

## **A Brief Report of Prof. Frank Upham's Visit to Peking University**

On November 3-6<sup>th</sup>, Prof. Frank Upham visited the International Center for Critical Theory at Peking University (ICCT-PKU), and had several in-depth discussions with scholars and students from the Chinese Language and Literature Department, the Law School, and Chinese Academy of Social Science. Prof. Upham is the Wilf Family Professor of Property Law at NYU School of Law, and serves as co-director of the U.S.-Asia Law Institute.

The academic path that Prof. Upham pursued was formed in his contact with the “critical legal studies” tradition when he was still a student at Harvard University. His field of specialty has since been Property Law. He learned Chinese first, then turned to Japanese studies, for he considered Japan as the first successful example of industrialization and modernization among non-western countries, thus raising challenges to many western institutions and ideas dressed up as universalism and formalism. Recently, he focuses on the social, cultural and political basis of law, and co-taught with Prof. Xudong Zhang an interdisciplinary seminar “East Asian Cinema, Law and Culture” at NYU in Fall, 2009. This seminar took Chinese and Japanese cinema as basic texts, to analyze and discuss the cultural and political significance of law,

and to understand the existence, action, and self-contradiction of law in a broader context.

On November 4<sup>th</sup>, 3-5pm, Prof. Upham gave a talk titled “Politics, Law and the Harmonious Society” at the Chinese Language and Literature Department. The talk was hosted by Prof. Xudong Zhang, the director of ICCT.

Prof. Upham described his approach toward law as “critical legal studies”, and dismissed the “vending machine” styled, formalistic notion of “rule of law” as ideology and institution fetishism, which is not true to the legal practice in the U.S., and is neither feasible nor desirable. On the other hand, he emphasized the autonomy of legal practices, as such an autonomy gives the possibility to engage with the political reality, and contributes to the building of a more just and placid society in its unique and irreplaceable way, such as regulating and mitigating the social trauma and social conflicts during the drastic and cruel process of industrialization and marketization. “Harmonious Society” is impossible at a time of drastic social transition. There are always winners and losers, and the disadvantaged are usually ruthlessly abandoned by the social development. But the court can play a certain mediating role in this process. Upham gave two examples. The first one is the “Enclosure

Movement” in England in early modern period. Through this movement, agriculture in England underwent a fundamental transformation, but many people lost their benefits during this process. The court intervened in the “Enclosure Movement”, striving to protect the interest of the weak, thus to a certain extent slowed down the speed of social transition, and prevented disastrous consequences. The other example is of postwar Japan. During the postwar period, the rapid industrialization process incurred serious pollutions, and many people at the bottom of the society were victimized; but the law at that time was still “centered on the economic development”, putting very little effort upon environmental protection. Initially, the government tended to solve the problem through “harmonious” mediation, usually trying to persuade the company to compensate to the victim; but such a method was hardly effective with large-scale pollution accidents. Because they were from the bottom of the society, the victims had little resource to set political agenda in the democratic political process. Under such a severe situation, it was the lawyers of Japanese Communist Party who had broken the impasse. They helped the victims to sue at the court, and brought the case to the attention of the media and the society, thus creating a political theatre around the court. In the end, the judges declared that the company lost the case. Even though the judicial decision had no sufficient legal basis, it gained wide-ranging support from the society, and advanced the

development of the environmental law in Japan. China is facing drastic social transformation now, the social conflicts are acute, and many conflicts are actually impossible to be solved through mediation. At this moment, is the Chinese court ready to create a political theatre through autonomous legal system to protect the interest of the disadvantaged and to solve social conflicts? If the court is unable to play this role, does the ruling party in China have any substitute?

Focusing on these questions, the audience raised several questions. First was about the professional and intellectual sources of the judicial activism of the judges in Japan: in a country like Japan which belongs to the continental legal system, how is judicial activism possible? Second, why is the court able to do better than other institutions in dealing with conflicts among different social groups? If the judges themselves are ideological and lack practical wisdom, won't judicial activism cause even worse consequences? In addition to these questions, some listener was very interested in the recent turbulence of the Sino-Japanese relationship, and exchanged their ideas with Prof. Upham.

