The Battle of the Court of Final Appeal

Some people strain at a gnat and swallow a camel!

That was certainly true in the battle to set up the Court of Final Appeal à la Martin Lee camp. These legislators had swallowed a camel in agreeing to breaching numerous articles in the Basic Law, but when it came to the Court of Final Appeal they strained at a gnat, that is, at one short clause.

In this case, all their anger turned against Chris Patten, and in their manner of expressing their anger it would appear that they might have had some secret agreement for his support in exchange for their support on other issues. However, that is only a surmise based upon their action which I shall mention later. There is little doubt that if the matter of the Court of Final Appeal had not been formally agreed between China and Britain in the Joint Liaison Group (JLG), he would have supported them, and on one occasion indicated that he sympathised with their stand. However, he had no choice because the matter had been settled between the two countries in writing, signed and made public. However, it still had to be passed in the Legislative Council before being entered into the law books and before the court could be set up.

In both the Joint Declaration signed in 1984 in Beijing, and in the Basic Law enacted by the Chinese Government in 1990, it was stated: "The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal."

The gnat I referred to was the clause "may as required invite judges from other common law jurisdictions". If I were asked to interpret that clause, as a layman I would say that it meant that any number of judges from zero to the whole number (which number is five) could be invited, but only if required at any one time. However, the matter had been discussed by the Joint Liaison Group, and they had decided that the five judges of the Court of Final Appeal would be four locals and one from another common law jurisdiction. At this point I should mention that "local" did not mean Chinese, but locally domiciled. In fact, the majority of local senior judges likely to be appointed to the four seats in the Court of Final Appeal were non-Chinese. The formula for appointment to the Court of Final Appeal came to be known as the 4:1 formula, that is, four locals and one overseas.

It was within the jurisdiction of the Joint Liaison Group (JLG) to decide on the matter. Annex 1 of the Joint Declaration reads: "The judicial system should remain unchanged except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication", while Annex 11 states "The functions of the Joint Liaison Group shall be (a) to conduct consultations in the implementation of the Joint Declaration."

Martin Lee seemed to think it was his right to suggest the necessary changes and pressure his colleagues to agree with him. As Chairman of the House Committee, I had more than once asked Martin to be a little more democratic and not force his views
on others.

So this was the gnat which for the next four years would cause "much ado about nothing". Apart from the Lee camp in the Legislative Council he had some support among a minority of lawyers. I had the impression that the vast majority of lawyers were not troubled about the matter, but as one might expect, those who sit on the Councils of legal bodies are usually more aggressive, and it happened that most of them seemed to have a British educational background, many of them with little knowledge of present-day China. The father of one of them said he regretted having his offspring educated abroad because they had forgotten their Chinese heritage. Behind the argument in fact was an unwillingness on some prejudiced minds to look at the fact that, whatever China does in her own country it is for the Chinese Government and people to take care of; the facts of history show that China had a clean record in observing international agreements, having tolerated for a century and a half the unequal treaties forced upon her by Britain. If China promised one country two systems, it was credible she would do just that, as she had always carried out her international agreements.

However, Martin Lee and Company had found a gnat to irritate China and he would not let that chance go. Moreover, he exaggerated the importance of the matter to people who had little or no idea of the issue, making it appear both in Hong Kong and worldwide that it was a matter of life and death to the rule of law In Hong Kong. The Court of Final Appeal under colonial rule was based in London and named the Privy Council. It was not a court to which people could go ad lib to appeal. Usually it dealt with complicated commercial cases, assessed the issue by reading documents but not seeing the appellants, and on average I think I am right in saying that there were not even a dozen cases in a year. It has no impact on the rule of law of the ordinary citizen but appears to be more important to businessmen, especially foreigners.

The composition of the Court of Final Appeal became known in 1991, and in December of that year the representative of the legal profession, Simon Ip, no doubt on request by the legal council bodies, moved a motion: "That when the Court of Final Appeal is set up, it should have more flexibility to invite overseas judges to sit on it than has been agreed by the British and Chinese Governments, and such flexibility should be in accordance with the Joint Declaration and the Basic Law."

