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LOOKING AT FLOWERS FROM A GALLOPING HORSE

An ancient Chinese proverb says, if you would do something for a friend, send him on a journey.

Several years ago, I told an earlier open meeting about a casual tour of Ireland and the delights of that green and pleasant land and this time I'll try to transport you in the opposite direction.

Since the trip to Ireland, I have been a member of a People-to-People Legal Delegation that travelled to the People's Republic of China only a few months after the normalization of Sino-American relations which took place in 1979. Between 1979 and 1981, the hey-day of Sino-American friendship coincided with the most open internal policy China has known for more than a generation and our legal group spent nearly three weeks in mainland China in the late fall of 1980.

Basically, I will compare our legal systems and tell about a criminal trial we were permitted to attend. A short survey of this type is often described by the Chinese as "Looking at flowers from a galloping horse," and fleeting as the view may be, I hope you will feel it is better to see flowers from horseback than to see no flowers at all.

Our group consisted of precisely 33 people because this was the seating capacity of the standard Chinese bus in which we travelled much of the way. The leader of our delegation was Dr. Harold G. Wren, at that time the Dean of the University of Louisville School of Law, and our group was comprised principally of lawyers from Kentucky, Oregon and the state of Washington where Dean Wren formerly taught.

The group assembled in Seattle, met representatives of the People-to-People Program, and was briefed by the University of Washington's Dr. Mike Robinson, an expert on the People's Republic of China. Dr. Robinson discussed the changing Chinese culture and how the Chinese legal system operates. He emphasized that the present legal system in China is built

operates. He emphasized that the present legal system in China is built on the foundations of Chinese culture; that is, Confucian ethics modified and modernized from the perspective of the People's Republic of China. He noted that some latter-day principles are in conflict with Confucian ethics.

Almost one-fourth of the world's population lives in that large and diverse territory that comprises China and we were entering a society that is carrying on a vast and fascinating experiment, trying in a short time and with meagre resources to transform a poor and backward country,

with an ancient civilization, into one of the major countries of the world.

American and Chinese societies hold fundamentally different underlying assumptions concerning the relative roles of stability and change. To oversimplify, we in the West generally regard stability as the normal and preferred state. The great bulk of our law and legal institutions have developed over the centuries and they not only define the status quo but support it as well. We regard this stability and hence predictability, in a system which can yet allow change, to be one of the fundamental virtues of our legal system.

The attitude toward stability and change in China, we were told, is quite different. Traditionally, Chinese society has been basically retrospective. Graham Peck in his book "Two Kinds of Time" uses an analogy to illustrate this: While a Westerner would face downstream to see where the river is going, a man in traditional China would look upstream and be concerned where the river had come from. For many such people of China, the Golden Age had occurred several thousand years ago during the Chou dynasty. Somewhere along the line, man had fallen from that ideal state. The task of subsequent generations has been to rediscover and then restore the Golden Age. Such a viewpoint would not be supportive of change, whether social or technological.

Contemporary China presents a completely different picture. Change and not stability is regarded as the normal state. We learned that Western-style law which supposes stability and restrains change has fared poorly in the People's Republic of China.

Victor H. Li, one of the world's leading authorities on Chinese law, reports that the Chinese have a penchant for debate and an acceptance of a fairly high level of turmoil (by Western standards), and they often say of the present international scene: "There is great disorder

often say of the present international scene: "There is great disorder under the heavens; the situation is excellent."

The United States has some 600,000 lawyers in a population somewhat in excess of 226 million people. China, with more than four times our population at its highest peak had about 3500 lawyers in 1956 before the cultural purge.

With so few legal specialists, the Chinese legal system must be simple in structure, method and content since it must be administered by

relatively untrained people. There is a great need to have disputes mediated rather than to bring differences before the courts.

The concept of the "rule of law" is one of the philosophic and political cornerstones of Western society but it has not ever been as revered in China. In traditional Confucian terms, a ruler should govern by means of virtue rather than law; that is, through a painstaking process of socialization and education, the people first learn and internalize the rules of proper behavior. Only when a person is extremely recalcitrant or when the educational system has broken down should it be necessary to use the severe sanctions of the law.

