Open Justice: Exploring Illustrations of the Principle in Singapore

By: Charlotte Sim Yi Xuan and Hoy Jun En, John*

I. INTRODUCTION

Scenes from Hollywood courtroom dramas often depict court hearings as occasions for public entertainment, with a public audience privy to much of court proceedings. While Hollywood dramas are often unrealistic in their portrayal of actual courtroom proceedings, they do accurately reflect the fact that courtroom proceedings are usually open to the public. Such open proceedings illustrate the principle of open justice. This article seeks to explain the notion of open justice, as well as its application in court proceedings in Singapore.

Premised on the view that "justice must not only be done but must also be seen to be done",[1] open justice is an integral part of the justice system. It is indispensable in preserving the public interest during court proceedings. For instance, it has been observed that "publicity is the authentic hallmark of judicial…procedure".[2] Others observe that "people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing".[3]

This view applies as well in Singapore, with Singapore courts citing two main reasons for the application of open justice:

(a) The public administration of justice promotes transparency, providing a "safeguard against judicial arbitrariness or idiosyncrasy";[4] and

(b) Allowing the public to witness court hearings maintains public confidence in the judiciary and "dampen[s] the desire for recourse to vigilante justice".[5]

Further, open justice is statutorily provided for by section 8(1) of the Supreme Court of Judicature Act 1969 ("**SCJA**"), which states that: "The place in which any court is held for the

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* Year 3 LL.B. students, Yong Pung How School of Law, Singapore Management University.

1 *Millar v Dickson* [2002] 1 WLR 1615 at 1639.

2 *McPherson v McPherson* [1936] AC 17 at 200.

3 *Richmond Newspapers v Virginia* 448 US 555 at 571–572.

4 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [34], citing *Attorney-General v Leveller Magazine Ltd and others* [1979] 2 WLR 247 at 252.

5 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [34], citing Justice Stephen Hall, Judge of the Supreme Court of Western Australia, "Open Justice – Seen to be done", keynote address at the Fremantle Law Conference (19 February 2021).

purpose of trying any cause or matter, civil or criminal, is deemed an open and public court to which the public generally may have access." [6]

The principle of open justice would appear to be engaged when parties disagree about whether a particular piece of information revealed in the course of court proceedings should be accessible to the public. Given that court hearings often involve sensitive information, parties may argue for a gag order,[7] or some form of sealing and redaction order.[8] Such orders ensure the public is not privy to confidential or sensitive information disclosed during court proceedings. In doing so, however, they seem to run counter to the open justice principle by rendering certain aspects of court hearings inaccessible to the public eye.

Nonetheless, as the High Court in *Re Tay Quan Li Leon* observed, derogations from the principle of open justice are permissible provided they are "grounded in statute or in the court's inherent powers to do what is necessary in order to serve the ends of justice"[9] – these principles will be explored below. These derogations are reflected in section 8(2) of the SCJA, which provides that courts may hear proceedings in private if it is "expedient in the interests of justice, public safety, public security or propriety, the national interest or national security of Singapore, or for other sufficient reason".[10] Such departures, which are the "exception and not the norm",[11] can be observed in both criminal and civil proceedings.

Part II of this article will explore two areas where derogations from open justice are permissible: (1) derogations grounded in statute;[12] and (2) derogations within the court's inherent powers.[13] Part III will discuss several cases heard in Singapore courts to illustrate how the open justice principle has been applied in Singapore.

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6 Supreme Court of Judicature Act 1969, s 8(1).
7 See the case of *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) discussed below.
8 See the cases of *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) and *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) discussed below.
9 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [19].
10 Supreme Court of Judicature Act 1969, s 8(2).
11 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [17].
12 A statute is a formal written law enacted by the legislature, which, in Singapore, comprises of the President and Parliament. See <https://www.agc.gov.sg/our-roles/drafter-of-laws/the-legislative-process> for a brief summary of the legislative process.
13 See Part II(B): Derogations within the ambit of the courts' inherent powers.

