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SUB JUDICE AND GAG ORDER: THE RECENT DEVELOPMENT IN MALAYSIA*

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ABSTRACT

High profile court cases always attracted media attention for public interest purposes. As a liaison between the court and the public, the media broadcast or report the case on their media channels and newspapers. From these broadcast and reports, the public receives sufficient information for them to formulate a certain opinion. Those who believe that they understand more would advocate their stance openly, usually comments through social media or actual publishers. However, many are not aware of the existence of a *sub judice* rule that prevents anyone from publishing any statement about the ongoing trial. This *sub judice* rule is imposed to avoid disruption of court proceedings and to avoid "trials by the media". In such circumstances, the parties to the suit usually apply for a committal order for contempt of court for breaching the *sub judice* rule. Alternatively, they apply for a gag order to stop anyone from publishing about the case. However, the court will only grant or reject the application for the gag order after examining and considering certain factors as enunciated in the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* which has been applied in the case of *Public Prosecutor v Arumugam a/l Dorasamy*. This paper adopts doctrinal legal research methodology with case analysis approach. It delves into the analysis of the court's decisions on the standards and tests laid down and evaluates the impacts on future cases. At the end of the analysis, it is established that the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* has become the

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benchmark and precedent for all future gag-order applications. The outcome of this analysis is important to chart the application of the *sub judice* rule and a gag order in Malaysia.

Keywords: Publication, *Sub Judice*, Prior Restraint, Gag Order, Contempt.

SUBJUDIS DAN PERINTAH TEGAHAN: PERKEMBANGAN TERKINI DI MALAYSIA

ABSTRAK

Kes mahkamah, terutamanya kes berprofil tinggi, sentiasa menarik perhatian media kerana melibatkan kepentingan awam. Media, sebagai penghubung antara mahkamah dan orang awam, akan menyiarkan atau melaporkan kes-kes demikian di saluran media dan akhbar mereka. Daripada penyiaran dan laporan tersebut, orang awam mendapat maklumat yang mencukupi untuk mereka merumuskan pendapat mereka terhadap kes-kes tersebut. Adakalanya mereka akan mengulas secara terbuka pendapat dan pandangan mereka terhadap kes-kes tersebut di media sosial mahupun media tradisional. Walau bagaimanapun, orang awam mungkin tidak menyedari kewujudan peraturan subjudis yang menghalang sesiapa sahaja daripada menerbit atau mengeluarkan sebarang kenyataan tentang perbicaraan yang sedang berjalan di mahkamah. Peraturan subjudis ini dikenakan untuk mengelakkan gangguan prosiding mahkamah dan mengelakkan "perbicaraan oleh media". Dalam keadaan sedemikian, kebiasaannya pihak-pihak yang terlibat di dalam perbicaraan kes tersebut akan memohon perintah komital penghinaan mahkamah dikenakan ke atas pihak yang melanggar peraturan subjudis. Sebagai alternatif, mereka juga memohon perintah larang suara untuk menghalang sesiapa sahaja daripada menerbit dan mengeluarkan kenyataan berkenaan kes subjudis. Bagaimanapun, mahkamah hanya akan membenarkan atau menolak permohonan perintah larang suara selepas meneliti dan mempertimbangkan faktor-faktor tertentu seperti yang dinyatakan di dalam kes *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* yang telah diterima pakai di dalam kes *Pendakwa Raya v. Arumugam a/l Dorasamy*. Artikel ini menggunakan metodologi penyelidikan undang-undang doktrin dengan pendekatan analisis kes. Ia mengkaji dan menganalisa keputusan mahkamah-mahkamah tersebut mengenai kriteria, piawaian dan ujian yang ditetapkan untuk memberikan satu perintah larang suara, dan juga

menilai kesan ke atas kes-kes akan datang. Pada akhir analisis, didapati bahawa kes *Dato' Sri Mohd Najib bin Hj Abd Razak lwn Pendakwa Raya* telah menjadi penanda aras dan keputusan mengikat untuk semua permohonan perintah larang suara pada masa hadapan. Hasil penyelidikan ini adalah penting untuk menentukan penggunaan peraturan subjudis dan perintah larang suara yang tepat di Malaysia.

Kata kunci: Penerbitan, *Subjudis*, Perintah Tegahan, Perintah Larang Suara, Penghinaan Mahkamah.

INTRODUCTION

In Malaysia, after the abolishment of the jury trial in 1995, a legal dispute is tried before judges who are trained in the law and decide the defendant's liability or guilt based on admissible evidence presented before them.[1] Trial proceedings are usually conducted in a transparent manner where the public can attend and hear the trial in high-profile cases and of public interest. The mainstream media are permitted to publish the proceedings and decisions of the trials under a strict rule after the trial. However, a different rule applies when reporting an ongoing court case.