Two quotations from Chinese and English sources serve to highlight the differences concerning the rule of law. In the 6th century B.C., a century before the Golden Age in Athens, a Confucian scholar criticized the promulgation of an early criminal code in the following terms:

He said that, "The ancient kings taught the people the principles of sincerity, urged them on by their own exemplary conduct, instructed them in what was most important, called for their services in a spirit of harmony, came before them in a spirit of reverence, met exigencies with vigor and made their decisions with firmness....In this way the people could be successfully dealt with, and misery and disorder prevented from arising."

The scholar continued, "When people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit and make their appeal to literal words, hoping per adventure to be successful in their argument. They can no longer be managed."

The argument is that more laws do not make for a better and more harmonious society. On the contrary, the emphasis on law makes people more litigious and diverts attention away from the more important works of moral education. This is in marked contrast to the "Western" attitude toward the law expressed by Sir Thomas Moore in Robert Bolt's play, "A Man for all Seasons."

And when the last law was down, and the devil turned round on you-- where would you hide, Roper, the laws being all flat? This country's planted thick with laws from coast to coast--man's laws, not God's--

planted thick with laws from coast to coast--man's laws, not God's--
and if you cut them down--and you are just the man to do it--d'you
really think you could stand upright in the winds that would blow then?

It has long been a proud claim of the United States that ours is
a government of laws and not of men.

One of the difficult things in writing this paper is the neces-
sity of the severe limitation of focussing on a narrow part of an ex-
perience which was far more traumatic culturally than any other travelling

that we had ever done. In order to convey even one aspect of this voyage in so brief a time, I must resolutely concentrate on this limited phase if I am to recreate the impact of a confrontation with a society that was only just emerging from a decade of the Cultural Revolution. This was a society that under the leadership of the revolutionary Mao Tse-tung, had sought in a revolutionary fashion to alter or even reverse the course of the most ancient civilization on this globe. Mao preached that "power comes from the barrel of the gun" and he did not try to prevent violence. On the contrary, he encouraged it, and here we were as a group of 33 people, oriented toward law, trying in so brief a time to grasp some of the fundamental differences and to comprehend events which are still now occurring in this ancient land, a land in which Mao had failed to create the society he envisioned and in which his widow, Chaiang Ch'ing, was even then being held for doing things that only months before had been the conscious social policy of the government.

Our first morning in China, the lawyers in our group assembled in the lobby of Shanghai's Peace Hotel and proceeded to a room on the ninth floor designated as "Nice Heaven Hall" for a meeting with several members of the Chinese legal profession. Two unexpected guests were Judge Allen J. Ballhoffer and Judge Walter P. Cappaccioli, both from Red Wood City, California, who were staying in Peace Hotel with another delegation and had learned of our legal meeting through the government staff. We had been assigned a Chinese tour guide who stayed with us throughout our travels in China and in addition, we had at least one local representative of the state tourist agency at every major stop in our travels.

Our host for the morning proceedings included Mr. Li Hai Cheng, Judge of Shanghai's High People's Court, Mr. Mao, Assistant Judge of the

same court and Mr. Yang Zelao and Miss Chen Aili representing the Shanghai Bar Assn. which had been organized only the preceding year. Shanghai is the largest port in China and its cultural significance is surpassed only by the city of Beijing, formerly Peking, itself.

The National Tourist Office sent Mr. Mao Baigin, a superb translator with legal training, from Beijing several hundred miles away, to facilitate the first meeting of our study program. We felt that the decision of the government of China to go to such pains augured well for our success.

Our group was seated around a single table, each with a large lidded porcelain mug of green tea before him, and the discussions were surprisingly open and frank from each side.

Judge Li described the three types of ownership that exist under China's socialist system: (1) State ownership, which includes all lands (2) Property that is owned collectively by groups and communes and (3) Property that can be owned by individuals, including such items as income, private housing and legitimate means of production, such as tools and savings. According to Judge Li, a private home of not more than 150 square meters can be rented by the owner at rentals twice that of state-owned properties of similar type. He explained that such an exception was made to encourage the production of residential properties which are critically short, and that the government issues certificates for ownership of such property.

Laborers are permitted to have individual means of production (such as equipment to make shoes) and up to two apprentices, so long as the master does not exploit others.

Ownership of most property, however, is vested in the state and in people's groups, though the practice in the countryside is different; more of the agricultural property there is owned by collectives whose operations are different from state enterprises. Foreign investment is a special form of ownership and is especially protected by law.

