Malaysia v. Malaysiakini and Steven Gan

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHOR:

Joan Barata is a Fellow at the Cyber Policy Center of Stanford University. He works on freedom of expression, media regulation and intermediary liability issues. He teaches at various universities in different parts of the world and has published many articles and books on these subjects, both in academic and popular press. His work has taken him to most regions of the world, and he is regularly involved in projects with international organizations such as UNESCO, the Council of Europe, the Organization of American States, and the Organization for Security and Cooperation in Europe, where he was the principal advisor to the Representative on Media Freedom. Mr. Barata also has experience as a regulator, as he held the position of Secretary General of the Audiovisual Council of Catalonia in Spain and was member of the Permanent Secretariat of the Mediterranean Network of Regulatory Authorities. The views expressed here regarding the grading of the trial are his own. Mr. Barata thanks the TrialWatch initiative for helping to draft the report, which facilitated his legal conclusions and grading of the trial.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice** (CFJ) advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable – including journalists, protesters, women, LGBTQ+ persons and minorities – and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY

Joan Barata, who is a member of the TrialWatch Experts Panel, assigned this trial a grade of D on the following grounds:

a) The court's decision violated the right to freedom of expression due to lack of acknowledgement of the importance of criticism of State institutions and their performance.
b) The court's decision created a societal "chilling effect."
c) The court placed an excessive burden of proof on Malaysiakini regarding the website's editorial responsibility for the content under analysis.
d) The court did not take into account applicable international and regional standards establishing intermediary liability exemptions for third-party content.

In accordance with the grading methodology, the above violations of international standards were the basis of the guilty verdict against Malaysiakini and resulted in significant harm to both Malaysiakini and co-accused Steven Gan.

From July 2020 to February 2021, the Clooney Foundation for Justice monitored contempt of court proceedings against the news outlet Malaysiakini and its editor-in-chief Steven Gan. The defendants were accused of contempt of court on the basis of unmoderated subscriber comments on a Malaysiakini article about an order by the Malaysian Federal Court's Chief Justice to reopen courts following their closure because of the COVID-19 pandemic. According to the prosecution, the comments, which criticized various courts and judges for corruption and incompetence, were insulting to the judiciary. The trial, which consisted of one hearing on the merits, commenced before the Federal Court on July 13, 2020. On February 19, 2021, Malaysiakini was convicted of contempt and fined and Gan was acquitted. The prosecution of both accused and Malaysiakini's conviction contravened, among other things, the right to freedom of expression, and best practices on content moderation. More broadly, the case sets a disturbing precedent for press freedom in Malaysia, in line with recent crackdowns on the media. The Federal Court, which is scheduled to review the verdict on October 12, should set it aside.

The report draws on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which reflect international human rights standards and both of which guarantee the right to a fair trial and the right to freedom of expression.

First, the proceedings undermined the presumption of innocence. Malaysiakini did not dispute that the impugned comments were insulting. Instead, the central issue in the case was whether Malaysiakini had "published" the comments, raising the question of whether

Malaysiakini had actual knowledge and intent. Malaysiakini argued that it had not published the comments because it did not make the comments, approve of the comments, or even know about the comments.

In nonetheless finding Malaysiakini guilty of contempt, the court, acknowledging that different jurisdictions have taken different approaches to the question of intermediary liability for third-party comments, relied heavily on the presumption of publication established by Section 114A(1) of the Malaysian Evidence Act. Under Section 114(A), "A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved." Given that the question of publication was the crux of the case and that the consequences of conviction were of a criminal nature, the court's application of the presumption imposed on Malaysiakini an excessive burden to prove its innocence and on the prosecution an inadequate burden to prove Malaysiakini's guilt. This undermined the presumption of innocence.

Apart from fair trial rights, the proceedings also violated the right to freedom of expression. Under international standards, speech regarding matters of public concern warrants heightened protection. The United Nations Human Rights Committee, charged with interpreting the ICCPR, has delineated requirements that States must fulfil to restrict protected speech: restrictions must be provided by law – clear enough to ensure that officials are not afforded unbounded discretion and that individuals are put on notice of what conduct is unlawful; must have a legitimate objective – the protection of public order, national security, public health, public morals, or the rights and reputations of others; and must be necessary and proportional.

In the present case, the article at issue and the subsequent comments directly pertained to matters of public interest central to a democratic society: the functioning of the judiciary. Consequently, in order to impose a restriction on such speech – i.e., Malaysiakini's prosecution – the State had to comply with the requirements outlined above. As a threshold matter, the contempt of court charge contravenes the requirement that restrictions on freedom of expression be provided by law. While contempt of court is envisioned in Malaysia's Constitution, the offense has not been defined, and the authorities are thus afforded near unbounded discretion in initiating such cases.

This latitude was evidenced by the fact that the comments at issue in the Malaysiakini case varied widely. One comment, for example, was relatively specific in its criticism and did not use profane language: "The High Courts are already acquitting criminals without any trial. The country has gone to the dogs." Another comment contained mostly questions and then a recommendation for how to proceed: "Kangaroo courts fully operational? Musa Aman, 43 charges, fully acquitted. Where is law and order in this country? Law of the Jungle? Better to defund the judiciary!" Still other comments used

more aggressive language and named a specific justice: “Hey Chief Justice Tengku Maimun Tuan Mat - How many MILLIONS have been swept under the rug - 46 corruption cases - Deleted non-stop !!! Not ashamed and not afraid of God? How About Hell? Not afraid about it either? Again - getting paid a little money for a cover up - (they will be) freed too. WHAT IS THIS JUSTICE ??? The People's Deceiver? Together sweeping under the rug the people's money ??” Another comment simply stated: “The Judiciary in Bolihland [Malaysia] is a laughing stock.” That all of these comments were wedged into the Malaysiakini prosecution reflects both the broadness of and confusion surrounding the offense of contempt of court, demonstrating how its imprecision gives Malaysia free reign to curtail speech on a matter of vital public concern — the functioning of the judiciary.

Second, although the Malaysian authorities may have possessed a legitimate objective in pursuing the case (potentially seeking to protect public order and/or confidence in the judiciary), where a State invokes an ostensibly legitimate ground for restriction of freedom of expression, “it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.” In the present case, the State did not articulate the “precise nature of the threat.” While the verdict, for example, contains vague and ominous references to the “chaos” and “havoc” potentially engendered by the subscribers’ comments, it does not identify any specific risks or harm.

Third, with respect to necessity and proportionality requirements, prosecution in this case was far from necessary. Malaysiakini removed the impugned comments within three days of their posting, immediately upon notification by the police. It is unclear why subsequent legal action was required after the posts had already been taken down. More broadly, prosecution and potential imprisonment are not appropriate responses to speech offenses except in the gravest circumstances: child pornography, incitement to terrorism, direct and public incitement to commit genocide, and advocacy for national, racial, or religious hatred. It is clear that the comments at issue did not meet this threshold.

Lastly, the case against Malaysiakini violated international standards and best practices on intermediary liability for third-party comments, as articulated by UN bodies and as supplemented by the Manila Principles on Intermediary Liability. Under these standards, intermediaries should never be required to preemptively monitor and remove third party-content: given the significant chilling effect, removal should only be required pursuant to a judicial order subsequent to the posting of content. Further, States should not impose fines and/or imprisonment on intermediaries for third-party content, particularly where intermediaries have not been involved in modifying this content. As such, Malaysiakini’s prosecution and the convicting verdict, which states that Malaysiakini should have taken greater care in monitoring and removing comments and by not doing so subjected itself to prosecution and penalties of a criminal nature, directly contravenes international standards in this emerging area of law. It further sets a dangerous precedent, compelling news outlets to self-censor in fear of harsh penalties.

Malaysiakini's prosecution thus represents a shot across the bow to independent media outlets in Malaysia. Taking into account the international standards discussed above as well as the potential chilling effect on freedom of expression, the Federal Court, which is scheduled to review the verdict on October 12, should set it aside.

A. POLITICAL AND LEGAL CONTEXT

Malaysia's Political System

Malaysia is a federal parliamentary democracy with a constitutional monarchy and three branches of government.[1] A Prime Minister heads parliament, which is elected in regular multiparty elections.[2] The King acts as head of state in a ceremonial role and serves a five-year term, the position rotating among the sultans of the nine Malaysian states.[3] Under the Malaysian Constitution, the Prime Minister is appointed by the King from the lower house of parliament.[4]

In the 2018 elections, the ruling Barisan Nasional coalition lost to the Pakatan Harapan coalition, "resulting in the first transfer of power between coalitions since independence in 1957."[5] In February 2020, the Pakatan Harapan coalition, "cobbled together out of disparate political forces – including Malay nationalists, Chinese reformists and liberal Islamists," collapsed "under the weight of internal rivalries and ideological contradictions," with Malaysian Prime Minister Mahathir Mohamad resigning from his position.[6]

Days later, the King replaced Mahathir with Muhyiddin Yassin,[7] who founded the Malaysian United Indigenous Party and partnered with the United Malays National Organization (UMNO), a nationalist party that had dominated Malaysian politics for decades, to form the new Perikatan Nasional government.[8]

With the change in political power, reformists expressed concerns about UMNO's nationalist tenets and the prospect that Malaysia would gradually move towards a Malay-centric state, in contrast to the multiethnic coalition that prevailed in the 2018 elections.[9] In August 2021, Yassin lost his majority in parliament amid conflicts with UMNO and

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[1] See Hauser Global Law School Program, "An Overview of Malaysian Legal System and Research", February 2008. Available at https://www.nyulawglobal.org/globalex/Malaysia.html#_4._Judicial_Authority.
[2] U.S. State Department, "2019 Country Report on Human Rights Practices: Malaysia", 2020, pg. 1. Available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/malaysia/.
[3] Id.
[4] Constitution of Malaysia, Article 43(2).
[5] U.S. State Department, "2019 Country Report on Human Rights Practices: Malaysia", 2020, pg. 1.
[6] New York Times, "Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn", February 29, 2020. Available at https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html.
[7] Id.
[8] Id.; Global Asia, "Race and Religion in Command: Malaysia Returns to Identity Politics", March 2020. Available at https://www.globalasia.org/v15no1/cover/race-and-religion-in-command-malaysia-returns-to-identity-politics_james-chin. Both Mahathir and Muhyiddin were elders in the UMNO but stepped down when UMNO leader, and then Prime Minister, Najib Razak was accused of siphoning billions of dollars from 1Malaysia Development Berhad (1MDB), a state investment fund. Mahathir then denounced Muhyiddin for his continued ties with the UMNO in light of the corruption revelations.
[9] Id.

