

## Trial by media? Understanding the contours of the sub judice rule

\*By: Tan Shih Rong, Robbie & Wong Li De, Brian

### I. An introduction to the *sub judice* rule

A recent spate of events, including a stabbing at Ming Arcade and allegations of sexual misconduct against a former radio deejay, have drawn widespread public attention on social media,<sup>1</sup> with many having weighed in on what might have transpired. The question arises: are members of the public allowed to publish materials and comments about these cases on social media platforms, when they are being determined by the Singapore courts?

The answer lies in the rules governing *sub judice*, which forms part of the law of contempt of court in Singapore. This rule directly translates to “before the court or judge for determination”<sup>2</sup> and seeks to prevent the intentional publication of materials which either prejudice or interfere with pending court proceedings, or pose a real risk of doing so.<sup>3</sup> In the UK, for instance, newspaper articles which sought to persuade readers that the accused had committed the crime of rape pending jury trial fell afoul of the *sub judice* rule.<sup>4</sup>

Historically, this rule originated in legal systems which employed the use of juries in making factual determinations during trials, based on the evidence admitted.<sup>5</sup> These juries would comprise members of the public, who generally would not have professional legal training or experience. Exposure to public discussion and opinion concerning the case might therefore cause them to subconsciously pre-judge the accused and affect their eventual decision, prejudicing the accused’s right to a fair and impartial trial.<sup>6</sup> The *sub judice* rule was thus aimed at obviating the risk of such prejudice, by preventing public speculation and opinion in the first place.<sup>7</sup>

However, even in non-jury systems such as Singapore’s where findings of fact are made by legally trained judges, who by virtue of their training and experience should not be as susceptible to being influenced by public opinion, the *sub judice* rule remains important for several reasons.<sup>8</sup> *First*, the fear of stigmatization might prevent potential witnesses from coming forward with evidence or information that runs counter to strong public opinion,<sup>9</sup> or from giving testimony in favor of an accused against whom public mood has been colored.<sup>10</sup>

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\* Year 4 LL.B. student, Yong Pung How School of Law, Singapore Management University; Juris Doctor student, Yong Pung How School of Law, Singapore Management University.

<sup>1</sup> *Channel News Asia* (6 June 2022); available at: <<https://www.channelnewsasia.com/singapore/harpoon-stabbing-ming-arcade-two-men-charged-labrador-park-2729166>> (accessed 8 June 2022); *Channel News Asia* (30 May 2022); available at: <<https://www.channelnewsasia.com/singapore/dee-kosh-pleads-guilty-sex-offences-exploitation-underage-teenage-boys-2715696>> (accessed 8 June 2022).

<sup>2</sup> Sossin, Lorne, and Valerie Crystal, *A Comment on “No Comment”: The Sub Judice Rule and the Accountability of Public Officials in the 21<sup>st</sup> Century*, *Dalhousie Law Journal* 36.2 (2013): 535-580, at p 539.

<sup>3</sup> Administration of Justice (Protection) Act 2016 (“AJPA”), s 3.

<sup>4</sup> *AG v News Group Newspaper PLC*. [1989] A.B. 110, at 126–128.

<sup>5</sup> Ian Cram (ed), *Borrie and Lowe: The Law of Contempt of Court* (LexisNexis, 4<sup>th</sup> edition, 2010), at para 5.1.

<sup>6</sup> Sui Yi Siong, *Sub Judice Contempt of Court in Singapore and the Way Forward*, *SLR* (2014), 32, 121-150, at p 126.

<sup>7</sup> *Ibid.*

<sup>8</sup> Indranee Rajah S.C., *Upholding the Integrity of Our Justice System And Balancing Rights* (2016) (“*Upholding the Integrity of Our Justice System*”), at p 4.

<sup>9</sup> *HM Attorney-General v MGN Ltd* [2011] EWHC 2074, at [31].

<sup>10</sup> Minister Shanmugam, 2<sup>nd</sup> reading of Administration of Justice (Protection) Bill (“2<sup>nd</sup> reading”), at [79].

