

# Foreign Lawyers & Arbitrators : Imperialism In The Law? (Part 1)

Tuesday, 26 June 2012 08:44AM

©The Edge (Used by permission)  
by Tommy Thomas

The 15 years between 1945 and 1960 witnessed the greatest number of countries gaining independence from their colonial rulers. All across the Third World, the winds of change resulted in nations securing political independence from European empires, some peacefully, others through armed struggle. The naive idealism of freedom fighters who became leaders of newly independent nations that they would be masters of their own destiny was exemplified by this statement of Kwame Nkrumah, independent Ghana's first Prime Minister:

"Seek ye first the political kingdom, and all things else shall be added unto you."

Presidents and Prime Ministers discovered very quickly upon taking office in the post-colonial world that political sovereignty and a place in the world community, including membership in the United Nations, did not mean sovereignty and freedom of action in other critical areas of national life like economic, financial and trade matters.

Students of empire understood this phenomenon. In 7000 years of recorded history, no corner of the earth has been spared by colonialism. Empire building is more the norm in history than the exception. The origins of civilization lay in exploitation of people. The Greek and Roman empires are outstanding examples of imperialism, and their lasting impact on Europe, and, to a lesser extent, the rest of the world, can still be felt today. In fact, an argument can be made that it was empires that brought the Westphalian international system into existence.

Ultimately, imperialism represents dominance and power relationships. The dominance of one state over another state may take many forms : the generally recognizable types include political, economic, military and cultural. Although each is different from the other, imperialism shares similarities with empire, colonialism and neo-colonialism. The critical questions to be asked always are : how is this dominance manifested? how is power exerted? Further, the patterns or phases of imperial control change over time. Thus, technological and intellectual imperialism manifest themselves to a larger degree with the advent of the borderless internet world.

I propose to consider whether in the areas of law and dispute resolution, imperialism exists. British judges over centuries have built up the common law system by their decisions on a case by case basis, which serve as precedent. They form a magnificent corpus of learning. One of the most enduring exports of the British empire (the greatest in world history) is the common law. As nations emerged from British rule, they seamlessly joined the Commonwealth. Without exception, every nation freely and voluntarily adopted the common law system. Nearly all these independent nations continued, for some time, to use the Privy Council in London as their highest court. Again, this was freely and voluntarily sought. Over time, the cry by nationalists that appealing to a court in a foreign land — however distinguished and independent their judges are — was incompatible with true independence meant that a majority of nations severed their links. Thus, Malaysia abolished appeals to the Privy Council in 1985.

The adoption of the common law system and the use of the Privy Council as the highest court by independent states do not constitute imperialism. The choices were always made by the peripheral countries, not imposed by the centre or the metropolitan power, the United Kingdom, in this case. It can be argued that the major beneficiary is the user country because its judges, lawyers and academia can take advantage of learning, expertise and experience from the United Kingdom. It is an illustration of transfer of technology. It also represents a sense of belonging, that is, being part of the universal brotherhood of the common law system, and a shared tradition.

But two developments in the past 20 years may amount to imperialism in the law. First, multi-national law firms originating out of United States, United Kingdom, Europe and Australia spreading their reach regionally and globally. Secondly, the international arbitration circuit. Their activities in recent decades cause concern to small jurisdictions : Malaysia, because of our economic and financial successes which generate legal work, has been particularly vulnerable to the overreaching effects of these trends.

## INTERNATIONAL LAW FIRMS

International law firms practice a type of economic imperialism by endeavouring to dominate the legal services in lucrative areas of the law in third countries because they claim that their clients are sophisticated multi-national corporations who require their services rather than domestic law firms practicing in their home jurisdiction in the traditional manner. Their clients will invariably include giant banks, financial institutions, hedge funds, leaders in telecommunication businesses, trading houses, and the like. Relying on institutions like the WTO, GATT, IMF and the World Bank, and on rules governing international trade and investment written by them in association with their clients, pressure is put on countries to open up their legal services to them. Singapore is perhaps the best example of such penetration, although in her case it seems to represent government policy.

For years, the Bar Council has objected to their physical presence in Malaysia, although it is an open secret that foreign law firms have for decades been undertaking "pure" Malaysian work without having a local presence. Thus, fees worth hundreds of millions have been paid to them, a drain on our balance of payments. In the guise of strengthening Malaysia's Islamic finance credentials, foreign law firms have persuaded the Malaysian Government, and its agencies like

Bank Negara, to permit their presence here.

The 2012 amendments to the Legal Profession Act, 1976 allowing foreign law firms to open offices in Malaysia for the very first time in our history must be viewed against the background of relentless pressure put on emerging nations to open up their financial and legal services.

The declared rationale is reciprocity. Thus, it is contended that because Malaysian lawyers are free to establish offices in England, their lawyers should also likewise be permitted to practice in Malaysia. This is only a theoretical right. In reality, no Malaysian law firm would be able to secure any legal work from clients in England; when the costs factor is taken into account, the artificiality of the whole concept becomes self-evident. For the large City of London firms, on the other hand (some of which have more than 1,000 lawyers) both client support and costs are in their favour if they establish offices in foreign countries.

Their conduct however indicates a lack of loyalty or commitment to or continuity with the host nation. They are always driven by profits, which to a large extent is determined by their head-office. Thus, when the global financial crisis which originated in Wall Street and the City of London in August 2008 resulted in down-sizing of companies, among the first casualties were the foreign branches of international law firms. They are birds of passage. As in all multi-national corporations, decisions are made by persons working in their headquarters for their personal interests. In these circumstances, to expect such decision-making elites to take into account factors that apply in foreign countries where they have opened offices is wholly unrealistic. That is not how business is conducted, and this is just a business.

One of the fundamental causes of the 2008 global financial crisis was the absence of any effective regulation in the United States and United Kingdom over bankers. Although they were dealing with trillions of dollars of other people's monies, they were left uncontrolled and unsupervised. That is a lesson that must always be kept in mind with regard to all professions, and certainly the legal profession. It is in the public interest that the legal profession across the world is regulated. It would be interesting to observe in the coming years how the foreign law firms that are given licenses to practice in Malaysia are regulated by our disciplinary authorities : the Disciplinary Board, the Bar Council and the Courts. A student of imperialism would consider highly significant the fact that foreign law firms enjoy a lion's share of the most lucrative legal work in every society and they only practice in nations where such work can be found. Hence, they will not rush to practice in North Korea! What is equally significant is also a complete abstinence from any support for pro bono or legal aid work. Would foreign lawyers support the rule of law, justice and civil liberties — duties which the Malaysian Bar takes very seriously? Would they participate in vigorous debate during the Bar's general meetings? Would they be comfortable being associated with the Bar's criticisms of policies of the Malaysian government?

- Foreign Lawyers & Arbitrators : Imperialism In The Law? (Part 2)