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in Honor of Takao Tanase

Takao Tanase,
Japanese Litigiousness, and
“Taking Kawashima Seriously”

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Takao Tanase, Japanese Litigiousness, and “Taking Kawashima Seriously”

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It is a commonplace in comparative law that Japanese litigate less than citizens in other major industrialized societies, but there are interesting disagreements as to the reasons behind the alleged Japanese non-litigiousness.² The debate begins with Tanase’s teacher Takeyoshi Kawashima, professor of law at Tokyo University and the father of the sociology of law in Japan. Writing in the 1950s and 1960s, Kawashima saw Japan’s low rate of litigation as reflecting a cultural preference for informal mechanisms of dispute resolution.³ As Tanase points out in his forthcoming chapter on Kawashima’s sociology of law, Kawashima tended to view non-litigiousness as a symptom of Japan’s overall lack of modernization. Kawashima also noted that Japanese society was modernizing, and he presumed that as economic modernization proceeded, Japanese would become more litigious, like citizens in other (Western) industrialized societies. Kawashima thus saw culture as the key factor in explaining litigation, but also viewed economics as a driving force in cultural change.

Later, Japanese and American scholars such as Toshio Sasaki⁴ and John Haley⁵ argued that Kawashima’s cultural approach was wrong. Institutional factors, such as the scarcity of lawyers and judges, and the weakness of legal remedies, were the key barriers that discouraged litigation in these accounts. Kawashima’s cultural approach became the foil against which later accounts were

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² See John Haley, “The Myth of the Reluctant Litigant,” *Journal of Japanese Studies* 4 (1978), 359; J. Mark Ramseyer, “The Reluctant Litigant Revisited: Rationality and Disputes in Japan,” *Journal of Japanese Studies* 14 (1988), 111.

³ Takeyoshi Kawashima, “Dispute Resolution in Contemporary Japan,” in Arthur von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Cambridge, 1963), 41-72; Takeyoshi Kawashima, *Nihonjin no hō-ishiki [Japanese Legal Consciousness]* (Tokyo, 1967).

⁴ Yoshio Sasaki, *Minji chotei no kenkyu [A Study of Civil Conciliation]* (Kyoto, 1967); cited in Takao Tanase, “The Ideal and Unsettling of Modernity – The Theory and Practice of Kawashima’s Sociology of Law,” chapter 6 of the volume of collected essays (forthcoming).

⁵ Haley, “The Myth of the Reluctant Litigant.”

written: One might even say that had Kawashima not existed, institutionalists would have to invent him so as to have someone they all could agree was wrong.

Tanase's contribution in this debate has been to "take Kawashima seriously," to quote the title of an article by Setsuo Miyazawa.⁶ In his reading of his teacher's work, Tanase quite rightly refuses to accept Kawashima's notion of convergent modernization, but also refrains from rejecting Kawashima out of hand. Tanase wrestles with Kawashima on fair terms.

This stance is drawn in part from Tanase's serious sociological commitments, as he seeks to view Kawashima as a manifestation of his time. Kawashima was writing during the immediate postwar period, when the old Meiji-era formula of *wakon yosai* (Japanese spirit, western technology) was no longer effective. This formula had guided Japan's rapid industrialization, but in the wake of the wartime experience, the "Japanese spirit" part of the slogan had become problematic. In this ideological vacuum, Kawashima argued for a movement away from the specificity of the Japanese past toward a universal modernity, signified especially by modern law. Tanase identifies how Kawashima's normative concerns underpinned his positive analysis of Japanese society, and thus allows us to understand Kawashima on his own terms.