During this debate, Martin Lee said: "This new agreement violates the letter of the Joint Declaration ... For the British to claim that this new agreement is consistent with the Joint Declaration is highly disingenuous and serves only to insult the intelligence of the people of Hong Kong".

I consider myself to be one of the people of Hong Kong but I did not feel insulted. Maybe I lack that intelligence he mentioned. I would agree with Martin in the change of a letter: 'judges' in the original had become 'judge' in the agreement. But that would be putting it out of context, as no doubt Martin
intended to do. As I have said earlier, the original, according to my layman's English, could have meant any number from zero to five, as required. If the JLG in their wisdom had decided on only one, that choice was within their jurisdiction. If not, who had the right to choose? Martin Lee and Company?

I did not speak on that occasion because, not being a lawyer, I wanted to hear all views. To me, one foreign judge was acceptable, but the issue had just begun to be debated and no Bill had yet been put before the Council. It seemed too early to become hysterical about it, so I abstained. I could not see what all the fuss was about, but Emily Lau gave us some enlightenment on that in her speech.

"I have no intention," said Emily, "to show disrespect for local judges; they might not have the qualifications, prestige and status comparable to those judges of the Privy Council in London." Obviously she had little respect for Hong Kong's judges, with a little snobbery thrown in because they do not have the prestige and status of judges based in London. Emily continued, "What is more important, I believe, some people may worry that in future courts will be under the control of communist China." So the integrity of the local judges was also in question: they could be influenced by politics. She did not clarify which people might be worried, though usually in her speeches Miss Lau claimed to speak for all the Hong Kong people. I had not heard of anyone being worried on this issue, but, unlike Emily, I do not know the thoughts and wishes of all the people, only of those with whom I have discussed issues. And on this issue I found none of them were worried, and some not even interested. But then I only move among the grass-roots people, not the "prestigious" ones she mentioned earlier.

As a matter of fact, I do know one former member of the Privy Council, and he has all along agreed with the Joint Declaration and the Basic Law, is on good terms with China, and when Chris Patten arrived on the scene he opposed him vigorously on his political package.

It happens that as I was writing this chapter, I read a book that I considered might be helpful. The book is entitled "In the Public Interest" and the author is probably well known in Britain since he claimed to be one of the scapegoats in the disgraceful and illegal sale of arms to Iraq during the time of the Iran-Iraq War, arms that were later used against British soldiers in the Gulf War. He was calling for an investigation into where the funds from those sales went, and clearly suspected not only civil servants but also the Tory Government.

In blaming the investigator, Scott, for failing to get to the root of the scandal, the author, Gerald James says: "Perhaps it is naive to have expected a thorough investigation. The man (Scott) is a Privy Councillor. Members of the Privy Council get State papers. They have unique access to what is really going on. But ... the Privy Council is at once an information source and a golden gag. You get information on Privy Council terms. You
can't talk to anyone about it except other Privy Councillors, a number of whom are core Tories, members of the boards of arms companies, and banks closely connected with the Tory Government."

Gerald James, the writer of those words is British, and he has a deep insight into the judicial system. Apparently he would not share Emily Lau's views on the Privy Council's right to prestige or status, or even its freedom from political pressures. Emily will have to learn to see people as human beings with human frailties not as communist bogey-men and foreign saviours.

Instead of a red-under-the-bed there could be a Tory lurking there. In fact, if the worst fears of the Martin Lee faction were to be true, would a change in the law from one to two judges on the Court of Final Appeal make any difference? If China had malintentions, an extra foreigner could be discarded overnight on 30 June 1997. The fact is, that no changes were made in the judges, or the administration, either on 30 June or thereafter. As usual, the Martin Lee camp was crying wolf, and we all know what happened to the boy who played games with the public by crying wolf! When the real enemy, the economic colonials come to the attack, will people like Martin Lee be ready to help, or will they still be self-occupied and do nothing to help. The noble sacrifices of the Chinese people in the 1998 disastrous floods should shame the self-occupied politicians.

China has enough problems with 1.3 billion population and repeated natural disasters, without trying to take on Hong Kong and swat that fly on her nose.

However, as Patten was accustomed to saying when he tried to bulldoze through his reforms, "Tick-tock goes the clock", and action had to be taken to set up the Court of Final Appeal in time to make arrangements for its members and venue. It was clear at the end of 1994 that Patten wanted to have another go at setting it up, though it must be pointed out that when it was first debated in 1991 he was not the Governor.

