TAKAO TANASE, ***Community and the Law:***
A Critical Reassessment of American Liberalism and Japanese Modernity
Translated and edited by Luke Nottage and Leon Wolff

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Community and the Law is a collection of seminal essays written by leading Japanese legal sociologist Takao Tanase. But it is also much more than that. With the able assistance of Nottage and Wolff as translators and editors, Tanase has distilled something of a communitarian manifesto from a vast body of work traversing multiple subjects and methodologies. The book is divided into three substantive parts: 'a critique of American liberalism', 'a normative theory of community and the law', and 'a re-evaluation of Japanese modernity'. However, the elements of Tanase's manifesto emerge only from a thorough and holistic reading of this challenging but rewarding book.

In the introduction, the author frames the central debate between liberalism and communitarianism. A comparison between the United States and Japan is central to the book. Tanase applies a postmodern method to question (or deconstruct) the liberal ideology underpinning both the US legal system and sustained postwar law reform efforts in Japan. His distinctive communitarian vision also draws from other theories critical of liberalism ranging from legal realism to critical legal studies, critical race theory, radical feminism, republicanism, and structuralism. The book is not purely theoretical, however, and presents compelling case studies and statistical evidence from Japan and United States. Indeed, it may be Tanase's special authority to speak of the jurisprudence and practice of both of these jurisdictions that has shaped his communitarian vision and makes this book an invaluable contribution to legal sociology and jurisprudence more generally. Tanase does not simplistically extol the virtues of Japanese law. Rather, it is his rigorous comparative method that may compel a firm advocate of liberalism to at least sample the familiar from a radically different perspective. Nor is Tanase's perspective needlessly antagonistic toward the concepts of modernism and liberalism. Unlike some postmodern writers, Tanase's vision is one that constantly seeks solutions to the challenges faced by liberalism today. And unlike some communitarian thinkers, Tanase presents proposals for affirming the value of community to law without necessarily disavowing individual rights.

In chapter 2, the first of three chapters that attempt to destabilise the assumptions of American liberalism, Tanase carefully dismantles conventional understandings about

legal ethics in United States. The central relationship between client and lawyer, he argues, is much more complex than commonly thought. The goals of the 'autonomous' client are actually shaped by a legal profession and the logic of law. This logic is one of abstraction and dehumanises the client and other parties to a dispute. It is a positivist logic that progressively displaces questions of moral validity, for example questions about the destructive potential litigation has for ongoing human relationships. As a 'circuit breaker' to liberalism's tendency to displace valuable social norms, Tanase recommends greater recognition of the value of stories. Stories – or narratives – he argues can empower clients to ensure that their real, lived experiences are heard by the agents of the law.

Of course, this is not merely a matter of lawyers listening more carefully. Tanase proceeds to demonstrate what components of liberalism should be abandoned for the law to accommodate such lived experiences. The first is the strict distinction between public and private spheres. This distinction, Tanase argues, is precisely why lawyers do not engage in a thorough discussion with clients about moral issues, including the propriety and desirability of litigation (beyond mere strategic retreat). Liberalism's assumption of the rational client bringing fully formed goals to their legal 'mouthpiece' also requires revision, according to Tanase. Instead, the client occupies an 'inter-subjective world', in which understandings shape the world (including the acts of the client) and the world in turn shapes new understandings. Similarly, law shapes and is shaped by social norms. Tanase's argument is that the role of the lawyer should be to facilitate the telling of the many individual stories that occupy the space where law and society interacts. This conceptual shift, he argues, has the humanising potential of encouraging full recognition and empathy toward other parties to a dispute.

Tanase makes similar conclusions in his survey of US tort law, perceived to be in crisis. He compares three different approaches to theorising liability in tort. The first is 'individual justice', a creature of the liberal ideal that (only) harm caused by incursions upon liberty should be compensated. This is flawed, according to Tanase, because it reduces individuals (and the harm they have suffered) to legal abstractions processed through an alienating judicial system. 'Total justice' focuses on the harm caused and seeks generalised, comprehensive remedies such as a bureaucratically managed compensation scheme. Tanase also rejects this model because of its dehumanising effects on individual responsibility and community solidarity. The approach preferred by Tanase is communitarian justice, a model that affirms the interconnectedness of individuals in a community. There are certain preconditions for this model to succeed. These include appreciation on the part of tortfeasors of their wrong, respect for personhood, acknowledgement of mutual reliance, and autonomous processes (such as mediation) by which parties can together discover ways of promoting the victim's recovery.

In the last of his analyses of US case studies, Tanase compares the treatment of post-divorce visitation rights in United States and Japan. In contrast to the preceding case studies, Tanase is broadly approving of outcomes in United States, where the courts and

legislatures have been much more open to allowing non-custodian parents (and others) regular access to children. He concedes that this is partly because of a stronger popular and jurisprudential emphasis on individual rights (of the parent) in the United States. However, Tanase argues that this is not simply a triumph of liberalism. It is also consistent with the tenor of communitarianism, in the sense that the legal framework surrounding the American 'post-divorce composite family' nurtures relationships from the perspective of the child. Tanase supports this conclusion with in-depth analysis of the social norms underpinning Japanese and US court decisions. He also proposes ways of shaping the context of custody and visitation disputes in a way that encourages all parties to adopt the perspective of the child. This context, he argues, should feature equitable distributions of property *and* create room for a discourse of responsibility consistent with social norms.