resigned.[10] UMNO leader Ismail Sabri replaced him as Prime Minister.[11] In September 2021, Sabri signed a cooperation agreement with an opposition alliance to "shore up his support and end months of political instability."[12]

Legal Framework

Malaysia has a common law legal system. The judicial structure includes Magistrates Courts, Sessions Courts, two High Courts with original and appellate jurisdiction, a Court of Appeal, and the Federal Court.[13] The Federal Court is the highest judicial authority.[14] It reviews decisions referred from the Court of Appeal and has original jurisdiction in constitutional matters and disputes between states and between states and the federal government.[15] There are also Sharia courts and native courts that apply religious and customary law.[16]

Article 10 of Malaysia's Constitution guarantees freedom of speech and expression.[17] According to the same provision, however, parliament may impose restrictions on the right to freedom of speech and expression on various enumerated grounds, including "as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence."[18] Article 126 of Malaysia's Constitution provides: "The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

The Constitution does not define contempt of court, and the Malaysian parliament has not passed a contempt of court law.[19] According to an academic journal article on the subject: "It may also be surprising to note that after over 180 years of reported cases on contempt of court in Malaysia, there still does not appear to be a consistent definition of this concept

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[10] Reuters, "Malaysia PM to Sign Cooperation Agreement with Opposition", September 13, 2021. Available at https://www.aljazeera.com/news/2021/9/13/malaysia-pm-to-sign-cooperation-agreement-with-opposition.
[11] Id.
[12] Id.
[13] See Council of ASEAN Chief Justices, "Malaysia." Available at https://cacj-ajp.org/malaysia/; Hauser Global Law School Program, "An Overview of Malaysian Legal System and Research", February 2008.
[14] Hauser Global Law School Program, "An Overview of Malaysian Legal System and Research", February 2008.
[15] Id.
[16] New Sarwak Tribune, "Overview of Native Courts", March 20, 2020. Available at https://www.newsarawaktribune.com.my/overview-of-native-courts/.
[17] Constitution of Malaysia, Article 10.
[18] Id.
[19] See Malayan Law Journal, "Contempt of Court: Freedom of Expression and the Rights of the Accused", September 2002. Available at https://jeraldgomez.com/wp-content/uploads/2018/01/MLJ-Contempt-of-Court-Freedom-of-Expression-and-the-Rights-of-the-Accused.pdf; Advances in Natural and Applied Sciences, "The Law of Contempt of Court in Malaysia: Considering Reforms", 2012, pg. 1454. Available at http://www.aensiweb.com/old/anas/2012/1451-1464.pdf.

quoted by judges, despite this concept being focused on in over 120 reported cases."[20] The absence of a definition of contempt leaves "wide discretion for the judge in exercising contempt jurisdiction."[21]

Malaysia distinguishes between civil and criminal contempt, though it is not clear which varieties of contempt fall under which category. All contempt actions, whether civil or criminal, foresee imprisonment as a possible punishment and entail a beyond a reasonable doubt standard.[22]

While various organizations and institutions such as the Malaysian Bar Council have recommended that contempt of court be codified via statute,[23] citing the "vague[ness]" of the concept and the need to ensure "some degree of certainty in this area of law," there appears to be no progress in this regard.

In addition to the proscription of contempt of court in the Constitution, various criminal laws restrict the right to freedom of expression.[24] The colonial era 1948 Sedition Act criminalizes, among other things, "any act which has ... a seditious tendency;" the "utter[ing of] any seditious words;" and the printing, publishing, sale or offer to sell, distribution, reproduction, or import of any "seditious publication."[25] A first time offender can be punished with up to 5,000 ringgit (about 1,200 USD) in fines and/or up to three years imprisonment.[26] A subsequent offence carries a potential penalty of up to five years in prison.[27] As documented by NGO Article 19, the government has frequently used the Sedition Act "to suppress dissent and silence opponents."[28]

Like the Sedition Act, the 1998 Communications and Multimedia Act (CMA) has been widely criticized by human rights organizations.[29] Particularly problematic is Section 233,

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[20] Advances in Natural and Applied Sciences, "The Law of Contempt of Court in Malaysia: Considering Reforms", 2012, pg. 1454.

[21] Bar Council of Malaysia, "What is Contempt", October 19, 2010. Available at https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/what-is-contempt. See also Advances in Natural and Applied Sciences, "The Law of Contempt of Court in Malaysia: Considering Reforms", 2012, pg. 1451.

[22] The Star, "Free speech vs contempt", Letter to the Editor, March 20, 2019. Available at https://www.thestar.com.my/opinion/letters/2019/03/20/free-speech-vs-contempt/; Notes from Monitor, October 24, 2020.

[23] Malaysian Bar, "Press Comment: More Clarity Required for the Law of Contempt", June 30, 2021. Available at https://www.malaysianbar.org.my/article/about-us/president-s-corner/pressstatements/press-comment-more-clarity-required-for-the-law-of-contempt; Malay Mail, "Malaysian Judiciary Calls for Scandalizing Judiciary as a Form of Contempt to be Abolished", March 14, 2021. Available at https://www.malaymail.com/news/malaysia/2021/03/14/malaysian-bar-calls-for-scandalising-judiciary-as-form-of-contempt-to-be-ab/1957657.

[24] Article 19, "Malaysia: Reform or repeal laws that restrict freedom of expression", June 12, 2020. Available at https://www.article19.org/resources/malaysia-reform-or-repeal-laws-that-restrict-freedom-of-expression/.

[25] Sedition Act 1948, Section 4(1). Available at https://web.archive.org/web/20150404073719/http://www.agc.gov.my/Akta/Vol.%201/Act%2015.pdf.

[26] Id.

[27] Id.

[28] Article 19, "Malaysia: Reform or repeal laws that restrict freedom of expression", June 12, 2020.

[29] See id; Human Rights Watch, "Creating a Culture of Fear: The Criminalization of Peaceful Expression in Malaysia", October 26, 2015. Available at https://www.hrw.org/report/2015/10/26/creating-culture-

which foresees a sentence of up to one year in prison and/or a 50,000 ringgit (about 12,000 USD) fine for using "any network facilities or network service or applications service" to "make[], create[], or solicit[] and ... initiate[] the transmission of ... communication[s]" that are "obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person."[30] The law does not define the terms "obscene," "indecent," "menacing," "annoy," "abuse," or "offensive in character."[31] In 2018, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on Freedom of Expression) sent the Malaysian government a communication raising concerns about the CMA, including the vagueness of the terms used in Section 233.[32]

The Malaysian Penal Code contains several provisions restricting freedom of expression, including Sections 499 and 500, which criminalize defamation. Defamation is defined as "mak[ing] or publish[ing] any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation."[33] It is punishable with up to two years imprisonment, a fine, or both.[34] The law does not provide exceptions for speech about public figures.

Section 504 of the Penal Code criminalizes insults that cause individuals "to break the public peace, or to commit any other offence,"[35] while Section 505 criminalizes statements made "with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity."[36] Violations of both provisions are punishable with a fine and/or a two-year jail term.[37]

Media Freedom in Malaysia

Many observers have expressed concern about the Perikatan Nasional government's escalation of restrictions on free expression (it is unclear if the new government will follow a similar path). In the words of Thomas Fann, chairman of the local pro-democracy group Bersih: "We are beginning to see a reverting to the old government ways where not only were people called in for questioning – people are now getting charged and brought to

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fear/criminalization-peaceful-expression-malaysia; Freedom House, "Freedom on the Net 2020: Malaysia", 2020. Available at https://freedomhouse.org/country/malaysia/freedom-net/2020.

[30]Communications and Multimedia Act, 1998, Section 233. Available at https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Act588bi_3.pdf.

[31] See generally Communications and Multimedia Act, 1998.

[32] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Communication on Malaysia, OL MYS 2/2018, July 5, 2018.

[33] Penal Code, Section 499. Available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61339/117909/F-833274986/MYS61339%202018.pdf.

[34] Id. at Section 500.

[35] Id. at Section 504.

[36] Id. at Section 505.

[37] Id. at Sections 504–05.

court."[38] Reporters Without Borders' 2021 annual World Press Freedom Index ranked Malaysia 119 out of 178 countries,[39] a fall of 18 spots from 2020.[40] Criminal investigations and prosecutions for speech offenses initiated since the rise of the Perikatan Nasional coalition in February 2020 include:

- On May 3, 2020, South China Morning Post journalist Tashny Sukumaran was questioned on suspicion of violating Section 504 of the Penal Code and Section 233 of the CMA after reporting on "immigration raids in an area under an enhanced movement control order due to the presence of Covid-19."[41]

- On May 8, 2020, prosecutors charged business owner Datuk Shamsubahrin Ismail under Section 233 of the CMA and Section 505 of the Penal Code for social media comments in which he criticized the government for prosecuting individuals who violated COVID-19-related movement restrictions.[42]

- On June 5, 2020, R. Sri Sanjeevan, head of the Malaysian Crime Watch Task Force, was charged with violating Section 233 of the CMA for allegedly posting "false" information critical of the Royal Malaysia Police on social media.[43]

- On June 10, 2020, police questioned the founding director of the Centre to Combat Corruption and Cronyism – Cynthia Gabriel – on suspicion of violating Section 233 of the CMA and Section 4 of the Sedition Act after she issued a public letter calling on the Malaysian Anti-Corruption Commission to investigate allegations of influence trading in the government.[44]

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[38] Voice of America, "Malaysia's new government cracks down on critics", June 16, 2020. Available at https://www.voanews.com/press-freedom/malaysias-new-government-cracks-down-critics. See also Human Rights Watch, "Malaysia: New Government Backslides on Free Speech", June 10, 2020. Available at https://www.hrw.org/news/2020/06/10/malaysia-new-government-backslides-free-speech#.

[39] Reporters Without Borders, "World Press Freedom Index", 2021. Available at https://rsf.org/en/ranking.

[40] Reporters Without Borders, "World Press Freedom Index", 2020. Available at https://rsf.org/en/ranking/2020.

[41] Human Rights Watch, "Malaysia: New Government Backslides on Free Speech", June 10, 2020; Article 19, "Malaysia: Police Summon Journalist Who Reported on Migrant Raids", May 4, 2020. Available at https://www.article19.org/resources/malaysia-police-summon-journalist-who-reported-on-migrant-raids/; Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020. Available at https://www.amnesty.my/2020/11/30/with-censorship-on-the-rise-in-malaysia-amnesty-launches-unsilenced-campaign/.

[42] Human Rights Watch, "Malaysia: New Government Backslides on Free Speech", June 10, 2020; Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020.