There are limits to commenting, discussing, reporting, and publishing the cases, particularly, the legal proceedings that are ongoing and pending judgment. The rationale for such limits is due to the fear that any publications-printed or electronic about an ongoing trial report beyond the events in a courtroom may undermine the fairness of the trial. Thus, publicly sharing any facts about a case that the judge has said cannot be made public, publishing evidence which has not yet been tendered in court or expressing the opinion of the defendant's guilt or innocence is also prohibited.[2] Such publication is considered prejudicial, which may affect the trial ongoing especially when it has been circulated outside the confines of the court. Case law has evidenced that after reading the said publication, the witness who

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1 Mahadev Shankar, "Is the Political Clamour for the Total Abolishment of the Death Penalty Legally Misconceived?," *Malayan Law Journal* 5 (2019): xii-xvii.

2 See *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and Another Application* [1990] 1 MLJ 273*; Public Prosecutor v Arumugam a/l Dorasamy* [2022] 10 MLJ 684.

has earlier agreed to testify in court for the case has refused to attend and testify, or if he attends the trial, he may alter his testimony.[3] This will certainly affect the flow of the legal proceeding that is still ongoing.

Due to the above, *sub judice* rule has been introduced to limit anyone from publishing any part or matters that are still being tried in court or pending disposal. Failure to abide the rule may result in "contempt of court" by the publisher. In a high-profile case, the court may impose a "gag order" restraining anyone including the media from publishing matters related to the trial throughout the entire court proceedings. If the publisher fails to obey the order, they may be punished for contempt of court. Article 126 of the Federal Constitution empowers the superior courts to issue committal orders for contempt of court.[4]

To apply this concept to Malaysia's settings, the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v PP*[5] (hereinafter referred to as DSNR) illustrates the above situation. In this case, the court had denied DSNR's application for a pre-trial gag order to stop anyone including the media from publishing or discussing the merits of his criminal case until the conclusion of his trial proceedings. The dismissal was among others due to the availability of other remedies which will be discussed in the later part of this article. On the other hand, in the most recent 2022 case of *Public Prosecutor v Arumugam a/l Dorasamy*[6] (hereinafter referred to as Arumugam), the court granted the application of the public prosecutor for a gag order. Comparing the two decisions, an issue arises on the application of the gag order and the sub judice rule in Malaysia - namely is the court depriving a victim of his right to stop publication of his ongoing case or the court is sympathetic with the prosecutors in the latter case? Why did the courts in these two cases reach different conclusions? What differentiates the two cases? This article will analyse the reasoning behind the order, focusing on the standards or tests laid down by the court, and

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3 *Public Prosecutor v Arumugam a/l Dorasamy* [2022] 10 MLJ 684.

4 Article 126 of the Federal Constitution states that the Federal Court, the Court of Appeal or a High Court shall have power to punish contempt of itself.

5 *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] 8 MLJ 624, HC; [2019] 4 MLJ 74, CA; [2019] 4 MLJ 281, FC

6 *Public Prosecutor v Arumugam a/l Dorasamy* [2022] 10 MLJ 684.

evaluating the impact on future cases. This Federal Court's decision may become a precedent for all gag order applications. Therefore, the outcome of this analysis will help to conclude that DSNR's case is paving the right direction for the use of gag order and *sub judice* in Malaysia.

COURT, CONTEMPT AND THE EXISTENCE OF *SUB JUDICE* RULE

Courts exist to administer impartial justice.[7] Thus, the journey to impartial justice must be void of obstacles. Therefore, any acts that interfere with the administration of justice will become an offence against the court.[8] This is known as contempt of court. The courts in Malaysia have the power to punish contempt of itself.[9] This power to punish for contempt is necessary to ensure that the due administration

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7 See Nathan M. Cohen, "The Contempt Power - The Lifeblood of the Judiciary," *Loyola University Chicago Law Journal* 69, vol. 2 (Issue 1 Winter 1971): 69-71, https://lawecommons.luc.edu/luclj/vol2/iss1/4.

8 According to Lord Diplock in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 309-
"The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

9 The power of contempt is conferred by statute and can be found in Article 126 of the Federal Constitution, Section 13 of the Court of Judicature Act 1964, Paragraph 26 of the Third Schedule under Section 99A of the Subordinate Courts Act 1948, Section 353 of the Criminal Procedure Code, Section 228 of the Penal Code. It is also recognised as being within the inherent jurisdiction of the courts.

of justice is not impeded and to provide the courts with the power to enforce their judgment.

Contempt of court can take up many forms[10] and one of these forms is *sub judice*.[11] The term *sub judice* is a Latin word for "under judgment" or "under judicial consideration." According to the Oxford Dictionary of Law, the term is defined as "a rule limiting comment and disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury (in a jury trial system)."[12] In simple terms, it is a legal mechanism that prohibits the publication that could interfere with the proceedings of that case. The *sub judice* period starts in criminal cases from the issuance of warrant or arrest made until the conclusion of appeal. In civil cases, it is from the issuance of a writ until the conclusion of appeal.[13]

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10 Joseph Moskovitz has described contempt as "the Proteus of the legal world, assuming an almost infinite diversity of forms,". See Joseph Moskovitz, "Contempt of Injunctions, Civil and Criminal," *Columbia Law Review,* 780, vol. 43, no. 6 (1943): 780, https://doi.org/10.2307/1117151. In similar terms, Sir John Donaldson MR in *Attorney General v Newspaper Publishing PLC* [1987] 3 All ER 276, 299, CA, said that:

" The law of contempt is based on the broadest of principles, namely that the courts cannot and will not permit interference with the due administration of justice. Its application is universal."