Strong public opinion may also affect how witnesses perceive and recall the evidence they have witnessed.<sup>11</sup> This would naturally risk depriving judges of the benefit of accurate testimony at trial, and hamper the administration of justice accordingly.

*Secondly*, even if their assessment of the evidence is less likely to be influenced by public opinion, judges should not be subject to pressure from the public, which might in some cases go so far as to seek to influence the result of a court decision.<sup>12</sup> After all,

“[Judges] are also human and the law would be difficult to reconcile with common sense if it had to proceed on the basis that, unlike other people, they were incapable of being prejudiced in their views by material damaging to a particular litigant to which they had been unnecessarily exposed”.<sup>13</sup>

Such public opinion may also put pressure on the prosecution to handle cases differently, which would not be proper.<sup>14</sup>

*Finally*, strong public opinion or charged discussions may be *seen* as having had an impact on the outcome of a case, regardless of what that outcome is or whether it had in fact been so affected.<sup>15</sup> For example, if the sentence appears harsh, some people may attribute this to strong public opinion against the accused.<sup>16</sup> Conversely, if the accused is acquitted, some might assume that the judge might have deliberately leaned the other way, to show that he had *not* been influenced by the media.<sup>17</sup> In either case, the integrity and credibility of the outcome would be damaged, an outcome which should be avoided.

For these reasons, the *sub judice* rule remains crucial to upholding the integrity of the justice system, and violations thereof will amount to contempt of court and be punishable with a hefty fine and/or imprisonment.<sup>18</sup> It is therefore important to be aware of the scope of the rule, which may be understood in terms of: the duration for which it operates in respect of any particular case; what sorts of matters which should not be published during that period of time; and what kind of communication or discussion would amount to publication.

## **II. The duration of the *sub judice* rule**

As the rationale behind the *sub judice* rule is to prevent the possibility of prejudicing an accused person’s right to a fair trial, it only operates to prohibit the publication of certain matters pending court proceedings.<sup>19</sup> This begins from the time an accused person is summoned or arrested, or a warrant for his or her arrest is issued,<sup>20</sup> and ends when sentence is passed, and any appeal is either finally decided, or the period of limitation for appeals expires.<sup>21</sup> Naturally, after legal proceedings have ended, there is no risk that any publication would prevent witnesses from coming forward or put pressure on the judge or lawyers, as said witnesses would have already come forward and the judge and lawyers would already have discharged

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<sup>11</sup> *Id.*, at [81].

<sup>12</sup> *Upholding the Integrity of Our Justice System*, *supra* n 8, at p 4.

<sup>13</sup> *Kelly v O’Neill* [2000] 1 IR 354, at 375 (“*Kelly v O’Neill*”).

<sup>14</sup> 2<sup>nd</sup> reading, *supra* n 10, at [80].

<sup>15</sup> *Kelly v O’Neill*, at 376.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.*, at [83]–[84].

<sup>18</sup> AJPA, s 12.

<sup>19</sup> *Id.*, s 2(2).

<sup>20</sup> *Id.*, s 2(2)(b).

<sup>21</sup> *Id.*, s 2(2)(c).

their responsibilities in respect of the particular case. Members of the public may therefore freely comment anything related to the case, including the defendant and the decision itself.<sup>22</sup>

