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Comments on the Collected Writings of Takao Tanase: Modernism

Marianne Constable
University of California, Berkeley

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Comments on the Collected Writings of Takao Tanase: Modernism

Marianne Constable[1]

I'd like to thank Professor Scheiber and the Earl Warren Legal Institute for inviting me to comment on "modernism" or, rather, "modernity" and "modernization" in the work of Professor Takao Tanase. I am honored to be paying my respects to Professor Tanase's scholarship at this symposium.

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Modernity and modernization and law is clearly a question for Professor Tanase that concerns not only Japan. This is a good thing for me because, before discussing three aspects of the modernization of law in Tanase's work, I must admit that I know next to nothing about Japan and even less about Japanese law. I was happy to see then that Professor Tanase has imbued his work with a deep appreciation of something that I do know a bit more about – rhetoric.

In reading the chapters of "The Collected Writings of Takao Tanase," which were circulated before this meeting (and to which all page numbers refer), I was struck by how great is Professor Tanase's recognition of the importance of speech to law. Chapter One, as its title indicates, invokes law "as narrative," and discusses lawyers "claims" on behalf of their clients, the "expressive meaning" of clients' acts, and the possibility of "normative" and "moral dialogue" in and about law. Other chapters consider how to reinstall community by "resurrecting the language of cooperation"[2]; they concern both Constitutional and public "debate," "opinion," and "interpretation"[3]; and they treat of "ideology," "rights assertions," and many other varieties of "talk" and "words." In Chapter 7, Tanase describes "modernization" as "not simply a scholarly analytical concept," but also "a folk concept," and describes himself as taking "a hermeneutic interpretive approach to understanding how the Japanese interpret their own experiences."[4]

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[1] Professor, Department of Rhetoric, University of California, Berkeley.

[2] Chapter 3. [All chapter references are to the collected essays in preliminary book form, distributed to conferees.]

[3] May 2002 talk and Chapter 4.

[4] Chapter 7, p.7.

Throughout the collected essays, then, Tanase turns to the claims, discourses, and assertions made by scholars and others on behalf of, or addressing, law. His work acknowledges that much law involves speech and that a strong distinction and absolute separation between law in action and law on the books is not conducive to understanding modern law properly. Law, like legal scholarship, for Tanase, involves among other things a series of speech acts, which can be read not only for what they say, but also for what they don't say. Hence Tanase writes, in the context of lawyer-client interactions, for instance, that:

> [U]nderstandings of the world, inhabited by oneself and others, are expressed in those situations [of narratives related by clients]. What is required from lawyers is to take in <u>what cannot be spoken of</u>, slipping through the speaker's conscious control, amidst the words spoken by the client.[5]

Underlying Tanase's own talk or writing about law and modernity and its discourses are questions of the autonomy of both modern law and the subject of law. From the first chapter, Tanase challenges any strong – modernist! – subject/object distinction (in which an observer can objectively grasp the realities of an autonomous law, in which law can be grasped independently of context, or in which an individual can be independent of social and legal culture). He turns instead for what he calls "intersubjectivity," to which I shall return. As an aside, though, let me remind you that the issue of the subject can be thought of, at least in English, on the model of grammar. Complete English sentences require a subject and a predicate, or a subject <u>that</u> predicates, as one might say, or a noun that verbs. The noun is considered the active subject in control of what it (noun) does (verb) to a passive object. The so-called post-modern or post-structuralist "critique of the subject" challenges the autonomy or control that is attributed to the grammatical subject and seeks to understand how such a model has been taken to represent the truth about action and events in the world. Like Tanase, such a critique rejects the possibility of our knowing truths about reality in a manner that is completely distinct from operations of language.

In what follows, I will show how issues related to this very rough sketch of the post-modern arise in three aspects of Tanase's work on modernization: (1) in Tanase's critique of Kawashima's work on the ostensible shift from the premodern to the modern; (2) in Tanase's concern with the particularity of Japan's experience of law; and (3) in the intersubjectivity that characterizes the systematicity and knowledge of law and society that Tanase offers.

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[5] Chapter 5, p. 23, emphasis added.

1. From the Premodern to the Modern

In his critique of Kawashima, Tanase addresses both perceptions (largely identified through claims or talk) and realities. He asks how Japan can be thought to have industrialized and become modern even as it is simultaneously thought to retain a premodern consciousness or culture.[6] He also asks whether conditions in Japan are changing and what the contemporary relation is between community and the assertion of individual rights.[7] Kawashima had proposed that a shift from what he characterized as traditional premodern consciousness to acceptance of modern Western law would be one of "enlightenment" and that such enlightenment would have to accompany the economic resurgence of Japan.[8] Tanase shows that both current conditions and current perceptions cannot be explained in purely economic – or even economic, cultural-enlightenment, and political – terms.