[43] Human Rights Watch, "Malaysia: New Government Backslides on Free Speech", June 10, 2020; Article 19, "Malaysia: Reform or repeal laws that restrict freedom of expression", June 12, 2020.

[44] Article 19, "Malaysia: Reform or repeal laws that restrict freedom of expression", June 12, 2020; Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020; Human Rights Watch, "Malaysia: New Government Backslides on Free Speech", June 10, 2020; Malay Mail, "Anti-graft activist critical of Muhyiddin govt taken in for police questioning", June 10, 2020. Available at https://www.malaymail.com/news/malaysia/2020/06/10/anti-graft-activist-critical-of-muhyiddin-govt-taken-in-for-police-question/1874261.

- On June 10, 2020, citing Section 233 of the CMA and Sections 499 and 500 of the Penal Code on defamation, police questioned MP Sivarasa Rasiah about comments he made in November 2019 regarding arrests of alleged supporters of the Liberation Tigers of Tamil Eelam (LTTE).[45]

- On June 9, 2020, blogger Dian Abdullah was charged under Section 233 of the CMA and Section 505 of the Penal Code with, respectively, "ma[king] statements ... with intent to cause, or that may cause fear or unrest to the public or to any sections of the public" and "consciously ma[king] and commenc[ing] the communication delivery that is abhorrent in nature ... with intent to offend other people's feelings."[46] The charges were based on two blog posts in which Abdullah, among other things, criticized the King and Prime Minister for mismanaging the COVID-19 pandemic.[47] Her trial, which is being monitored by the American Bar Association Center for Human Rights as part of TrialWatch, is ongoing.[48]

- On June 14, 2020, prosecutors charged radio personality Patrick Teoh with violating Section 233 of the CMA for a Facebook post that allegedly insulted the crown prince of Johor.[49]

- On July 7, 2020, police questioned NGO Refuge for the Refugees founder Heidy Quah after she posted about poor conditions in immigration detention on Facebook. Though she had received threats as a result of the post, authorities failed to investigate them.[50] In July 2021, she was charged under Section 233.

- On November 5, 2020, police initiated an investigation under the Sedition Act and CMA of "leaders of Universiti Malaya Association of New Youth (UMANY) for publishing a post about the role of the king."[51] In total nine students were questioned; one was charged under Section 188 of the Penal Code for filming a police raid on the home of a UMANY leader.[52]

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[45] Article 19, "Malaysia: Reform or repeal laws that restrict freedom of expression", June 12, 2020; Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020.

[46] American Bar Association Center for Human Rights, "Preliminary Report on Criminal Proceedings Against Blogger Dian Abdullah", March 23, 2021. Available at https://www.americanbar.org/groups/human_rights/reports/malaysia--a-preliminary-report-on-criminal-proceedings-against-b/.

[47] Id.

[48] Id.

[49] Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020.

[50] Id.

[51] Article 19 and Civicus, "Rights in Reverse: One Year Under the Perikatan Nasional Government in Malaysia", March 2021. Available at https://civicus.org/documents/A19CIVICUSRightsInReverseReportMarch2021.pdf; Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020.

[52] Amnesty International, "With censorship on the rise in Malaysia, Amnesty launches Unsilenced campaign", November 30, 2020.

- In January 2021, a sedition complaint was brought against popular cartoonist Zulkiflee Awar Ulhaque (Zunar) for a cartoon satirizing the Kedah State Minister's decision to cancel a Hindu religious festival.[53] The police subsequently opened an investigation against Zunar for violating Section 233 of the CMA as well as various Penal Code provisions.

- In April 2021, the police arrested graphic artist Fahmi Reza with respect to a "jealousy-themed Spotify playlist he had created as a satirical response to a controversial tweet by Malaysia's queen."[54] He is currently being investigated for violating the Sedition Act.[55]

Criminal investigations and prosecutions have been accompanied by troubling legislation. In March 2021, the Malaysian government implemented an ordinance punishing the creation or spreading of "wholly or partly false" news relating to COVID-19 and the corresponding proclamation of emergency with a fine, three years in jail, or both.[56] The executive used its emergency powers to "bypass[] parliament" in imposing the new law.[57] Notably, the law reinstated much of the substance of Malaysia's previous Anti-Fake News Act, which was "repealed in 2019 after it was slammed for contravening international human rights law and risking illegitimate and overbroad implementation."[58]

Content Moderation

Under the Communications and Multimedia Act, internet service providers and media outlets can be held criminally liable for content produced by others and posted on their platforms.[59] Section 211 of the CMA, for example, states that "[n]o content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person," establishing a potential sentence of up to one year in prison. There is no knowledge requirement and the provision "appears to offer the possibility of holding online intermediary services strictly liable for user-generated content."[60] Section 233(2) prohibits "knowingly using a network service or

[53] The Diplomat, "Malaysian Cartoonist in the Crosshairs of Increasingly Repressive Government", April 30, 2021. Available at https://thediplomat.com/2021/04/malaysian-cartoonist-in-the-crosshairs-of-increasingly-repressive-government/.
[54] Id; Human Rights Watch, "Malaysia: Free Speech Under Increasing Threat", May 19, 2021. Available at https://www.hrw.org/news/2021/05/19/malaysia-free-speech-under-increasing-threat.
[55] Id.
[56] Bloomberg News, "Malaysia Outlaws 'Fake News' on Emergency, Covid Pandemic", March 11, 2021. Available at https://www.bloomberg.com/news/articles/2021-03-12/malaysia-outlaws-fake-news-on-emergency-covid-pandemic.
[57] Id.
[58] Article 19, "Malaysia: Authorities Reverting to Repressive Tactics of Former Governments to Throttle Expression Online", June 10, 2021. Available at https://www.article19.org/resources/malaysia-authorities-reverting-repressive-tactics-former-governments-throttle-expression-online/.
[59] See Article 19, "The Communications and Multimedia Act 1998: Legal Analysis", February 2017. Available at https://www.article19.org/wp-content/uploads/2018/02/Malaysia-analysis-Final-December-2.pdf.
[60] Id. at pg. 12.

applications service to provide 'obscene' communication to a person for commercial purposes or permitting a 'network service or applications service under the person's control' to be used for that purpose."[61] While Section 233(2) contains a knowledge requirement, no definition of "obscene" is provided. Like Section 211, Section 233(2) carries a potential one-year sentence. In a recent analysis of the CMA, NGO Article 19 stated that the Act was insufficiently clear as to the liability of online intermediaries; that "service providers should not be held criminally liable for content produced by others;" and that, with respect to Section 233(2), the Act should "raise the threshold for liability of intermediaries to one of actual and specific knowledge of illegal use of their facilities."[62]

Meanwhile, Section 263 of the CMA obligates online intermediaries to actively monitor content. Section 263(1) mandates a licensee to "use his best endeavour to prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia," while Section 263(2) requires licensees to assist the authorities upon written request "as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia." As noted by Article 19, Section 263 "essentially amounts to imposing on [online intermediaries] a duty of care in respect of preventing the transmission of unlawful material. As such, they are given a strong incentive to actively monitor and filter information on their services in order to locate infringing material."[63]

The CMA establishes the Malaysian Communication and Multimedia Commission,[64] which it affords broad powers to regulate the communications and multimedia industry.[65] The Commission's duties entail enforcement of the CMA and regulating "all matters relating to communications and multimedia activities not provided for in the communications and multimedia law."[66] The Commission "[s]upervise[s] and monitor[s] communications and multimedia activities,"[67] which can include the "monitor[ing of] websites and the [ordering of the] removal of material considered provocative or subversive;"[68] "[p]romote[s] and maintain[s] the integrity of all persons licenced or otherwise authorized under the communications and multimedia industry;"[69] enforces licensing regulations;[70] and sets out rules for content regulation, including "the prohibition

[61] Id. at pg. 14.
[62] Id. at pgs. 1-2.
[63] Id. at pg. 21.
[64] Communications and Multimedia Act, 1998, Part V.
[65] See Article 19, "The Communications and Multimedia Act 1998: Legal Analysis", February 2017, pg. 1; Malaysian Communications and Multimedia Commission "Our Responsibility." Available at https://www.mcmc.gov.my/en/about-us/our-responsibility.
[66] Malaysian Communications and Multimedia Commission, "Our Responsibility."
[67] Id.
[68] Freedom House, "Freedom in the World 2020: Malaysia", 2020. Available at https://freedomhouse.org/country/malaysia/freedom-world/2020.
[69] Malaysian Communications and Multimedia Commission, "Our Responsibility."
[70] Id.

of offensive content as well as public education on content-related issues."[71] The Commission has been criticized for lacking independence – in particular because the CMA does not specify how Commission members are appointed.[72] Notably, in 2016, the Commission used its powers to "blanket block websites that published content related to Malaysia's 1MDB scandal."[73]

As a potential counterbalance to the Commission and government regulation of the media, journalists and civil society groups have advocated for increased media self-regulation.[74] In December 2019, plans were put in place – with the government's agreement – to establish a Media Council of representatives from various media outlets, journalist associations, and civil society groups.[75] Among the Council's goals were to "promote a legislative and regulatory environment conducive to media freedom;" create a code of conduct and "promote ethical and responsible conduct among journalists and media practitioners;" "establish an independent body that responds to public complaints, mediates complaints and advocates on behalf of media industry professionals;" "support the financial sustainability of the media industry;" and "accredit members of the media, and protect media professionals in their professional capacity."[76] A Media Council Steering Committee was established,[77] with the task of "reviewing the laws that need to be abolished or amended for the media council to be successful," including the Printing Presses and Publications Act, the Sedition Act, and the Communications and Multimedia Act.[78] The establishment of the Media Council, however, stalled with the ascendance of the Perikatan Nasional government and the spread of COVID-19.