11 Lord Russell of Killoween CJ in *R v Gray* [1900] 2 QB 36, 40 defined contempt as:

"Any act done, or writing published calculated to bring a court or a judge of the court into contempt, or lower his authority, is a contempt of court. This is one class of contempt. Further, any act done, or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the court is a contempt of court."

The second part in the definition is what is known as *sub judice* contempt i.e., contempt through interfering with particular legal proceedings. See also *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd. (No. 1)* [2005] 3 CLJ 440.

12 *Oxford Dictionary of Law*, ed. Jonathan Law, 9th edition (Oxford: Oxford University Press, 2018), s.v. "*Sub judice*".

13 *PP v Abdul Samad bin Ahmad & Anor* [1953] 1 MLJ 118.

Therefore, *sub judice* rule prohibits publications relating to ongoing legal proceedings.[14] If there are any publications during this *sub judice* period and it is likely to prejudice a fair trial, the publisher may be held and found guilty of contempt of court, resulting in a fine or imprisonment. Hence, according to Bhag Singh,[15] *sub judice* rule refers to the status of the proceedings or the matter, whereas *sub judice* contempt is made up of publication that may influence or prejudice the outcome of a particular matter. Publication in this context includes any communication in whatever form which is addressed to the public.[16]

Accordingly, it is important to ask in what manner and how can such publication interfere with the proceedings of a case in court in a non-jury trial system in Malaysia?

To answer the question, we need to understand the workings of the court. The main function of a court is to settle disputes between parties in a civil matter, and to punish an accused person after he is found guilty of the crime he has committed. In doing so, the court must ensure that the relevant parties receive a fair trial. Nevertheless, the process for a fair hearing in both civil and criminal matters may take a long time before the case could be settled and judgment passed by the court. Until then, the accused in a criminal proceeding is presumed to be innocent until proven guilty. Hence, no one should question, talk, and discuss his innocence or guilt. Whereas in civil matters, only facts, issues and matters stated and submitted at trial can be discussed and published. Any outside facts or evidence are to be excluded from the publication. This is the main reason why the right to reporting a case that is currently being tried in court is given to qualified journalists from the mainstream media who understand what to publish without violating the rule of *sub judice*.

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14 See Siong Sui Yi, "*Sub Judice* Contempt of Court in Singapore and the Way Forward." *Singapore Law Review* 32 (2014): 121.

15 Bhag Singh, "What is contempt?", *The Star,* October 19, 2010, accessed February 13, 2021, https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/what-is-contempt.

16 "Publication" is defined under Section 114A (4) (b) Evidence Act 1950 to mean "a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer."

Before deciding in either civil or criminal matters, the court must consider all facts, issues and evidence that are presented by both parties at the trial in court. The Rules of Courts 2012 and the Criminal Procedure Code govern the process of civil and criminal proceedings, respectively. The Rules of Courts 2012 governs the manner on how facts, issues and evidence of the case be filed and presented in court in civil matters. In addition, all facts, issues, and evidence that have been filed and agreed by both parties in a civil dispute will be presented, argued, proven, and submitted in court at the trial. Here, parties are bound by their pleadings because each material fact or facts that are relevant to the case must be proven by the parties. Parties cannot bring any new facts or evidence unless an amendment has been made and the other party has knowledge about and agreed to it.

In relation to criminal trials, the facts about the offence or crime committed are framed in the charge sheet prepared by the prosecutor after investigation has been made. The prosecutor has a heavy burden to prove that the accused has committed the crime beyond reasonable doubt. The conduct of the prosecution and the proceeding is governed by Article 145 (3) of the Federal Constitution. It reads:

The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

The High Court in Arumugam's case has defined the word "to conduct" as "to lead and guide" giving the prosecution the right to structure and strategise the direction of its case as it sees fit and advantageous including the approach in eliciting evidence from its witness. Thus, it is not appropriate for anyone to criticise and comment about the police, the prosecutor, and the prosecution witness to the public, while the case is still on trial. This is to avoid instigating the public to have no confidence in the police force and the prosecution. Any comment about them should be made through a proper channel to the relevant personnel within the organisation. If dissatisfied with the judgment, the party can appeal against the decision.

Since the procedure is regulated in that manner, no one should discuss, comment, or make any statement relating to any facts, issues or evidence that are not presented, argued, and proven in court. Thus,

in a high-profile case, usually the lawyer or counsel handling the case will give the statement to the press in relation to what has taken place in court and will decline to answer any questions that fall outside the trial or are speculative in nature. Even journalists who conduct their own investigation on the case cannot publish the outcome of their findings which is not presented in court because this may prejudice the ongoing trial.