More interesting for my purposes then than Tanase's careful analysis of Japanese litigation rate data and numbers of lawyers and judges[9] or even Tanase's insistence on responsiveness and justice as communitarian counterweights to the pathologies of Western-imported rights talk[10] is the question raised by his critique of Kawashima: What does it "mean" for Japan to be a modern nation, with the rule of law and a market economy? Tanase suggests that modernity, at least in Japan and for the Japanese people, involves a paradoxical mindset or consciousness in which contradictory perceptions of the modern compete and co-exist. The "collective consciousness" of the Japanese people involves experience of a "double-layered society. On the surface it is an industrialized society with necessary modern paraphernalia, while at bottom or, I would rather say, at the core, it is a hollow yet to be filled by the modern substance." Hence modernization "implants in the depth of the Japanese heart a sense of guilt, stemming from the sin of not being modern. The resulting compulsive search for the modern only leaves the people in despair as they find out that they are not modern."[11]

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[6] Chapter 7.

[7] Chapter 8.

[8] Chapter 6.

[9] Chapter 8.

[10] Chapters 3, 4, 5.

[11] Chapter 7, p. 7.

2. The Particularity of Japan

If one important aspect of modernization for Tanase is its substantively problematic character, a second aspect of Tanase's study of modernization worth noting is methodological: his exploration of and insistence on what is particular and seemingly peculiar. Tanase's attentiveness to the particularity of, and differences in, the manifestations in different cultures of what is an ostensibly "universal" law, resembles that of another great sociologist of law, Montesquieu. Tanase is concerned not with making an enemy of rights talk, of Western legal institutions, of the Weberian rational-legal order, or even of "law itself" (as a commentator before me asserted), but with the particularity that such abstractions take on when they are transposed into different cultures. Tanase's comparative law scholarship looks at what happens to Western law when it is imported to Japan, as well as (in more recent work) at what happens to Japanese law when it is exported to Thailand.

Tanase, like Montesquieu in *The Spirit of the Laws*, suggests that the interaction of laws and societies cannot be reduced to simple cause-and-effect relations or to determinism. Innumerable factors or parts of a society react dynamically to one another and to their environment in complex and sometimes circular and unpredictable ways. Like Montesquieu again, Tanase suggests that humanly enacted laws and decrees do not exist for their own sake, nor is it enough to say that they exemplify (or misrepresent) the rule of law or certain values. The sociolegal scholar must ask what the rule of law means in this particular context (such as Japan). Without defending natural law as such, both Montesquieu and Tanase argue that a country's law is not simply its positive law, but includes and interacts with the traditions and morals of the people.

Finally, again like Montesquieu, Tanase suggests the impossibility of a sociolegal interpreter's completely extricating himself from systems of law to present an objective or universal law. For Tanase as sociolegal interpreter, sociologists and their observations – Kawashima and others whose scholarship Tanase invokes, analyses, contextualizes – become themselves part of the higher-order system that Tanase considers. This higher-order system incorporates the initial observations of the ostensibly primary system into a new system (as when Tanase shows the resonances that Kawashima's observations have had in society and law), of which even the current interpreter is part.

3. Intersubjectivity and System

In this understanding of law as system – or even as a system of overlapping systems – Tanase's work moves not only through topics of premodernity and modernity but also explicitly to postmodernity. Issues of postmodernity arise not only in his concern for narrativity and system, but in the way that Tanase reminds us, over and over again, of the possibility that iteration

or repetition occurs with a difference. He points (again) to the difference that occurs when the "same" law is taken abroad (and which Kawashima had misidentified as mere "cultural lag").

According to Tanase, cultural difference as to law is not within the control of any single or autonomous human being; it is something he describes as "intersubjective." And it is here that I have a major question for Professor Tanase, a question which also besets some versions of the post-structuralist thought that he sometimes appeals to. The question is this. In his discussion and critique of the perceived freedom and autonomy of the modern subject (of rights or of Western law), I perceive an oscillation in Tanase's descriptions of what takes the admittedly impossible, modern subject's place.

At times, Tanase writes of a turn to community or communities that could overcome an impoverished sense of rights and its liberal subject.[12] When he does so, he seems to grasp the world as does critical legal scholar Roberto Unger in speaking of modernity. Writes Unger, "To an unprecedented extent, society is understood to be made and imagined, not given."[13] Or, as Tanase puts it, what is referred to as "the world," is "formed as existing as a world through actors understanding things as 'the world'."[14] (Tanase, in his discussion of community, thus often seems to suggest that the "intersubjectivity" that characterizes communities is a brave new subject capable of controlling law and society.

At other times, however, Tanase seems to imply that the dynamics of law and society are not and cannot be within any human subject's control, whether singular or collective. He writes, for instance (citing Tamura), that the world "does not exist in the sense that anyone can understand it and write that out as precisely stated knowledge. Rather, this world is endlessly rich, and the sort of opaque entity that people can only approach from a partial perspective."[15] Thus he sometimes seems to believe in the possibility that something always escapes human control – whether that of communities or of sociological knowledge.

I conclude by wondering which of these two interpretations of the modern intersubjective subject, its knowledge, and its world, Professor Tanase as sociolegal interpreter would endorse.

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[12] Chapters 3 and 4.

[13] Roberto Unger, *Critical Legal Studies Movement* (Cambridge, 1983, 1986), 18.

[14] Chapter 5, p. 22.

[15] Chapter 5, p. 22.