Justice done and justice seen to be done - the public administration of justice

by Claire Baylis*

This article examines the principle that justice should be administered in open court. It analyses the reasoning behind the principle and discusses the various exceptions with a particular focus on name suppression in the criminal area.

I INTRODUCTION

A fundamental principle of the justice system in New Zealand is that the courts are open to the public, as this is believed to be a necessity in ensuring the proper administration of justice.[1] The public administration of justice has come to be seen as a trademark of a democratic society. This rhetoric is easily accepted and seldom questioned, but in fact on closer examination there are a number of problems with this apparantly simple principle. Some areas of law in New Zealand are not covered by this Publicity Principle, and specialist courts have been established which are to a great extent closed to the public. Some devices have been established as exceptions to the principle in certain circumstances. Some questions are even more basic - what is meant by the open and public administration of justice and why it is so important?

This Publicity Principle inherent in our system, has in more recent times attained constitutional status. In 1966 the General Assembly of the United Nations adopted the International Convention on Civil and Political Rights. New Zealand signed the Convention in 1968 and ratified it ten years later. The Convention creates legal obligations, on the signatories, binding in international law, to comply with the various articles, both in policy and in legislation.[2] Article 2 states that one of the duties of states who are parties to it is "to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ... Covenant".[3]

Article 14 (1) of the Convention states:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial

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1 *General Comments on the International Convention on Civil and Political Rights* Report of the UN Human Rights Committee GAOR, 1984, 39th Session, Supp No 40 (A/39/40) 143.

2 JB Elkind "Application of the International Covenant on Civil and Political Rights in New Zealand." (1981) 75 AJIL 169, 172.

3 Article 2 International Convention on Civil and Political Rights 1968.

> tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order *(ordre public)* or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children (emphasis added).

This article analyses how New Zealand law can be reconciled with Article 14(1) and whether the provision creates any obligations which are not being fulfilled in New Zealand at the present time. Secondly there will be a discussion of whether the publicity concept is synonymous in criminal and civil areas. Finally the article looks at the way that the rationale for the principle applies to different areas and how exceptions can be justified in areas where the rationale applies. In addition to these general themes the article will explain and highlight interesting areas relating to the principle of public justice, the reasons behind the principle and the exceptions which are accepted in New Zealand law.

There are good reasons for the Publicity Principle in the New Zealand system, and in general all the competing factors should be carefully weighed, before allowing exceptions to become widespread. There are however some exceptions where the rationale that underlie the principle do not apply, one of these being the area of name suppression in the criminal law. Appropriate reform is therefore suggested in this area.

II THE PUBLICITY PRINCIPLE

A *The Principle of the Public Administration of Justice*

The concept of an open and public justice system to a large extent speaks for itself. The key is simply the right of access to court proceedings by the public. "It is clearly stated in *Scott* v *Scott*[4] ... applied in New Zealand in *C* v *C*[5] ... that, apart from statutory provisions to the contrary or in some very special circumstances, all regular Courts of Justice must conduct their proceedings in public."[6] This common law principle is reinforced by statute in the criminal area by section 138(1) of the Criminal Justice Act 1985 which states that subject to specific exceptions, all proceedings concerning offences should be open to the public.

The Privy Council case of *McPherson* v *McPherson*[7] considered the question of what is an open hearing. The case concerned the validity of divorce proceedings which had taken place in the Judges' law library of the court house. The applicant contended

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4 *Scott* v *Scott* [1913] AC 417.

5 *C* v *C* (1915) 34 NZLR 626.

6 Addendum to the 1980 *Initial Report of New Zealand on the International Convention of Civil and Political Rights* [1982] Human Rights Committee 15th Session CCPR /C/ 10/ Add 6, 51.

7 *McPherson* v *McPherson* [1936] AC 177.

that the divorce should be declared void, one of the grounds being that the hearing had not taken place in open court. The judge, Lord Blanesburgh, considered that public access was the fundamental factor to the openness of the proceedings. While access was easy in respect of the court rooms, a "private" sign at the entrance hindered access to the library. The court considered that this sign would be as much a bar to an ordinary member of the public, as would a door being locked.[8] The judge made it clear that in deciding whether a case had been heard in open court, it was irrelevant that there were not any members of the public present, providing that the public could have had access to the hearing even in cases where it was very unlikely that anyone would have attended. He stated that "[t]he actual presence of the public is never necessary",[9] but that:[10]

> the court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

The fact that the judge on beginning the proceedings stated that the hearing was in open court, did not mitigate against this restriction on public access. It was also held not to be significant that there would have been no greater degree of publicity if the proceedings had been held in a court room, due to there being no written list of court business.[11]

This case clearly illustrates the common law basis for the general principle of openness. It is now accepted and entrenched in New Zealand law, not only by common law and statute, but also by the ratification of the International Convention on Civil and Political Rights, that in general the public must have open access to court proceedings. While the parties involved in a dispute are a subset of the public, as are the judges and other court officials who make up the state in the context of the justice system "the public is somehow also a third party, apart from both the individuals and the state, and playing a variety of roles, including those of witness, audience, critic, foil, and commentator".[12] There is not one unified body that can be called "the public." Members of the public will all have different values and norms. However the term refers to the public in general, thus incorporating all these different beliefs and cannot "for instance be limited only to a particular category of persons".[13]

Article 14 includes the press in the term "public", (in modern terms this may be read to encompass also radio and television reporters). Lord Diplock in *Attorney-General* v *Leveller Magazine*[14] agreed that the press have a role in the concept of a public justice system. He explained this role, by suggesting that the press are a useful tool in the open administration of justice as they disseminate reports of the proceedings to the

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8 Above n7, 200.
9 Above n7, 200.
10 Above n7, 200.
11 Above n7, 197.
12 J Resnik "Due Process: A Public Dimension" (1987) 39 Univ of Fla LR 405, 407.
13 Above n1, 144.
14 *Attorney-General* v *Leveller Magazine* [1979] AC 444, 450.

wider community. This means that a much greater percentage of the public will learn about the court hearing.