Our delegation was told that only very recently an income tax affecting only a scattered few had been initiated in China, and no inheritance tax exists. There is not a specific law for inheriting property, though certain other laws, such as those pertaining to marriage, cover some aspects of inheritance, as does a civil code which was then under development. The marriage law provides that husbands and wives may in-

herit from each other, as can parents and children. If there are neither parents, or children, then grandparents and grandchildren can inherit. Judicial practices recognize Wills so long as their provisions do not conflict with the laws of inheritance. For example, an individual cannot by Will disinherit minors or those who cannot support themselves.

The court structure was discussed in considerable detail, the general courts falling into four grades: (1) Central Government level, the Supreme Court in Beijing; (2) Provincial High Court in each province;

(3) Prefect level-Intermediate People's Court; and (4) County level-Lower People's Court.

There are also special People's Courts such as Military Courts for cases involving Army personnel, Rail Transportation Courts, Water Transportation Courts and Forestry Courts.

At certain of the courts at the lower level, a collegiate panel consists of three members (a judge and two assessors,) while at the next higher level the court is composed of three lawyers. Those serving at the lower levels are commonly appointed to serve for indefinite periods, while their superiors serve for three years at the intermediate level and 4-year terms at the highest level. At the intermediate level, judges are elected by the People's Congress.

Within a lower-level may be found criminal, civil and economic divisions, the work of which is supervised by a Chief Judge of the division.

Judge Li was asked to describe how a trial is conducted in a Chinese court and what are the rights to call witnesses, to interrogate or to introduce evidence. The judge responded that when an accused is prosecuted or publicly charged, he can be represented by an attorney during the court proceeding. All lawyers are employees of the state, rather than being employed by the accused. The advocate for the accused has a right to interview the accuser and to examine the file of the accused. If an advocate considers procedures improper, he may ask the court to make changes. The advocate can participate in the accumulation of evidence, call new witnesses and introduce new or additional evidence. After a verdict, the advocate has the right to appeal to the next level of court, provided he has the consent of the accused. In the event of discovery of new evidence, a person can be tried again, even if formerly acquitted.

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There appears to be no presumption of innocence of the accused, since the laws of China have no provision for dealing directly with this question. Neither is there a presumption of guilt prior to the rendering of judgment. Judge Li said it is generally felt that no presumption of innocence is necessary because a court's decision is required to be based on law and evidence.

In a criminal trial in China, an accused is not asked whether he pleads guilty or not guilty, but he may be asked to state what happened,

and if the facts reported are correct. The accused has the right to remain silent but it appeared that a premium is placed upon securing an admission of improper conduct by an accused. The courts want an accused to admit he has acted improperly but the judge said torture of defendants had now been outlawed.

The doctrine of stare decisis, or the respect for decisions of court as precedent, appear to have much less significance in China than in Common Law jurisdictions although some attention may be paid to another court's interpretation if it is known. The Chinese system has a doctrine of analogy whereby statutes may be extended by interpretation to cover situations not specifically in the statute mentioned or even covered by its provisions. This device appears to have been developed to avoid a situation not being covered by law. It appears to be somewhat reminiscent of our invocation of the Common Law to cover circumstances where no statute exists.

A week after this initial conference, we were in Tianjin, a major provincial city, and we were permitted to attend a trial in the Intermediate People's Court. Later, we were told by American consular officials in Hong Kong at an extensive debriefing that none of our officials had heard of any group being permitted to attend a trial. Encounters with other travellers seemed to confirm this experience was unique.

At a "Friendship Store," we met an American legal scholar who was officially spending twelve months in China for the express purpose of studying its legal system. She told my wife that, though she spoke Chinese, was living in an assigned university community, and had been trying for seven months to observe a court trial, as promised to her, she had as yet been unable to secure admission to any such court proceedings.

The trial we attended was held in a modest amphitheatre in a building which we understood to be a courthouse. The entrance was securely

ing which we understood to be a courthouse. The entrance was securely guarded and we trooped into a theatre-type room with folding seats fastened to a floor which sloped down to a flat area some 25 by 40 feet on which there were a bench for the judges who faced us and a dock in which a defendant stood, facing the judges with his back to the observers. Each of us was given a set of earphones and we received what we were told was a full and literal translation of the proceeding. Unfortunately, this translator was not of the quality of Mr. Baigin who had been flown to Shanghai for our original meeting. I would estimate that there were prob-

ably another hundred people in the audience but, so far as we could observe, we were the only foreigners.

