Translators’ preface: the legal sociology of Takao Tanase

Takao Tanase is one of Japan’s most respected and influential socio-legal thinkers (Feldman, 2007, p. 57). From an academic career spanning more than 40 years, including a three-decade stretch at the University of Kyoto from 1977–2007, Takao Tanase bestows a prodigious body of work: 17 authored, edited or translated books, and dozens of major journal articles and book chapters. This book collects together seven of his landmark essays. Originally published in Japanese in prestigious law journals or as book chapters published by leading publishing houses between 1990 and 2002, these essays appear for the first time in English translation. They provide an insight into the diverse range and imaginative scope of Tanase’s legal sociology.

Until now, only a fraction of Tanase’s work has been available in English. Even so, he has laid down several challenges to orthodox understandings about the role of law in Japanese society.1 For example, his analysis of the extra-judicial management of high-volume traffic accident cases emphasised that non-litigiousness is a function of control by political and legal actors rather than a direct artefact of culture (Tanase, 1990). A decade later, his post-modern re-reading of Japanese legal history caused him to question whether transplanted legal codes will inexorably lead to the modernisation of Japanese society (Tanase, 2001). His empirical study of popular attitudes to the judicial reform process then revealed a paradox about the fate of a reform – enacted in 2004 and to take effect from May 2009 – to involve the citizenry in judging serious criminal trials in Japan: far from heralding the triumph of the rule of law, he argues that its success hinges on Japanese people remaining sceptical about the promise of universal law (Tanase, 2004). And his reflections on the history of Japanese law undermine confident predictions that law will propel China towards a modern market and political democracy (Tanase, 2006). These observations are important and profound. They underscore his global reputation as a leading authority on Japanese law and society.

1 For a succinct introduction to Japanese legal history and key legal institutions, see Abe and Nottage (2006), updated at www.asianlit.org/jp/other/JPLRes/2008/1.html
The suite of essays in *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity,* however, go further, uncovering the full ambition of Tanase’s legal sociology. As the title of the book reveals, Tanase extends his gaze beyond Japan. Indeed, only one-third of the book is directly concerned with Japanese law and society. The first third of the book is a searing critique of the ideology of liberalism in American law. The second third constructs a communitarian theory that can replace liberalism as a more suitable and progressive platform for balancing the needs of social cohesion with social justice for individuals and groups. The final third then re-evaluates assumptions about the ‘triumph’ of liberal law and modernity in Japan.

Tanase blends the ‘perspective of the comparativist’ with the ‘vision of a bold theorist’ in these essays (Scheiber, 2005, p. 2). As a comparativist, Tanase reflects broadly on law and society in both Japan and the United States. (Elsewhere, he has extended his analysis for example to China: Tanase, 2006.) Tanase canvasses a wide range of legal and social issues, such as legal ethics (Chapter 2), torts (Chapter 3), family law (Chapter 4), human rights (Chapter 5) and constitutionalism (Chapter 6). As a theorist, he applies these reflections to forge new understandings about broader socio-legal themes encompassing litigiousness (Chapter 8), modernity and modernisation (Chapter 7), and – most centrally – legal communitarianism (all chapters).

Tanase’s methodology and mode of analysis are a refreshing departure from an increasingly positivist tendency in socio-legal studies of Japan. Adopting instead a ‘hermeneutic, interpretive’ strategy (Tanase, 2001, p. 187), he builds theoretical ideas from a careful re-reading of stories and data, identifying the values and ideologies that underpin the way law and society intersect. To be sure, his essays also draw on other approaches, such as the comparative doctrinal review of child visitations law in the US and Japan (Chapter 4), quantitative analysis of aggregate litigation data (Chapter 8) and the critical literature review of the scholarship of the renowned legal sociologist, Takeyoshi Kawashima (Chapter 7). Yet it is Tanase’s interpretivist methodology that provides this book with an important and original voice.

As Tanase himself explains in his introductory essay (Chapter 1), the book addresses three main issues. The first is a critical re-examination of the liberal tradition of law in the United States. To what extent does liberal law represent the pinnacle of legal achievement, the so-called ‘end of history’ of law (compare Fukuyama, 1992; Nottage and Wolff, 2005)? Part II of the book (Chapters 2–4) is sceptical of legal liberalism’s claims to superiority. Tanase deconstructs the underlying values of the liberal tradition of law and the unhealthy grip they often hold on cohesive social relationships. Tanase is prepared to acknowledge that liberal law can have (sometimes unintended) positive effects, building new communities out of fractured relationships.
(Chapter 4). But mostly, he argues, it divorces people from their embedded community relationships (Chapter 2).

