



An Interview with Frank Upham

With Peter Frost

Frank Upham is the Wilf Family Professor of Property Law at New York University School of Law. In addition to property law, Professor Upham offers courses on law and development with an emphasis on Asia. He has spent considerable time at various institutions in Asia, including as Japan Foundation fellow and visiting scholar at Dōshisha University in 1977, as research fellow of the Japan Society for the Promotion of Science at Sophia University in 1986, and as visiting professor at Tsinghua University in Beijing in 2003. Professor Upham's scholarship has focused on Japan and, in 2006, he published an essay on the "stealth activism" of the Japanese judiciary in Japanese. His book *Law and Social Change in Postwar Japan* received the Thomas J. Wilson Prize from Harvard University Press in 1987. More recently, Professor Upham has begun researching and writing about Chinese law and society, as well as general law and development. Professor Upham's 2005 Yale Law Journal essay, "Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China," helped introduce contemporary Chinese socio-legal scholarship to an English-speaking audience for the first time.

Peter Frost is an Associate Editor for Education About Asia. Currently a Visiting Professor of International Studies at the University of Mississippi's Croft Institute for International Studies, Frost previously spent thirty-seven years at Williams College, where he is now the Frederick L. Schuman Professor of International Studies Emeritus. What immediately follows is Professor Frost's introduction to the interview.

In reaction to Japan's militarist era, their American-influenced 1947 constitution stressed the limited role of the emperor, the separation of church and state, parliamentary democracy, individual rights, and the independence of the judiciary. Law was based on the so-called Six Codes (the 1947 constitution, the Civil Code, the Code of Civil Procedure, the Criminal Code, the Code of Criminal Procedure, and the Commercial Code). Criminal cases were handled in a European court system model, where prosecutors had considerable discretion over what cases they brought to trial, and almost always got a conviction. There were no juries, so trials were designed for the convenience of the lawyers, judges, and prosecutors who conducted them. They were largely based on documents, not oral testimony, and were discontinuous, meeting periodically over months or years, rather than on consecutive days. In 1990, the number of certified lawyers per capita was 1/20th that of the US, litigation was relatively rare, and most disputes were resolved by mediation of one sort or another.¹ While most foreign observers were impressed by a low crime rate and what appeared to be an effective judicial system, not all Japanese agreed, and in 1999 the Diet (Parliament) established the Justice System Reform Council to consider reforms. The result was legislation that fundamentally restructured legal education, increased the number of lawyers, and introduced lay judges into certain serious criminal trials. With all this in mind, I recently asked New York University Law Professor Frank Upham the following questions.²

Peter Frost: Thank you, Professor Upham, for your time and help. I'd like to begin by asking you why the Japanese government, and particularly the Justice System Reform Council, felt that there was a need for legal reforms.

Frank Upham: The shock of the economic stagnation that followed the bursting of the economic bubble of the late 80s probably created the public mood that made reform possible, but there were also a variety of specific sources, including a desire among Japanese corporations for a larger and more professional bar that could handle complex international deals and a general sense that the legal system, and the judiciary in particular, were out of touch with society. Part of the blame for Japan's weak post-bubble economic performance was put on an economic system that was considered too intertwined with the bureaucrats (and sometimes banks) and that did not allow businesses enough freedom to try new things. In the US, there is an attempt to make economic regulation as clear as possible so that companies know what they can and cannot do without having to ask the

government for guidance. In Japan, however, the practice has historically been quite different, with broad and vague rules and constant interaction between firms and bureaucrats on what the former can and should do. This national characteristic was caricatured by the postwar term "Japan Inc.," and while this term exaggerated the situation, the Japanese economy has generally been much more closely connected with the government than the American economy. While this was not a problem during the period of high growth, the poor economic performance since 1990 convinced Japanese that the cozy relationship between bureaucrats and the private sector should be eliminated and the private sector allowed (and forced) to become more independent. Part of this social restructuring was the substantial reform of the legal system.

