

1 AUGUST 2022**Defamation: Apex Court Rules Political Parties Cannot Sue****Contact Persons:**

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There is a plethora of cases which analyses the issues surrounding the law on defamation. Be that as it may, one territory of that law remained uncharted – whether a political party can maintain a suit for defamation. The Federal Court in *Lim Lip Eng v Ong Ka Chuan (as a public officer of a society registered as Malaysian Chinese Association)* [2022] MLJU 762 observed that this issue “*might not be a novel issue in other jurisdictions, but it is still quite unsettled in ours*”.

Background

Lim Lip Eng (the Appellant) is the Member of Parliament for Kepong. Ong Ka Chuan (the Respondent) was the Secretary General Malaysia Chinese Association (MCA), a political party registered under the Societies Act 1966. MCA is a political party and a component party to the then ruling Federal Government at the material time. The Respondent filed an action against the Appellant for an alleged defamatory statement made by the Appellant at a press conference held at Parliament on 15 March 2017. In essence, the statement alleged that MCA, despite receiving funds from public donations and the government for the purpose of assisting Chinese schools, kept the funds for itself.

The Appellant applied to strike out the claim at the High Court which was then dismissed. The High Court held that the Appellant failed to show the Respondent’s claim was obviously unsustainable. On appeal, the Court of Appeal also dismissed the appeal. Based on the *ex tempore* grounds recorded in the notes of proceedings, the Court of Appeal observed that the question of whether a political party can sue in defamation is a substantial question of law yet to be decided in Malaysia and ordered for the matter to proceed to trial. The Appellant appealed to the Federal Court on the sole question of law – whether a political party can maintain a suit for defamation having regard to the decisions in *Goldsmith &*

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Another v Bhoyrul & Others [1998] Q.B. 459 and *Rajagopal v Jayalalitha* [2006] 2 MLJ 689.

Analysis Of Apex Court's Decision

The judgment of the Federal Court was pronounced by a 7 member panel reaching a unanimous conclusion that a political party cannot maintain a suit for defamation. Central to the discussion of the Federal Court was its own decision in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2018] 8 AMR 317 which rejected the principle in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011.

Briefly, in *Chong Chieng Jen*, the Government of Sarawak filed a claim for defamation against Chong Chieng Jen, who was a Sarawak State Assemblyman and a Member of Parliament over a statement made by him. Chong had alleged the mismanagement of the state's financial affairs had resulted in the "disappearance" of RM11 billion in public funds. The issue before the Federal Court then was whether a state government or a department or organ of that department had the right to sue for defamation. The Federal Court declined to apply the common law principle expounded in *Derbyshire* and held that the right of government to sue in civil proceedings under Section 3 of the Government Proceedings Act 1956 (Act) included defamation.

The Federal Court further held that the Act did not preclude the government from taking civil action for defamation. Section 2(2) of the Act which defined 'Government' to include the federal government and the state governments, provided a wide definition of '*civil proceedings*' to include any proceeding whatsoever of a civil nature before a court.

The Federal Court in *Lim Lip Eng* took cognizance of its earlier decision in *Chong Chieng Jen* but proceeded to distinguish the latter on the following basis:

- a) Unlike a society, the Government can sue and be sued in its own name. It is a legal entity by itself. The same cannot be said for a political party.

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- b) A society is not, on its own, a legal entity and cannot even sue or be sued in its own name. A society is dependent on its members to sue. This is clearly stated under Section 9(c) of Societies Act 1966.
- c) Even though a political party may have the legal capacity through its members to sue or bring an action, it does not have a standing to bring an action for defamation.
- d) Since a political party has no existence separate from its members, it cannot assert or claim any reputation.
- e) A political party has no requisite reputation for and over which it may go to Court to sue to protect.

In holding the above, the Federal Court observed:

“...A political party relies on the public to get their votes to be in power. The political party puts itself forward for office or to govern and be responsible for public administration. It is not right nor is it in the public interest to put the public in fear of a defamation suit and prevent them from expressing their views or making criticisms or voicing out opinion. To allow this to happen definitely goes against the true value of democracy.”

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Chong Chieng Jen Decision Criticised

2 of the 7 Federal Court judges in *Lim Lip Eng* questioned the correctness of the Federal Court's earlier decision in *Chong Chieng Jen*. They analysed the judgment in *Chong Chieng Jen* where it was observed to be in stark contrast with all other jurisdictions as it permits elected government authority to commence actions for damages for defamation against its citizens. According to these 2 judges, the decision in *Chong Chieng Jen* suffers from a legal infirmity as it failed to appreciate the crucial distinction between a cause of action and the standing to sue at the outset. They also commented that whilst Section 3 of the Act enables the government to initiate a civil action by way of court proceedings, this provision merely explains how a government can initiate proceedings – such right is not an absolute one. In other words, although the government has

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a statutory right to sue, this does not mean that the government has a right to maintain an action in defamation. In holding the above, they were of the opinion that it is extremely doubtful if any government can ever have a 'governing' reputation. A political party may, in the end run a government if elected by the people. Thus, it would be contrary to public interest if that political party be allowed to maintain an action in defamation against those very voters who elected them to office.

Conclusion

Cognizant that freedom of speech and expression remains sacrosanct and should always be protected, the apex court ruled that this shall not extend to political parties for reasons discussed above. The Federal Court decision effectively rules that in a democratic society like Malaysia, political parties must be open to public criticisms. The decision in *Lim Lip Eng* may now invite questions on the applicability of *Chong Chien Jen*. Hence, whilst, *Lim Lip Eng* sealed the questions surrounding defamation actions initiated by political parties, it may have reopened the issues in *Chong Chien Jen*.

Authored by Amiratu Al Amirat, an associate with the firm's Dispute Resolution practice.

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