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Comparing Japanese and American
Approaches to Parental Rights:
A Comment on, and Appreciation of,
the Work of Takao Tanase

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Comparing Japanese and American Approaches to Parental Rights: A Comment on, and Appreciation of, the Work of Takao Tanase

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I must thank Professor Scheiber for inviting me to participate in this panel. I am neither a comparative law scholar nor a scholar of Japanese law, but his invitation, and my resulting study of Professor Tanase's work, has caused me to wonder whether it is not too late to retool. The chapter of Professor Tanase's book on which I've been asked to comment offers a comparative examination of the Japanese and American law on parental visitation after divorce.² It is a very rich essay, and I cannot do it justice in the brief time I have to comment upon it. I do hope to provide some sense of why it is so interesting.

Professor Tanase describes an important Japanese family law case with a disposition that would surprise most American family law specialists.³ A year after they married the parties had a son, and a year after that the husband became involved with another woman. When the boy was six, the parents were divorced by mutual consent. The terms of the divorce agreement gave the husband primary custody of their son, allowing the wife, "upon request," to visit him "no more than" eight times a month, with the right "during holidays" to have him stay at her home for "no more than" five consecutive days. To an American ear, these terms sound strange. Decrees granting primary custody to fathers are apparently far more common in Japan than in the United States. But paternal custody, though still relatively unusual here, is hardly strange. What does seem strange is that the Japanese decree does not promise the mother *any* time with her son. It rather tells

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² The chapter was originally published as "Post-Divorce Child Visitations and Parental Rights: Insights from Comparative Legal Cultures," *Hanrei Taimuzu* 712 (1990), 4-19; *Hanrei Taimuzu* 713 (1990), 4-15; reprinted in *The Discourse of Rights, A Communitarian Perspective* (Tokyo, 2002), chapter 5. Panel members were provided with translations of the original work that include some revisions Professor Tanase has made to reflect developments since the original was published in 1990.

³ The case [37(5) Kagetsu 5] was decided in 1984 and is apparently the sole Supreme Court authority on these issues, and still the prevailing rule.

us what she is *not* allowed: she is *not* allowed to see him more than eight times a month, and she is *not* allowed to have him overnight, during the holidays, for more than five days. So while she knows the most she can hope for, hope is all the decree gives her. It does not entitle her to anything.

Now an American family law expert might have two reactions to the decree I have described. He might first suspect there are unrevealed additional facts in the case that explain the decree. Perhaps the mother suffers from some condition raising questions about her suitability. Or second, he might wonder whether the Japanese legal system is particularly inhospitable to women. Both these musings would arise, in important part, from the decree's limitations upon the mother's access to her son. In the United States, visitation is regarded as an entitlement, which any divorced parent must be accorded in all but very unusual cases.⁴

On the other hand, the amateur but alert comparativist might suspect this is a case of a distinction without a difference. After all, sometimes when the formal law, as stated in authoritative sources, differs between countries, the law as actually applied is nonetheless quite similar. Perhaps that is the case here as well. We soon learn, however, that in this case the difference is very real. A year after the divorce, the custodial father in our story remarries – his new wife is the woman with whom he had the affair. Their new household has three children – his son, her child by a prior marriage, and a new child they have together – a “blended family” in current American lingo. The blending is completed when the new wife adopts the first wife's son. But here's the surprise: No notice of the adoption is given to the first wife – I'll call her mother – because none is required in Japanese law. As soon as she learns about it, she tries to reclaim primary custody of her son, but is turned down by the Japanese courts. Indeed, the court concluded that as the son had adjusted well to his new family, it would be best, all things considered, to order that the mother “not be allowed to visit her son at the present time.”