II. DEROGATIONS FROM OPEN JUSTICE

A. Derogations grounded in statute

Derogations from the principle of open justice are permissible when there are statutory grounds for doing so.[14] While these usually include cases involving vulnerable persons, such as young children, and victims of sexual offences or child abuse, they also extend to situations such as arbitration proceedings.

For example, under section 112 of the Children and Young Persons Act 1993, the names and particulars of young children involved in court proceedings cannot be published.[15] This serves to prevent the identification of these young children, given their vulnerability in the face of public scrutiny. Further, under section 425A of the Criminal Procedure Code 2010, the names of complainants or alleged victims of sexual offence or child abuse offences must not be published.[16] Additionally, regarding family disputes, the Family Justice Act 2014 not only dictates that matters in a Family Justice Court must be heard in private (unless a court orders otherwise),[17] but also grants courts the jurisdiction to issue a gag or reduction order.[18] As for arbitration proceedings, sections 22 and 23 of the International Arbitration Act 1994 ("**IAA**") "reflect the public policy of keeping arbitrations, and all proceedings related to arbitration, confidential".[19] Section 22 of the IAA dictates that as a general rule, all proceedings under the IAA "are to be heard in private",[20] while section 23 of the IAA stipulates grounds under which information relating to the proceedings may be published.[21]

B. Derogations within the ambit of the courts' inherent powers

Derogations from the principle of open justice are also permissible if they fall within the ambit of the courts' inherent powers. These inherent powers are derived from Order 3 rule 2 of the Rules of Court 2021, which grants the courts power to "do whatever the Court considers

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14 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [19].
15 Children and Young Persons Act 1993, s 112.
16 Criminal Procedure Code 2010, s 425A.
17 Family Justice Act 2014, s 10(1).
18 Family Justice Act 2014, s 10(4).
19 International Arbitration Act 1994, ss 22–23.
20 International Arbitration Act 1994, s 22.
21 International Arbitration Act 1994, s 23.

necessary…to ensure that justice is done or to prevent any abuse of the process of the Court".[22] Such a provision "stems from the court's role as an adjudicating organ of the legal system",[23] and grants courts the freedom to make the necessary orders "[w]here the ends of justice so require".[24]

However, given the importance of open justice, the courts exercise their inherent powers with caution. They may have regard to section 8(2) of the SCJA[25] mentioned above, as well as whether strict adherence to open justice will result in disproportionate harm to an alleged wrongdoer.[26] This consideration was illustrated in the case of Dr Yeo Sow Nam, who was awarded a discharge amounting to acquittal[27] after being accused of outraging the modesty of a patient.[28] Although the testimony of Dr Yeo's accuser failed to hold up in court, his reputation had already been tarnished since his identity was published even before his trial commenced.[29]

This case therefore demonstrates the importance of upholding the principle of open justice in *substance*, and not merely in *form*. A rigid adherence to the principle would demand publication of an accused's name, but it would fall short of another fundamental tenet of the rule of law – the presumption of innocence,[30] i.e. that a person is innocent until proven guilty. Substantial injustice might befall an accused person whose identity is revealed before the outcome of his case is determined, since he may suffer loss of livelihood and reputation, such as in the case of Dr Yeo. Hence, courts have struck a delicate balance between preserving

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22 Rules of Court (2021 Rev Ed), O 3 r 2. For reference, O 92 r 4 of the Rules of Court (2014 Rev Ed) granted the courts "inherent powers…to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court".

23 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [23].

24 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [23].

25 Supreme Court of Judicature Act 1969, s 8(2).

26 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [25].

27 Criminal Procedure Code 2010, s 230 (*j*)-(*k*). A discharge amounting to acquittal is ordered by the court if it is of the view that there is no such evidence which is inherently incredible and which satisfies each and every element of the charge as framed by the prosecutor or as altered or framed by the court.

28 Lydia Lam, "Doctor acquitted of molesting woman after she admits to lying in court", *Channel NewsAsia* (16 August 2021) <https://www.channelnewsasia.com/singapore/doctor-mount-elizabeth-molest-acquitted-yeo-sow-nam-2115606> (accessed 27 January 2023). This appears to be an unreported case. As such, our information has been obtained from news reports.