The case we were privileged to hear began in the early morning and was concerned with a man named Sha Quin, a member of the Communist Party and foreman in a steel foundry, who was accused of violating Article 187 of the Criminal Code on September 16, 1978, and on various dates thereafter.

We were told that this section of the code under which Sha was tried is the same section under which Mao's widow had been charged only shortly before. Article 187 provides:

A government employee who causes the loss of public property, or damage to people's property, or against the people's benefit, by reason of negligence, shall suffer imprisonment for no more than five years.

The indictment of Sha charged that a female employee, Ma Guoyeng, who was an apprentice worker and very young, was due at work to operate a crane at the foundry. She was not present, being late to work, and a master worker operated her crane without permission and caused the death of a third worker when he picked up a load improperly (This was an uncertain detail involving electrodes, a short circuit and/or a dropped load.) At a later date, Ma went to Beijing without permission. The defendant Sha was directed to talk to Ma concerning her tardiness and absence. Defendant Sha proceeded to Ma's dwelling and did discuss the situation with her. At the time and place, Ma maintained that she had not, in fact, been late on the date of the accident. She insisted that a supervisor from the foundry had told her that the hours of work were not as the defendant Sha stated. Ma's mother talked to Sha telling him her daughter was unhappy, did not want to work in the foundry, and was sleeping badly. Ma gave no reason for her trip to Beijing when Sha, as her foreman, questioned her.

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The defendant Sha reported to the Committee that Ma's attitude was bad. An investigation of the death of the worker was made; the defendant Sha did not attend and it did not appear anyone was charged with being responsible for the worker's death.

Defendant Sha, at a later date, demanded that Ma write a self criticism, which is in effect a confession. She at first refused but later did write one. Defendant Sha informed Ma that she was to receive

a punishment for her tardiness, which Sha told her was the cause of the worker's death. Her punishment was to be suspension plus extension of her apprenticeship for an extra six months. The defendant informed Ma of the punishment, but he did so before the punishment had been approved by the final authority. The charge was that, as a result of the improper conduct of the defendant, Ma took her own life by hanging herself on a tree near a stream.

At the beginning of the trial, we were seated in two rows and provided with our earphones. The secretary of the Court appeared and seated himself at the bench facing the audience. He opened the Court by declaring there would be no talking, shouting or other disturbances, and no note taking, recording or photography.

After this opening by the Secretary, other Court personnel appeared: the judge and two assessors, three prosecutors, and the defense counsel. The prosecutors sat at a table to our right some 30 or 40 feet away and one defense counsel sat alone at a table on the left some 30 feet from the dock in which, whenever he testified or talked, the accused stood throughout the trial facing the judge, with his back to the audience.

So far as we could observe, there was no communication during the trial between the accused and his counsel.

Two uniformed guards stood at rigid attention, one at each edge of the judge's bench, and they were relieved by two other guards every thirty minutes, the maneuver being conducted in a disciplined military fashion.

The defendant was first summoned into court and he stood about 20 feet in front of the judge with dual microphones before him. He acknowledged himself to be the defendant Sha, and gave his name, age and place of work. The prosecutor, seated to the right of the bench, read the

place of work. The prosecutor, seated to the right of the bench, read the indictment aloud. The defendant held a copy and followed the reading. The judge asked the defendant to recite his agreement or disagreement with the charges as read.

The defendant primarily denied he was the responsible person to be blamed for Ma's death. He apparently was being tried for causing her death. (The American lawyers later expressed grave doubts that any indictment against Sha would have been returned in any court in the United States under such circumstances, although one of our group, Glenn Schilling

of the Kentucky Workmen's Compensation Board, thought there might be some basis for liability if the death were judged to be work-connected.)

The defendant included in his defense that discipline in the plant had become lax (e.g. employees smoking, sitting around and playing cards when they should have been working) and that there was a significant difficulty in meeting production quotas. He argued that the punishment decreed for Ma would also have served as a warning to other young workers.

The defendant's response to the charge was given in a loud clear voice, and without apparent fear. At the conclusion of his response, which had the elements of an opening statement for a defendant, the witnesses were brought into court and seated in chairs to the left of the bench, and in front of the defense lawyer. As the name of each witness was called, he advanced to a microphone that stood in front of the witness.