Thus, publishing any matters relating to the current trial proceedings that are speculative, risky and beyond the event in the courtroom breaches the *sub judice* rule. As seen above, the *sub judice* rule is still relevant and applicable even in a non-jury trial system because the administration of justice is not only about the jury but also the judge, the investigation officers, the prosecution, and the counsels. The publication about the ongoing trial may also influence the witness to give testimony in court and this may disturb the smooth running of the case toward speedy, economical, and fair disposal. Further, the *sub judice* rule also protects the accused's right to a fair trial and the presumption of "innocent until proven guilty". This is a rule of law that many are not aware of, but it exists in Malaysia.

SUB JUDICE RULE AND GAG ORDER

During the *sub judice* period, any publication of statements and comments on a current ongoing trial amounts to a breach of the *sub judice* rule and would therefore be an act of contempt if the said publication poses a real and substantial danger of prejudice to the trial of the action.[17] If the risk is real and poses a substantial danger of prejudice to the trial, such as by bringing pressure on one of the parties to force him to drop his complaint or to give up his defence, then the

[17] This is the test to prove prejudicial publication and applied in major common law jurisdiction such as in England, Australia and New Zealand. In *Duffy, ex p. Nash* [1960] 2 All ER 891, 896, Lord Parker CJ emphasised that there must be "a real risk, as opposed to remote possibility, that the article was calculated to prejudice a fair hearing". The same test applied in Australia in *Attorney General for New South Wales v John Fairfax and Sons Ltd*. [1986] 6 NSWLR 695, where Samuels JA said: "I regard it as established law that, to constitute a contempt of the kind we are considering, a publication must reveal, as a matter of practical reality, a tendency to interfere with the due course of justice in a pending case".

publication has breached the *sub judice* rule and it is contemptuous.[18]

The application of *sub judice* rule and contempt in Malaysia was discussed in much detailed in the case of *Chandra Sri Ram v Murray Hiebert*.[19] In this case, the applicant who was the next friend of the plaintiff in the main suit applied from the court to commit the respondent, a journalist to prison for contempt of court in publishing an article in the Far Eastern Economic Review pending the applicant's case against the International School of Kuala Lumpur (the defendant in the main suit).

The respondent wrote in the article, inter alia in paragraph 3 that "many are surprised at the speed with which the case raced through Malaysia's legal labyrinth". The trial was fixed less than seven months after a writ was filed at the High Court. "Normally, in a civil case, you're lucky to get a hearing within five years."[20] The court examined words appeared in that paragraph and weighed the potential effect that the words used would have on ordinary reasonable readers. According to the court, there are two critical points, first, the plaintiff's father is a prominent Court of Appeal's judge, and secondly, by reason of that position, he was able to influence the court. Hence, the court decided that this paragraph was calculated to give an impression to ordinary readers that the High Court had been manipulated or influenced by the plaintiff's father, the judge of the Court of Appeal. Therefore, the article made a scandalous attack upon the integrity of the court.

In paragraph 5 of the article, the respondent wrote "a hefty award for the plaintiff would be a major financial burden on the school – and could hinder Malaysia's efforts to attract foreigners."[21] The court found that the words posed a risk of prejudice to the plaintiff's civil suit because it contained threat and intimidation to the court in that if the court were to award hefty damages to the plaintiff, the court put a major financial burden on the school that would drive foreign investors away. This article clearly interferes with the due process of law and decision making. It intended to press the court to throw out the

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18 *Bursa Malaysia Securities Bhd. v. Gan Boon Aun* [2009] 5 CLJ 698, 719. See also *Moir v Wallersteiner and others* [1974] 3 All ER 217.

19 [1997] 3 MLJ 240, HC; [1999] 4 MLJ 321, CA.

20 [1997] 3 MLJ 240, 258.

21 [1997] 3 MLJ 240, 264.

plaintiff's suit so that foreign investment in Malaysia would not be jeopardised. The court in this case decided that the respondent was guilty of contempt of court because the article contained comments going into the merits of the pending civil suit. The article tended to prejudice the fair trial, scandalise the court and put pressure on the court in deciding the case. The test established in this case has been referred to and applied in cases relating to the publication that breaches *sub judice* rule such as in the cases of *Syarikat Bekalan Air Selangor Sdn. Bhd. v Fadha Nur binti Ahmad Kamar & Anor*[22] and *Khairul Azwan bin Harun v Mohd Rafizi bin Ramli.*[23]

Nevertheless, particularly in high-profile cases, court may impose a "gag order" restraining trial participants or anyone including the media from publishing matters related to the trial throughout the entire court proceedings. Failure to obey the order may amount to contempt of court.