On 3 May 1995, Jimmy McGregor moved a motion urging the Government to set up the Court of Final Appeal at the earliest opportunity... in conformity with the agreement reached in 1991 between the Governments of China and Britain. It was easy to guess that Jimmy was "flying a kite" for the Governor. He could always be depended upon to do what his former employers wished. On this occasion he said he was giving his own views and those of his constituency, the Hong Kong Chamber of Commerce, which he had failed to do on the Patten political reforms. He reminded members, quite correctly I think, that the issue was not negotiable, and that being so, the alternative would be no Court of Final Appeal at the change of sovereignty in 1997, creating a vacuum which the Incoming SAR Government would have to fill.

Martin Lee and Company still opposed the 4:1 formula. They were obviously prepared to have no court at all rather than one that China had agreed to. This time round, Simon Ip revealed that he had had another think since his motion in 1991, and he now considered it imperative that the Court be set up, even if not exactly as would have been preferred. The Chief Secretary spoke seriously on the motion: "I strongly urge members to
support Mr. McGregor's motion. That will give the people of
Hong Kong and international investors a clear signal that this
Council is committed to the rule of law, and that members are
prepared to do their part in ensuring continuity in the judicial
system in Hong Kong during the transition to 1997."
The Council was again split down the middle. Not everyone was
like Simon Ip in admitting that he had had another think. Those
who changed their minds in the present political climate became
the subject of ridicule by those like Martin Lee who had closed
minds on any issue connected with China. The result of that
debate was that the Court was still at a stalemate. On this
occasion I voted in favour of the motion as being the only
rational stand to take.

Soon after, the Bill was read for the first time and put before
the Council for scrutiny. A Bills committee was set up, the
largest we had seen that year, if I remember correctly, thirty
members, and I was one of them so can witness its operation.
From the outset it was dominated by Martin Lee. He rejected
any view that was contrary to his own, using the pressure of
his eloquence to persuade his colleagues to reject the Bill.
When they rejected one of his arguments he would bring up
the same one at the next meeting. Members began to grow tired
of the constant repetition of the same points until the number
of members attending the meetings dwindled. The time arrived
when the meeting had to be cancelled for lack of a quorum,
and he then gave the Council a tongue-lashing for showing so
little interest in what he considered the most vital matter.
It did not seem to cross his mind that everyone was tired of
listening to his harangues when all they wanted was to make
a few minor amendments, which the administration accepted, and
get on with the Bill. Martin insisted that they must accept his
amendment, that there must be a different formula from the 4:1
agreed by the JLG. With Martin still protesting, the Bill
then went for the Second and Third Readings on 26 July, 1995.

One sensible amendment, I cannot remember who made it, was
that the Bill should be passed immediately but that it would
not be implemented until 1 July 1997. This would enable
arrangements to be made, and would also stop the arguments once
it was passed.

Simon Ip, in his usual logical, reasonable and pleasantly
eloquent manner pointed out that the Council had only three
alternatives. The first was to reject the Bill outright, in
which case the future was uncertain. The second was to set up
the Court of Final Appeal in the way demanded by Martin Lee,
in which case the Court would fall apart in 1997; in fact the
Government would withdraw the Bill. The third way was to accept
the 4:1 formula now, to be implemented on 1 July 1997. Simon
indicated that he would support the third alternative, and
clearly he had the majority of members with him.