### III. What matters cannot be published pending court proceedings

We next consider what matters might, if published while proceedings are pending, fall foul of the *sub judice* rule. The most obvious are those which directly relate to a key issue in a case, which the court would need to determine at trial. In criminal cases, these typically concern physical or mental elements of the crime in question. For example, in a case where Person A is on trial for assaulting Person B, but where there is some uncertainty over whether it was in fact Person A who physically committed the assault, publications alleging that A was in fact the assailant, or even merely that he was at the scene of the assault when it took place, would likely fall foul of the *sub judice* rule.<sup>23</sup> Likewise, where an issue at trial is whether the accused knowingly participated in the hacking of mobile phones, publishing material implying that he did in fact knowingly carry out the hacking on the orders of a superior, would likewise be prohibited.<sup>24</sup> Additionally, where an issue at trial is the sentence to be given to the accused, publishing articles with the intention to urge the imposition of a particular sentence would fall afoul of the *sub judice* rule.<sup>25</sup> In *Kelly v O’Neill*, the accused was convicted in the Dublin Circuit Criminal Court for drug offences. Prior to his sentencing, an article was published by The Irish Times, which not only stated that the accused was involved in other major crimes but also that he was closely associated with the most notorious criminal family in Dublin. The Court found that if any regard were had to these materials, it would be seriously damaging to the accused.<sup>26</sup>

Criminal trials also often turn on the availability of legal defences. In many sexual assault cases, there is no dispute as to whether the act constituting the alleged assault occurred. Instead, the accused often claims to have mistakenly believed the victim had consented to the act,<sup>27</sup> a belief which must have been held in “good faith” and be founded on “due care and attention” to be legally exculpatory.<sup>28</sup> Publication of material concerning the reasonableness or well-foundedness of the accused’s mistaken belief in the particular instance, might thus amount to *sub judice* contempt. For instance, in May 2022, the Public Prosecutor filed an appeal against the High Court’s decision to acquit an ex-Grab driver for alleged sexual misconduct.<sup>29</sup> Pending the appeal, publishing materials relating to the capacity of the victim to consent may similarly fall afoul of the *sub judice* rule.

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<sup>22</sup> 2<sup>nd</sup> reading, *supra* n 10, at [87].

<sup>23</sup> *Id.*, s 3 Illustration 2.

<sup>24</sup> *Attorney General v The Condé Nast Publications Ltd* [2015] EWHC 3322 (Admin), at [14], [24].

<sup>25</sup> *Kelly v O’Neill*, at 379–380.

<sup>26</sup> *Kelly v O’Neill*, at 380.

<sup>27</sup> *Channel News Asia* (5 April 2021); available at: <<https://www.channelnewsasia.com/singapore/smu-student-lee-yan-ru-on-trial-for-molesting-woman-196486>> (accessed 5 December 2021); *Ong Mingwei (alias Wang Mingwei) v Public Prosecutor* [2013] 1 SLR 1217.

<sup>28</sup> Penal Code (Cap 224, 2008 Rev Ed), ss 26B, 79; Stanley Yeo, Neil Morgan, Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3<sup>rd</sup> edition, 2018) at p 384.

<sup>29</sup> *Channel News Asia* (27 Apr 2022); available at: <<https://www.channelnewsasia.com/singapore/ex-grab-driver-acquit-attempted-rape-drunk-passenger-2649921>> (accessed 8 June 2022).

Alternatively, in cases concerning murder or drug trafficking, accused persons often attempt to rely on the defences of diminished responsibility or unsoundness of mind,<sup>30</sup> which requires them to show that they were suffering from a mental incapacity of a sufficiently serious nature. One should therefore avoid publishing matters concerning the accused's mental health, and whether it might have affected his or her ability to understand the nature of their actions in that particular case. Of course, the *sub judice* rule is not limited only to criminal cases, but to any issue which is to be determined in a legal proceeding. In the context of a coroner's inquiry, for example, alleging that the deceased committed suicide as a result of police intimidation during an investigation, might prejudice the crucial issue of what caused the suicide,<sup>31</sup> and ought to be left to the coroner to determine.