On November 5<sup>th</sup>, 2:30-6:00, Prof. Upham had an informal, in-depth seminar with scholars from Peking University and the Chinese Academy of Social Sciences, including Xudong Zhang, Suli Zhu, Shigong Qiang, Defeng Xu, Haibo Liu, Yongle Zhang, Han Liu, and graduate students from Law School at Chenming Building in Peking University.

Prof. Upham made a summary of the main ideas of the talk of the previous afternoon, raised the same questions to the scholars at the seminar, and also added some new contents. One thing he added was: during the Meiji Period, the Supreme Court in Japan intervened with the commodification process of the rural land and slowed it down; in the 20<sup>th</sup> century, because the Supreme Court gave up this intervention, the land annexation went out of control, and encouraged the rising of Japanese militarism. Besides this, Prof. Upham also mentioned his discussion with Prof. Suli Zhu about the latter's book *Sending Law to the Countryside* (*Song fa xiexiang*). Prof. Upham highly appraised Prof. Suli's book, but also thought that the attention paid to the political dimension was not sufficient when it talked about the basic-level court. Another criticism he had was that Suli still has some characteristics of the modernization paradigm, and lacks a more theoretical awareness of the fact that social transformation constantly produces the disadvantaged groups and the losers.

Prof. Suli responded to Upham's critique. He thanked Upham for his review of this book in the U.S., and also confessed that he didn't take into consideration international readers while writing the book, thus didn't provide every detail. Suli emphasized that the legal system in China has its unique historical background and contemporary condition, and its reform and development has no ready-made model to copy. He doesn't

think that the western model can be copied; nor does he believe in the existence of any “Asian value”. The Supreme Court of the previous term followed the western model to conduct legal reform, striving to reinforce judicial autonomy, but it didn’t take into consideration the concrete social conditions; as a result, the authority of the court actually declined among common people. For now, one can’t disregard the following factors while thinking about the legal reform in China: first, the court, produced by the ruling party, is very difficult to avoid its influence; Second, at a time of drastic social conflicts, the court is already burdened with many tasks, and it’s not competent for the settlement of all social dissensions; third, China is a vast country of deep heterogeneity, a reform project that sounds reasonable in the eastern region could produce totally opposite result in the central and the western region. Only prudent reformers can carry forward the reform and consolidate its achievements.

The other scholars also raised a series of questions. In regard to the “critical legal studies” approach that Upham takes, it was asked whether it is possible to turn the model of “law and development” into that of “law and culture”, to discuss how the belief in law was produced in the west, and what kind of social function it exerted. Correspondingly, in China, it might not be legal discourse, but other discourse that has taken such a social role. In addition, is it possible to solve legal problems through pure

talk? What is the relationship between the legal rationality and the state violence behind it?

Questions were also raised against Upham's comparison between early England and contemporary China. It was argued that in early modern England, the local power was in the hand of the nobles, and behind the intervention of the court in the enclosure was actually the conflicts between the king and the nobles; this is not the same as the conflicts between the central and the local government in contemporary China, because no matter which side fails, the people would always blame the ruling party. Thus in the overall consideration of the ruling party, the court is not necessarily to be put in an important position. Besides, the "political theatre" that Upham imagined is actually possible in China --- many officials in the judicial branch have enough ambition, and the media also has enough interest, so once the media is open, there could emerge thousands of "political theatres". But whether the exemplary role that these "political theatres" play could paralyze the legal system, already over-burdened, has to be carefully examined. As to the substitutive conflicts-solving mechanism, some scholar pointed out that the traditional literati class which used to be the mediation between the commoners and the government, and the "mass-route" policy that was established during the revolutionary and socialist period could be taken as possible sources.

The story that Upham told about how the intervention with the land commodification process during the Meiji era delayed the rising of militarism, led to a comparison with the process of land commodification and village disintegration that is going on in China. If this process is too fast and a large number of peasants lose their land, would this lead to the danger of militarism under certain international environment and military structure? In postwar Japan, as land reform was carried out, and land circulation was made difficult, it established the basis of a stable society, and successfully prevented the danger of militarism. Today, this experience might be still taken as our reference.

During two days' intellectual exchange, Prof. Upham's "critical legal studies" approach, and the cases he presented about early modern England, Meiji and postwar Japan, left a deep impression upon the scholars and students from Peking University. On the other hand, Prof. Upham also came to know more of the legal practice in China, and how the young scholars in China look at China and the world at large. Both sides benefited from this productive and successful visit.