In some jurisdictions such as India, a gag order may be imposed against a media publisher upon application to the court.[24] Once the gag order is issued against a publisher, it restricts information and comments relating to the ongoing case in court from being made public. However, in the United States of America, it is more acceptable to "gag" people involved in trials such as lawyers, litigants, and witnesses, than similar order issued against the media and press. This is because the order on the media and press represents a form of prior restraint and a threat to the First Amendment guarantee of free speech and free press. Nonetheless, the judges see the order as necessary to maintain the integrity of the judicial process. Therefore, the Supreme Court in *Nebraska Press Association v Stuart*[25] decided to set a high bar for gag orders. The gag orders must meet heavy burdens and standards. The Court held that rather than issuing gag orders courts should consider alternatives, such as a change of venue or trial postponement until public attention fades.[26] The test established in

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22 [2012] 7 MLJ 657.

23 [2016] MLJU 234.

24 *Sahara India Real Estate Corp Ltd & Ors v Securities & Exchange Board of India & another* CA No 9813 of 201.

25 (1976) 427 US 539.

26 James C. Goodale, "The Press Ungagged: The Practical effect on Gag Order Litigation of *Nebraska Press Association v Stuart*," *Stamford Law Review* 29 (1976-1977): 497-514, accessed January 10, 2021.

Nebraska's case was followed by the Federal Court in the case of DSNR in Malaysia. The same test was also applied in other Commonwealth counterparts i.e., New Zealand and Australia.

Approach to the Application of Gag Order Pursuant to Publication Relating to Ongoing Trial by Malaysian Courts

i) Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor

The court in Malaysia has rejected the application for a gag order in the case of DSNR. DSNR, the applicant, applied for the gag order to prevent any person i.e., all media outlets - be it traditional, digital, or social- and public, from publishing anything that forms an opinion on his guilt or innocence and discussing the merit of criminal charges predicting or influencing the outcome of the case against him until the conclusion of the trial proceedings.[27] Those who were deemed to do the acts or matters outlined in the application during his trial period would be cited and punished for contempt of court.

The gag order was applied in the relation to his ongoing trial. On 4 July 2018, he was charged with offences relating to criminal breach of trust, abuse of power, corruption and money laundering under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011. As it is a high-profile case and of public interest, his trial proceedings attracted much media attention both local and international.[28] From media reports, the public began to discuss openly the merit of his case.

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[27] Emir Zainul, Adam Aziz, "Gag Order to Prevent Prejudgement of Najib's Case, Says Defence Counsel" *The Edge Markets*, July 5, 2018, accessed January 10, 2021, https://www.theedgemarkets.com/article/gag-order-prevent-prejudgement-najibs-case-says-defence-counsel.

[28] Hafiz Yatim, "Najib Dijangka Dituduh di Mahkamah Lagi Esok," *Malaysiakini,* August 7, 2018, accessed March 3, 2021, https://www.malaysiakini.com/news/437777; "Najib Charged with 3 Counts of Money Laundering," *The New Straits Times,* August 8, 2018, accessed March 3, 2021, https://www.nst.com.my/news/crime-courts/2018/08/399230/najib-charged-3-counts-money-laundering; "Najib Razak Charged with Money Laundering over 1MDB Scandal,"

Some of the accusatory articles consist of online portal news-reports relating to the subject matter of the charges, articles appear in Sarawak Report - a blog operated by an activist and advocate journalist,[29] publications that delved into the investigation by the Malaysian Anti-Corruption Commission, comments made by public figures on allegations against the applicant, comments made by the Attorney General, comments by the public and articles on an interview given by the applicant himself. His lawyers wanted to avoid these discussions, to allow him to not be "tried by the media", hence applied for the gag order.[30]

The High Court in this case, after considering several decisions from India, Australia, Canada, New Zealand and the United States of America, found that the courts in Malaysia have the jurisdiction to grant gag orders, however, the granting of such orders must meet the following test or standard:

i. Whether the publication caused a real and substantial risk to the fairness of the trial,

ii. Whether there are no adequate alternative measures to remedy the risk, and

iii. Whether the gag order is necessary and proportionate to protect the applicant's right to a fair trial.[31]

The Guardian, August 8, 2018, accessed May 5, 2021, https://www.theguardian.com/world/2018/aug/08/najib-razak-charged-with-money-laundering-over-1mdb-scandal; "Former Malaysian PM Najib Razak Charged with 3 Counts of Money Laundering," *Channel News Asia,* August 8, 2018, accessed May 5, 2021, https://www.channelnewsasia.com/asia/najib-razak-in-court-money-laundering-charges-1mdb-802586.

29 "1MDB Backed Jho Low's £1Billion London Hotel Bid! EXCLUSIVE EXPOSE," *Sarawak Report*, May 2, 2014, accessed June 6, 2021, https://www.sarawakreport.org/2014/05/1mdb-backed-jho-low-with-uk1billion-exclusive-expose/.

30 Alyaa Alhadjri, "Defence Cites "Trial by Media", Court Grants Interim Gag Order," *Malaysiakini*, July 4, 2018, accessed June 6, 2021, https://www.malaysiakini.com/news/432643.

31 This is also the test applied in the United States, Canada, India and New Zealand. See *Nebraska Press Association n Hugh Stuart* (1976) 427 US 539; *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835;

The above must be fulfilled or proven by the applicant while the respondent may refute them.