Malaysiakini

Malaysiakini was created in 1999 by a group of journalists looking for a portal that would allow them to escape the censorship they had experienced working in mainstream media.[79] Many mainstream outlets were owned by political parties, giving editors little room to criticize those in power.[80] Malaysiakini was intended to be an online platform that

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[71] Id.
[72] See Article 19, "The Communications and Multimedia Act 1998: Legal Analysis", February 2017, pg. 1.
[73] Id. at pg. 6.
[74] See ASEAN Today, "Malaysia: Media council critical for press freedom", September 10, 2020. Available at https://www.ifj.org/es/centro-de-medios/noticias/detalle/category/press-releases/article/malaysia-media-council-critical-for-press-freedom.html.
[75] Freedom House, "Freedom in the World 2020: Malaysia", 2020.
[76] Malaysiakini, "Report of the Pro Term Committee of the Malaysian Media Council", July 30, 2020. Available at https://docs.google.com/document/d/1TphLkPOaD3Phq8axVyuvCiO4yAvP3HDOCho8xzeAM74/edit?ts=5f056628#.
[77] Malaysiakini, "Reforms in Malaysia Must Go On", February 26, 2020. Available at https://www.malaysiakini.com/news/512264.
[78] Id.
[79] Committee to Protect Journalists, "Interview with Steven Gan-International Press Freedom Awards", November 2000. Available at https://cpj.org/awards/gan-interview/.
[80] Id.

would give Malaysians access to information they could not get from other sources:[81] at the time, there was limited government censorship of online media and no publication license was necessary for online outlets, as opposed to print and broadcast media.[82]

Malaysiakini has been recognized for both the quality of its news product and its commitment to a free press by the International Press Institute, Reporters Without Borders, the Committee to Protect Journalists, AsiaWeek, and Businessweek.[83] It is the only media outlet in Southeast Asia to be nominated for membership in the World Economic Forum's International Media Council.[84]

Throughout its existence, Malaysiakini has experienced harassment by the government, including – according to the Committee to Protect Journalists – being "frequently threatened with sedition and other legal charges punishable by imprisonment for reporting critically on the government."[85] In 2016, police initiated a criminal investigation into Malaysiakini's financing under a Penal Code provision criminalizing activities that "authorities deem 'detrimental to parliamentary democracy.'"[86] The investigation followed Malaysiakini's extensive reporting on fraud allegations against former Prime Minister Najib Razak.[87] Also in 2016, Malaysiakini editor-in-chief Steven Gan was charged under Section 233 of the CMA after KiniTV aired a video of a press conference held by a UMNO leader about the fitness – or lack thereof – of the country's Attorney General.[88]

In March 2021, editor-in-chief Steven Gan and member of parliament Charles Santiago were questioned on suspicion of committing sedition for their criticism of the contempt verdict against Malaysiakini that is the subject of this report.[89] In May 2021, two Malaysiakini journalists were summoned by the police for questioning as part of an investigation into a series of articles covering allegations that a detainee had died due to mistreatment in custody.[90]

Malaysiakini's news articles receive up to 2,000 comments per day, which are uploaded automatically.[91] Like most news websites, Malaysiakini has developed a system for

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[81] Id.
[82] Id.
[83] Malaysiakini, "Awards and Accolades." Available at https://about.malaysiakini.com/awards/.
[84] Id.
[85] Committee to Protect Journalists, "Malaysian journalist detained, threatened with sedition", September 10, 2014. Available at https://cpj.org/2014/09/malaysian-journalist-detained-threatened-with-sedi/.
[86] Committee to Protect Journalists, "Independent Malaysian news website faces threats, harassment", November 7, 2016. Available at https://cpj.org/2016/11/independent-malaysian-news-website-faces-threats-h/.
[87] Id.
[88] Malaysiakini, "M'kini editor-in-chief charged over AG videos", November 18, 2016. Available at https://www.malaysiakini.com/news/363282.
[89] Yahoo News, "Malaysia News Site Editor Questioned for Sedition", March 1, 2021, https://news.yahoo.com/malaysian-news-editor-questioned-sedition-105642997.html.
[90] Malaysiakini, "Ganapathy's Death: Cops Summon Two Mkini Journalists for Statements", May 18, 2021. Available at https://www.malaysiakini.com/news/575071; Human Rights Watch, "Malaysia: Free Speech Under Increasing Threat", May 19, 2021.
[91] Affidavit of First Respondent's Director, July 9, 2020, pg. 6.

managing reader comments. Only registered users may comment on articles.[92] Before submitting comments, users are warned that comments must conform to the site's terms and conditions, which are made available to them.[93] Under those terms and conditions, Malaysiakini does not "tolerate obscene, abusive, defamatory language, personal attacks, threats, sexually explicit comments or use any method of communication that may violate any law or provoke an unpleasant situation."[94]

The news portal does not review every comment published.[95] When a user posts a comment, he or she is allowed to edit it within five minutes of posting.[96] If this is done, the word "edited" will appear by the side of the comment. The word does not refer to editing by the editorial team.[97] Other users can comment on published comments; a line will appear on the left side of said comment.[98]

Malaysiakini relies on two safeguards against abusive comments: filtering software and peer reporting. Filtering software stops comments from being posted if they contain certain "offensive" words.[99] Comments that do not contain any of these words are automatically uploaded.[100] Under the peer reporting process, other users can report problematic posts to Malaysiakini, which will review the posts and delete them if found inappropriate.[101] Malaysiakini prohibits comments on articles about politicians or prominent individuals who have passed away, as "a sign of respect for their loved ones."[102]

B. CASE HISTORY

Factual History

On June 9, Malaysiakini published an article titled "CJ orders all courts to be fully operational by July 1," explaining that given the lifting of the "movement control order" to contain the COVID-19 pandemic on June 2, all courts were expected to return to full operation on July 1.[103] The article was published on the same day that a former political leader was acquitted of corruption charges.[104] Among others, the following were posted in the comments section to the article:

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[92] Id.
[93] Id.
[94] Id. at pgs. 6-7.
[95] Id. at pg. 7.
[96] Id. at pg. 8.
[97] Id.
[98] Id.
[99] Id. at pg. 7.
[100] Id.
[101] Id.
[102] Id. at pg. 10.
[103] Malaysiakini, "CJ orders all courts to be fully operational from July 1", June 9, 2020. Available at https://www.malaysiakini.com/news/529385.
[104] Federal Court, Judgment, February 19, 2021, para. 2.

- The High Courts are already acquitting criminals without any trial. The country has gone to the dogs.
- Kangaroo courts fully operational? Musa Aman, 43 charges, fully acquitted. Where is law and order in this country? Law of the Jungle? Better to defund the judiciary!
- This Judge is a shameless joker. The judges are out of control and the judicial system is completely broken. The crooks are being let out one by one in an expeditious manner and will run wild by going back to looting the country. This Chief Judge is talking about opening of the courts! Covid 19 siesta!
- Hey Chief Justice Tengku Maimun Tuan Mat - How many MILLIONS have been swept under the rug - 46 corruption cases - Deleted non-stop !!! Not ashamed and not afraid of God? How About Hell? Not afraid about it either? Again - getting paid a little money for a cover up - (they will be) freed too. WHAT IS THIS JUSTICE ??? The People's Deceiver? Together sweeping under the rug the people's money ???
- The Judiciary in Bolihland is a laughing stock.[105]

All were posted under pseudonyms.[106]

Malaysiakini was not aware of the comments until informed by police.[107] It removed them twelve minutes later and banned the five users who posted them.[108] These facts were not contested by the prosecution. Malaysiakini agreed that the comments were offensive and inappropriate and apologized for indirectly allowing the comments to be published.[109]

Procedural History

According to submissions by the Attorney General, the posted comments amounted to contempt of court because they:

(i) … clearly implie[d] that the Judiciary … committed misconduct while handling cases, engaged in corrupt activities, did not uphold justice and … compromised the integrity of the Judiciary in the performance of judicial functions;

(ii) … not only carrie[d] perceptions and meanings that demean, insult and humiliate the dignity, integrity and fairness of the Judiciary, but also undermine[d] public confidence in the Judiciary and intend[ed] to tarnish the good name of the administration of justice by the Judiciary;

(iii) … exceed[ed] the limits of reasonable decency and the right to make honest remarks; and

[105] Attorney General's Affidavit Verifying Facts, June 15, 2020, pgs. 3-4.
[106] Id.
[107] Affidavit of First Respondent's Director, July 9, 2020, pg. 10.
[108] Id.; Federal Court, Judgement, February 19, 2021.
[109] See Affidavit of First Respondent's Director, July 9, 2020, pg. 10.

(iv) … [were] clearly an act of insult and [were] an inappropriate attack on the Judiciary.[110]

Acknowledging that the comments were not made by Malaysiakini or its editor-in-chief, the Attorney General asserted that the accused were nonetheless liable because by allowing comments on articles, they "agreed to publish the statements."[111] According to the Attorney General, Malaysiakini and its editor-in-chief "knew, or should have known" that the posts "were an insult to the Judiciary in general and the Chief Justice in particular; undermined public confidence in the Judiciary; and insulted, humiliated and degraded the dignity and integrity of the Judiciary."[112] On this basis, the Attorney General called for the editor-in-chief's imprisonment "for facilitating the release of the Comments."[113]

On June 16, 2020, as soon as Malaysiakini learned that the Attorney General had filed a Motion to Apply for Order of Committal in Federal Court, which if granted would formally initiate the legal process, Malaysiakini contacted the Attorney General requesting reconsideration of the motion on the basis that the comments had been removed as soon as Malaysiakini learned of them, that it was fully cooperating in any investigation, and that it had no intention of insulting the judiciary.[114] Malaysiakini's lawyers appeared in Federal Court on June 17, 2020, and asked for an adjournment to give the Attorney General time to consider the request, which the Attorney General refused.[115] After a judge approved the Order of Committal, it was served on the Defendants on June 23, 2020.[116]

On June 24, 2020, the defense moved to dismiss the charges before the Federal Court, arguing that counsel had not received sufficient notice of the Attorney General's intent to tender new articles from Malaysiakini to show that non-subscribers could comment on Malaysiakini's website and that because some of the comments at issue concerned the Chief Justice of the Federal Court, the Federal Court was not the appropriate forum for the proceedings.[117] The defense also asserted that Malaysian law did not require sites to "pre-moderate" comments.[118] The court rejected these arguments,[119] finding that:

(a) [Malaysiakini] facilitated publication [of the comments];

(b) The editorial policy allowing editing, removing and modifying comments;

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[110] Attorney General's Affidavit Pursuant to Rule 52 Rule 3(2), June 15, 2020, para. 8.
[111] Id.
[112] Attorney General's Motion to Apply for Order of Committal, June 18, 2020, para. 1.
[113] Attorney General's Affidavit Verifying Facts, June 15, 2020, paras. 8-9.
[114] Response Affidavit, June 29, 2020, para. 27.
[115] Id. at para. 27.1-2.
[116] Id. at para. 27.3-4.
[117] Federal Court, Decision Setting Aside of Leave Order by Malaysiakini, July 2, 2020, para. 6; Notes from Monitor, October 24, 2020.
[118] Malaysiakini, "Defence: Law does not require websites to pre-moderate comments", July 1, 2020. Available at https://www.malaysiakini.com/news/532693.
[119] Federal Court, Decision Setting Aside of Leave Order by Malaysiakini, July 2, 2020, para. 6.