Peter Frost: What impact will this have on legal training?

Frank Upham: Historically, Japanese legal education was, like that in most European countries, conducted by an undergraduate law faculty. Since only a tiny percentage of those students became professional lawyers or judges, the curriculum was more like an American social science education than an American law school. Now, the Japanese have instituted what they call "American-style" post-graduate law schools. They are also encouraging applicants to have, as roughly half of all American law students do, some work experience prior to enrolling. Both to encourage students to do graduate work and to increase the number of lawyers, they also increased the number of new lawyers certified each year so that as many as 60 percent of the test-takers could pass the equivalent of the bar exam, which for much of the post-war period had had a passage rate of below 3 percent. The hope was that this would not only increase the numbers of lawyers but also allow them to have more life experience and improve legal training by moving away from simply a cram course aimed solely at the exam.

Peter Frost: How is that educational reform working out?

Frank Upham: Not well so far. The Ministry of Education allowed too many universities to start law schools, which has meant too many students, which has in turn led to a declining exam passage rate and a fear that legal education will return to little more than cramming for the exam. The large number of schools and students and the ceiling on the number of lawyers certified each year has meant that the "bar" passage rate has declined from an initial 50 percent a few years ago to closer to 20 percent more recently, which is seen by many as too low to create the kind of socially experienced lawyers that

was a major goal of the reform. There is, therefore, much concern about the future of the system, although the low passage rate issue may solve itself if a number of the weaker law schools disappear because of market pressures. However this shakes out, the total number of lawyers is in any case bound to increase over the extremely small level of the postwar period.

Peter Frost: *A second novel reform—at least for Americans—is the new policy of having lay persons in certain cases sit with judges in both the actual trial and (if convicted) the penalty decision. Could you tell us why you think this procedure was adopted?*

Frank Upham: Since most judges start their judicial career at a very early age and never have any experience other than studying for the bar exam and being a judge, many Japanese worried that they were out of touch with the rest of society. They felt that the judiciary should be opened up, and bringing laypersons into a limited number of trials was seen as one response. Under the new system, in serious criminal cases, six citizens—selected at random as a jury would be in the US—sit as equals with three professional judges. They deliberate together, and the trials are conducted on consecutive days to minimize the inconvenience to the lay judges. There have been only a few such cases so far, and no particular pattern has emerged. One area of interest was whether lay judges would treat capital cases differently, and in the first case in which the prosecution requested the death penalty, the combined judges refused. In subsequent cases, however, they have sentenced defendants to death, so there does not seem to have been an immediate change in this area. Support for the death penalty, it should be noted, is even stronger in Japan than it is in the United States.

Peter Frost: *So, in your opinion, will more and better-trained lawyers, more lay judges, and quicker trials increase the numbers of Japanese using the court system, or will the general public still not sue or prefer quieter mediation?*

Frank Upham: In answering this question, it is important to note that it is not the average American who uses our courts. The vast majority of American lawsuits are filed by what are called “repeat players,” essentially commercial entities that use the courts to collect bills, evict tenants, or, as we are seeing now, foreclose on delinquent mortgage holders. That said, there is no question that Americans experience litigation at a higher rate than Japanese, and while there are no doubt lots of cultural reasons why Japan traditionally had a low rate of litigation, limited lawyers, doctrines that limit access to courts, discontinuous trials, and, on the positive side, a range of effective alternatives for resolving most disputes, have also been part of it.³ Now some trials will have to be quicker as lay judges, like American juries, require continuous trials, and an increased number of legal professionals may speed things up. But one of the things you need to keep in mind about the length of trials is that if you look not just at the actual court trial but rather the time between when an American plaintiff files a complaint, goes through various deposition and discovery procedures, and finally gets a judgment, American trials may actually take longer. So, overall, these reforms by themselves may not greatly increase the rate of litigation.

Peter Frost: *How about expense? Does it take a lot of money to get legal help in Japan?*

Frank Upham: Yes, but probably not as much as in the United States. So this too may not affect the litigation rate.