The High Court after much deliberation found that the applicant failed to satisfy the test in granting the gag order, thus, declined his application.[32] This decision was later upheld by the Court of Appeal and the Federal Court. The court found the application is not supported by averments in the applicant's affidavit in support. Failure to do so amounts to a failure to meet the requirements for the grant of a pre-emptive order.

The court found that the publications complained of did not pose any real and serious risk of prejudice to the applicant's ongoing trial. There is no element of immediacy of the threat of real risk of serious prejudice to his trial because one of the publications complained of which is Sarawak Report has long been in the public domain, i.e., since 2014. Thus, the long exposure to the public meant that there was never an immediate risk to his impending trial. When the immediacy is not established, the weaker the argument in justifying the presence of a real risk of prejudice to a fair trial.

Also, the conduct of the applicant in conducting interviews to explain his case to the press and the publication in his social media about his case have diminished the risk of serious prejudice to his trial partly because of the balance of reporting that had been favourable to him. Numerous interviews given by the applicant had been highly publicised which gave them the higher ground in media attention compared to the alleged prejudicial publications against him which were stale news from years ago. Moreover, the alleged prejudicial publications would not affect judges who are trained legal officers. The judges are not easily swayed by irrelevant information and succumb to

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Sahara India Real Estate Corp Ltd & Ors v Securities & Exchange Board of India & another CA No 9813 of 201; *Vincent Ross Siemer v The Solicitor General* [2013] NZSC 68, respectively.

32 Nurbaiti Hamdan, "High Court Dismisses Najib's Application for Gag Order on Media," *The Star,* August 10, 2018, accessed 8 August 2021, https://www.thestar.com.my/news/nation/2018/08/10/high-court-dismisses-najib-application-for-media-gag-order/; Sulhi Azman, Adam Aziz, "Court Rejects Najib's Bid to Extend Gag Order, Says It Violates Speech Freedom," *The Edge Markets,* August 10, 2018, accessed 8 August, 2021, https://www.theedgemarkets.com/article/court-rejects-najibs-bid-extend-gag-order-says-it-violates-speech-freedom.

public opinion. In discharging their judicial responsibilities, they must only consider the facts and the law applicable to a particular case before them.[33]

The gag order has also been rejected by the court because of the availability of other legal remedies. He could resort to the laws of defamation if the publications complained of deemed defamatory. He may also bring committal proceedings for contempt of court in the event the media or anybody offends the rule against *sub judice*. These are the available remedies for him to safeguard his right to a fair trial without resorting to the grant of a gag order. Nonetheless, he has not taken any legal action against those whom he deemed responsible for publishing the publications complained of. Thus, the availability of the law of contempt and defamation law renders the case for the gag order ineffective.

The court has also considered the proportionality test in balancing fair trial and freedom of expression. On this matter, since there was no immediate threat of a real and substantial risk of serious prejudice to the applicant's fair trial and there is availability of alternative remedies to him under the law of contempt and defamation, the grant of gag order was held disproportionate. The court gave greater emphasis on the freedom of speech and expression. Additionally, the court rejected the gag order when the scope of the order applied for is far too wide and lacked precision. It is applied to restrict "any person" from commenting, discussing, and publishing "anything" on the applicant's trial proceeding until the conclusion of the trial. The gag order seems to serve as a blanket ban on all publications that may pose the risk of prejudice to the applicant's trial. Thus, there is difficulty in imposing the order against foreign media based outside Malaysia. This would create a situation where local media are censored whilst foreign media are not.

ii) Public Prosecutor v Arumugam a/l Subramaniam

In contrast to DSNR, the High Court has granted a gag order to the prosecutor in Arumugam's case. In this case, the respondent, a social activist, and influencer, posted on his Facebook page a statement

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[33] *Syarikat Bekalan Air Selangor Sdn. Bhd. v Fadha Nur binti Ahmad Kamar & Anor* [2012] 7 MLJ 657.

relating to an ongoing murder trial condemning the work of the police, prosecution, and prosecution witness on his Facebook.[34] The publication was made immediately after the conclusion of the last hearing date, which he attended. His Facebook's postings which were accessible to the public contained inter alia a forensic pathologist who testified in the case manipulated the evidence, claims of fraud or a cover-up by police, and the "hidden hands" of so-called conspirators. His publications had invited negative comments which encourage the public to speculate on alleged conspirators as well as failure in the administration of justice.

The prosecutor applied for a gag order to prevent the respondent from further publishing any such statement in any form of media including Facebook and WhatsApp to protect the integrity of the ongoing murder trial and the whole justice system.