(c) Only upon being made aware by the police [did Malaysiakini] indeed remove[] the comments;

(d) Evidence revealed that the editors of [Malaysiakini] review postings on a daily basis.[120]

The court also stated that Malaysiakini was "presumed to have published the comments in question. This is a rebuttable presumption."[121] The court based this conclusion on Section 114A(1) of the Evidence Act, which states: "A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved."[122]

In light of the aforementioned findings, the presumption of publication under the Evidence Act, and the fact that "both parties agree[d] that the aforementioned comments are contemptuous," the court "found that a prima facie case [for contempt of court] ha[d] been established."[123]

At the July 13, 2020 hearing on the merits, the main issues were whether "one need[ed] to have knowledge of the content published to be regarded in law as a 'publisher,'" whether intent was required to establish publication, and whether compliance with the Malaysian Communications and Multimedia Commission's regulations obviated Malaysiakini's potential liability.

The Attorney General argued that because Malaysiakini provided a platform for comments to its articles, it was the "publisher" and had to assume responsibility for those comments.[124] According to the Attorney General, Malaysiakini's intent to publish the comments could be inferred from the fact that it sought to generate public discussion, invited subscribers to comment, and exercised a non-censorship approach by which it opted not to control the comments.[125] Even assuming that intent was not present, the Attorney General argued that under Section 114A of the Evidence Act Malaysiakini was presumed to have published the comments, meaning that proof of intent was not required.[126]

The defense argued that actual knowledge and intent to publish were required for contempt[127] and that Section 114A of the Evidence Act should not apply because it was

[120] Id. at para. 3.
[121] Id. at para. 5.
[122] This provision of the Evidence Act was added in 2012. Freedom House, "Freedom in the World 2020, Malaysia", 2020.
[123] Federal Court, Decision Setting Aside of Leave Order by Malaysiakini, July 2, 2020, para. 5.
[124] Monitor's Notes, July 13, 2020, para. 11.
[125] Id. at para. 25.1.
[126] Id. at paras. 5.1-5.3, 15.3.
[127] Id. at paras. 17.1-17.2.

"never intended to allow for finding of guilt for contempt [but] was legislated to deal with internet anonymity."[128] According to the defense, it was not possible to intentionally publish offensive material if one had no actual knowledge of that material[129] and knowledge could not be presumed based on the fact of acting as the facilitator of content.[130] Given that the defense was only informed of the comments when notified by the police and immediately took them down, Malaysiakini did not possess actual knowledge, let alone intent.[131]

The defense also argued that Malaysiakini's compliance with the Malaysia Communications and Multimedia Content Code (MCMC Code) obviated any liability. According to the defense, the MCMC Code did not require websites to monitor comments and allowed a two-day window to take down posts.[132]

On February 19, 2021, the Federal Court found Malaysiakini guilty of contempt and acquitted editor-in-chief Steven Gan. The court first emphasized that the purpose of the offense of contempt was not to protect judges as individuals but to "maintain public confidence in the administration of justice."[133] The court noted that Malaysiakini had acknowledged the "contemptuous nature of the impugned comments" and that it therefore did "not intend to deliberate further on what constitutes contempt in law."[134]

Recognizing differences in case law on "the role of publication on the internet content provider when the comments were made and posted by third parties,"[135] the court stated that the Malaysian parliament had enacted Section 114A of the Evidence Act to "resolve this difficulty."[136] According to the court, it was "beyond argument" that Malaysiakini "depicted itself as the host to the publication and by virtue of" the Evidence Act, was "presumed to have published the impugned comments."[137]

The remainder of the verdict is dedicated to the question of whether Malaysiakini rebutted the presumption of publication. Malaysiakini's attempt to rebut the presumption centered "on the ground that it ha[d] no knowledge of the impugned comments."[138] The court found that this argument did not stand because Malaysiakini had failed to develop a system of safeguards that "efficiently control[led] or prevent[ed] offensive comments from being published."[139] As stated by the court, Malaysiakini could not "just wait to be alerted, because such alert may never come:"[140] "to accept such measures as a complete defence

[128] Id. at para. 19.2.
[129] Id. at para. 17.3.
[130] Id. at para. 17.5.
[131] Id.; Federal Court, Judgment, February 19, 2021, para. 63.
[132] Monitor's Notes, July 13, 2020, para. 19.4.
[133] Federal Court, Judgment, February 19, 2021, para. 19.
[134] Id. at para. 32.
[135] Id. at para. 43.
[136] Id. at paras. 44, 109.
[137] Id. at para. 45.
[138] Id. at para. 110.
[139] Id. at para. 75.
[140] Id. at para. 74.

[would] be to allow it to unjustifiably and irresponsibly shift the entire blame on its third party online subscribers, while exonerating itself of all liabilities."[141] In other words:

> [Malaysiakini] designs and controls its online platform in the way it chooses. It has full control of what is publishable and what is not. It must carry with it, the risks that follow from allowing the way its platform operates.[142]

The court further found that given Malaysiakini's "structured, coordinated and well-organised editorial team," it was difficult to believe that the comments in question had truly "escape[d] the attention of the editors" for the three days they remained posted before the police notified Malaysiakini.[143] According to the court, "the irresistible inference is that at least one of them had notice and knowledge of these impugned comments."[144]

The court correspondingly noted that given Malaysiakini's longstanding experience as a current affairs news outlet, it should have foreseen that the article in question would have attracted contemptuous comments.[145] Notably, it is unclear throughout the verdict if the court is applying a standard of actual knowledge or constructive knowledge. The court, however, appears to have ruled that the standard of intent applicable to contempt charges carrying the possibility of fines or imprisonment is intent to publish. Quoting approvingly from another case, it asserts: "the only requirement is that the publication of the impugned articles is intentional. Hence there is no necessity to prove an intention to undermine public confidence in the administration of justice or the Judiciary."[146] Beyond stating these general principles, however, the court does not make explicit findings regarding Malaysiakini's intent in the present case, although it indicates that Malaysiakini possessed intent.[147] As such, it is not entirely clear whether the court agreed with the prosecution's position that the Evidence Act obviated the need to prove intent.

The court also addressed Malaysiakini's argument that the MCMC Code did not require pre-moderation of comments, thus relieving it of liability. According to the court, Malaysiakini had "misconstrued the true position of the law," as it was "in fact not in compliance with the Code" and was attempting to "shield its liabilities by [] piecemeal reading of its provisions."[148] In particular, the court cited various sections of the Code prohibiting the publication of offensive or false material.[149]

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[141] Id. at para. 76.
[142] Id. at para. 78.
[143] Id. at paras. 81-84.
[144] Id. at para. 84.
[145] Id. at para. 86.
[146] Id. at para. 124.
[147] Id. at paras. 124-126.
[148] Id. at para. 121.
[149] Id. at paras. 118-119.

The verdict contains various statements portending the bedlam that might ensue if States did not prevent purportedly contemptuous comments from being made about the judiciary. Among other things, the court asserted:

> One cannot insist on freedom of speech which transgresses on the rights of others in society. Such a right cannot, above all extend to a right to undermine the institution of the Judiciary, which will ultimately bring chaos in the administration of justice. There is indeed a real need to enforce the law to maintain and uphold social norms in our society.[150]

According to the court, Malaysiakini could not be allowed "to turn their news portal into a runaway train, destroying anything and everything in its path, only because their riders are the ones creating such havoc albeit made possible by the train."[151] The court thus stated that "[p]ublic interest demand[ed] a deterrent sentence be meted out against the First Respondent," imposing a fine of RM 500,000 (approximately $118,000 USD).[152]

In acquitting Steven Gan of contempt, the court focused on the fact that his name had not appeared anywhere on the article or in association with the third-party comments, that "there was no evidence … that [Mr. Gan] was at all material times named as the owner or the host or the editor on the online news portal," and that there was no evidence that "he is the person who reserves the sole discretion to edit or completely remove any comments by a third party."[153] As such, the court found that the presumption of publication established by the Evidence Act did not apply to Gan.[154]

Within hours of the verdict, Malaysiakini had raised enough via crowdfunding to pay the entirety of the RM 500,000 fine.[155] Notably, in March 2021, Gan and MP Charles Santiago were questioned on suspicion of committing sedition for their criticism of the verdict against Malaysiakini.[156] That investigation is ongoing.

Although there is no higher court than the Federal Court, meaning that Malaysiakini could not appeal the conviction, it is possible to seek review of a decision by the Federal Court. In May, Malaysiakini sought such a review so as to set aside its contempt conviction. The Federal Court has scheduled the review hearing for October 12.

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[150] Id. at para. 37.
[151] Id. at para. 76.
[152] Id. at para. 158.
[153] Id. at paras. 136, 138.
[154] Id. at paras. 138-140.
[155] Free Malaysia Today, "Malaysiakini Raises Enough to Settle Fine in Four Hours", February 19, 2021. Available at https://www.freemalaysiatoday.com/category/nation/2021/02/19/malaysiakini-raises-enough-to-settle-fine-in-four-hours/?__cf_chl_jschl_tk__=pmd_2c771e3e183eb0ea841c3c3a233fc11a29ea1d29-1627543966-0-gqNtZGzNAnijcnBszQlO.
[156] Yahoo News, "Malaysia News Site Editor Questioned for Sedition", March 1, 2021. Available at https://news.yahoo.com/malaysian-news-editor-questioned-sedition-105642997.html.

METHODOLOGY

A. THE MONITORING PHASE

The Clooney Foundation for Justice's TrialWatch Initiative deployed monitors to both the hearing on the merits on July 13, 2020 before the Federal Court and the court's issuance of the verdict on February 19, 2021. The monitors were fluent in Malay and did not experience any impediments in entering the courtroom. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Joan Barata reviewed notes taken during the proceedings, and court documents. Barata concluded that the court's decision violated the right to freedom of expression, due to lack of acknowledgement of the importance of criticism of State institutions and their performance; that the court's decision created a societal "chilling effect;" that the court placed an excessive burden of proof on Malaysiakini regarding its editorial responsibility for the content under analysis; and that the court did not take into account the applicable international and regional standards establishing intermediary liability exemptions for third-party content.

ANALYSIS

A. APPLICABLE LAW

This report draws on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which reflect international human rights standards and, in some cases, customary international law. The UDHR, adopted by the UN General Assembly in 1948, provides for the right to an independent and impartial tribunal,[157] the right to a fair trial,[158] the right to a defense,[159] the right to the presumption of innocence,[160] and the right to freedom of expression.[161] The ICCPR contains parallel provisions, with Article 14 protecting defendants' right to a fair trial and Article 19 protecting the right to freedom of expression.