Peter Frost: *My last questions have to do with how Japan’s Supreme Court fits into these various legal changes. First, Japan’s Supreme Court does not seem to me to be as divided between generally quite predictable conservative and liberal wings as is the US Supreme Court. Why is this?*

Frank Upham: The Japanese Supreme Court is generally considered the least assertive court in the developed, democratic nations. It has fifteen justices that by custom include professional judges, prosecutors, private attorneys, academics, and a career bureaucrat, usually a diplomat (to provide interna-

tional law expertise). The court is not monolithic: there are dissents, justices have judicial personalities, and academics in particular are less inclined simply to accept what the government wants. On the other hand, justices in Japan traditionally have not been appointed until their early sixties, and they retire at seventy, so they do not have much time to develop a judicial philosophy. More importantly, for most of the past sixty years, the justices have been appointed by the conservative Liberal Democratic Party. So, it is natural that they will be more deferential to government positions than courts in countries with frequent changes in party regimes.

Peter Frost: *Second, the US Supreme Court frequently rules on whether various laws are constitutional, thereby, many would argue, providing a healthy check on executive and legislative power. Why is this not the case in Japan?*

Frank Upham: This also reflects the way in which the judges have been appointed up to now. Overall, very few statutes have been overturned. For example, the court has long been worried about the fairness of the allocation of seats in the Diet (frequently, rural districts are much better represented than urban or suburban districts) and has repeatedly found the disparity unconstitutional. So far, however, the court has not taken the next step and invalidated the election, preferring simply to chide the government for its unconstitutional inaction in the face of population shifts. The government has made vague promises and piecemeal changes, but has not undertaken serious electoral reforms. So, the Supreme Court dances back and forth with the Diet, and this drives the academics and some policy wonks crazy. So, overall, despite some recent activity to the contrary, the Supreme Court is considered to be very deferential to the government.

Peter Frost: *So as you ponder all this, do you think that all these current legal reforms will actually improve things, or will it just be, in Yogi Berra’s memorable phrase, “déjà vu all over again?”*

Frank Upham: Most Japanese observers are pessimistic, but Japanese often tend to criticize themselves. I am not quite so pessimistic. It is too early to declare the educational reforms a failure, and there has certainly been an increase in the number of lawyers and probably an increase in their breadth of life experience as well. If the number of law schools and students declines, the “bar” passage rate issue may disappear, and the whole system may begin to work as intended. Whatever happens, there will be an increase in the total number of lawyers able to play a greater role in policy debates. Meanwhile, the lay judge system is attracting attention to the operation of the courts, and even the Supreme Court has shown some recent signs of asserting itself. So, overall, this is a most interesting time to be studying Japan’s legal system.

Peter Frost: *Thank you for the interview!* ■

NOTES

1. *Japan: An Illustrated Encyclopedia* (Kodansha, 1993), 881. I should note that much of the work that business lawyers do in the US, such as writing contracts or negotiating deals, is done in Japan by graduates of law faculties who have not gone on to become certified lawyers. It is also true that most workers in the legal field are located in the Tokyo-Osaka area.
2. My questions have been particularly suggested by my reading of Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Boston: Harvard University Press, 1963); Frank Upham, *Law and Social Change in Postwar Japan* (Boston: Harvard University Press, 1987); and ed., Daniel H. Foote, *Law in Japan: A Turning Point* (University of Washington Press, 2007). Concerns about alleged abuses by prosecutors is discussed in “Japan’s Judiciary on Trial: Prosecutors or Persecutors?,” *The Economist*, October 16, 2010: 51.
3. In *Law and Social Change in Postwar Japan*, Professor Upham states that where serious pollution became an issue in the Minamata case, victims were often reluctant to sue for reasons that included shame at their sickness, worry that their complaints would be considered selfish, fears of pollution issues reflecting badly on the community, a dislike of court procedures, and a general, and quite traditional, desire to have Minamata executives make a direct, personal apology.