The hearing of the application was fixed on 28 July 2021. Despite knowing the hearing of the application and having given the undertaking to the court not to make any public statement, the respondent still published a statement condemning the gag order application on his Facebook and WhatsApp.[35]

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[34] Wong Kai Hui, "Nhaveen Murder Trial: DPP Tries to Gag Activist on "New Evidence"," *Malaysiakini*, June 25, 2021, accessed September 9, 2021, https://www.malaysiakini.com/news/580393; Pradeep Nambiar, "Activist Gets Ticking-off and Gag Order After Comments on Nhaveen Murder Trial," *Free Malaysia Today,* August 5, 2021, accessed September 9, 2021, https://www.freemalaysiatoday.com/category/nation/2021/08/05/activist-gets-ticking-off-and-gag-order-after-comments-on-nhaveen-murder-trial/.

[35] Pradeep Nambiar, "Court Gags Activist Arun over Nhaveen Murder Trial," *Free Malaysia Today,* July 28, 2021, accessed September 15, 2021, https://www.freemalaysiatoday.com/category/nation/2021/07/28/court-gags-activist-arun-over-nhaveen-murder-trial/; Pradeep Nambiar, "Activist Ordered to Stop Posting Remarks on Nhaveen Murder Trial," *Free Malaysia Today,* June 25, 2021, accessed September 15, 2021, https://www.freemalaysiatoday.com/category/nation/2021/06/25/activist-ordered-to-stop-posting-remarks-on-nhaveen-murder-trial/.

After hearing the application, the court granted the gag order on the ground that the publications complained of posed immediate risk to the ongoing murder trial in the following manners:

(i) The Facebook postings were published immediately after the conclusion of the last trial date and made accessible to the public. His posting invited comments from the public and it was tainted with speculations, accusations, and insinuations of manipulation of evidence by the prosecution and witness.

(ii) The court also examined the language of the message posted through his WhatsApp and the court found that the message implied that if the court were to grant the gag order, the court was equally complicit in that sinister plot.

(iii) The publications resulted in the failure of an important witness for the prosecution to testify in court on the day when the trial is supposed to resume due to lack of confidence in the prosecution case.

(iv) The allegation against the prosecution found in the publications could not be answered by the prosecution publicly. The prosecution cannot enter the arena of public debate to balance reporting of rival views on the matter. If so, it would amount to conducting the trial through public media. The prosecution can only respond to any allegation of misdeed by continuing to conduct the trial with honesty and integrity to the best of its ability.

Application of the Gag Order Test and Recent Developments in Malaysia

In evaluating the merits of the application of the gag order, the High Court in Arumugam's case was guided by the decisions of the courts in DSNR's case which had formulated the test to be satisfied in granting the gag order that:

i. it is necessary to prevent an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings,

ii. in the absence of alternative measures, and

iii. is proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial.

The first part of the test is the impugned publications pose an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings. The applicant must prove that the impugned publications are prejudicial, and the risk of prejudice is real and substantial which means that the said impugned publications can extend to pre-judging the case and encroaching into how the case is to be addressed or decided by the judge. Such publications may usurp the role of the courts in decision making if the media is allowed to discuss matters and evaluate the evidence adduced in court in an ongoing trial proceeding.[36] Further, these materials are published, made available to the general public or at any rate a section of the public which is likely to comprise those having connection with the case, and it has to be shown not only that the prejudicial publication is likely to influence the reader but also that it is likely to be read by persons connected with the trial. The publications must be pervasive and imminent too.

In DSNR's case, the alleged publications did not fulfil this part. There is no element of immediacy of the threat of real risk of serious prejudice to his trial because one of the publications complained of has long been in the public domain. Apart from this, the applicant had conducted interviews with the media to answer the allegations against him. The courts found that the application had the opportunity to present his side of the story and those interviews amounted to balance reporting of rival views on the matter. Furthermore, the possibility of prejudice from those publications on the judges is remote. The judges in the discharge of their judicial responsibilities must consider only the facts and law applicable to a case before them and will not succumb to public opinion. Hence, there was no real and substantial risk to the fairness of his trial. Moreover, the gag order was applied against the media at large and any person that publish, comment, or discuss his ongoing trial. It was a blanket ban, thus rejected by the courts.

On the other hand, in Arumugam's case, the Facebook postings and the WhatsApp message posed the risk of prejudice to the trial. As mentioned earlier, those publications were published immediately after the trial and the narratives of those publications had badly influenced

[36] See *Attorney General v Times Newspaper Ltd* [1973] 3 All ER 54.

the main witness in this case to the point that he lost his confidence in the prosecution which resulted in his failure to be present in court. His absence disrupts the trial. Unlike in DSNR's case, the application for the gag order was made by the prosecution against the respondent, the specific member of the public, whose publications have touched upon the integrity of the trial and the prosecution witness in the ongoing trial.

Hence, the court would have to take the linguistic meaning into consideration, as well as the number of people affected by the publication. Adding on, the court will consider the pre-set image of the trial set onto the readers by the publication. With all these factors in consideration the risk of prejudice to the ongoing trial will be determined. The effects of these factors may result in a deprivation of a fair trial and the case will be considered a trial by the media.