Obstinate to the end, Martin then called for the Bill to be
adjourned, but everyone was weary of his repeated arguments
and we all knew that there would be no compromise with him:
it would be Martin's way or no way. There would be no point
in adjoining the Bill and starting the argument all over again.
If Martin Lee's camp had really been expressing the views of the general public, one would have expected that on the day of the debate large crowds would have flocked to the Legislative Council Building to stage a demonstration, just as one sees enormous crowds demonstrating in other countries on matters of vital importance, as, for example, the peace move in Ireland. The fact is that neither the Court of Final Appeal debate nor the debate on the Patten package the previous year attracted demonstrators. Most people questioned on the street by the press knew nothing about the issues. Yet, whenever there was a debate on a social issue, such as rent increases, fare increases, or labour laws, a few dozen people martialled either by parties or Non-Government Organisations would demonstrate loudly outside the building, lobbying members for support. The general lack of interest in political issues is quite clear. The only group with a very strong interest in political issues is the April 5 movement, which I have heard claims to be Trotskyite, consisting of a handful of members who claim the right to flout any law with which they disagree. I do not know their strength, but I have never seen even a dozen at any one demonstration. They occasionally send four or five members to the Legislative Council Chamber ostensibly to listen to a debate, but almost invariably jump up at some point, display slogans, shout and struggle with security guards and disrupt meetings. That is strictly against the rules and is a prosecutable offence. What they gain from it is questionable. I write this not to offend the group, but to indicate how few people are really interested in abstract political issues. Rightly, in my view, the vast majority are concerned about bread-and-butter issues. Martin Lee once quoted, in defence of his abstract philosophies, "Man shall not live by bread alone." He did not finish the quotation which ends "but by every word that proceeds from the mouth of God." In fact, the number who worship at churches and temples far outweighs the number who care about abstract politics. When they pray to God, I believe most will be praying on material issues. In reply to Martin's statement, in which he implied that people need politics as well as bread, I retorted, "But neither can man live without bread". Politics, in fact democracy, I believe, is all about bread, and one-man-one-vote is not an end in itself.

On the Court of Final Appeal issue, the Martin Lee camp had raised a debate in the Urban Council, a municipal body supposed to deal with public health, sports, and culture. I had been a member for 32 years, and we had always kept the rule not to debate matters outside our jurisdiction, and the legal system was obviously totally outside its jurisdiction. The officials of its executive arm, the Urban Services Department, were not qualified or permitted to reply in any such debate. However, Szeto Wah joined the Urban Council stating clearly that he would turn it into a political forum. I know that some of the officials were fed up with wasting their time on politically motivated issues, and several told me they had sought early retirement because they were fed up with wasting time on matters outside their jurisdiction. My old colleagues told me that the Council had become unhappy and contentious since his arrival on the scene, and press reports confirm this view.
I was at that time the Urban Council representative on the Legislative Council, having been elected to the position in 1988 and 1991. My instructions from the Urban Council were that I was to consult and represent them on all matters pertaining to Urban Council work, but that on issues outside the Council's jurisdiction I could make my own decision on how to vote. I hope I did my duty in that respect, and I reported regularly on issues affecting the Council including Patten's plan to abolish the appointed seats, a proposal with which they strongly disagreed and in which I had represented their views during debates.

However, in some way which I do not understand, the Martin Lee camp, of whom several members serve both Councils, raised a debate on the Court of Final Appeal, during an Urban Council Meeting. They were defeated on the vote and as the Council's representative I spoke at the Legislative Council debate on the Bill, saying that I was representing the majority view of that constituency.

Finally, the Legislative Council debate on the subject resulted in the passing of the Bill by 37 votes to 20, the latter number being the Martin Lee camp and a few who regularly supported Lee but did not join his party.

Martin Lee was angry, and always when defeated claimed that as some of his party were directly elected, only they could represent the public. In fact, some of his members were from functional constituencies and would probably not have gained a seat by direct election. Moreover, 80 percent of the potential electorate do not register to vote or do not vote when registered. Of the twenty percent that did vote, his party could only claim to have the support of 12 percent of the whole adult population. At a guess I would say that the other 80 percent of adults are either not interested in politics, or are disenfranchised with politicians. Who knows the thinking of the silent majority?

On this occasion Martin vowed he would not give up but would raise the matter again after the election. That sound-byte in the media may have got a few votes, but he apparently forgot his promise. Instead he travelled the western world declaring the end of the rule of law for 1997. Those who wanted to believe him, especially in Britain and America, used the propaganda for international political purposes. Many were scared away from visiting Hong Kong for the celebration of reunification with China in 1997, and tourism has slumped, some of that, I believe, attributable to Martin Lee and his female counterpart running her own party, Emily Lau. They have greatly damaged Hong Kong, as well as denigrating and damaging their motherland, not to mention the Chinese Government itself.

