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## CASE HIGHLIGHT

*Defamation*

### CRITIQUE – GOVERNMENT’S RIGHT TO SUE FOR DEFAMATION

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“Government of the people, by the people, for the people, shall not perish from the earth”. These renowned words of President Abraham Lincoln during the American Civil War are the hallmark of modern democracy. However, more often than not, many governments after being voted into power do not reach the expectations of their citizens in respect of their governance resulting in their actions being criticized which may impact the government’s reputation.

In the Federal Court case of Chong Chieng Jen v Government of State of Sarawak & Anor [2019] 3 MLJ 300, the apex court ruled that a government can sue individuals on the grounds of defamation for tarnishing its reputation. In brief, the Respondents sued the Appellant for libel concerning the alleged mismanagement of Sarawak’s financial affairs whereby the statements were published in local news outlets. The following questions were posed for the determination of the Federal Court:

- (a) *Whether the Government Proceedings Act (GPA) 1956, particularly Section 3, excludes the principle in Derbyshire County Council v Times Newspapers Ltd and Others [1993] AC 534 to be extended to the Sarawak Government?*
- (b) *Whether Section 3(1)(c) of the Civil Law Act (CLA) 1956 excludes the principle in Derbyshire to be extended to the Sarawak Government?*

In the Derbyshire’s case, the House of Lords held that it is vital for a democratically elected government to be open to uninhibited public criticism. Any threat of civil actions for defamation would only fetter the freedom to express such criticism and would be contrary to public interest. In arriving to this finding, the Lordships referred to the American jurisprudence on the matter laid down in City of Chicago v Tribune Co [1923] 139 NE 86 and New York Times Co v Sullivan [1964] 376 US 254 which uphold the freedom of the people to criticize a governing authority.

Despite the decision in *Derbyshire*, the Federal Court viewed:-

- (a) It is inappropriate to import common law when our local legislation has provided the applicable principles of law (*Public Services Commission Malaysia & Anor v Vickneswary A/P RM Santhivelu* [2008] 6 MLJ 1).
  - The local legislation governing proceedings by and against the government would be the GPA 1956. Its Section 3 expresses that subject to any written law, the Government may bring a civil action against any person if such claim had arisen and provides the ground for a civil action.
- (b) Under Section 3 of the Interpretation Acts 1948 and 1967, the definition of “written law” does not include the common law. The government’s statutory right to sue then fall under Section 3 of the GPA 1956 and this includes an action for defamation whereby Section 2(2) encompasses a wide definition of “civil proceeding”.
- (c) In common law and Section 3(1) of the CLA 1967, if there is any written law in force in Malaysia, the Court need not import the common law and *should only do so if the circumstances of the case permit it* (*Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389).
- (d) Freedom of speech in Malaysia is not absolute or unfettered. It is subject to limitations imposed by written law under Article 10(2)(a) of the Federal Constitution. This freedom is not a license to defame individuals and if this right is absolute, it would jeopardize the principle that every person’s reputation must be protected (*Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77).

Based on these, the Federal Court, through Ahmad Maarop PCA held that the local legislation governing legal actions by the government is the GPA 1956 and it is not appropriate to import the *Derbyshire*’s principles. Under its Section 3(1), anyone who criticizes the government may be subject to an action for defamation (as it is an allegation if made against another individual, would afford ground for that person to sue). There is nothing under the said provision which bars the government from doing so and although the government does not have “feelings” that could be injured, its reputation can be damaged through statements which have a tendency to lower its reputation or expose it to hatred.

### Observations

David Wong JCA’s dissenting judgment in this case in the Court of Appeal pointed out that Section 3 of the GPA is a general legislation providing the government the locus standi to sue but not the cause of action to sue for defamation as Section 3(1) of the CLA 1956 does not impede the Malaysian courts to import common law (the *Derbyshire*’s principle) if it is fit to do so. In addition, under Article 10(2), Parliament’s restrictions to the right of free speech must be made clear in the laws enacted. Nevertheless, there is no specific provision in any Act of Parliament allowing the government to maintain

an action for defamation. Such clear absence shall mean that the government would have no cause of action in defamation.

Despite the majority's decision of the Federal Court, there is still much weight in the dissenting judgment of David Wong JCA at the Court of Appeal. The composition of the Malaysian Government, be it Federal or State, is made up of individuals that have the majority in Parliament or the State Legislative Assembly, voted in by the Malaysian people in the electoral process. It would be detrimental to bar them from criticizing the government made up of their elected representatives if they are not governing effectively and efficiently. This right to be critical of the government's conduct or decision, has to be part of an individual's right of free speech. Limiting or absolutely barring this right must not be countenanced as the government of the day must always be accountable and answerable to the people. Feedback from the public (be it positive or negative and strong or subtle) should always be favorably embraced by the government to enable them to self-analyze their actions and to conduct a constructive evaluation with the objective to provide the people with a more accountable and responsible governance.

As an alternative, the Parliament could yet be motivated to amend the provisions of the GPA 1956 to specifically exclude the tort of defamation as a cause of action open to the government. It is noteworthy that the penal aspects of defamation preserved by the Penal Code is always available as is other penal legislations. Only time will decide whether our representatives have the political will and courage to effect this change which would, in my view bring a positive impact to the legal framework of Malaysian libel laws. As it stands, allowing the government to sue for defamation on criticisms made is a dangerous alley to be left opened. Whilst it is accepted that the government's reputation needs to be protected to ensure it does not affect the governance of the nation particularly where foreign relations are involved, it should not be at the expense of the citizens who are only voicing out their views with the hope that their voice is heard by the government elected by them to effect constructive changes.

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