The second part of the test requires the applicant to prove that a gag order to restrain the media and the public is the only means by which a fair trial can be assured. It means that there is an absence of alternative measures to deal with the problem such as through a change of venue, postponement of the trial[37] or to have an early trial.[38] In DSNR's case, since the impugned articles complained of did not pose an immediate risk of prejudice to the ongoing trial, he could resort to defamation law or contempt law. There are available alternative measures for him to resort to. Unlike the case of Arumugam where the court found that the publications posed an immediate risk of prejudice as they resulted in the failure of the important witness to appear and testify in court. In this case, the gag order is the best available measure to stop such publications.

In the last part of the test, the applicant must prove that a gag order is necessary and proportionate[39] to protect his right to a fair trial. He must convince the court that an interference, in the form of a gag

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37 *Nebraska Press Association n Hugh Stuart* (1976) 427 US 539.

38 In *Hodgson and others v Imperial Tobacco Ltd and others* [1998] 2 All ER 673, the English Court of Appeal suggested that to avoid the risk of trial by media is to have an early trial. The longer the trial is delayed the greater opportunity for the media to widely publicised the case.

39 Proportionality test is a resolution of a conflict between the right and a competing right, and this conflict is ultimately resolved at the balancing stage. See Kai Moller, "Proportionality: Challenging the Critics," *International Journal of Constitutional Law* 10, no. 3 (July 2012): 709–731, https://doi.org/10.1093/icon/mos024.

order, with a right to free speech and expression is justified. The court in Arumugam's case decided that the gag order is proportionate to the preservation of the right of the prosecution to conduct the trial without fear, undue pressure of public condemnation, suspicion of malicious misconduct or the risk of any witnesses becoming absent, uncooperative, or fearful witness. It is also proportionate to the right of all the accused persons to a fair trial and the presumption of innocence until proven guilty. The order to gag the respondent was granted that restricts the respondent from making "any publications or comments that have the effect of casting allegations of speculations, suspicion or accusations of illegal conduct, cover up and manipulation of evidence by the police, prosecution and the prosecution witness pending the final conclusion of the said trial."[40] The gag order, however, will not restrict the right of the respondent to communicate with the police or the prosecution on any *bona fide* matter.

The case of DSNR has become a landmark case that would have a lasting effect on the application of the law relating to prior restraint. It has laid down the test or standard that needs to be fulfilled in applying the prior restraint in the form of gag order. Recently, the sessions court in Raub Pahang dismissed an application for a gag order by the prosecution against an activist to prevent her from making any statement on her ongoing state land encroachment case to the media. She was charged with three counts of unlawful occupation of state land under Section 425(1)(a) of the National Land Code 1965. The judge dismissed the application to gag the activist because the application failed to meet the test or conditions laid down in DSNR's case. The judge found that the publication did not pose any immediate and substantial risk of prejudice to the trial. The judge would not succumb to the statements made by the activist. It is the duty of the judge hearing the case to consider only evidence adduced in court and to ignore irrelevant matters. The judge further held that the applicant could still initiate committal proceedings for contempt of court if any party violated the rule of *sub judice*. Moreover, the judge also decided that dismissing the application for the gag order would not result in a denial of the right to a fair trial. Instead, it would give the applicant an opportunity to tell her story and thus create a balanced narrative in the

40 [2022] 10 MLJ 684 at p. 708.

matter.[41] Hence, DSNR's case is indeed a reference for future cases of similar nature.

CONCLUSION

The court in the case of DSNR and Arumugam affirmed the application of the *sub judice* rule and prior restraint or gag order in Malaysia. The *sub judice* rule must be observed not only by the mainstream media, but also by the Malaysian public to curb from making, commenting, reporting prejudicial publication which may undermined the fair trial of a case.

As members of a community and human in nature, it is natural to want to know about the cases of our surroundings. It is what makes us feel secure. It is also in our nature to want to advocate our opinion and thoughts, but we must always remember that we need to observe our ethics, the ethics of reporting what can and cannot be reported relating to ongoing cases. These reports may influence one's thoughts, though they may be speculations, insinuations, fake allegations, and accusations. These "reports" will have the possibility to jeopardise a trial and deprive the relevant individuals of a fair trial. "Innocent until proven guilty" should become a principle that stays in our minds before a publication is made.

However, when the *sub judice* rule is breached, a "gag-order" can be applied for. The success will depend on fulfilling the three tests as laid down in the case of DSNR which has been made the benchmark for all future cases. In the case of Arumugam, the prosecutor, being the applicant was able to prove the three tests thus was granted with the gag order whereas in the recent case against an activist in Raub, the application by the prosecutor was rejected.

Finally, the factors that will be considered- prevention of an immediate threat to the case, no alternative measures, and the necessity

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[41] "Court Dismisses Application for Gag Order by Prosecution against Green Activist Shariffa Sabrina," *The Star*, July 8, 2022, accessed September 8, 2022, https://www.thestar.com.my/news/nation/2022/07/08/court-dismisses-application-for-gag-order-by-prosecution-against-green-activist-shariffa-sabrina.

to protect the right of a fair trial- would determine the approval or rejection of the application of the gag order.