Certainly Lord Denning who described the media as the "watchdog of justice"[15] takes a generous view of their work:[16]

> A newspaper reporter says nothing but writes a lot. He notes all that goes on and makes a fair and accurate report of it. If he is to do his work properly and effectively we must hold fast to the principle that every case must be heard and determined in open court. It must not take place behind locked doors. Every member of the public must be entitled to report in the public press all that he has seen and heard.

In this way the media can be seen to play a positive role in the publicity concept. Sometimes, however there are negative aspects in this role, when reports of proceedings may be sensationalized or when pre-trial publicity may jeopardise the fair trial of the accused. In New Zealand law the law reflects the positive role of the media, even going so far in some circumstances as allowing the media greater rights of access to court hearings than the public. In this event reporters are seen as the public's representative, and bring a minimum element of openness to the proceedings, while other considerations can be protected by excluding the general public and restricting publication of details of the hearing.

The right to public access to court proceedings applies generally to the evidence and the judgment of the court in both criminal and civil cases, and to higher review authorities.[17] Lord Diplock stated in *Attorney-General* v *Leveller*[18] that, in criminal trials at least, all the evidence should be communicated to the court publicly. Lord Diplock's focus on criminal proceedings reflects the immense power over the individual's freedom which the state has by virtue of the criminal law. If the public knows the grounds on which a charge is based, this provides a check on the deprivation of personal liberty. Article 14 does not draw this distinction between civil and criminal hearings and in New Zealand the general principle applies in both areas. However as an apparently "extra safeguard", the publicity principle and its exceptions were recently codified in the criminal area in the Criminal Justice Act 1985. The position in civil proceedings is still governed by the common law.

Article 14 does allow some exceptions to the general principle of open proceedings, but it states that the judgment of the court should be made public except in very limited circumstances.[19] Thus public judgments are pinpointed as the fundamental feature of the public justice concept. It seems that in almost all circumstances, a public judgment is

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15 "A Free Press" (1984) 17 Bracton LJ 13.

16 Above n15, 13.

17 Above n1, 146.

18 Above n14, 450.

19 "... any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." Article 14 International Convention on Civil and Political Rights 1968.

the minimum requirement of the Publicity Principle. However the wording of the Article raises an interpretation issue as to whether "judgment" means the judge's reasoning and the result, or just the actual decision or verdict. Obviously if the strict or latter interpretation is adopted this will limit the minimum requirements of public justice to a much greater extent.

The Criminal Justice Act 1985 clarifies the point in criminal law. Section 138(6) of the Act states that:

> the announcement of the verdict or decision of the court . . . and the passing of sentence shall in every case take place in public; but, if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other considerations that it has taken in to account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.

In the criminal context then, the minimum requirement of the Publicity Principle is that only the verdict and the sentence needs to be made public. This limits the effectiveness of the provision as it is difficult to assess a verdict or sentence when the evidence and the reasons on which it is based are suppressed.

The position is not clear in the civil context, where it is governed by the inherent jurisdiction of the court rather than by statute. The term is used commonly in both senses as can be illustrated by the High Court Rules. Rule 540 governs the time and mode of giving the judgment, and uses the term in its wider sense. Rule 539 defines "judgment" for Rules 541-544 and uses the stricter definition, defining also the term "reasons for judgment". The same issue was raised in *Lake* v *Lake*,[20] which was an appeal from a finding made during a divorce case, that the wife had committed adultery. Under section 27 of the Judicature Act 1925 (UK) it was possible to appeal from "the whole or any part of any judgment or order." The court held that this reference meant only the "formal judgment or order which is drawn up and disposes of the proceedings, and which, in appropriate cases, the successful party is entitled to enforce or execute",[21] and not the statement of the judge's reasons for that decision.

The courts in New Zealand have two options in defining "judgment" when exercising their inherent jurisdiction in the civil area. One is to follow the interpretation of judgment in *Lake* v *Lake* [22] which would make the civil law consistent with the criminal law. However in doing so this would drastically reduce the protection accorded by this minimum requirement against closed, secret hearings (as does the provision in the Criminal Justice Act 1985). Without either the evidence or the reasoning of the judge it is not possible for the public to analyse the judge's result. The alternative would be to give the word "judgment" a generous interpretation, so that both the decision and the reasons for that decision were public in all but the very limited number

20 *Lake* v *Lake* [1955] P 336.

21 Above n20, 344.

22 Above n20, 344.

circumstances set out in Article 14. It is this latter approach which would be consistent with the spirit and purpose of Article 14.