29 Lydia Lam, "Doctor acquitted of molesting woman after she admits to lying in court", *Channel NewsAsia* (16 August 2021) <https://www.channelnewsasia.com/singapore/doctor-mount-elizabeth-molest-acquitted-yeo-sow-nam-2115606> (accessed 27 January 2023).

30 Alexander Woon & Melvin Loh, "Open justice and anonymity for the accused", *The Straits Times* (6 September 2021).
The presumption of innocence means that a person is innocent until proven guilty. Minister for Law, Mr K. Shanmugam, is quoted as saying, "the presumption of innocence is an important and fundamental principle, and is one of the foundations of our criminal justice system. The Government is absolutely committed to upholding the presumption of innocence, as a core principle in our commitment to rule of law".

public interest during court proceedings (open justice) and the rights of an accused person (presumption of innocence).[31]

Nonetheless, courts are only allowed to derogate from open justice "sparingly on grounds that are correspondingly strong to outweigh the principle of open justice".[32] This ensures that open justice remains the overriding consideration guiding courts in their decision-making.

To illustrate how courts have considered whether the principle of open justice should be outweighed by other considerations, we turn to the following cases: an application for a sealing order to redact the applicant's name; an application for a gag order redacting the perpetrator's name; and an application for keeping arbitration documents confidential. Granting any of these applications would have involved a derogation from open justice.

III. CASES ILLUSTRATING THE APPLICATION OF THE OPEN JUSTICE PRINCIPLE

A. Cheating on the Bar exam – sealing order application to redact name of Bar exam cheater

In *Re Tay Quan Li Leon*,[33] the applicant, Leon, was among five people caught cheating on the Bar exam. After being caught, he sought to withdraw his application to the Bar, stating in his Withdrawal Application that he had failed to display the requisite values of honesty and integrity, and that he was not a fit and proper person to be admitted to the Bar.[34] Leon then wrote to the Supreme Court Registry, requesting that his personal particulars, including his name, be redacted so that it would not be accessible through an e-Litigation search.[35]

He applied for a sealing order, arguing that:

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[31] Alexander Woon & Melvin Loh, "Open justice and anonymity for the accused", *The Straits Times* (6 September 2021).
A possible approach to balancing both open justice and the presumption of innocence is to publish the accused's name after he has been found guilty. This approach will not detract from open justice; in fact, it will serve to uphold it, in a way that is fair and in line with the presumption of innocence.

[32] *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [24].

[33] *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC).

[34] *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [2].

[35] *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [6].

(a) There was no public interest in his identity since he was withdrawing his application;[36] and

(b) He suffered from a mental health condition which he claimed had been exacerbated by his anxiety over the public attention attracted by the incident, as well as the public outcry and reactions, especially on social media.[37]

He also included a medical memo ("**Memo**") which opined that the disclosure of his name could trigger a severe psychiatric reaction.[38]

However, the court pointed out that contrary to Leon's claim, there was public interest in revealing his identity. Since open justice protects public confidence in the judicial system,[39] it is particularly relevant where the proceedings concern the legal profession. After all, admissions to the Bar *are* matters of public interest, given the role of the legal profession in upholding the justice system.[40] Therefore, since there was public interest in revealing his identity, the court opposed the first ground of Leon's claim.

Moreover, the court would be inclined to grant the sealing order where there is evidence that publishing the name of the litigant would pose "*imminent* risks or danger to that litigant",[41] or when the sealing order is "necessary to spare the litigant from imminent harm".[42] There was no credible evidence that Leon would suffer imminent harm caused by his alleged anxiety if his name was published. Not only was the Memo sparse, but it also failed to meet the criteria expected of a forensic psychiatric report, since the report was largely based on his self-reported symptoms.[43] Thus, as there was an absence of an imminent risk of harm to Leon, the court rejected Leon's application for a sealing order.[44]

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36 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [15].
37 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [15].
38 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [15].
39 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [17].
40 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [17].
41 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [25].
42 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [25].
43 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [29].
44 *Re Tay Quan Li Leon* [2022] 5 SLR 896 (SGHC) at [30].