However, matters may be considered *sub judice* contempt even if they do not appear to directly relate to legal elements or defences in a pending case. The Administration of Justice (Protection) Act provides an example of a defendant who is being tried for raping a particular individual. Public allegations that he had previously committed rapes against other individuals, for which he is not presently on trial, may fall foul of the *sub judice* rule.<sup>32</sup> This is likely because such allegations would suggest that the accused has a "disposition" towards or a tendency to commit such crimes, and would thus be highly prejudicial to him at trial even though they are not directly relevant to the particular allegation of rape for which he is being tried.<sup>33</sup> In fact, it is precisely because the prejudicial effect of such "similar fact evidence" would outweigh its value in proving the actual commission of the specific crime, that it may not even be admissible as evidence at trial.<sup>34</sup> Even evidence which merely speaks to the general character of any party to a criminal or civil case, such as claims that a defendant is generally dishonest<sup>35</sup> or has a reputation for behaving inappropriately towards women,<sup>36</sup> are typically regarded as inadmissible as well. Such matters should therefore also not be published.

However, this does not mean that any and all discussion related to a pending case is prohibited. While publication of matters concerning the specifics of a case or the parties involved should be avoided, public discussion of wider socio-political or systemic issues which some might see as connected to the case are permissible.<sup>37</sup>

Consider the above example of the coroner's inquiry into the suicide of a teenager. In that case, a prominent lawyer had suggested that a "less intimidating approach" could have been considered by the police when dealing with the deceased.<sup>38</sup> The court found that this publication did *not* breach the *sub judice* rule, as it fell short of suggesting that there had been

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<sup>30</sup> *Straits Times* (3 November 2020); available at: <<https://www.straitstimes.com/singapore/courts-crime/jobless-man-of-unsound-mind-ordered-to-be-detained-after-trial-for-murdering>> (accessed 5 December 2021); *Channel News Asia* (12 October 2021); available at: <<https://www.channelnewsasia.com/singapore/murder-man-appeals-against-death-sentence-ahmed-salim-geylang-hotel-girlfriend-2237821>> (accessed 5 December 2021); *Today Online* (9 November 2021); available at: <<https://www.todayonline.com/singapore/maid-trial-murdering-employers-elderly-mother-law-who-allegedly-abused-her>> (accessed 5 December 2021); *Today Online* (4 March 2014); available at: <<https://www.todayonline.com/singapore/drug-trafficker-first-escape-death-because-mental-disability-after-act-amended>> (accessed 5 December 2021).

<sup>31</sup> *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2018] 4 SLR 317 ("*Nalpon Zero*"), at [67].

<sup>32</sup> *AJPA*, *supra* n 3, s 3 Illustration 1.

<sup>33</sup> *Lee Kwang Peng v Public Prosecutor and another appeal* [1997] 2 SLR(R) 569, at [44].

<sup>34</sup> Evidence Act (Cap 97, 1997 Rev Ed) s 14, Illustration (o).

<sup>35</sup> *Ng Kong Yeam (suing by Ling Towi Sing (alias Ling Chooi Seng) and others) v Kay Swee Pin and another* [2019] SGHC 219, at [36]–[44].

<sup>36</sup> *Soh Yang Tick v Public Prosecutor* [1998] 1 SLR(R) 209, at [23].

<sup>37</sup> 2<sup>nd</sup> reading, *supra* n 10, at [63].

<sup>38</sup> *Nalpon Zero*, *supra* n 31, at [10].

police intimidation or that it had caused the deceased to commit suicide. Instead, the statement was an “attempt to address a wider issue” of police investigations involving vulnerable suspects, which was permissible.<sup>39</sup> As another example, in the aftermath of the tragic murder of a secondary school student, numerous commentaries were published arguing for greater mental health awareness and training in schools, prompted in part by reports that the perpetrator had a history of mental health issues.<sup>40</sup>

It is unlikely that such discussions will constitute *sub judice* contempt, as they do not necessarily imply anything about the mental health of the perpetrator. On the other hand, matters which should not be shared would include rumours of what transpired on the day of the incident, or any information regarding the perpetrator’s mental health history that has been circulated on the internet. Similarly, in the context of a recent sexual assault case involving a university student,<sup>41</sup> while matters concerning the character of the alleged perpetrator should not be published, broader discussions online about women’s rights, sexual assault, and the importance of explicit consent remain permissible. Ultimately, the guiding principle in all cases should simply be to avoid publication of matters pertaining to the specific acts or actors involved in a pending case.