The final point of clarification concerns the question of whether the publicity principle safeguards the individual's right to a public hearing or the general public's right to have access to court proceedings. Article 14 is framed in terms of the individual's right to have a public hearing,[23] yet this wording could suggest that if the parties wanted to give up this right the public and media would have no right of access.

Lord Diplock in the *Attorney-General* v *Leveller Magazine*[24] discussed the notion of public justice, and appeared to frame his concept around the press and the public's right to have free access to court hearings. This seems more in line with the general notion of an open court system.[25] In the United States *Richmond Newspapers, Inc* v *Virginia*[26] concurred on this point. The case concerned a murder trial in which the defendant had requested that the trial be closed to the public, and as the prosecutor did not object, the judge made an order to this effect. Later two reporters brought a case arguing that the press and the public had the right to be present. Burger CJ in the Supreme Court stated that the 1st and 6th Amendments to the Constitution gave the press and the public the right of access to trials.[27]

The New Zealand report on the Convention appears to accept the principle as a duty owed by the courts to the public: "all regular Courts of Justice must conduct their proceedings"[28] "in a public court with open doors".[29] It is generally accepted that in this country there is not only the individual right to a public hearing, but also generally a public right of access to proceedings. There is a corresponding duty on the judges to ensure a hearing is public, unless it falls within one of the acknowledged exceptions.[30] For example section 138(1) of the Criminal Justice Act 1985 governs the position in criminal proceedings and states that:

> [s]ubject to the provisions of subsections (2) and (3) of this section and of any other enactment, every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public.

In civil matters the position is similar. The parties do have some choice as to whether they use the justice system or a private dispute resolution method, for example arbitration. However, if the dispute is brought to the justice system then the common law position is that generally hearings must be open to the public. It is not possible

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23 Article 14 of the International Convention on Civil and Political Rights, states that "everyone shall be entitled to a fair and public hearing..."

24 Above n14.

25 See also the case of *McPherson* above n7, where it was also held that the public have a right of access to a court of justice.

26 *Richmond Newspapers, Inc* v *Virginia* 448 US 555, 580 (1980).

27 Above n26, 580.

28 Above n6, 51.

29 Above n6, 51.

30 See Part III and Part IV.

under New Zealand law for the parties at a proceeding to opt to have a closed hearing. Thus the right to an open court system lies with the public rather than the parties to the hearing. In effect New Zealand law is already a step ahead of the position envisaged by Article 14.

B The Rationale for the Publicity Principle

The paramount concern of the Publicity Principle is to ensure that justice is done.[31] This is not limited to justice between the parties involved, but also includes justice in the wider sense. It is fundamental to a discussion of both the Publicity Principle, and of the necessary exceptions to that principle, that there is an analysis of the reasons why this idiom is now accepted as a principle of constitutional status. The discussion will start with the historical background to the Publicity Principle and a theoretical explanation for it. A variety of reasons will then be examined which justify the principle on the basis of the role the public plays in the process of adjudication. Finally the principle will be justified on the basis of the function of an open court system for the public.

1 The historical basis

The starting point in an analysis of the reasons for the Publicity Principle is its historical basis. It was claimed by Burger CJ in *Richmond Newspapers, Inc* v *Virginia* that throughout the history of the common law courts, there has always been a presumption that the public can attend trials, and therefore the public must be allowed to continue to attend.[32] It has been suggested that this practice started as "almost a necessary incident of jury trials, since the presence of a jury - involving a panel of thirty-six men and more - already insured the presence of a large part of the public".[33] Another suggestion is that according to ancient notions a court hearing is necessarily a public occasion.[34]

Judith Resnik, in her article "Due Process: A Public Dimension", criticises the notion that historical background is a reason for the Publicity Principle.[35] She claims that "[s]imply because we have, in the past, either included or excluded the public does not confirm that we should do the same thing today".[36] Certainly society cannot continue traditions just because they are traditions, without paying any regard to the merits and disadvantages of the practice, and to the other factors which can rationalise the principle. Procedure does change over time, and historical precedent does not necessarily lend merit to a practice. For example, historically proceedings concerning family matters were held in open, public courts, even though they concerned such

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31 Above n4, 437.

32 Above n26, 573 per Burger CJ.

33 NA Radin "The Right to a Public Trial" [1932] Temple LQ 381, 388.

34 G Netthiem "The Principle of Open Justice" (1984) 8 Tas ULR 25, 26.

35 Above n12, 409 - 412.

36 Above n12, 411.

specifically private matters. In the case of *McPherson* v *McPherson*[37] in 1936, Lord Blanesburgh held that in these types of cases especially, public access had to be protected, because these were the very types of cases where the parties would try to avoid publicity. The perception of the morality of these separations has changed so much that in New Zealand today the public has very limited access to the Family Courts. The protection of the individual's privacy in these hearings is now recognised as the paramount concern. Thus what was traditionally an area of public access has changed completely, as public attitudes have developed.

While it is obvious then that we cannot place undue emphasis on the historical aspect alone, neither can we disregard the role of history. "Whether 'unbroken' or sporadic, whether right or wrong there is some tradition of a role for the public in adjudication."[38] Publicity gives the proceedings formality and it "is the authentic hall-mark of judicial as distinct from administrative procedure ...".[39] In New Zealand certainly there is a tradition that courts are essentially open to the public, and in both the criminal and civil areas, closed courts are believed to be very much the exception to the principle. The weight of past practice would bear heavily on any attempt to deviate from the presumption of open court proceedings.

