

**INTERNATIONAL COLLOQUIUM  
ON CIVIL ASSET TRACING AND RECOVERY  
ORGANISED BY: UNCITRAL  
VENUE: VIENNA INTERNATIONAL CENTRE  
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**VIEWS FOR CONSIDERATION BY THE COMMISSION  
BY  
DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER<sup>1</sup>**

I take this opportunity to thank the Secretary of the United Nations Commission on International Trade Law, Ms. Anna Joubin-Bret, for inviting me to attend on the basis of my relevant experience and knowledge on the subject matter. Knowledge and experience will have no utility if it is not shared for public and/or global benefit. On that basis, I would like to pen down some of my thoughts for the consideration of the distinguished and learned members attending this colloquium organized by the Commission (UNCITRAL) which has international significance.

**Preliminaries**

For a start, I must say that the civil recovery system will be most efficient if aggrieved persons, be it private parties or sovereign States, are given the

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<sup>1</sup> Judge of Court of Appeal Malaysia.

My heartfelt thanks to the editorial team, namely Datuk Joy Appukuttan, Mr. Arun Kasi, Mr. Dinesh Nandrajog, Advocates and Solicitors of the High Court of Malaysia and S.V. Parvin Rathinam and V. Saratha Devi, Advocates and Solicitors of High Court, Chennai. And special thanks to Prof. Omar Oseni and Prof. Ashgar Ali for their input.

opportunity to bring civil and quasi-criminal proceedings by mode of civil suit, not only in the country of origin where the tort or crimes were committed but also in other countries where the assets have been transferred to. This Commission must recognize the emergence of the ‘kleptocracy regime’ as the biggest threat to misappropriation of private as well as public assets by the corrupt individuals and institutions. This Commission must take steps to suggest innovative and robust methodology to arrest the breaches which is against humanity itself and recover the assets from the kleptocrats who may be members of the Executive, Legislature and the Judiciary. The Oxford English Dictionary defines Kleptocracy as follows:

*Kleptocracy is a government with corrupt leaders that use their power to exploit the people and natural resources of their own territory in order to extend their personal wealth and political powers. Typically, this system involves embezzlement of funds at the expense of the wider population.*

My equation of a kleptocracy regime is as follows:

Political Rowdyism + Judicial Passivism = Kleptocracy.

Rowdyism here, I mean persons deliberately breaching the rule of law to enrich themselves.<sup>2</sup>

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<sup>2</sup> See articles ‘Judiciary As The Principal Guardians of the Rule of Law’ – [https://www.malaysianbar.org.my/index.php?option=com\\_docman &task=doc\\_details&gid =7114 &Itemid=332](https://www.malaysianbar.org.my/index.php?option=com_docman &task=doc_details&gid =7114 &Itemid=332); CLJ (Malaysia) [2018] 1 LNS(A) 1xxxiv]; ‘Another Win For Judicial Dynamism – Peguam Negara Malaysia v. Chin Chee Kow’ [2019] 1 LNS(A) cxxxvi].

The Commission must recognize that the Rule of Law and Convention obligations will not be recognized easily in kleptocracy regimes. In fact, it is well known that kleptocracy regimes will have laws in place to ensure that exposing corruption or corrupt values of the regimes are not permissible. I will explain further and provide some solution for consideration.

## **Introduction**

[1] The Civil Asset Tracing and Recovery procedure is not an uncommon feature in the commonwealth jurisdictions. It originated through the development of the common law. During the British Rule, it was codified and is found in Civil Procedure, Criminal Procedure, Specific Relief Act, etc. in countries like India and Malaysia. After independence, most countries have developed the laws to include anti-corruption laws, detention laws and anti-money laundering laws to arrest this menace and to support convention obligations. However, when a country is ruled by a kleptocracy regime, these laws are arbitrarily exercised. In the case of proponents against such regime, such laws are enforced with great rigour while with laxity on the proponents for the regime. Proper enforcement of the laws against influential persons and politicians within such a regime is almost an impossibility. Thus, it is not a case where laws are not in place, rather it is the lack of will to get such laws enforced by the relevant enforcement agencies. This is a point that this Commission must take cognizance of. The Commission must also take note that in a kleptocracy regime, the complaint of misappropriation of property may be treated as a civil case by investigative agencies. In addition, the complainant may be harassed by arbitrary arrest as well as unlawful detention. Further, there are cases where the government machinery is used

in full force to expunge evidence of wrongdoings which in any civilized nation will be a matter for investigation.

