International Journal of Asian Studies, **1**, 1 (2004), pp. 137–138 2004 Cambridge University Press
DOI: 10.1017|S1479591404000099 Printed in the United Kingdom

LAW, STATE AND SOCIETY IN CHINA [1]

INTRODUCTION

Osamu Takamizawa

University of Tokyo
E-mail takamiza@ioc.u-tokyo.ac.jp

The following article is the first part of a translation of *Dentō Chūgoku hō – hinagatasetsu ni taisuru ichishiron*「伝統中国法＝雛型説に対する一試論」by Nakamura Shigeo 中村茂夫, which was published in 1979 in the *Hōsei riron* 12:1 (Niigata University). The second part will appear in the next issue of the *International Journal of Asian Studies*.

While Chinese law is on the one hand widely understood to have contained minute administrative and penal provisions and to be related to the examination system, it has always been shadowed, on the other, by a different image. First, the law was seen to have been determined as no more than a reflection of political ideas and so to have been divorced from reality. This is called in the following article "the theory that the law was a mere model". Second, civil disputes (what we would call civil cases today) were regarded as having been resolved by mediation among the people themselves, without recourse to judgement by the state. This may be called "the theory of civil settlement".

Nakamura here compels us to revise this stereotypical understanding. He argues that, as far as penal offenses went, the law was applied as the standard for bureaucrats to discharge their official duties, and was not based just on the penal code alone but also on secondary law collections. He also points out that a considerable number of what we would today call civil cases were dealt with by the state (at district magistrates' courts). In doing so he has brought a new perspective to the study of the history of Chinese law. Already Shiga Shūzō had discussed criminal cases in *Keibatsu to kokka kenryoku* 刑罰と国家権力 [Crime, Punishment and State Power] (ed. Hōseishi gakkai, Tokyo: Sōbunsha) in a chapter entitled "Shinchō jidai no keiji saiban – sono gyōseiteki seikaku, jakkan no enkakuteki kōsatsu o fukumete"清朝時代の刑事裁判――その行政的性格　若干の沿革的考察を含めて [The Administrative Character of Criminal Judgements in the Qing Dynasty – With Some Historical Observations], where he pointed out that Chinese trials in the Qing dynasty were administrative rather than judicial. In another article, "Shindai no shihō ni okeru hanketsu no seikaku – hanketsu no kakutei to iu kannen bo fusonzai" 清代の司法における判決の性格――判決の確定という観念の不存在―― [The nature of judgements in Qing judicature – the lack of a concept of settling judgement] in *Hōgaku kyōkai zasshi* 91:8 (1974) and 92:1 (1975) he showed the role of district magistrates as the "mother and father of the people". He also discussed the Chinese situation through "didactic conciliation" as presented by Dan Fenno Henderson in *Conciliation and Japanese Law: Tokugawa and Modern* (University of Tokyo Press and University of Washington Press, 1965). In *Shindai soshō seido ni okeru*

https://doi.org/10.1017/S1479591404000099 Published online by Cambridge University Press

minjiteki hōgen no gaikatsuteki kentō 清代訴訟制度における民事的法源の概括的検討 [A short examination of the sources of civil law as they exist in the Qing dynasty system of lawsuits] published in the *Tōyōshi kenkyū*(40:1) in 1981 he pointed out that when judging civil cases, magistrates based their judgements on human sense 情 (*qing*) and reason 理 (*li*), rather than citing items from the penal code or supplementary clauses. These essays can be found together in *Shindai Chūgoku no hō to saiban* 清代中国の法と裁判 [Qing Law and Trials], published by Sōbunsha in 1984.

Taken together, these studies point us in the direction that studies on the history of Chinese law (particularly that of the Qing dynasty) in Japan have taken. If civil disputes could not be resolved through networks of local ties, blood ties or occupational groups, then people sought judgement by the state. However, such judgements were made from an administrative rather than a juridical point of view; the law was seen as having a parental function, and human sense and reason were utilized as expressions in the judgement. In criminal cases, however, the law was made to conform strictly to the codes, incorporating supplementary legal treatises and separate edicts, as well as rules adapting them to specific cases.

This is as far as the argument has gone and there has been no basic change since the publication in 1994 of Philip C.C. Huang's "Codified Law and Magisterial Adjudication in the Qing" in *Civil Law in Qing and Republican China* (edited by Kathryn Bernhardt and Philip C.C. Huang, Stanford University Press). Huang's research may be considered to supplement the arguments made by Japanese researchers through the viewpoint that even judgements based on human sense and reason could not be separated from state legislated law (though Huang himself would probably disagree with this).

The present study comprises a high point in Japanese research into the history of Chinese law and without it, it is difficult to gain an understanding of the direction studies in Japan have gone in this field since the 1980s.

https://doi.org/10.1017/S1479591404000099 Published online by Cambridge University Press