2 The public's justice system - theoretical underpinnings

The public should have access to the justice system as in effect the justice system is the public's system. The justice system works for the public, governs the public, and is made up of members of the public. "... [T]he public is the state. Our employees - judges, jurors, magistrates, administrative law judges or the like - have the power to speak for the public and, in theory, according to norms generated by the public."[40] This reasoning is consistent with the Social Contract theorists, Thomas Hobbes and John Locke, who both suggested that societies developed when humanity stopped living in a state of nature, and gave up the individual rights that went with this, thus empowering the state to make and administer laws as the representative of the community.

Democratic societies acknowledge the public's interest in the state, by public elections of the legislature. While in New Zealand judges are seen as being above elections, the public still has an interest in the justice system, as the administrator of society's laws. This gives the public in any democratic society a right of access to the justice system. The public has a right to some input into the process, and some control over it; which can be maintained only if there is public access to the courts. If the public does not know what is happening in the courts, then it has no control over the courts and in effect, no control over the powers of the state. Related to this is the notion in the criminal justice system that a crime is an offence against the community. This means that the public has an interest in seeing wrongdoers brought to justice, which arguably it should be possible to manifest, by gaining access to the courts.

37 Above n7, 201.
38 Above n12, 412.
39 Above n7, 200.
40 Above n12, 407.

3 Publicity as an aid to justice

There is a role for the public in the justice system, which can, theoretically at least, benefit the system. The suggestion is that public access provides a check on the judges, enhances fact finding and acts in the criminal context as as both a punishment to the offender, and a general deterrent to society.

(a) Accountability

It has often been suggested in both texts and case law, that public, open trials are one of the numerous checks and balances of the system.[41] The focus is on the monitoring of the judge's power:[42]

> If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.

If justice takes place openly and in public, this gives the justice system some public accountability:[43]

> The judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be.

It is claimed that widespread media coverage can reduce the possibility of arbitrariness, and encourages public debate so that the public can to some extent judge the judges. The reasons behind judges' decisions must "justify themselves at the bar of public opinion".[44]

How then does this accountability work? In this country judges have security of tenure, and High Court judges can only be removed by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, and only on the grounds of misbehaviour or incapacity to discharge their functions.[45] Thus there would have to be a very serious misdemeanour before a judge would be removed.

Partly perhaps the accountability claim is psychological, that judges will act in a fairer manner when they know that they act in the public's view. Also the media can be seen as playing a large and constructive role in this rationale. Through the media,

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41 For example see above n26.

42 Above n15, 450.

43 *Broadcasting Corporation* v *Attorney-General* [1982] 1 NZLR 120, 123.

44 Above n15, 13.

45 Section 23, Constitution Act 1986.

criticism of judges' decisions will have a much greater impact. While the decision is unlikely to be overturned unless there is an appeal, the judges may bear the criticism in mind in later decisions especially if the matter concerns public policy. Probably the scenario that would illustrate the greatest control by the public would be public debate in the media about a judge's misdemeanour, eventually leading to the judge's resignation.

The legislature has recently recognised this role of the media as "the watchdog of justice"[46] as section 138 of the Criminal Justice Act 1985 allows courts to limit publication of the details of hearings in some situations, and to exclude members of the public, but the courts has very limited powers to totally remove reporters.[47] While in practice the media would only rarely stay in a proceeding of which they can report only limited details, this provision theoretically acts as a further control on the courts.[48]

To the extent that this accountability does work, it would be useful in both the criminal and the civil context; although to some extent this depends on the quality of reporting by the media.

(b) Accuracy

Another reason for the Publicity Principle focuses on the parties within the system in both criminal and civil cases, and suggests that public proceedings enhance fact-finding in two ways.[49] First, there is a claim that witnesses unknown to the parties may come forward as a result of the public proceedings. While the emergence of new evidence may arise from the publicity when a crime is committed, it would be very rare for new evidence to arise as a result of the hearing itself.

Secondly, it is claimed by advocates of the adversarial system that people who testify in court would be more likely to tell the truth in a public hearing, than if the proceeding was held in private. Other processes including a large proportion of inquisitorial processes, are based on the opposite assumption, namely that people are more likely to be truthful when they know that what they say is confidential and will not be subject to public scrutiny. The persuasiveness of this reason is thus questionable. It would be only in very rare cases that a witness would be inspired to be honest by the knowledge that there were members of the public, or media present, generally those who would lie will lie regardless of publicity.

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46 Above n15, 13.

47 Section 138 of the Criminal Justice Act 1985 replaces the inherent jurisdiction previously exercised by the criminal courts, and allows reporters to be excluded from hearings only in the interests of security and defence.

48 Presumably the reasoning is that if something untoward happened in the hearing, the reporters could object (on behalf of the public), or they could risk being held in contempt of court for breach of a court order and report the judge's misdemeanour.

49 Above n26, 596 - 597.

(c) Deterrent and punishment

In the criminal area publicity can act as both a deterrent and a punishment.[50] Through reading reports of criminal proceedings, the public learns about the sentences imposed on different offenders. Also there is a general impression emanated that criminals are caught and brought to justice, as the media usually report the initial offence and then details of any proceedings brought. Publicity can also sometimes be a harsh punishment as it can damage reputations especially if the offence relates in some way to an offender's work.