In response to questions from the judge, each witness acknowledged his name, age, place of work and connection or relationship to the case at bar and what had happened. The judge admonished the witness to tell the truth, which was the only indication of an oath, and asked the prosecutors, the defendant, and the defendant's lawyer if more witnesses were required. Upon all answers being no, the Court further inquired if the parties were satisfied with each witness. Being told they were so satisfied, the witnesses were taken from the courtroom.

The defendant again testified, without questions from his lawyer, telling at some length the facts of the case as he understood them. Afterwards, the judge questioned the defendant and read from what appeared to be a report by a medical examiner. The report stated that the body of Ma had been found by a stream of water and that she had died by her own hands, a suicide, and there were no other marks of violence on the body.

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After the judge again examined the defendant, the judge invited the prosecutor to examine the witness, which he did. Thereafter, the judge asked the defense attorney if he wished to examine the witness, the defense attorney declined with a single word.

After the defendant's questioning was completed, other witnesses were called in one by one, the judge naming which witness he wanted. The secretary would give a paper to the guard who would leave the courtroom and reappear with the witness. Each witness advanced to the micro-

phone, acknowledged his presence and sat in a metal folding chair from which he answered questions. These witnesses were questioned first by the judge, then the prosecutor, and finally the defense counsel, who, however, questioned only one witness.

After each witness testified, the defendant would state his position concerning the testimony just given. All but one were fellow workers of the defendant and all but one were favorable to the defendant. Among them were Sha's superiors in the party structure and in the foundry. All of these, except the brother, supported Sha and said he was trying to carry out instructions given him in order to meet production quotas in a difficult time and climate.

The one unfavorable witness among this group, Ma's brother, said Sha was evasive, uncooperative and hostile when the witness tried to talk to Sha before the death of Ma. The brother stated his belief that Sha's attitude toward his sister, who had been unhappy in the job to which she had been assigned, had driven her to suicide.

The defendant, in response to and comment on the brother's testimony, gave a well-conceived and tactful statement. Sha expressed sympathy for the brother and all the family of Ma, but concluded the witness should tell the truth. The defense counsel did examine the brother.

The trial was adjourned for lunch and, afterward, part of the group attended a discussion held with members of the Tianjin bench and bar in an adjoining conference room while others returned to the afternoon session of the court during which the trial was concluded.

Three additional witnesses were called and questioned simultaneously, apparently a time-saving device.

At the conclusion of the testimony, arguments were made to the court. The defendant personally gave the opening argument, followed by a prosecutor, and then by the defense attorney, who primarily pled for

a prosecutor, and then by the defense attorney, who primarily pled for leniency. Thereafter, a rebuttal was given by the prosecutor and a surrebuttal by the defense attorney.

In conclusion, the judge gave the defendant the final right of appeal, a sort of final summation in which the defendant defended himself eloquently and persuasively. He cited his lack of education (6 years of school), his 20 years of un-faulted labor, and the fact that he was not the person in full charge.

The judge and the two assessors withdrew and returned in about

20 minutes. The verdict -- Guilty. The judge condemned the defendant for his failure to attend the investigations, his treatment of Ma, and his having related the punishment to her before it had been approved by the final authority.

The sentence was one year in jail, suspended, and probation for one year. The defendant would have the same right to work and he would not lose his political power as a result of the court's decision, but we were told that the Communist Party itself might later impose some discipline upon Sha.

Throughout the preparation of this paper, I have placed heavy reliance on the distinguished brief book "Law Without Lawyers" by Victor H. Li, which was published in 1978 by Westview Press in Boulder, Colorado, a book I had discovered before I was invited to participate in this expedition to China. Professor Li reports that much of the work of controlling anti-social behavior in China is handled at the peer group level or through administrative sanctions rather than through court proceedings as in this country and that trials such as we saw are rare happenings.

I hope that this glance from the galloping horse has afforded insight into a very different way from ours of handling disputes, and in some degree imparts fundamental ways in which Anglo-American law with its democratic stress on individual rights differs in philosophical and ideological value judgments from the Chinese system which lays such stress on the individual's obligation to the group of which he is a part, a system under which nearly a quarter of the human race is born, lives and dies.