B. Voyeurism – the need for a gag order for the perpetrator and the victim

In *Chua Yi Jin Colin v Public Prosecutor*,[45] the defendant, Colin Chua, was charged for filming multiple voyeuristic videos of several women.[46] This case concerned an application to lift the gag order, which redacted Colin's name to protect the identities of his victims. The victims, however, unanimously expressed support for the court to lift the gag order and disclose Colin's name.[47]

The court held that a gag order,[48] which is a derogation from open justice, is concerned with only the interests of the victims – the promise of anonymity encourages them to testify honestly since they are shielded from public scrutiny, and also minimises re-victimisation by sparing them from further trauma of unwanted publicity and embarrassment.[49] However, when the victim consents to a gag order being lifted, the court's concern over their safety will carry less weight. In this case, since the victims expressed support for lifting the gag order, the court was inclined to disclose the accused person's identity.[50]

Further, the continued suppression of Colin's identity may compound the victims' distress, undermining the purpose of a gag order.[51] One of the victims expressed that she felt complicit in the applicant's offences as she had introduced others to him.[52] Other victims felt helpless that they could not warn others of his predatory conduct.[53] Therefore, in light of the victims' unequivocal support for disclosure of Colin's identity, as well as the possibility that the gag order will harm the victims' mental wellbeing, open justice prevailed and the court lifted the gag order.

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45 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC).
46 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [1].
47 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [2]. We note that Colin pled guilty to all his charges before the application was made to lift the gag order. In comparison, for Dr Yeo's case, it is unclear whether there even was a gag order in the first place, and his guilt was not determined before his identity was published.
48 Gag orders are orders issued by the Court to protect the identities of minors involved in court proceedings or victims of criminal offences, especially victims of sexual crimes. Refer to https://www.agc.gov.sg/legal-processes/application-of-gag-orders for more information.
49 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [36].
50 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [38].
51 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [39].
52 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [39].
53 *Chua Yi Jin Colin v Public Prosecutor* [2022] 4 SLR 1133 (SGHC) at [40].

C. Arbitration proceedings – confidentiality of documents

As mentioned earlier, arbitrations[54] are generally kept confidential as a matter of public policy.[55] Two such cases are discussed here.

In the first case of *AZT and others v AZV* ("***AZT v AZV***"),[56] the High Court had to deal with AZT's application to seal court documents. AZT and AZV were parties to a Singapore arbitration,[57] where they were found jointly and severally liable for certain damages.[58] However, the arbitral award did not apportion liability as between the two parties.[59] Afterwards, AZT "agreed to pay $65m in full satisfaction of the arbitral award", which led to it seeking contribution from AZV in an Originating Summons ("**OS**") action.[60] Since the court documents in the OS action contained sensitive information such as the arbitration award, and transcripts of the arbitration hearing,[61] AZT applied for the sealing of the documents in the interests of confidentiality.[62] Since such an application derogates from open justice, the court had to weigh the need to preserve confidentiality in arbitration against the general principle of open justice.[63]

First, the court acknowledged that although open justice is an important consideration in court proceedings, it must "yield in the appropriate cases where to sit in public would destroy the subject matter of the dispute".[64] This is especially pertinent in arbitration proceedings, which have become an increasingly attractive form of legal recourse in recent years, in part due to their confidentiality. Therefore, open justice cannot be stubbornly and universally applied, or

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54 Arbitration is a form of alternative dispute resolution, outside the judiciary courts. The dispute is decided by an 'arbitral tribunal' comprising of a panel of independent arbitrators, who will then render an 'arbitral award'. This award is usually legally binding and enforceable in the courts. See <https://www.lawsociety.org.sg/our-community/legal-fact-check/understanding-arbitration/> for more information.

55 International Arbitration Act 1994, ss 22–23.

56 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC).

57 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [1].

58 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [4].

59 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [4].

60 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [4].

61 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [5].

62 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [46].

63 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [14].

64 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [9].