Sometimes the legislature makes use of these aspects of publicity. For example, section 61 of the Transport Act 1962 states that the court has very limited powers to give name suppression orders, or to order that the hearing be closed to the public, in respect to drink driving charges. The dangers of drink driving have been widely acknowledged in recent years and there have been widespread attempts to eradicate such offences. This provision suggests that the offence is so grave that only in very limited circumstances should anyone be able to claim immunity from the publication of their misbehaviour. As the stigma for drink driving offences increases, this provision also serves as a deterrent.

4 Interaction to assist in the expression and generation of norms.

Resnik suggests another rationale, which focuses on the role the public plays in the system. The suggestion is that the public's interaction in the system helps to generate and develop society's norms. She argues that it is wrong to assume "that when judges work within reach of the public, we the public can check to be sure that judges are acting in accordance with the established norms".[51] Norms are not concrete, "prefixed, [or] independent of the disputes that they govern."[52] Instead Resnik suggests that norms are being generated during the dispute resolution procedure due to the interaction between the disputants, the adjudicator and the public. This process is seen as essential by Resnik because society is not one "single, homogeneous community. Rather we are a series of publics, with values at great variance, and we live a fragile coexistence".[53]

Obviously norms cannot be generated as particular court proceedings are heard, as the public is silent and does not interact with the adjudicator. The judge's norms may develop during the proceedings, but they cannot be influenced at this stage by the public or the media as this could be prejudicial to the hearing and probably in contempt of court. In the long term though, norms do develop as the media and public criticise and comment on the result of proceedings. This response will affect some judges in later cases; for example if there is a widespread feeling that sentences for violent offenders are too lenient, this may be reflected in later sentencing patterns.

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50 SH Wood "Publicity of Children's Court Proceedings" [1964] NZLJ 347, 350.

51 Above n12, 417.

52 Above n12, 417.

53 Above n12, 417.

There are problems even with this long-term generation of norms. As Resnik recognises we are not one identifiable public, with a shared and defined set of norms, and values, thus there will be a variety of responses from different sectors of the community. The most that judges can hope to do is to reflect the views of a substantial majority of the population. Another problem is that it may be incorrect to assume that the range of media views is synonymous with the range of public views on the matter. In some instances this may be an advantage as the media's opinions may be more developed than society's, which can encourage norms to evolve more quickly.

It seems though that there is a role for the public and the media in the long-term generation of norms. Also this reasoning is supported by judge's use of "public policy" reasons in their decision-making. Public policy arguments lead to the formulation of principles which are meant to be for the common good and which encourage socially acceptable behaviour. It would therefore be ironic if these public policy principles were formulated behind closed doors in non-public proceedings. The public accepts that the courts are free to make public policy principles, and to develop and interpret some of the norms by which our society is governed. This in itself gives the courts a considerable amount of power, if this process were to take place behind closed doors with no public debate or criticism on the results reached by these norms or of the norms themselves, this would be a draconian increase in the court's power:[54]

> No wrong is done by any member of the public who exercises the ordinary right of criticizing, in good faith, in public or private, the public act done in a seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: . . . Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Already the court's public policy principles are criticised because the courts have a very limited perspective of society. For example, the judges in New Zealand are predominantly white, middle-class, males. If the courts were to remove themselves further from society by working behind closed doors, the justice system would loose all credibility in the public's eyes. Even if the courts functioned just as well behind closed doors, justice would not be seen to be done.

5 Justice must be seen to be done

"Justice must be seen to be done" is a common idiom in common law justice systems, and is often advanced as the principal reason for the Publicity Principle. It is a reason which focuses on the role of an open justice system for the public. Thus it is seen as central to a democratic system that justice is administered openly and in public. In that way the public can be reassured that the powers of the state are being applied in accordance with the laws made by Parliament, the elected representative of the public. Public court systems are one of the first things that is dispensed with when totalitarian states are set up.

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54 *Ambard* v *Attorney-General for Trinidad and Tobago* [1936] AC 322, 335 per Lord Atkin.

An open justice system stops the public from building up imaginary and uncomplimentary pictures of the courts.[55] Due to the accountability that publicity brings, people have more trust in the system and hold it in higher regard. "It is not merely of some importance but is of fundamental importance that Justice should not only be done but should manifestly and undoubtedly be seen to be done."[56] If it were believed by much of society that justice was not done in the courts, then the justice system would not operate efficiently. People would not report crimes, laws would not be followed, and people would take the law into their own hands, finding other ways to solve their disputes.

Related to this rationale is the notion that in this sense public proceedings can be seen as educative, by giving the public "an opportunity both for understanding the system in general and its workings in a particular case", which it is claimed will result in confidence in the system and in the administration of justice.[57] Again this reasoning can be criticised as it rests on a number of assumptions. It is questionable whether many people would understand the procedure or what happened in the court-room. The rationale assumes also that what members of the public see in the court will encourage them to have positive feelings about the system; in fact it is quite possible that the opposite could happen. Perhaps more importantly it is not likely that people are educated about court proceedings to the same degree when they do not attend the hearing but learn of it through the media. As it is only the minority of the population who actually go and sit in on court proceedings, this educative role of the Publicity Principle is relatively minor.

The Publicity Principle also plays another role as educator in the criminal context. Through open court proceedings and the media reports of those proceedings, the public learns of the crimes that are committed and becomes aware of how to attempt to avoid those crimes. This is especially useful where there is some pattern or trend to the offences.