The UN Human Rights Committee has previously explained that some "provisions in the Covenant ... represent customary international law."[162] In particular, the Committee has stated that "while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be,"[163] indicating that the overall right to a fair trial is a norm of customary international law.[164]

Malaysia is not a party to the ICCPR.[165] Section 4(4) of the Human Rights Commission of Malaysia Act 1999 advises, however, that the government may rely on the UDHR "to the extent that it is not inconsistent with the Federal Constitution."[166] As the provisions of the ICCPR are "materially similar to and based on the UDHR,"[167] this report utilizes interpretations of the ICCPR by the UN Human Rights Committee and UN Special

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[157] UDHR, Article 10.
[158] Id. at Articles 10-11.
[159] Id. at Article 11.
[160] Id.
[161] Id. at Article 19. There is debate over whether the right to freedom of expression constitutes customary international law.
[162] Human Rights Committee, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6, November 4, 1994, para. 8.
[163] Id.
[164] See also Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11; Patrick L. Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY", Berkeley Journal of International Law, 2009, pg. 5 ("That the provision of Article 14 on the right of an accused to a fair trial reflects customary international law is beyond dispute.").
[165] Malaysia has only ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and its two protocols, and the Convention on the Rights of Persons with Disabilities (CRPD). It has not ratified the International Covenant on Civil and Political Rights. Office of High Commissioner for Human Rights, "Status of Malaysia Treaty Ratifications." Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN.
[166] Human Rights Commission of Malaysia Act 1999, Section 4(4). Available at http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20597%20-%20Human%20Rights%20Commission%20of%20Malaysia%20Act%201999.pdf.
[167] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Communication on Malaysia OL MYS 2/2018, July 5, 2018, pg. 4. Available at https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-MYS-2-2018.pdf.

Procedures to elaborate on relevant UDHR standards. The report also draws on European Court of Human Rights jurisprudence where applicable.

B. FAIR TRIAL VIOLATIONS

Right to the Presumption of Innocence

The court's application of Malaysia's Evidence Act in this case relieved the prosecution of its burden to adequately establish a key element of the crime, undermining the presumption of innocence.[168] Under Article 11 of the UDHR and Article 14(2) of the ICCPR, everyone charged with a criminal offense has the right "to be presumed innocent until proved guilty according to law." This presumption "imposes on the prosecution the burden of proving the charge."[169] As stated by the European Court of Human Rights, "States [must] confine [presumptions of fact or of law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[170]

Under Section 114A(1) of the Evidence Act, "A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved."

As noted above, the Federal Court, acknowledging that different jurisdictions had taken different approaches to the question of intermediary liability for third-party comments, found that the presumption established by Section 114A(1) of the Evidence Act "resolve[d] this difficulty:"[171] that Malaysiakini was presumed to have published the comments at issue despite the fact that Malaysiakini did not make the comments, approve of them, or – potentially – actually know of them. Notably, publication of the comments was the central disputed element of the case against Malaysiakini: Malaysiakini had already acknowledged that the comments in question were insulting but denied being the "publisher" of said comments due to lack of actual knowledge of their publication. The court had further stated that only intent to publish, not intent to malign the judiciary, was relevant to the case: again, making the presumption of publication the element on which the case hinged.

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[168] This case was classified as a civil contempt proceeding. However, given the possibility of imprisonment if the accused were found liable and the application of a beyond a reasonable doubt standard to such cases, the case should be treated the same as a criminal proceeding. See Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 15.

[169] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

[170] See European Court of Human Rights, Salabiaku v. France, App. No. 10519/83, October 7, 1988, para. 28.

[171] Federal Court, Judgment, February 19, 2021, paras. 44, 109.

As such, the presumption established by Section 114A(1) was not appropriately "confine[d] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence." Instead, the court heavily relied on the Evidence Act as proof of the key element of the contempt charge, imposing on Malaysiakini an excessive burden to prove its innocence and imposing on the prosecution an inadequate burden to prove Malaysiakini's guilt.

This undermined the presumption of innocence.

It is further worth noting that with respect to the Evidence Act, the court applied a legal presumption seemingly intended for editors or publishers themselves to platforms that host third-party comments. Use of the presumption in this case thus inappropriately extended the principle to a significantly different field, creating a dangerous chilling effect – discussed at more length below.

Right to Appeal

Under Article 14(5) of the ICCPR, anyone convicted of a criminal offense has the right to have both their conviction and sentence "reviewed by a higher tribunal according to law." The trying of a case before the highest court in the land does not obviate the requirement of genuine review by a higher tribunal. "Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect."[172] Notably, while the UN Human Rights Committee has yet to deem the right to appeal customary international law, the International Commission of Jurists' Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (developed by international experts),[173] the African Commission,[174] and the Inter-American Commission[175] have deemed the right non-derogable.

In the present case, that the trial took place before the Federal Court, the highest court in Malaysia, prevented Malaysiakini from appealing any adverse judgment, in contravention of the right to appeal.

C. OTHER FAIRNESS CONCERNS

Freedom of Expression

[172] Id. at para. 47.
[173] American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, April 1985, Principle 70.
[174] African Commission on Human and Peoples' Rights, Amnesty International v. Sudan, Comm. Nos. 48/90, 50/91, 52/91, 89/93, November 1999, para. 37.
[175] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, October 22, 2002, para. 247.

The legal proceedings against Malaysiakini and Steven Gan violated the right to freedom of expression.

International Standards

Under Article 19 of the UDHR, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19 sets out a nearly identical guarantee: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The United Nations Human Rights Committee has asserted that under Article 19 of the ICCPR, "all forms of opinion [must be] protected," including commentary on "public affairs,... discussion of human rights, [and] journalism."[176] The Committee places a "particularly high" value on "uninhibited expression" in the context of "public debate concerning public figures in the political domain and public institutions."[177] According to the Committee, "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."[178] The Committee has therefore raised particular concerns about laws that restrict criticism of public officials:

> [T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials ... States parties should not prohibit criticism of institutions, such as the army or the administration.[179]

[176] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 9, 11.
[177] Id. at para. 38.
[178] Id. at para. 13.
[179] Id. at para. 38 [internal citations removed].

To this end, public officials "must tolerate a higher degree of scrutiny than ordinary individuals because of their public functions, and should not be granted a higher level of protection against defamatory statements in media."[180]

In the posts at issue, Malaysiakini subscribers criticized the judiciary for perceived corruption and unjust decision-making, using colorful and – in some cases – graphic language to make their respective points. The posts clearly address matters of public concern, amounting to commentary on "public affairs," and were made in the context of "public debate concerning public figures in the political domain and public institutions."[181] Consistent with the Committee's interpretation of Article 19, the comments were protected speech and, indeed, due to the importance of criticism of public institutions in a democratic society, warranted heightened protection.

In this regard, European Court of Human Rights jurisprudence is instructive. The European Court has provided detailed guidance with respect to the protection due criticism of the judiciary. As noted in *Mustafa Erdogan et al v. Turkey*, "issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10" and "[t]he press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them."[182] According to the European Court, while the protections of Article 10 do not extend to speech delivered with the sole intent to insult,[183] restrictions on the basis of "maintaining the authority of the judiciary" must be reserved for "gravely damaging attacks that [were] essentially unfounded," and should not be applied to "value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or [used to] ban[] any criticism of the latter."[184]

As stated by the Court in *Erdogan et. al*, which involved "strong and harsh remarks" directed against judges sitting on the Turkish Constitutional Court:

> some of the language and expressions used in the article in question, notably those highlighted by the domestic courts, were harsh and [] they could be perceived as offensive. They were, however mostly, value judgments, coloured by the author's own political and legal opinions and perceptions. In this connection, the Court also observes that they were based on the manner in which the

[180] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/20/17, June 4, 2012, para. 88.
[181] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.
[182] European Court of Human Rights, Mustafa Erdogan et al v. Turkey, App. Nos. 346/04 & 39779/04, August 27, 2014, paras. 40-41.
[183] Id. at paras. 44-45.
[184] European Court of Human Rights, Morice v. France, App. No. 29369/10, April 23, 2015, para. 168.

> Constitutional Court ruled on certain issues and that these rulings … were already subject to virulent public debate ... They could therefore be considered to have had a sufficient factual basis."[185]

In the proceedings against Malaysiakini, although some of the subscriber comments were certainly "strong and harsh," they concerned a matter "already subject to virulent public debate;" were directly responsive to "the functioning of the justice system" and certain judicial rulings (the re-opening of courts and the high-profile acquittal of a political leader on corruption charges); took the form of value judgments, not statements of fact; and, interpreted in the most favorable light (as is due the defense), could not be said to have the "sole intent to insult" but also the intent to place the judiciary under scrutiny, criticism that is key in a democratic society. As such, based on European standards, the impugned comments would merit protection as speech aimed at ensuring "that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them."[186]

Notably, any restrictions on protected speech must: i) be provided by law (the legality principle); ii) serve a legitimate objective; and iii) be necessary to achieve and proportionate to that objective.[187] The prosecution of Malaysiakini and Steven Gan for the impugned comments fails to meet these standards.

Legality

Under the legality prong, restrictions on freedom of expression must be provided by law. Further, laws cannot be overbroad.[188] As stated by the UN Human Rights Committee, legislation must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[189] The UN Special Rapporteur on Freedom of Expression has similarly noted: "the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion."[190]

Contempt of court in Malaysia has yet to be defined at all, let alone "formulated with sufficient provision," falling far short of legality requirements. As noted above, beyond

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[185] European Court of Human Rights, Mustafa Erdogan et al v. Turkey, App. Nos. 346/04 & 39779/04, August 27, 2014, para. 45.
[186] Id. at paras. 40-41.
[187] See Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34; Human Rights Committee, Kim v. Republic of Korea, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.
[188] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.
[189] Id. at para. 25.
[190] Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, October 9, 2019, para. 6.

being broadly proscribed in the federal Constitution, contempt has yet to be codified. Parliament has not passed a statute criminalizing contempt, meaning that there is a lack of clarity as to "the definition of contempt, the offences of contempt, the procedure to be followed, the defences available, or the sentences for the various offences of contempt."[191] Even with respect to case-law, "after over 180 years of reported cases on contempt of court in Malaysia, there still does not appear to be a consistent definition of this concept quoted by judges, despite this concept being focused on in over 120 reported cases."[192]

One form of contempt found in prior cases is that of "scandalizing the judiciary," which appears to be the form of contempt at issue here.[193] As with the lack of definition of contempt of court more broadly, there is also no definition of what kind of speech would rise to the level of scandalizing the judiciary. Is highly critical commentary sufficient? Does the commentary in question need to include swear words or otherwise graphic language? Do critical comments that are not specifically supported by documentation proving the claims suffice? What about comments more broadly expressing concerns about the state of the judiciary as opposed to comments targeted at a specific court or specific judge?

