the Shortage of Legal Services in Japan, in: ZJapanR/J.Japan.L. 27 (2009) 59–80.

*schauung*. Trying to help the "weak" and "poor" by regulating markets and market transactions may seem to be a devious instrument to liberalists and neo-liberalists, allegedly contributing to the destruction of markets or at least causing market distortions, and thus would entail more disadvantages than advantages for the poor people. In Japan, however, such a regulatory approach is common and a basic feature of the Japanese political and legal system on the whole, and is particularly visible in the fields of consumer law and politics.[7] Besides, in the Japanese view, landlord-tenant contracts and consumer loan contracts are also areas that should be regulated in order to protect "consumers". Japanese judges in such fields of law thus only follow the generally prevailing socio-political concept in Japan. One may certainly argue that this is a poor approach, but then one would have to fundamentally criticize the whole Japanese (social/market/legal) system of governance as defective. This, however, is not so easy. Is the US better-developed, wealthier and more successful than Japan?

Likewise, many countries in Europe follow to some extent a similar regulatory policy as Japan in order to protect those considered as weak, such as consumers. Therefore, from *Ramseyer*'s point of view, almost all continental European countries could be similarly criticized. And from my personal point of view, *Ramseyer* would be right to criticize European policy to a certain degree as well, as there is a visible tendency of over-regulation in both European Union and German law, with some of the adverse effects *Ramseyer* mentions. America certainly has a longer and stronger tradition of liberal market advocacy than Japan and many countries in continental Europe. However, it is very difficult to assess whether this liberal model will turn out in the long run to be the better. So far, at least, economists, jurists, political scientists and scholars of other disciplines have thus far not reached a consensus on the ideal system of governance.

In Chapter Seven, *Ramseyer* explores the structure of the Japanese judiciary in order to determine the reasons for the Japanese courts' efficiency. As one of the organizational reasons for the Japanese court system's ability to generate and maintain such high predictability of court decisions, which is a precondition for high out-of-court settlement rates, *Ramseyer* identifies the selection, relentless monitoring and rewarding of talented judges who decide cases quickly *and* by established principles (p. 207, pp. 209–221). While the former probably is and certainly should be a valid criterion for the employment and promotion of judges in all countries, the latter, i.e. a preference for deciding by established principles, would be a point of serious concern only if it can be proven that the judges realize that they decide *wrongly* while sticking to those established principles as the basis for their decisions. In fact, in cases concerning highly-charged political issues, one cannot ignore the fact that Japanese judges often seem to be reluctant to issue a judgment contrary to the expectations of the Japanese government and the ruling political class, as *Ramseyer* also points out (p. 207). But this is a special problem and, as

7 See M. DERNAUER, Verbraucherschutz und Vertragsfreiheit im japanischen Recht [Consumer Protection and Liberty of Contract in Japanese Law] (Mohr Siebeck 2006).

*Ramseyer* rightly notes, almost irrelevant for cases in private law. Apart from that, *Ramseyer* offers few facts to allow for a conclusion that Japanese judges really have a tendency for a peculiarly Japanese approach to effective decision-making. In particular, the question of whether Japanese judges sacrifice quality for quantity in their work in order to improve their efficiency while being judged by their number of finished cases remains unanswered (p. 236). The result of *Ramseyer*'s analysis of the structure of the Japanese judiciary is that Japanese judges work hard and efficiently. This certainly is to be lauded, but whether this contributes to the particularly high predictability of court decisions in Japan, especially if compared to civil judiciaries in countries more similar to Japan than the US, remains unproven.

In conclusion, despite the critical comments above, *Ramseyer*'s book is a highly inspiring and worthwhile read. In fact, everyone engaged in research or practical work related to private law conflict resolution in Japan should be familiar with *Ramseyer*'s theory. This book offers a concise summary of that theory, is well-structured in content, rich in detail and a joy to read.

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