6 The courts as law-makers

It is now recognised that the courts must sometimes determine law as well as ascertain it. Cooke P recently justified the court's law making function as "in a sense fill[ing] gaps in an Act."[58] If the courts make law the public must have the right of access to the courts; or at the least the right to a public judgment which includes the reasons for the decision, so that the public can know what the law is on any particular issue. Practically, access to the courts may not be of much use in clarifying the law for a large majority of the population. However, this does not rebut this reason for public access as the same argument could be made against the practice of the publication of statutes; for probably a majority of the population legislation is largely

55 JF Burrows *News Media Law in New Zealand* (2ed, The Newspapers Publishers' Association of NZ(Inc), Wellington, 1980) 181.

56 *R* v *Sussex Justices ex p McCarthy* [1924] 1 KB 256, 259 per Lord Hewart LCJ.

57 Above n26, 572.

58 *Northland Milk Vendors* v *Northern Milk Ltd* [1988] 1 NZLR 535, 538.

incomprehensible. Ignorance of the law is no excuse in our society, so there must be, at least theoretically, some way for the public to know what the courts are determining the law to be.

7 Community catharsis

A final argument which has been used as another justification for the Publicity Principle pertains essentially to criminal cases, and suggests that public trials have a therapeutic value for the members of the community, by allowing them to express their outrage and protest at shocking crimes.[59] The argument is that the court system allows the public an outlet for these feelings as the public can watch justice being done and see retribution.[60] Without public trials, it is claimed that vigilante groups would be established.[61]

Resnik analysed this argument and pin-pointed several problems. First she questioned the number of people who would actually need to vent their emotions when they heard of a crime.[62] Generally, only people who are affected by the crime in a direct way would be likely to feel this emotional. However, in cases which particularly offend the public's sense of decency, for example the more serious sex offences, especially where children or elderly people are involved, members of the public may wish to express their anger in some way.

Secondly, Resnik states that even if there are people who do wish to vent their emotion, the ability to attend trials or read reports of the trial are not very effective ways of doing this as trials are very subdued and much of the procedure is aimed at controlling emotions. When emotions are running high at a trial, the proceedings are often closed, due to the disruptions these emotions may cause. Also there is often a substantial delay between the commission of a crime and a trial, so the hearing is not an immediate outlet.

Finally this sort of reasoning would probably only apply to crimes which have been brought into the public eye by the media, as open access to courts does not necessarily mean that the public will attend, or even learn of the trial. In such a small country as New Zealand most reported crimes that are not of a very minor nature are reported in the media, so this criticism does not apply in the New Zealand context.

While these criticisms do limit the impact of this rationale, the larger trials, which are reported in the media, make the public feel that there is a response to a criminal action, that justice is being done, and the perpetrator is punished. This is especially true in situations where the public may have believed that there would be some bias on the part of the system, for example if some public official is involved. In this way the

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59 It could be argued that some civil cases may have the same effect, for example in some tort actions.

60 Above n26, 572.

61 Above n26, 572.

62 Above n12, 412 - 413.

Publicity Principle may work to stop people getting emotional about crimes, as they know that their involvement is not necessary because the justice system will deal with the offender adequately. Usually people only feel the need to get involved in instances where justice is not seen to have been done; either because an offender was not punished for a crime, or where members of the community believe an action should be a crime, but which the justice system does not regard as such.

III AREAS WHERE THE PUBLICITY PRINCIPLE IS NOT APPLIED

The Publicity Principle states that generally court proceedings should be conducted in public, however in two areas of law in New Zealand this presumption of openness has been completely reversed.[63] Court proceedings relating to the family law and to juvenile offending are not subject to the Publicity Principle, and specialist courts have been established which are essentially of a closed nature.[64]

The procedure of the Family Courts and the Youth Courts does not infringe Article 14(1) of the International Convention on Civil and Political Rights as this allows three exemptions to the minimum requirement of public judgments: where the interests of juvenile persons require that judgments should not be public, where the proceedings concern matrimonial disputes, and where the proceedings concern the guardianship of children. These areas can also be exempted from the general rule that hearings should be public on the grounds of the interests of justice or of the private lives of the parties. Thus Article 14 enables States to completely exclude these areas from the Publicity Principle, while all other areas must comply at least with the minimum requirement of a public judgment. This blanket approach has been adopted in New Zealand.

Historically in the family law area there was some tradition for public hearings especially divorce applications essentially on the basis that the area concerned "the entire social structure and the preservation of a wholesome family life throughout the community".[65] The early legislation allowed hearings to be private only when this was necessary to protect the public morals.[66] Gradually society's attitude of the morality of divorce changed so that it came to be seen as essentially a private area which was merely regulated by the courts. Thus by 1939 the courts had accepted that the parties should

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63 Restrictions on space necessitate only a brief analysis of this area, for a more detailed analysis see C Baylis *The Public Administration of Justice in the Courts* (Research Paper, LLM, VUW 1989).

64 Members of the general public are excluded from both courts, but the press is permitted entry to the Youth Court although publication of the proceedings is heavily restricted. See for example s 169 of the Family Proceedings Act 1980, and s166 and s329 of the Children, Young Persons, and Their Families Act 1989.

65 Above n7, 201. See also above n4, 442 where it was held that divorce proceedings should be public but that proceedings concerning wardship were "private family disputes" which had "no relation to the public administration of justice."