#### **IV. What constitutes “publication”**

However, not every discussion of matters will fall foul of the *sub judice* rule, even if they concern matters directly related to the specific case and take place before court proceedings have concluded. This is because the rule only prohibits discussions or commentary of matters which amount to “publication”, which has been defined in the Administration of Justice (Protection) Act as the act of disseminating, distribution, exhibiting, providing or communicating information to the public at large or a member of the public,<sup>42</sup> by oral, visual, written, electronic or other means.<sup>43</sup> On the other hand, “coffee shop” talk and private discussions about an ongoing case will not violate the *sub judice* rule,<sup>44</sup> as they are not directed towards or accessible to the public at large, or individuals simply in their capacity as members of the public.

However, it is important to note that “publication” does not only include traditional forms of publication by professional publishers such as books, newspapers, or news articles. The internet, social media platforms, and other advancements in information technology have made it significantly easier for private individuals share and publish information to a much larger audience than previously possible. In particular, posts on sites such as Facebook and Twitter can not only be viewed by members of the public, but also re-posted multiple times, and could have a real and substantial impact in shaping public opinion.<sup>45</sup> Such posts would therefore constitute “publication” in the legal sense.<sup>46</sup>

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<sup>39</sup> *Id.*, at [66]–[67].

<sup>40</sup> *Channel News Asia* (23 July 2021); available at: <<https://www.channelnewsasia.com/singapore/river-valley-high-school-death-halimah-yacob-mental-health-2039441>> (accessed 5 December 2021).

<sup>41</sup> *Channel News Asia* (5 April 2021); available at: <<https://www.channelnewsasia.com/singapore/smu-student-lee-yan-ru-on-trial-for-molesting-woman-196486>> (accessed 5 December 2021).

<sup>42</sup> AJPA, *supra* n 3, s 2(1).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Upholding the Integrity of Our Justice System*, *supra* n 8, at p 4.

<sup>45</sup> *Straits Times* (13 August 2016), <<https://www.straitstimes.com/opinion/dont-turn-court-trials-into-public-circuses>> (accessed 15 December 2021).

<sup>46</sup> *The Law Society of Singapore v Zero Geraldo Mario Nalpon* [2021] SGGT 5, at [18].

One should also exercise caution when resharing or republishing posts,<sup>47</sup> if those posts contain matters which would fall afoul of the *sub judice* rule.<sup>48</sup> This is because whether one specifically intends to interfere with pending court proceedings is not relevant to whether an act of publication amounts to *sub judice* contempt - it is only necessary that one intentionally publishes the matter in question, which objectively poses a real risk of interfering with the pending proceedings.<sup>49</sup> The extent of publication will be taken in account by the courts to objectively determine whether the publications, in totality, would pose a real risk of interfering with pending court proceedings.

## V. Conclusion

In summary, the test of whether a publication falls afoul of the *sub judice* rule is based on whether or not that publication prejudices, interferes with, or poses a real risk of doing so to pending court proceedings. To answer these questions, a myriad of factors would be considered by the court, including, but not limited to: (1) The content of the comment; (2) The extent of publication and (3) The likely impact on the trial.<sup>50</sup>

As a highly interconnected and wired society, information in Singapore is transmitted and amplified quickly with the aid of social media and digital technology. A trial by media or public opinion may undermine an individual's right to a fair trial, a key tenet of the Singapore justice system.<sup>51</sup> It is perhaps more important now than ever to be aware of the implications of publications which pose a real risk to pending court proceedings. Both legal practitioners and members of the public should pay special attention to the *sub judice* rule when making public remarks or comments about pending court proceedings. This will aid the judiciary in remaining neutral arbiters of justice.

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> AJPA, *supra* n 3, s 3(1)(b); Shadrake Alan v AG [2011] 3 SLR 778, at [23].

<sup>50</sup> *Id.*, at [47].

<sup>51</sup> *Upholding the Integrity of Our Justice System*, *supra* n 8, at p 3.