In each of these case studies, Tanase grapples with the age-old debate between positivism and natural law. It is unsurprising that Tanase in his critique of liberalism rejects positivism. Yet Tanase's argument is not merely that law should be evaluated on moral grounds (which is not inconsistent with positivism). Rather, morality forms part of the lived experience of individuals, thus the self-proclaimed autonomy and abstractions of liberal law are dehumanizing and blind to the social context in which law is embedded. Yet Tanase does not necessarily advocate uncritical compliance with existing social norms. Tanase borrows the language of modernity such as 'enlightenment' and 'modernisation' to urge change in the Japanese social norms that underpin judicial reluctance to recognise visitation rights. At other times, Tanase speaks of a universally valid communitarian theory. Elsewhere, he makes assertions that border on cultural essentialism. These include claims that the 'post-divorce composite family' is a unique American institution and descriptions of Japanese group dynamics as similarly unique.

Contrasted with the postmodern method adopted throughout the book, these apparent lapses can be confusing. However, they are not necessarily inconsistent with an approach that affirms the utility of modernism and liberalism for the historical period in which these movements emerged. Nor are Tanase's post-structuralist or postmodern emphasis on 'hermeneutics', the 'real', and the experienced (as opposed to the abstract) necessarily inconsistent with endorsing a structuralist view that society is based on certain organising principles. This is because he recognises that these principles are in flux and are dynamically related to the principles liberalism has attempted to quarantine as principles of law.

In the shortest and most theoretical chapter of the book (Chapter 5), Tanase explains his ambivalence toward individual rights. Tanase moves beyond the simple rejection of the utility of rights seen in the Critical Legal Studies movement. He instead explores the steps needed before rights can foster (rather than corrode) community ties. These include the acknowledgement of the destructive capacity of rights, a new relationship-affirming language for legal discourse, and empathy with marginalised individuals and groups.

In the sixth chapter, Tanase turns his communitarian perspective to the question of constitutional interpretation, or more accurately those aspects of constitutional law that deal with individual rights. He begins by mapping out the dimensions of communitarianism. He then demonstrates how this perspective can enhance the legitimacy of law by affirming the dynamic interplay between law and society. One example of this interplay is the courts' invocation of community in the application of law, just as the processes of law construct community. This would be a problematic argument without precision in language. Tanase aspires to this precision, distinguishing his 'structuralist' use of the term 'community' from that used in conservatism, liberalism, and republicanism respectively. Tanase's 'community' is a dynamic creation that transcends its individual members, and is also capable of deep conflict and oppression. The liberal community reflects a fundamental dichotomy between the state and the individual. In contrast, Tanase draws from Kant to argue that true self-determination can only be achieved within the restrictive framework of a wider community. As examples, Tanase uses court cases relating to marginalised groups – individuals with disabilities, and gays and lesbians. These demonstrate that concepts that underpin the law such as 'capacity' and 'identity' are given meaning by social context and are not susceptible to the abstractions of liberalism.

The final part of the book is dedicated to a reassessment of Japanese modernity. Chapter 7 critiques and builds on the work of Takeyoshi Kawashima, a groundbreaking legal sociologist writing mainly from the 1950s. Kawashima is sometimes taken in the English literature to represent an essentialist view of Japanese culture in relation to the operation of law in Japan. Tanase's critique exposes this misreading and instead affirms the value of Kawashima's modernisation thesis as suitable and crucial for the early postwar Japan in which he was writing. Tanase also demonstrates subtle shifts that occurred in Kawashima's work over time. These suggest that Kawashima himself began to question the determinist underpinnings of modernisation theory and the distinction between 'modern' and 'premodern'. Tanase builds from these doubts to construct a theory that critiques liberalism's destructive displacement of the underlying organising principles that exist in any society. Tanase concludes this chapter by noting the contribution these evolving principles (i.e. the 'social glue') have had in imbuing the liberal regime of individual rights promoted in postwar Japan with the respect and mutual recognition advocated by communitarianism.

In the final chapter, Tanase employs rigorous statistical analysis to question the modernist presumption that legal norms will inevitable displace social norms in Japan (as measured by the prevalence of litigation). Tanase acknowledges apparent connections between long-term litigation trends and broader economic conditions. However, he concludes that (with the exception of expedited debt recovery cases) there has been little change in rates of civil litigation since the War. Other theorists have explained this by

noting structural factors like limited numbers of lawyers and judges.[1] This is also the assumption behind recent liberal reforms in Japan attempting to 'complete' the modernist ideal of a society governed by rational law by, for example, increasing the number of lawyers. However, Tanase notes that statistics demonstrating a correlation between numbers of lawyers and court cases independent from other factors such as urbanisation could be read another way. In short, lawyers could be creating demand rather than responding to it.

Tanase concedes that the growing importance of market forces in an era of neoliberalism might be taken to confirm the 'modern' prediction that rational legal norms would eventually displace social norms. However, Tanase argues that the marketisation of society may merely conceal the continuing influence and regeneration of Japan's idiosyncratic organising social principles and their influence on attitudes to law and litigation. Tanase therefore returns to Kawashima's claims that there exists a 'Japanese legal consciousness', and indeed celebrates this. Tanase concedes that law should play a role in 'constructing' the relationships that comprise communities. But it should also 'invoke' the organising social principles or norms that emerge from communities. With its vision of the subject in law as an abstract individual and by not recognising this interplay, he argues, modernisation theory is incapable of recognising diversity among communities and of affirming marginalised groups within communities.

It is impossible to do justice to Tanase's complex but compelling arguments in this short review. It is also perhaps unlikely that firm adherents of liberalism would be tempted by this review to engage with this challenging text. However, in the face of premature predictions that American liberalism has triumphed in the global competition of ideas, Tanase has plumbed liberalism and modernisation theory to their depths to arrive at a communitarian vision that is both critical and constructive. The adherent of liberalism should not therefore be afraid to re-examine (or defend) his or her faith in liberalism by engaging fully with *Community and the Law*.

Trevor Ryan

1 See JOHN OWEN HALEY, Authority without Power: Law and the Japanese Paradox (1991).