"parties may be deterred from arbitrating…if their understanding regarding arbitral confidentiality is ignored".[65]

In deciding to grant AZT's application, the court concluded that sealing the documents would not be a significant intrusion into the principle of open justice.[66] It cited the case of *R v Legal Aid Board, Ex parte Kaim Todner*,[67] where the English Court of Appeal held that applications that relate to an interlocutory application are a "less significant intrusion into the general rule" of open justice, because such interlocutory hearings are normally of interest only to the parties.[68] The court in *AZT v AZV* then surmised that although the OS action was not an interlocutory application, both were similar given that they are not heard in open court.[69] Therefore, sealing the documents in the current proceedings was not a significant intrusion into the general rule of open justice.[70]

Additionally, the court pointed out that there was no legitimate public interest in the subject matter of the dispute.[71] Not only was the dispute between the parties purely commercial, but there was also no "countervailing and legitimate public interest weighing in favour of disclosure" of the contents of the court documents.[72] This meant there was even less reason to publicise the documents, which would compromise the confidentiality of the arbitration proceedings – something the parties had agreed to.[73]

However, in the second case of *AAY and others v AAZ* ("***AAY v AAZ***"),[74] the court reached a different conclusion, on the grounds that the documents were appropriately redacted and of "major legal interest".[75] In that case, the defendants were in favour of allowing publication of the judgment with appropriate redaction,[76] while the claimants demanded an absolute bar on

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65 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [11], citing *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 at [32].
66 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [17].
67 *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966.
68 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [16], citing *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966 at 978.
69 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [19].
70 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [17].
71 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [19].
72 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [19].
73 *AZT and others v AZV* [2012] 3 SLR 794 (SGHC) at [19].
74 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC).
75 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [28].
76 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [12].

publication.[77] Given that the hearing had been held otherwise than in open court pursuant to sections 22 and 23 of the IAA, the court had to determine whether the judgment ought to be published.[78]

The court found that under section 23 of the IAA, the judgment of a proceeding heard otherwise than in open court may be published if it was redacted to conceal information that the parties wished to conceal.[79] Since the redacted version of the judgment in the case had not only been approved by the two parties, but also concealed matters which the plaintiffs wished to keep confidential, the court had the discretion to give directions concerning the publication of the redacted judgment.[80]

Furthermore, the judgment was found to be of "major legal interest".[81] It concerned the issue of confidentiality in arbitration, and examined the English decision of *John Forster Emmott v Michael Wilson & Partners*,[82] which formed part of what was then the most recent jurisprudence on confidentiality in arbitration, and had never previously been discussed by a Singapore court.[83] Additionally, the judgment "set out the legal position on the implied obligation of confidentiality in arbitration", thus constituting an issue of major legal interest.[84] Accordingly, pursuant to section 23(4) of the IAA, the court was permitted to allow publication of the redacted judgment.[85]

The two arbitration-related cases discussed above demonstrate how courts determine whether concerns of confidentiality in arbitration proceedings should override the principle of open justice. In *AZT v AZV*, the lack of legitimate public interest in the contents of the court documents militated against strict adherence to the principle of open justice. In other words, there was no convincing reason for the court to depart from the generally accepted principle of confidentiality in arbitration proceedings. Conversely, in *AAY v AAZ*, the presence of public interest in a novel legal issue discussed within the judgment swung the pendulum in favour of giving effect to open justice. Nonetheless, even in such a situation, the court was careful to

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77 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [22].
78 International Arbitration Act 1994, ss 23(2) and 23(3)(b).
79 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [24].
80 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [24].
81 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [28].
82 *John Forster Emmott v Michael Wilson & Partners* [2008] 2 All ER (Comm).
83 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [28].
84 *AAY and others v AAZ* [2011] 2 SLR 528 (SGHC) at [28].
85 International Arbitration Act 1994, s 23(4).

preserve Singapore's reputation as an attractive international arbitration hub, by allowing only a redacted version of the judgment.

IV. CONCLUSION

The exercise of open justice, while desirable, is not absolute. It is subject to exceptions in the form of interests that outweigh the need for open justice. When encountering a criminal case with high public interest, one should not be quick to demand that the perpetrator's identity be revealed. Before formulating such an opinion, it is helpful to understand the factual matrix of the case, the competing interests against open justice, and the personal circumstances of the parties. Nonetheless, open justice remains a fundamental tenet of the rule of law in Singapore.