The confusion surrounding such questions is evidenced by the fact that the comments at issue in the Malaysiakini case varied widely. One comment, for example, was relatively specific in its criticism and did not use profane language: "The High Courts are already acquitting criminals without any trial. The country has gone to the dogs." Another comment contained mostly questions and then a recommendation for how to proceed: "Kangaroo courts fully operational? Musa Aman, 43 charges, fully acquitted. Where is law and order in this country? Law of the Jungle? Better to defund the judiciary!" Still other comments used more aggressive language and named a specific justice: "Hey Chief Justice Tengku Maimun Tuan Mat - How many MILLIONS have been swept under the rug - 46 corruption cases - Deleted non-stop!!! Not ashamed and not afraid of God? How About Hell? Not afraid about it either? Again - getting paid a little money for a cover up - (they will be) freed too. WHAT IS THIS JUSTICE ??? The People's Deceiver? Together sweeping under the rug the people's money ??" Another comment simply stated: "The Judiciary in Bolihland [Malaysia] is a laughing stock."

That all of these comments were wedged into the Malaysiakini prosecution reflects both the broadness of and confusion surrounding the offense of contempt of court, demonstrating how its imprecision gives Malaysia free reign to curtail speech on a matter of vital public concern – the functioning of the judiciary. This contravenes the legality standard that legislation must be "formulated with sufficient precision to enable an

[191] Malayan Law Journal, "Contempt of Court: Freedom of Expression and the Rights of the Accused", September 2002, pg. 5; Advances in Natural and Applied Sciences, "The Law of Contempt of Court in Malaysia: Considering Reforms", 2012, pg. 1454.
[192] Advances in Natural and Applied Sciences, "The Law of Contempt of Court in Malaysia: Considering Reforms", 2012, pg. 1454.
[193] See Plaintiff's Statement Pursuant to Rule 52 Rule 3(2), June 15, 2020, para. 10.

individual to regulate his or her conduct accordingly ... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution." Consequently, as a baseline matter Malaysiakini's prosecution violated the right to freedom of expression.

Legitimacy

Reading the State's case in the most favorable light, one could conclude that the objective of restricting the comments at issue may have been legitimate. As mentioned above, a restriction on freedom of expression is only legitimate if it protects "those interests enumerated in article 19(3): the rights or reputations of others, national security or public order, or public health or morals."[194]

There is no indication that national security, public health, public morals, or the rights and reputations of individuals were at stake in the present case (as stated by the court, "the purpose of the law on contempt is not to protect the dignity of individual judges but to protect the administration of justice.").[195] Rather, judging by the Attorney General's arguments and the court's conclusions, it appears that one objective of the proceedings was to protect public order. Namely, the court stated in its verdict that undermining the "institution of the Judiciary [would] ultimately bring chaos in the administration of justice"[196] and that Malaysiakini could not be allowed "to turn their news portal into a runaway train, destroying anything and everything in its path, only because their riders are the ones creating such havoc albeit made possible by the train."[197]

The Attorney General further argued that the comments at issue "demean[ed], insult[ed], and humiliate[d] the dignity, integrity and fairness of the Judiciary … undermine[d] public confidence in the Judiciary and intend[ed] to tarnish the good name of the administration of justice by the Judiciary."[198] These claims indicate that safeguarding the authority and "good name" of the judiciary may have been another potential objective of the prosecution. Notably, the European Convention, unlike the ICCPR, explicitly includes "maintaining the authority and impartiality of the judiciary" as a legitimate objective for restricting speech.[199]

As such, under European standards, the aim of protecting the functioning of the justice system may have been a legitimate additional aim for the prosecution in addition to that of protecting public order, discussed above.

Necessity and proportionality

[194] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, para. 7.
[195] Federal Court, Judgment, February 19, 2021, para. 17.
[196] Id. at para. 37.
[197] Id. at para. 76.
[198] Attorney General's Affidavit Pursuant to Rule 52 Rule 3(2), June 15, 2020, para. 8.
[199] European Convention on Human Rights, Article 10(2).

In the present case, the restrictions imposed were neither necessary nor proportional. In addition to legality and legitimacy, "States must demonstrate that the restriction imposes the least burden on the exercise of the right and actually protects, or is likely to protect, the legitimate State interest at issue. States may not merely assert necessity but must demonstrate it."[200] Requiring a demonstration of the necessity for a restriction helps prevent "unjustifiable or arbitrary invocation" of the permissible justifications for limiting freedom of expression.[201] In this regard, "where a State invokes a legitimate ground" for restriction of freedom of expression, "it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[202]

In the present case, beyond vague references to chaos and the need to protect the name of the judiciary, the State failed to demonstrate in "specific and individualized fashion the precise nature of the threat" that might follow from the comments criticizing the Chief Justice's decision to open up courts and the High Court's acquittal of the aforementioned UMNO leader. Indeed, there is no indication that the comments begot any sort of chaos or made any dent in the judiciary's ability to administer justice.

Further, the burden rests on the government to demonstrate that any measures are "the least restrictive means to protect the interest."[203] According to the UN Human Rights Committee, a restriction "violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression."[204]

In the present case, the State did not demonstrate that the prosecution of Malaysiakini and its editor-in-chief was the "least restrictive means" to protect the interests in question and that protection could not be "achieved in other ways that [did] not restrict freedom of expression." Malaysiakini removed the comments twelve minutes after it was notified of them by the police and issued a public apology. This compelled removal of the comments (issues with which are discussed further below) belies the Attorney General's assertion that subsequent prosecution was necessary.

Finally, a prosecution with the prospect of criminal penalties was a grossly disproportionate response to the alleged offense. States must meet a high threshold to institute such prosecutions. In line with necessity and proportionality standards, the UN Special Rapporteur on Freedom of Expression has concluded that the criminalization of

[200] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (regulation of user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, para. 7.
[201] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/71/373, September 6, 2016, para. 19.
[202] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.
[203] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/71/373, September 6, 2016, para. 19.
[204] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

speech is warranted in only the most serious and exceptional cases, such as child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.[205] According to the Special Rapporteur, it is never permissible to criminalize expression that does not fall into these categories given the "significant chilling effect" exerted by the "threat of harsh sanctions."[206] Leaving aside the other freedom of expression violations discussed above, the prosecution never alleged that the subscriber comments amounted to incitement to violence or another offense of sufficient gravity to warrant a prosecution carrying criminal penalties. As such, the criminalization of the acts at issue violated necessity and proportionality requirements and correspondingly violated the right to freedom of expression.

Delfi v. Estonia

At the July 13, 2020 hearing on the merits, the Federal Court asked the defense for its opinion on the *Delfi AS v. Estonia* European Court of Human Rights case, in which an online news platform was found liable for comments made on an article by readers.[207] Because the court's judgment convicting Malaysiakini likewise cites *Delfi* in support of its decision, stating that it "f[ound] the case of Delfi (supra) particularly instructive because the facts in that case bear semblance to the facts before us,"[208] it is worth noting the ways in which *Delfi* is distinguishable from the present case as well as evolving and muddled European Court of Human Rights jurisprudence on intermediary liability for third-party comments, which make the application of *Delfi* alone inapposite..

On January 24, 2006, Internet news portal Delfi published an article about a "shipping company's moving its ferries from one route to another and in doing so breaking the ice at potential locations of ice roads, as a result of which the opening of such roads – a cheaper and faster connection to the islands compared to the company's ferry services – was postponed for several weeks."[209] After the article was published, numerous comments were made that "contained personal threats and offensive language against" a member of the company's supervisory board and main shareholder.[210] Delfi manages its comment system much the same way as Malaysiakini, relying on a word filtering system and notification from readers.[211] Delfi removed the comments the same day the impugned shareholder's lawyer requested their removal,[212] although they had already

[205] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, para. 40.
[206] Id.
[207] European Court of Human Rights, Delfi AS v. Estonia, App. No. 64569/09, June 16, 2015.
[208] Federal Court, Judgment, February 19, 2021, para. 89.
[209] European Court of Human Rights, Delfi AS v. Estonia, App. No. 64569/09, June 16, 2015, para. 86.
[210] Id. at paras. 12-13.
[211] Id. at paras. 8-10.
[212] Id. at paras. 14-16.

been online for six weeks.[213] In subsequent civil proceedings, the shareholder was awarded 320 euros in damages.[214]

In assessing the Delfi case, the European Court found that there had not been a violation of the company's right to freedom of expression. Among other things, the Court found that restricting Delfi's "freedom of expression had pursued a legitimate aim of protecting the reputation and rights of others,"[215] noting that the liability of the actual authors of the comments did not absolve Delfi of its own liability and "[did] not remove the legitimate aim of holding the applicant company liable for any damage to the reputation and rights of others."[216]

The Court found that the restriction on Delfi – i.e., the civil proceedings and fine – was both necessary and proportional for the following reasons:

- The comments about the shareholder were particularly "insulting and threatening."[217]
- Delfi, which was run on a "commercial basis," had an interest in increasing the number of comments so as to increase advertising revenue.[218]
- The measures taken by Delfi to "avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable" were insufficient.[219]
- The comments in question remained online for six weeks.[220]
- The "actual writers of comments could not modify or delete their comments once posted on the Delfi news portal – only the applicant company had the technical means to do this," meaning that the "applicant company exercised a substantial degree of control over the comments published on its portal."[221]
- The approximately 320 Euro fine assessed on Delfi was a "moderate sanction."[222]

While Malaysiakini is run on a "commercial basis" and its safeguards resemble those in *Delfi*, several aspects of the Malaysiakini case are distinguishable. First, the comments in *Delfi* included curse words and graphic death threats. In comparison, the comments on the Malaysiakini article – while referencing corruption, calling for the defunding of the

[213] Id. at para. 88.
[214] Id. at para. 23.
[215] Id. at para. 77.
[216] Id.
[217] Id. at para. 94.
[218] Id. at para. 94. See also para. 27.
[219] Id at paras. 87-88, 94.
[220] Id. at para. 88.
[221] Id. at para. 89.
[222] Id. at paras. 93-94.

justice system, and deeming the judiciary a “laughingstock” and the Chief Justice a “joker” – contained no threats of violence and no curse words. The threat posed by the Delfi comments to the shareholder’s reputation and safety was much graver than that posed to the judiciary as the result of the Malaysiakini comments.