Another way Tanase takes Kawashima seriously is to continually push the inquiry about litigiousness back to social structure. Kawashima⁷ attributes the dearth of lawyers in Japan to the lack of demand from the public, whereas later writers⁸ treated the causal relationship as the reverse. Tanase has a more sophisticated story that de-emphasizes causal linkages and focuses on the mutual constitution of society and its institutions. In thinking about litigation constraints, for example, Tanase acknowledges the institutionalist arguments put forward by Haley and Ramseyer; but he asks why would a society tolerate and demand such institutions? So, for example, when Ramseyer⁹ argues that it is the predictability of Japanese courts that keeps litigation rates low, Tanase points out that judicial predictability is sustained by the values of the judiciary. This methodological approach is rooted in sociology as a discipline, and extends Kawashima's own concerns.

⁶ Setsuo Miyazawa, "Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior," *Law and Society Review* 21:2 (1987), 219-42.

⁷ Kawashima, "Dispute Resolution."

⁸ Haley, "The Myth of the Reluctant Litigant."

⁹ Ramseyer, "The Reluctant Litigant Revisited."

Tanase's evaluation of litigation rates is contained in an empirical chapter in his forthcoming book.¹⁰ His approach is to look at judicial statistics over time. He finds (consistent with Ginsburg and Hoetker¹¹) that the fluctuations in litigation rates in postwar Japan are largely countercyclical: Litigation moves inversely with the economy. He further notes that much of the variance in litigation is attributable to *tokusoku* cases which involve loan collection, suggesting that Kawashima's emphasis on economic factors was correct. Tanase, though, also asserts that "mood of the times" is also an important determinant of overall levels of litigation as well as the composition of litigation.

In examining the types of cases litigated, Tanase finds that the character of suits has changed over time. Environmental litigation, for example, has increased dramatically, reflecting the rise in such issues associated with economic development. In addition, the alienation accompanying modernization may lead to more claiming, explaining the correlation he identifies between divorce rates and *tokusoku* cases. Even the famous auto accident mediation system¹² has slowly become legalized as lawyers are much more frequently involved than they were in the postwar period.

In explaining these developments, Tanase takes seriously the claim that economic change may have a primary role, but true to form, he also looks back to social structure. Using prefecture-level data from the Judicial Statistics Yearbook, he seeks to identify correlations between litigation and various cultural and structural variables. He finds that rural, more "traditional" prefectures are less likely to have high litigation rates. For example, tort litigation is negatively correlated with responses to an NHK survey about the importance of neighborhood, and is positively correlated with indicators of urbanization such as the scale of the tertiary industry sector.¹³ In addition, tort litigation is positively

¹⁰ Drawn from Takao Tanase, "Soshō riyo to kindaikahan-setsu [Theory of litigation as a reflection of modernization]," in *Shindo Koji sensei koki shukuga: Minji sosho ho riron no arata na kochiku [Essays in honor of the 70th birthday of Professor Koji Shindo: New constructions in civil procedure law theory]* (Tokyo, 2001), volume 1, 289.

¹¹ Tom Ginsburg and Glenn Hoetker, "The Unreluctant Litigant? Japan's Turn to Litigation," *Journal of Legal Studies* (forthcoming).

¹² Takao Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law and Society Review* 24 (1990), 651; Robert A. Kagan, "On the Routinization of Tort Claims: Takao Tanase's 'The Management of Disputes,'" paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005.

¹³ If I can offer a methodological critique, it is that Tanase looks at variation across space but not across time. The single NHK survey dates from the 1970s; presumably cultural attitudes are not static.

related with the divorce rate. Thus cultural factors may matter in framing the litigation choices of residents.

In interpreting all the litigation data, Tanase makes a bold theoretical move: he notes that maybe Kawashima was right and that a social transformation is at last occurring in Japan, though in a delayed manner and many years after Kawashima might have anticipated it. Tanase is certainly not to be accused of being a naïve modernist, and he is careful not to overstate this claim. He shies away from pure economic determinism, seeing the particular forms of increasing litigation as a *distinctive* Japanese response to economic change and globalization, a response rooted in Japanese social structure. Tanase does, in the end, take Kawashima seriously. In doing so, he teaches us to do the same.