66 In *C* v *C* above n5, the court held that s 65 of the Divorce Act 1908 gave judges the power to exclude the public from divorce proceedings when this was in the interests of public decency and morality.

have some rights to privacy and a similar provision to the present day section 169 of the Family Proceedings Act 1980 was enacted.

Cases concerning juvenille offending were originally heard in the ordinary courts with few restrictions on publicity. However since 1925, when the first Children's Courts were established in New Zealand,[67] there have been restrictions placed on the openness of proceedings.

Historical tradition then does not play such an influential role as a reason for the Publicity Prinicple in these areas, yet many of the other reasons do apply. Judges in these specialist courts often need to establish public norms and formulate legal rules while reaching their decisions, and the social importance of these issues makes judicial accountability just as imperative as in other areas.

Although there is a persuasive basis for the application of the Publicity Principle to these specialist courts it is believed that other factors involved in these areas override the application of the principle. Probably the most forceful consideration is the informal nature of these courts which aim to encourage the parties to speak candidly and without the intimidating presence of the media and public. The procedure is specifically designed to be sensitive to the parties needs and to act almost as a social agency, providing counseling and mediation facilities. This development would not be consistent with open hearings at which the media were free to publish reports of the proceedings. In both areas privacy is also a major consideration, the regulation of family matters is now regarded primarily as a private area rather than one of public concern, while in the Youth Courts the concern is that a young offender should not be stigmatized as a criminal at an early age.

The procedure of the Youth Courts and the Family Courts is not entirely uncontroversial,[68] however if the justice system is to develop so that it is more responsive to the parties' needs this move towards informality in these particular areas must be favoured. It perhaps begs the even more basic question of whether the court system is an appropriate forum for these areas of social regulation.

IV EXCEPTIONS TO THE PUBLICITY PRINCIPLE

While the Publicity Principle is of constitutional importance in encouraging the fair and proper running of the justice system, it is necessary for such a principle to have some exceptions if it is to produce overall fairness. In some cases there will be

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67 These were established under the Child Welfare Act 1925.

68 In Canada, for example it was held that the right to a public hearing contained in the Canadian Charter of Rights included juvenile offenders. *Re Edmonton Journal and Attorney-General for Alberta et al* (1983) 4 CCC (3d) 59. The position now is that the hearings are open to the public and the media, except where the judge decides that the case should be heard in camera, while the child's interests are protected by a restriction on the publication of anything leading to their identity.

circumstances that dictate that information concerning the proceedings should be suppressed:[69]

> While the broad principle is that the Courts of this country must, as between the parties, administer justice in public, this principle is subject to apparent exceptions. . . But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of the Courts of justice must be to secure that justice is done . . . As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must *as of necessity* be superseded by this paramount consideration.

Article 14 of the Convention on Civil and Political Rights recognises this reasoning by admitting some exceptions to the general rule that court proceedings should be heard in public. These exceptions state that in both civil and criminal cases the media and the public can be excluded from all or part of the proceedings to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; or for reasons of morals, public order, national security in a democratic society or when the interests of the private lives of the parties so require. "[I]n no case is 'closing' the trial to be allowed to prejudice the defendant's right to a fair trial."[70] As a minimum safeguard Article 14 still requires that all judgments be made public, except in very limited circumstances.[71]

The laws of New Zealand also recognise that it is necessary that there are exceptions to the Publicity Principle. In the civil area exceptions generally fall within the courts' inherent jurisdiction to make any order necessary for the administration of justice,[72] although there are also some statutory exceptions. In the criminal area, Parliament has legislated so that instead of the courts having an unfettered discretion exceptions to the Publicity Principle can be made only if the case fits within one of the set circumstances in the Criminal Justice Act 1985. The following discussion focuses mainly on the criminal law as this is where the exceptions are more frequently used and where the consequences of any abuse are the most serious.

While it is essential that judges have the power to make these orders if the system is to work efficiently and fairly, this control opens the system to possible abuse. Courts may use these powers in circumstances where they are not justified, or may make orders which go further than is necessary. The circumstances in which suppression orders can

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69 Above n4, 437 - 438.

70 Haji N A Noor Muhammad "Due Process of Law for Persons Accused of a Crime" from Henkin (ed) *The International Bill of Rights* (Columbia University Press, New York, 1981) 149.

71 The only exceptions to this are those discussed in Part III, namely where the interests of juvenile persons otherwise requires, where the proceedings concern matrimonial disputes, or where the proceedings concern the guardianship of children.

72 This includes cases which are being heard on appeal in the Court of Appeal. See R42 Court of Appeal Rules.

be used are framed very widely,[73] so that it is possible for the exceptions to be used as a "handy blanket" to suppress information which does not really fit within one of these reasons but which may be embarrassing to the state.[74] The situation is more prone to abuse as all the usual checks and balances have often been removed.