Second, the Delfi comments remained online for six weeks, while the Malaysiakini comments were taken down in three days. Third, Malaysiakini subscribers possessed the ability to edit their comments, while those commenting on the Delfi article did not. Fourth, the proceedings in Delfi were initiated to protect the interests of a private individual, while the proceedings in Malaysiakini concerned speech directed at a public institution, which, as described above, warrants greater protection under freedom of expression standards. Fifth, there was no prospect of imprisonment in the Delfi proceedings and the ultimate penalty imposed on Delfi was only 320 Euros. In the present case, Malaysiakini’s editor-in-chief faced imprisonment if he was convicted and the fine imposed on Malaysiakini was approximately 118,000 USD.

In light of the above, the equities in protecting the right to freedom of expression and serving the public interest were different in the Malaysiakini case and, ultimately, the authorities failed to strike the appropriate balance. On the one hand, the comments at issue were much more innocuous, were directed at a public institution, and remained online for just three days; on the other hand, the interference with the right to freedom of expression was more severe, entailing the possibility of imprisonment.

Further, the *Delfi* majority opinion was widely criticized by experts on content moderation.[223] Less than a year later, the European Court reached a very different opinion in a similar case, demonstrating the lack of clarity with respect to the Court’s stance on intermediary liability for third-party comments. Notably, the Federal Court’s verdict appears to reference this opinion obliquely (not by name), characterizing it as “of no relevance to our case because the facts differ materially.”[224]

In *MTE & Index v. Hungary*, three entities – Index and www.vg.hu, both news portals, and MTE, a non-commercial body of Internet content providers – had published content on the allegedly unethical practices of two real estate management websites owned by the same company, which subsequently brought a civil action for damages.[225] “Once learning of the impending court action, the applicants removed the impugned comments at once.”[226] All three were found liable and ordered to pay court fees, but not damages.[227]

[223] Baltic Journal of Law and Politics, “Website Operators’ Liability for Offensive Comments: A Comparative Analysis of *Delfi v. Estonia* and *MTE & Index v. Hungary*”, 2017.
[224] Federal Court, Judgment, February 19, 2021, para. 106.
[225] European Court of Human Rights, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, App. No 22947/13, February 2, 2016, paras. 5-16.
[226] Id. at para. 15.
[227] Id. at paras. 17-19.

Considering the cases against just Index and MTE, the European Court ruled that the proceedings violated the right to freedom of expression.[228] Distinguishing *MTE* from *Delfi,* the Court emphasized that "although offensive and vulgar … the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence"[229] (notably, the same could be said for the Malaysiakini comments); that the content concerned a legal person (a company) rather than a natural person;[230] and that the consequences for the company were not severe since 'there were already ongoing inquiries into the plaintiff company's business conduct."[231]

However, the Court also made findings that appeared to deviate from its stance in *Delfi,* such as emphasizing the danger of requiring a website to preemptively monitor third-party comments:

> The domestic courts held that, by allowing unfiltered comments, the applicants should have expected that some of those might be in breach of the law. For the Court, this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet."[232]

The Court further held, in contrast to *Delfi*, that even though the financial costs borne by the applicants were relatively low, the key question was whether any imposition of any liability at all engendered a chilling effect:

> the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but the manner in which Internet portals such as theirs can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet.

Given this decision's deviation from *Delfi* as well as the confusion it has raised about European Court standards, the Federal Court's reliance on *Delfi* alone without looking to the broader scope of European jurisprudence was misplaced.

Moderation of User-Generated Content Online

[228] Id. at para. 91.
[229] Id. at para. 64. See also para. 91.
[230] Id. at para. 84.
[231] Id. at para. 85.
[232] Id. at para. 82.

The Malaysiakini case sets a disturbing precedent for online content moderation, in contravention of established international standards.

"Content moderation" describes the process by which Internet intermediaries "determine whether user-generated content meets the standards articulated in their terms of service and other rules."[233] Internet intermediaries "bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit, and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties."[234] In its role in facilitating third-party comments to articles on its website, Malaysiakini qualifies as an internet intermediary.

As discussed below, because content moderation amounts to the regulation of speech – and often speech on matters of public concern – it implicates the right to freedom of expression and imposes duties on the State.

Requiring Companies to Monitor and Remove Content

According to the UN Special Rapporteur on Freedom of Expression, imposing obligations on companies "to monitor and rapidly remove user-generated content" leads to the establishment of "punitive frameworks likely to undermine freedom of expression even in democratic societies."[235] The significant pressure these punitive frameworks put on companies results in the "remov[al] of lawful content in a broad effort to avoid liability."[236] As stated by the Special Rapporteur, "States and intergovernmental organizations should refrain from establishing laws or arrangements that would require the 'proactive' monitoring or filtering of content, which is both inconsistent with the right to privacy and likely to amount to pre-publication censorship."[237]

The Manila Principles on Intermediary Liability, which were developed by international experts on content moderation in conjunction with civil society and which supplement and are subsidiary to standards set by UN bodies, likewise assert that intermediaries "should [never] be required to monitor content proactively as part of an intermediary liability regime."[238]

The compelled monitoring and removal of content is also dangerous in that it "involve[s] the delegation of regulatory functions to private actors that lack basic tools of

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[233] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, footnote 2.
[234] Organization for Economic Cooperation and Development, "The Economic and Social Role of Internet Intermediaries", April 2010, pg. 9. Available at http://www.oecd.org/internet/ieconomy/44949023.pdf. See also The Manila Principles on Intermediary Liability Background Paper, May 30, 2015, pg. 7. Available at https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf.
[235] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, para. 16.
[236] Id. at para. 17.
[237] Id. at para. 67.
[238] The Manila Principles on Intermediary Liability, March 24, 2015, Principle I(d).

accountability," "risk[ing] new forms of prior restraint."[239] Namely, in line with the UN Special Rapporteur's recommendations, the compelled removal of content must be pursuant to a judicial order "in accordance with due process and standards of legality, necessity and legitimacy."[240] Correspondingly, the Manila Principles provide that any State-imposed requirement to remove content must be pursuant to an order issued by an "independent and impartial judicial authority" which has "determined that the material at issue is unlawful."[241]

Such restriction of content "should be limited to the specific content at issue,"[242] and should involve the "least restrictive technical means."[243] The intermediary and the user/commenter must be provided "an effective right to be heard" before content is restricted,[244] as well as the right to appeal content restriction orders.[245] (Allowing companies to create their own standards and remove content raises a different set of concerns, which are not at issue in the proceedings against Malaysiakini).

The Malaysiakini verdict contravenes the UN Special Rapporteur's recommendations as well as the Manila Principles, penalizing Malaysiakini for failing to actively monitor and remove content from its site. As noted above, any compelled removal of content should be the result of a judicial order determining that removal is appropriate subsequent to the publication of content and should not force the intermediary to either make a preemptive determination or risk incurring criminal or civil sanctions.

Notably, apart from the issue of the criminal prosecution of online intermediaries for failure to monitor and remove content, at present the Malaysian Communication and Multimedia Commission has the authority to "prohibit[] offensive content" and to order the removal of content.[246] As stated by the Special Rapporteur: "States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression."[247]

The MCMC's broad, vague powers, which enable the Commission to remove content without a judicial determination as to the unlawfulness of said content, are inconsistent with the recommendations of the Special Rapporteur on Freedom of Expression as well as with the Manila Principles.

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[239] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, para. 17.
[240] Id. at para. 66.
[241] Manila Principles on Intermediary Liability, March 24, 2015, Principle II(a).
[242] Id. at Principle IV(a).
[243] Id. at Principle IV(b).
[244] Id. at Principle V(a).
[245] Id. at Principle V(b).
[246] Malaysian Communications and Multimedia Commission, "Our Responsibility."; Freedom House, "Freedom on the Net 2020: Malaysia", 2020.
[247] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (user-generated online content), U.N. Doc. A/HRC/38/35, April 6, 2018, para. 68.

Intermediary Liability and Sanctions

According to the UN Special Rapporteur on Freedom of Expression, "States should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on Internet intermediaries, given their significant chilling effect on freedom of expression."[248] In particular, as set forth in the Manila Principles, intermediaries should be entitled to immunity "from liability for third-party content in circumstances where they have not been involved in modifying that content,"[249] and they "must not be held liable for failing to restrict lawful content."[250] Further, "[i]ntermediaries must never be made strictly liable for hosting unlawful third-party content."[251]

The prosecution of Malaysiakini directly contravenes these principles on shielding internet intermediaries from severe sanctions, let alone liability, for unmoderated third-party content – indeed, the imposition of the presumption of publication was akin to strict liability for third-party content. News outlets in Malaysia are sure to have taken note of the Malaysiakini precedent that unmoderated comments on an article can now incur fines and perhaps imprisonment, potentially even absent actual knowledge. The "chilling effect" of the Malaysiakini prosecution and verdict is sure to reverberate throughout the country in the years to come.

[248] Id. at para. 66.
[249] Id. at Principle I(b).
[250] Id. at Principle I(c).
[251] Id. at Principle 1(d).

CONCLUSION AND GRADE

The trial of Malaysiakini and its editor-in-chief Steven Gan and the ensuing guilty verdict against Malaysiakini will have a profoundly chilling effect on press freedom in Malaysia and, more broadly, the exercise of the right to criticize State institutions. Among the most concerning aspects of the proceedings are:

a) The court's decision violated the right to freedom of expression, due to lack of acknowledgement of the importance of criticism of State institutions and their performance. This type of expression represents a core element of the right to freedom of expression, as it enables discussion on matters of public interest and allows for democratic scrutiny of public institutions.

b) The court decision created a societal "chilling effect." Those who wish to criticize State institutions (even using more moderate terms than those employed in the present case) may feel intimidated by the outcome of this trial and refrain from doing so.

c) The court focused on the "language" used in order to justify the imposition of limits to the right to freedom of expression instead of considering the intrinsically political nature of the critical comments, which deserved protection.

d) The court put an excessive burden of proof on Malaysiakini with respect to its editorial responsibility for the content under analysis. Although civil liability provisions in several legal systems include presumptions regarding editors and publishers, the application of such criteria to this case raises problems of proportionality, as the proceedings did not involve "editorialized content" but third-party contributions and penalties were of a criminal nature. The severity of the consequences of the dissemination of the content at issue would require that the burden of proof be placed on the prosecution.

e) The court did not take into account applicable international and regional standards establishing intermediary liability exemptions for third-party content. In addition to this, the court applied an expansive and partial interpretation of the case law of the European Court of Human Rights in order to justify its decision.

In light of the above, on October 12 the Federal Court should set aside Malaysiakini's conviction.

GRADE **D**

ANNEX

GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[252] and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant's reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

[252] ICCPR, Article 26.