The second issue is whether there is a conception of law that can serve as a viable alternative to liberal law. Part III of the book (Chapters 5–6) is therefore an effort to build a universal theory of legal comunitarianism, drawing on the author’s experiences with – and observations of – Japanese law. Tanase canvasses the broader literature on comunitarianism to develop his own model that can serve as a progressive basis for upholding social cohesion while respecting the individual rights of disadvantaged persons and groups.

The third issue is whether Japan’s legal history exemplifies the triumph of legal liberalism or the importance of communal relations. Part IV of this book therefore examines Japanese legal history, post-war litigation statistics and the theory of Kawashima, who popularised the notion that Japan will fail to modernise unless it fully embraces the rule of law. Tanase, who was his last deshi (senior graduate student) at the University of Tokyo, points out that Kawashima himself began to have doubts about this modernisation thesis. Tanase concludes that a comunitarian theory of law provides a more nuanced explanation of how law and society interlace with one another, in Japan and beyond.

In this book, therefore, Tanase poses a direct challenge to much mainstream law and society scholarship by explicitly rejecting positivist and instrumental accounts of law. This is a major break, especially from existing work on Japanese law and society. Over the past 30 years or more, Japanese and foreign scholars alike have developed a range of theories explaining the relevance of law in Japan. Two of the more divergent answers derive from rational choice theory and anthropological or other studies of Japanese culture. Rational choice theorists argue that law matters because Japanese bargain, assert rights and otherwise behave rationally in light of legal parameters of incentives, penalties and predictable outcomes (for example, Ramseyer and Nakazato, 1999). Culturalists (Kawashima, 1963; Haley, 1998; Feldman, 2006) emphasise norms such as group harmony, preserving relationships, shame, face and a preference for ambiguity to explain why the Japanese ‘do not like law’ (Noda, 1976, p. 160). A group of younger scholars – Milhaupt (2002) and West (2006), in particular – rely on neo-institutional theory to come up with a more nuanced analysis: institutions and social capital shape the way Japanese respond to law.

Despite the diversity of views, these competing theoretical perspectives seem to be unified by a largely uni-directional vision of law. Both rational choice theorists and neo-institutionalists, for example, see law as an independent variable, determining Japanese legal behaviour. Culturalists, by contrast, see law as the dependent variable, determined by Japanese norms and attitudes. Both accounts, in short, tend to assume that ‘law’ and ‘society’ are fixed fields that exist in a linear relationship with another.
Tanase, however, does not. Instead, like a growing number of legal sociologists worldwide (for example, Garth and Sarat, 1998), he perceives a more constitutive, interactive relationship between law and social relationships. In Japan, according to Tanase, law plays a ‘decentred’ role.

Since its reception during the Meiji period, law in Japan has enlightened society and separated people from their embedded communitarian contexts to become modern, free individuals… [But, at the same time,] law draws on an innate set of mechanisms that sustain order in a communally constructed society (Chapter 1).

For Tanase, law is neither marginal nor central – but, rather, displaced. For this reason, Tanase criticises assumptions about ‘Americanisation’ and the triumph of liberal law in Japan (Kelemen & Sibbitt, 2002). Japan was never an ‘empty vessel’ that has passively consumed liberal law; rather, it is a breathing, living society that has adopted and adapted the law to meet its unique needs and experiences (Tanase, 2001). Nor is it inexorable that the introduction of Western law has propelled or will propel Japan on a path towards modernity (Chapter 7). Instead, as his quantitative study of litigation statistics reveals, the formal invocation of law to resolve contested disputes in Japan remains at fairly consistently low levels for the entire post-war period (Chapter 8; compare Ginsburg and Hoetker, 2006).

Nor should this be a cause for concern. Rather, it is a matter of some relief. For Tanase, the liberal tradition in law, especially as observed in the United States, is a threat to healthy social relationships. He is particularly critical of the way legal liberalism construes individuals as atomistic and abstract, rather than as real people embedded in broader community relationships. In some cases, such as in client-centred advocacy (Chapter 2), liberalism reinforces party estrangement and portends the inexorable destruction – rather than the possible repair – of fractured relationships. In other cases, however, such as the law on post-divorce visitations, liberalism can have unintended positive effects, building new and healthy family relationships out of those that have broken down (Chapter 4).

Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity is not only a wide-ranging and challenging thesis; it is also timely. The global financial crisis of 2008–2009, for example, has forced a re-think of American-style liberalism and its approach to conceptualising and ordering law, society and the economy. The ‘third wave’ of domestic law reform currently underway in Japan is also ripe for re-assessment. Will it fulfil its purpose of modernising Japan along Western lines (Foote, 2008)? And should it?