For a criminal actions to succeed, information and evidence is essential and there was in place some rewards for informers even during the British Rule in former colonies. Without such information, criminal or even civil actions may not succeed. This Commission must take into consideration a wide provision for genuine informers be it the public or government officials, to be entitled for generous reward from the proceeds of recovery and also provisions for protection for informers. I find that generous reward for informers on success basis is not in place in many jurisdictions. To put it mildly, paying high costs to solicitors or prosecutorial agencies to prosecute itself is not the answer without information and evidence. I will suggest a sort of renaissance in rewards to informers must be modelled that will encourage the public as well as government officials to provide the information readily. The State laws must guarantee protection to informers as well as reward them handsomely. This Commission must seriously take cognizance that in kleptocracy regime, informers are arrested and detained with no subsequent charge against them demonstrating blatant abuse of power. In addition, the State agencies in these regimes make use of the enforcement agencies to destroy the evidence in many ways. The Commission must take cognizance that informers are the most important nexus to successful recovery proceedings as well as to arrest corruption *in limine*.

### **Tracing and Recovery**

[2] A cause of action for tracing and recovery will arise when property is wrongfully misappropriated. The action can be commenced by civil or criminal proceedings. In criminal proceedings, the State is endowed with laws to arrest, investigate, confiscate and secure the necessary evidence of witnesses. In civil cases, this advantage is not readily available. In a very complicated case a civil action may not succeed because of strict rules of evidence as well as formalities of the court in getting the required advantage on evidence. It will be an advantage to a plaintiff in a civil suit first to lodge a criminal complaint and if it proceeds to a charge and trial, the prosecution evidence may be useful for the success of a civil suit. Thus, the importance and need for criminal prosecution must not be ruled out by the Commission for a successful civil suit whether the suit is initiated by a private person or government or its agencies. The difficulties in initiating the criminal complaint is that it may not be effective in a country where integrity and/or competency issues in enforcement agencies arise. However, to overcome these issues the Commission must formulate a robust methodology. My suggestion is that:

- (a) International Convention such as UNCAC<sup>3</sup> requires State to facilitate prosecution as well as recovery of assets where property is wrongfully misappropriated. This provision can equally apply to both criminal as well as civil proceedings, giving legitimacy for aggrieved persons to commence civil as well as quasi criminal action in one suit. Quasi criminal actions in civil suits are quite common where committal proceedings are sought.

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<sup>3</sup> United Nations Convention against Corruption.

- (b) In many commonwealth jurisdictions, criminal prosecutions by the aggrieved person is possible in a limited sense and such a provision was there during the British Rule itself. The procedure in such cases has to be done by the aggrieved person as though he is pursuing a civil case and usually State investigative agencies will not assist. Thus, it is not effective unless by convention or otherwise, these provisions are expanded to enable aggrieved persons to bring civil and criminal proceedings in one suit and in that suit the State must also made a party if upon a police complaint, the State has not acted against the wrongdoers within a reasonable time frame. By making the State a party, the court can give directions as to investigative procedures to secure evidence, etc. This will facilitate a recovery of the civil assets effectively and at the same time it may also lead to criminal convictions. Such a procedure itself will encourage the party who has misappropriated the property to settle the matter by consent terms. Such a step will also be effective against kleptocracy regimes. To put it mildly, naming and shaming ‘kleptocrats’ will strengthen the rule of law.

### **Kleptocracy and Civil Recovery**

The greatest threat faced by the citizens of the State where a kleptocracy regime reigns is that the Executive, Legislature and the Judiciary are utilized to plunder the national assets in many ways. These are some of my observations:

- (a) The executive and legislature formulate laws or utilize existing laws to conceal corrupt practices in breach of civilized concepts related to accountability, transparency and good governance, by providing sanctions against public who attempt to expose wrongdoings. This comes in various forms and labels and some of them are as follows: (a) Security Acts; (b) Official Secrets Act; (c) Sedition Act; (d) Peaceful Assembly Act; (e) Criminal Defamation Act, etc. These Acts are also used to arrest persons who complain against kleptocrats or their nominees and courts generally are slow in protecting the victims.
- (b) All these arbitrary and oppressive laws although unconstitutional are usually not struck down by the judiciary thereby giving legitimacy to the wrongful Acts as well as promoting corruption and corrupt practices. These laws technically will also be in breach of Convention obligations.<sup>4</sup>
- (c) In addition, kleptocracy governments have created various modus to siphon public funds by an appearance of lawful contracts to their nominees and/or persons who are perceived to have secured the contracts by unfair advantage. I can provide some example:
- (i) Giving long term contracts which are disadvantageous to the State exchequer and/or public revenue and also making provisions that if the State terminates the

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<sup>4</sup> Eg. United Nations Convention against Corruption (UNCAC); UN Convention against Transnational Organized Crime; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

contract it will give full compensation for the loss of profit for the full term itself or provisions of that nature arising from the termination.