As Professor Tanase points out, this result is quite inconsistent with American notions of parental rights. Both our state child welfare laws, and our Constitutional principles, generally bar judicial decrees that deny a fit parent any right to see her child.⁵ Even if one could imagine circumstances that offer an

⁴ For a description of the general view of American law that visitation is the norm, to be denied only in exceptional cases, see Ira Mark Ellman, Paul M. Kurtz, Elizabeth S. Scott, Lois Weithorn, and Brian Bix, *Family Law: Cases, Text, Problems* (4th edition, New York, 2004), 619-20.

⁵ The constitutional principle protecting parental access to their children is expressed in a variety of Supreme Court opinions. Examples include the cases protecting the paternal rights of unwed fathers, discussed *id.* at 981 *et. seq.*; cases protecting parental autonomy from state regulation of decisions about child rearing, discussed *id.* at 1077 *et. seq.*; and cases concerning the termination of parental rights, discussed *id.* at 1189-1190.

exception to that general rule, the mere fact that a judge believes parental visits might disrupt a relationship between the child and a third party would not be among them, even if the judge thinks the child would benefit from nurturing that relationship. The same principles bar American courts from allowing the adoption of a child without the consent of a fit parent, much less without parental notice. The amateur comparativist might guess that the contrary Japanese rule is merely one example of a more general Japanese resistance to rights-based rules. Professor Tanase makes most of these observations in this very rich chapter, but he also uses this case to make some larger points about the difference between Japanese and American law.

He observes that American and Japanese legal rules that are similar in their language differ in application because the rules are understood through very different cultural lenses. In the very case we have just discussed, the Japanese court says that “naturally, biological parents should be entitled to see their own child.” But because Japan has no cultural norm of parental rights, this “entitlement” does not carry the same weight in Japan that it does here. In Japan that “entitlement” is easily counterbalanced by other considerations. Professor Tanase also suggests that the American view of parental rights serves divorcing families as an instrument of family preservation, because it keeps the noncustodial parent a part of the family. It does this by insisting that post-divorce arrangements accommodate both parents, not only the primary custodian, which in most cases leads to cooperation between the parents in maintaining the child’s relationship with both of them. In other words, Professor Tanase suggests that the stronger American view of parental rights in fact furthers children’s interests, in contrast with the weaker Japanese view.

This picture of a dominant ethic of cooperation in American divorce may seem at odds with the picture often painted in American writings and the American media, but it is probably accurate in most cases. And so the message may be that while eliminating parental rights might avoid conflict, it is also likely to jeopardize children’s interests as well as parental interests. Rights, in other words, may yield the cooperative relationship we think serves children, rather than the conflict we worry will put them at risk. This view, that parental rights and children’s interests are not necessarily opposing considerations, is in fact a familiar take among some American commentators as well as the courts. An American court would almost certainly reject the result of this Japanese case, and in doing so would likely rely upon the language of parental rights. But it might well buttress its conclusion by asserting that the child’s interests are also vindicated by protecting the mother’s access to him. As rights-oriented as we may think Americans are, we are also not entirely comfortable with the idea of pure parental rights unconnected to children’s interests. That is why the Japanese rejection of American-style parental rights is not the only important difference

between the Japanese and American approaches. A second important difference is the apparent ease with which the Japanese court concludes the child's welfare would be advanced by denying his fit mother all access to him.

Finally, let me suggest another way to characterize the differences Professor Tanase describes between American and Japanese law. One can distinguish, as does American constitutional law, between the rights that flow from parental status, and the rules that identify the parent who holds those rights. This might seem a spurious distinction; any law professor can generate examples of how flexibility in one dimension could undermine bright lines in the other. Be that as it may, the distinction is clearly established: the Constitution limits the state's power to overrule parental decisions, or terminate parental rights, through both procedural requirements and substantive restrictions.⁶ At the same time, it allows states considerable flexibility in defining *parent*, as explained in the well-known case of *Michael H.* The Court there sustained a California law barring claims of legal paternity by the biological father of a child born to another man's wife, if husband and wife lived together. In cases to which it applied, the California law conclusively identified the husband as the child's legal father, making evidence of biological paternity irrelevant. While many other states would reach the same result as California in *many* of the cases to which the California rule applies, most would not reach the same result in *all* the cases, and some states would *allow* the biological father to challenge the husband's paternity in most or even all cases. Under *Michael H.*, these varying policy choices are all within the Constitutional prerogatives of state lawmakers. But whatever choice they make on this question of *identifying* the child's legal father, the paternal rights of the man so identified are protected by the procedural and substantive limits the Constitution imposes before states can compromise them. So under the same facts, the Constitution would protect the paternal rights of the husband in California, but of the biological father in Texas.⁷