What seemed to infuriate the Martin Lee camp most was that the Governor did not openly side with them, and that while he had collaborated in pressurising members to defeat the Liberal Party amendment of the Patten package, Patten had not attempted to stop the Court of Final Appeal Bill going through. The party then took the unprecedented step of moving a motion: "That as the British Administration in Hong Kong has seriously damaged the future rule of law in Hong Kong, this Council expresses no confidence in Mr. Christopher Patten, the Governor of Hong Kong." A member of the party's all-male core group, Cheung Man-kwong moved the motion. Emily Lau moved an amend-
ment to include the Chinese as well as the British Administration. As I see it, this motion could serve two purposes: it was aimed at scaring the Hong Kong people (if they were interested) into believing that Martin Lee's party was having to try to protect Hong Kong's rule of law; it also distanced the party from the increasingly unpopular Governor whom the party had so fiercely defended the previous year. They enjoyed calling their opponents "pro-China", but they did not like the growing accusation that they were "pro-colonial". This radical motion would allow Lee's party to pose as saviours from both China and Britain. The sensational motion, the first ever of this kind would give them all the sensational media-coverage they wanted for the elections two months ahead.

What a difference a year makes! These mutual friends, Lee and Patten, had parted, and the Governor had become the new target. The irony of the situation was that the party proposing the vote of no confidence, Patten's former allies, were now accusing him, in the words used by Cheung Man Kwong, of being "capricious" that he had "betrayed and broken promises". But what were those secret promises on the Court of Final Appeal? Were there promises between them for mutual support on all issues? The fact is that Patten had not publicly made any promises on the Court of Final Appeal, because he was not in Hong Kong when the formal agreement was made between Britain and China. Patten had made that clear publicly from the start. So did he have an agreement on this issue that the public was not told? The strong reaction by Martin Lee's party would suggest that there was something more than appeared on the surface since they were prepared to take such drastic action.

During this debate, Allen Lee probably voiced the opinion of most of us when he accused Cheung Man-Kwong of couching the motion in "shocking words in order to achieve a grandstand effect", adding that "the Legislative Assembly should not be turned into a venue for political shows." Indeed the party had long turned the Council into a political show, and Cheung Man-Kwong had said publicly, "We all have the right to stage a show". I personally totally disagree with Cheung. Staging shows are ruining the meaning of democracy. What the world needs now in politicians is sincerity, a virtue seldom found in front-line politicians nowadays. Since the invention of the silver screen, the world has seen a rise in actors, not statesmen, hypocrites, not genuine political reformers.

Another irony in the motion of no confidence in the Governor was that those who had most strenuously opposed Patten's political reforms were those who voted against the motion to Humiliate him. They had long been a moderating influence, but Patten had not appreciated that. Had he listened more to them, the through train would not have broken down, and the progress of democracy would not have been slowed down for a year to reinstate the Basic Law.

Though I strongly disapproved of this showmanship motion of Cheung's, I had actually on several occasions written confidentially to the Prime Minister, John Major, to recall Patten, continue to pay him, give him a long holiday, and allow the Chief Secretary to act in his place, as she frequently had to because of his numerous visits abroad that had earned him the title "the off-shore Governor". I took this action because I was deeply concerned about the Sino-British rift created by Patten.
I did not run to the press to "stage a show", nor did I want to humiliate the Governor publicly though I think he thoroughly deserved it.

Without Patten and his cynical barbs at the Chinese leaders, I consider that Hong Kong could have looked forward to a peaceful transition, and without him the Martin Lee camp would have faded out. The peaceful transition was no thanks to either of them.

Thus ended the battle of the Court of Final Appeal. The venue was chosen and the court members eventually appointed. When the swearing-in ceremony took place after the reunification, the Judiciary was sworn in, and among them were many non-Chinese. The rule of law did not disappear as threatened by Martin Lee's camp, and a year later everything continues as before, except that the Hong Kong public are now more aware of its existence because it is based here instead of in London.

The long and bitter four-year struggle to pass the Bill on the Court of Final Appeal was totally unnecessary. It wasted a lot of time which, when added to all the time spent on other fruitless and unnecessary arguments that failed in their efforts to cripple the Basic Law, could have been spent on the economic and social issues that have surfaced since the change of sovereignty, issues that were left to fester in the political turmoil of the Patten era.