- (ii) Giving nominees contracts which the State has no intention of honouring and subsequently terminating the contract and asking the nominee to sue the State in court. Upon the suit being filed, the State admits to the court that it is in breach of the contract and consent to liability for the claim and consent to an order of court for assessment of damages, thereby legitimately obtaining an order of court to pay excessive compensation for termination of contract where no work was done, etc. and paying the nominees the said sum thereby depleting the State coffers.

In my view, the above are corrupt practices and those who are receiving the benefits are participants of crime and the loot by such acts may be caught by UNCAC guidelines as well as money laundering laws of the State itself. Monies which had been received in consequence of breach to rule of law can and with proper methodology be recovered through civil and/or criminal proceedings.

To combat this kleptocracy regime, my proposal is to have convention provision:

- (a) To have a neutral complaint offices of the UN in every State to receive complaints of kleptocracy conduct;



- (b) To establish private investigation agencies authorized by the UN to investigate such complaints with the assistance of the State machinery;
- (c) To provide for aggrieved person including the public to initiate civil and/or criminal proceedings against wrongdoers.

The whole idea of this part of the proposal is actually to bring immediate awareness to the relevant international organisations as well as domestic population of the wrongdoings so that such corrupt practices as well as plundering of national wealth can be arrested *in limine*. One argument against such an approach is that it is not proper for the UN to interfere in the affairs of the State. My answer to it is that the prevention of the crime of plundering of national asset is the concern and/or responsibility of the UN, based on the fact that many conventions have already been signed by the States.

The recent 1MDB episode is a classic case where the information as to wrongdoing of a kleptocracy regime came from the Sarawak Report, an independent news portal operating from outside the country<sup>5</sup>. The kleptocracy regime refused to acknowledge it despite countries like the United States of America had already started its investigation procedure, based on *inter alia* convention and had seized the assets. The kleptocracy regime then had refused to admit the wrongdoings and went to the extent of saying that 1MDB had no interest in the assets seized and to rub salt in the

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<sup>5</sup> See Sarawak Report's articles at <http://www.sarawakreport.org/2015/02/heist-of-the-century-how-jho-low-used-petrosaudi-as-a-front-to-siphon-billions-out-of-1mdb-world-exclusive/> and <http://www.sarawakreport.org/2015/07/sensational-findings-prime-minister-najib-razaks-personal-accounts-linked-to-1mdb-money-trail-malaysia-exclusive/>

wound it went on to publicly declare that they are not also their assets. The kleptocracy regime conduct was supported by agencies of the government. The subsequent government after an election victory is now taking action against the previous kleptocracy regime and recovering the assets from various persons under various Acts including the Anti-Money Laundering Act<sup>6</sup>. It must also be noted that parties who have received the 1MDB funds even as donations or for public purposes are asked to repay and many have done so<sup>7</sup>. Thus, it goes to confirm that recovery will be effective by civil and criminal process if done jointly.

Thus, it is important for those who are involved in the civil recovery of assets procedure to recognize the threat of the kleptocracy regime in plundering the national assets by various dubious means and recovering of those assets may have to be dealt with by both civil and criminal process for its effectiveness. To put it mildly, the threat of private persons or institutions misappropriating property and the civil suit for recovery is one related to claims which may not be as big as recovery on money plundered by kleptocracy regimes. In terms of the impact on the global economy, the threat of the kleptocracy regime is much more serious than the individual case of corruption, money laundering, breach of trust, misappropriation of property, etc.

To put it again mildly, a kleptocracy regime can destroy a country which is seen as oasis in economic term for centuries to a desert within a few years, making its citizen poor and oppressed by large national debt. There are many

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<sup>6</sup> See news article at <https://www.channelnewsasia.com/news/asia/1mdb-scandal-a-timeline-10254406>

<sup>7</sup> See news article at <https://www.reuters.com/article/us-malaysia-politics-financeminister/malaysia-to-seek-return-of-1mdb-money-from-banks-political-parties-idUSKBN1JA1UX>

countries now which are signatories to various conventions but the people are still suffering from kleptocracy regimes or its effect.

In conclusion, I would like to reiterate the fact that the nature of corruption and misappropriation of public asset and fund is a class of its own which this Commission must take cognizance of. Therefore, legislative responses through a convention should consider some of the 'clean' permutations identified in this paper where public funds are diverted through 'legal' contracts to acquaintances.

If this colloquium finds my views and contribution have merits for formulating an effective Civil Asset, Tracing and Recovery System, I will be most pleased to assist in formulating the required robust methodology to arrest and/or reduce the misappropriation as well as to recover it efficiently. My editorial team who are familiar with civil and criminal assets recovery system have informed me that they will assist. [See [www.janablegal.com](http://www.janablegal.com)].

Thank you.

**Datuk Dr. Haji Hamid Sultan bin Abu Backer**  
**Judge, Court of Appeal, Malaysia.**