Now what is at issue in these varying state rules is a tension between social and biological paternity. The California rule chooses the social paternity of the mother's husband over the biological paternity of her lover.⁸ This particular

⁶ See Ellman et al., *Family Law*. For helpful commentary on this distinction, see Emily Buss, "Parental Rights," *Virginia Law Review* 88 (2002), 635.

⁷ A handful of state supreme courts have held that the biological father has a state constitutional right to assert his paternity over the opposition of the mother and her husband, Texas and Iowa are among them. To this author, the cases seem quite problematic. See Ellman et al., *Family Law*, 1032-33.

⁸ For a discussion of the choice between social and biological paternity, and varying state law rules that apply to such cases, see Ira Mark Ellman, "Ambiguous-Father Families," in Mary Ann Mason, Arlene Skolnick, and Stephen D. Sugarman, eds., *All Our Families* (revised and enlarged

California rule favoring the husband's paternity has a long history, but the debate over social versus biological parentage has in recent decades acquired more urgency, for several different reasons. First, advancing science made it possible to identify many more cases in which biological and social paternity diverge. A husband's social paternity suggests his biological paternity but does not constitute dispositive evidence of it. But 30 years ago, it was better evidence than that which any other man was likely able to produce. That is why, in this context, no real choice had to be made 30 years ago, in contrast to today. Second, social norms have changed in recent years in ways that make claims of social parentage more important. The same-sex partner of a biological parent may seek legal recognition of her social parentage, and some states have recognized that claim, at least where doing so does not displace the parental status of any biological parent.⁹ What then of the biological parent's new spouse – the stepparent? Here there may be an involved biological parent whose relationship with the child would necessarily be compromised in recognizing the stepparent, and for that reason the dominant American rule has remained much more cautious. Certainly, no American state would find the custodial parent's remarriage alone sufficient to shift legal parenthood to a stepparent, even though the increased incidence of blended families has generated interest in allowing some recognition of the parental-like relationship that often develops between a child and stepparent.

That caution is not seen in the Japanese case that I have discussed. This difference in law seems a direct reflection of different cultural norms. Professor Tanase describes Japanese culture as making a sharp distinction between persons within one's inner circle, and persons who are not. Divorced spouses leave one another's inner social circle, and this separation, Professor Tanase suggests, applies to their entire household. The result is that the noncustodial parent leaves the inner circle of his or her child as well. Seen this way, it is not that Japanese law disregards parental rights, but rather that the Japanese law Professor Tanase describes reflects the Japanese conception of social parenthood. Socially, the noncustodial parent is no longer regarded as a parent, much like the biological father that the California rule declines to recognize. The new spouse has become the social parent, and redefinition of legal parenthood then follows to align it with social parenthood. The adoption permitted by the Japanese court, without notice to the mother, merely recognized this shift. Culturally, the first wife was no

edition, New York, 2002); reprinted in a slightly different form as "Thinking About Custody and Support in Ambiguous-Father Families," *Family Law Quarterly* 36 (2002), 49.

⁹ See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), recognizing the birth mother's lesbian partner as a *de facto parent* entitled to most of the rights of the legal parent. In this case, there was no known father, and the recognition of the birth mother's partner did not displace the birth mother from her claim as legal parent.

longer the mother and the adoption merely recognized that reality. Our cultural norm is of course different. In the United States, the divorced parent normally retains social parenthood, and thus legal parenthood. Divorce may of course in fact lead to parent-child estrangement, but that result is generally regarded with concern. It is not the result we want, and perhaps not the one we expect. Our laws reflect our different cultural desires and expectations.

