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Malaysian Federal Court Decision Against Online News Portal *Malaysiakini* a Setback to Media Freedom and Freedom of Expression

A coalition of Malaysian and international media organisations and freedom of expression groups, including the Centre for Independent Journalism, Gerakan Media Merdeka and the National Union of Journalists Peninsula Malaysia, and global partners International Federation of Journalists, Article 19, Reporters Without Borders, and the Centre for Law and Democracy are concerned that the Malaysian Federal Court's 19 February 2021 conviction of online news outlet *Malaysiakini* on contempt of court charges will have a serious chilling effect on media freedom and freedom of expression.

Malaysia has experienced unprecedented political turmoil since the *Perikatan Nasional* coalition of political parties took power in March 2020 and is currently under a State of Emergency which was proclaimed on 11 January 2021. Increasingly, we are seeing journalists and news portals being investigated by the police and charged with criminal offences because of their reporting. Media operations in Malaysia are more controlled and restricted than ever since the change of government last year. The decision of the apex court comes at a time when the government is silencing dissent and cracking down on those challenging or questioning the current regime.

We call on the Malaysian government to end and refrain from the continued use of intimidating measures to threaten and punish the media and silence opinions.

We note that any restrictions on freedom of expression should be clear and narrowly defined, and serve a legitimate interest as recognised under international law, while meeting the internationally established tests of necessity and proportionality.

Punishing a news portal over comments left by their readers, which they removed upon being notified that the comments were problematic, is grossly disproportionate to any legitimate aim of protecting public order, and seriously undermines freedom of expression. Specifically, the Federal Court held that the online news portal *Malaysiakini* was guilty of contempt of court for comments

posted by third party subscribers on their site and fined an exorbitant amount of Malaysian Ringgit 500,000 (USD125,000). Steven Gan, the editor-in-chief, was acquitted as the second respondent.

Malaysiakini was first alerted by the police about five allegedly contemptuous comments left by their readers in the comments section of a news article on the [judiciary's decision to reopen its courts](#). Following the police notification, the comments were immediately taken down by *Malaysiakini*. Notwithstanding that, the [Attorney General initiated contempt of court proceedings](#) against *Malaysiakini* and its editor-in-chief in June 2020 on the basis that these “comments threaten public confidence in the judiciary and are clearly aimed at tarnishing the administration of justice by the judiciary”. According to the Attorney General, *Malaysiakini* had facilitated the publication of the five comments, which were themselves “unwarranted” and “demeaning” attacks on the judiciary.

The Federal Court on 19 February 2021 found *Malaysiakini* guilty as they were deemed to be publishers of the impugned comments under Section 114A of the Evidence (Amendment) (No.2) Act 2012. This Act is highly controversial and has been [criticised](#) for its overreach in making internet intermediaries liable for content that is published through their services. It further applies a presumption of guilt doctrine.

This decision imposes an obligation on all online news portals to ensure that they moderate, and ultimately censor, comments before they are posted to avoid liability. This goes against even the internationally contested standard of ‘flag and take down’, while better practice is to protect intermediaries until an authoritative source, such as a court, orders them to take content down. To comply with this rule would require extensive resources to be mobilised to manage the flow of third party comments. Online media, already under tremendous financial pressures, are instead likely to completely remove the comment option to mitigate the risks and save funds. This, in turn, would seriously undermine the critical role of media in facilitating space for public participation, which allows ideas and opinions to be exchanged and dissent and protests on matters of public interests to be expressed freely as a fundamental and constitutional right.

It is also discouraging to see the archaic approach to the legal doctrine of ‘scandalising the court’ which was applied. While we recognise the key role played by an independent judiciary, at the same time the public should be able to express critical views about the judiciary, and have those views published by the media, without being threatened with legal proceedings.

Public confidence in relation to all branches of the State, including the administration of justice, should be fostered through public criticism and debate, not suppression of democratic dissent. The State should be cautious of undermining its own stature and credibility through the repressive application of legal practices, which is likely to provoke discontent and suspicion rather than bolster the status of public institutions.

An example of this was seen in the public’s reaction to the decision against *Malaysiakini* and the outpouring of monetary support enabling *Malaysiakini* to reach its fundraising target of the 500,000 Malaysian Ringgit it was fined within less than 4 hours. Resistance can take many forms

and the people have clearly demonstrated their protest against this injustice and attempt to silence the media.

Malaysia must stop using its significant arsenal of repressive and archaic laws, such as the Evidence Act, Communications and Multimedia Act, Sedition Act, Official Secrets Act and the Printing Presses and Publications Act, amongst others, to defend its institutions. Instead, these laws should be reviewed and amended or repealed to ensure compliance with international standards.