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Professor Tanase speaks admiringly of the American law, because he sees it as fostering a continued relationship of the child with both divorced parents. In this context, then, he sees the law as a social force. I have suggested the differing American and Japanese rules reflect rather than shape the prevailing cultural norms. Of course, the causal arrow likely flows in both directions simultaneously. Consider the Japanese rules on custody and visitation in the larger context of divorce generally. A norm that treats the divorced noncustodial parent as an outsider is undoubtedly easier to sustain when divorce is uncommon and divorced families seen as exceptional. Perhaps, then, the Japanese norm is dependent upon that country's historically low divorce rate – considerably lower than American and even European rates.¹⁰ As Japanese divorce rates increase – and that has been their recent trend – one might then expect a shift in the cultural norm, and a resulting shift in the legal rule. Yet at the same time, these Japanese rules on custody may be one *reason* for their relatively modest divorce rates. We know from American data that wives, not husbands, are the moving force behind most divorces.¹¹ That means that a successful strategy for reducing divorce rates must change the choices that wives make. A social psychologist friend who has gathered much of this data once said, in casual conversation with me, that if people really wanted to use the law to bring down divorce rates he knew the rule they should adopt: that whoever filed for divorce would automatically lose in any

¹⁰ Between 1920 and 1972, the Japanese divorce rate never exceeded 1 per 1,000 population, and was often much less. A gradual climb from 1972 yielded a divorce rate of 1.94 in 1998 (Japanese Ministry of Health and Welfare statistics posted at http://www1.mhlw.go.jp/english/database/vs_8/vs0.html). By 2001 it had reached 2.27. See the article posted at the Statistical Handbook of Japan, 2004 (http://www.stat.go.jp/english/data/handbook/c02cont.htm#cha2_4), which relies upon more recent data from the same Japanese ministry. The 2003 rate of 2.25 perhaps suggests a pause in the recent trend (Statistical Handbook of Japan, 2004). The American divorce rate, by contrast, peaked in 1979, at 5.3 per 1,000, and has generally been declining since, reaching the low 4's. (Precise, comparable figures over time in American divorce rates has become difficult because they are no longer compiled, other than in preliminary form.)

¹¹ Sanford Braver, Marnie Whitley, and Christine Ng, "Who Divorced Whom? Methodological and Theoretical Issues," *Journal of Divorce and Remarriage* 20 (1993), 1.

custody dispute. That rule, he observed, would deter a large share of the wives who currently initiate most dissolutions. Of course, his suggestion was not serious, but it did illustrate a central quandary in formulating family law policy: the difficulty of finding rules that are efficacious in bringing about the desired result, but do not violate other norms.¹² For an American, his whimsical proposal was obviously unacceptable precisely because it *would* violate not only our norms of parental rights, but also our understanding of children's interests. It seems the traditional Japanese view of this matter may be quite different.

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I was told by Professor Kazuyo Tanase, an expert in her own right on divorce in Japan, that the outcomes in Japanese custody decisions have shifted in recent years: husbands apparently once gained custody in the majority of cases, but that is no longer true. That shift could be both a cause and an effect of rising divorce rates. On one hand, the shifting practice in custody awards may motivate men to seek changes in the law of custody and visitation, as they begin to see *themselves* at risk, under current law, of losing all contact with their children. On the other hand, changes in the law favorable to protecting visitation, if they occur, could in turn encourage further increase in divorce rates, as wives become less fearful that divorce risks complete estrangement from their children. Americans interested in family policy will certainly want to watch the Japanese developments unfold.

¹² For further development of this theme, see Ira Ellman, "Why Making Family Law Is Hard," *Arizona State Law Journal* 35 (2003), 699.