While it seems dramatic to discuss the possibility of abuse by the courts, this danger was realised in the criminal context in 1982, four years after New Zealand ratified the International Convention on Civil and Political Rights. Moller J made an order prohibiting the public and the media from attending a court hearing, suppressing all the details of the case, and allowing the publication only of the fact that a man had been sentenced. This draconian use of the court's powers was condemned by the Court of Appeal in *The Broadcasting Corporation* v *Attorney-General*.[75] In the civil context interlocutory orders made in the High Court in *Minister of Foreign Affairs* v *Benipal*[76] allowed secret evidence and submissions to be given, and to remain secret even from the other party to the case. Obviously these are extreme examples which are unlikely to be repeated, and there is an appeal structure to remedy mistakes. However, often when it is the media who appeal a suppression order, by the time the application is heard it is too late as the original case has already been decided.[77]

A The Exceptions in the Criminal Law

Prior to 1985 the statutory provisions dealing with suppression orders in criminal cases were scattered through a number of statutes. Courts also had the power under their inherent jurisdiction, to make any order necessary for the administration of justice, including orders suppressing certain information[78] and orders to hold hearings in camera.[79] The existence of this inherent jurisdiction alongside the statutory powers caused many interpretation problems as the scope of the two powers were not synonymous. In *Taylor* v *Attorney-General* Wild CJ held that while the statutory provisions gave the court powers, they did not "in the absence of a clear indication to the contrary" reduce the courts inherent powers.[80] If correct, the inherent power was dangerously wide in allowing **any type of order** to be made if it was in the interests of justice. In the English case of *Scott* v *Scott* Viscount Haldane LC held that this power was justified as its application did not depend on judicial discretion but on the demands of justice.[81] However Lord Halsbury thought that the power was too wide and

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73 For example see the discussion below in Part III (A) of the exceptions in the criminal area.

74 *The Law and the Press*. The report of a Joint Working Party of Justice and the British Committee of the International Press Institute (Stevens & Sons, London, 1965) 19.

75 Above n43.

76 *Minister of Foreign Affairs* v *Benipal* [1984] 1 NZLR 758.

77 This was the situation in both *Richmond Newspapers, Ltd*, above n26, and the *Broadcasting Corporation*, above n43.

78 For example see *Taylor* v *Attorney-General* [1975] 2 NZLR 675, 677.

79 For example see above n43.

80 Above n78, 680.

81 Above n4, 435.

could be misused, as individual judges would have different opinions as to when "the paramount object could not be attained without a secret hearing".[82]

These misgivings about the inherent powers have been proven correct in *The Broadcasting Corporation* v *Attorney-General.*[83] The "total black-out" order was given by Moller J as there were fears for the safety of the accused. The case concerned a relatively minor drug charge, but the accused had been giving the police information and there was a fear of reprisals. The judge ordered that the case was to be heard in camera, with no media representatives present in the court. There was also to be no publication about the trial except that a man had been sentenced. The defendant's identity, the charge, the sentence and the reasons for the proceedings being heard in camera were all suppressed. The nature of this order flew in the face of the open justice system and the need for publicity. The fact that the judgment and sentence were suppressed, also contravened the minimum requirement of the Publicity Principle given in Article 14 of the Convention on Civil and Political Rights. The Court of Appeal recognised this and held that the order went beyond the inherent jurisdiction by excluding the media and by keeping secret the sentence. The Court decided, contrary to *Taylor*, that the inherent jurisdiction was restricted to the scope of the statutory provisions.[84]

In 1985 the situation was clarified in the Criminal Justice Act 1985. Parliament brought together most of the statutory provisions dealing with suppression orders, and enacted some new provisions to deal with issues that had been raised in the courts, many of which were illustrated in *The Broadcasting Corporation.*[85] Sections 138 to 141 of the Act codify the court's powers to make exceptions to the Publicity Principle in the criminal jurisdiction. The Act specifically states in section 138(5) that the provisions are in total substitution for the inherent jurisdiction which the courts[86] previously commanded, and that the courts have no powers other than those conferred by statute to make orders suppressing evidence or witnesses names, or excluding the public or media from hearings:[87]

> The three sections 138, 139 and 140 of the Criminal Justice Act now contain the source and scope of the power of a Court to forbid publication of material or to exclude persons from the Court in proceedings in respect of an offence.

The New Zealand Bill of Rights 1990 affirms New Zealand's commitment to the International Convention on Civil and Political Rights, but does not have the standing accorded to most constitutional documents of this nature. It is not entrenched supreme law, rather it is simple law which has no power to override any prior or future statutory

82 Above n4, 442 - 443.

83 Above n43.

84 Above n43, 128.

85 Above n43

86 The Criminal Justice Act 1985 defines "court" in s 2 as any court dealing with a criminal proceeding.

87 *R* v *X (an accused)* [1987] 2 NZLR 240, 243. In that case it was held that s138(5) did not prevent access by counsel to the judge in chambers when that was essential, but that access could not be used for the purposes of making submissions about a criminal case.

enactment.[88] Thus while section 25 of the Bill of Rights states that "[e]veryone charged with an offence has ... [t]he right to a fair and public hearing by an independent and impartial court", this has no effect on sections 138 to 140 the Criminal Justice Act 1985 regardless of any apparant inconsistency. There may in fact be no inconsistency as section 5 of the New Zealand Bill of Rights states that the rights contained are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

1 The court orders under section 138.

(a) The orders

Section 138(1) of the Criminal Justice Act 1985 codifies the basic Publicity Principle as expounded in Article 14. It states that courts should sit in public except in restricted circumstances where the court has the discretion to suppress certain information,[89] by making one of the following orders on either a temporary or permanent basis:

(i) Orders forbidding publication of the whole or any part of the evidence or the submissions. While this type of order may not seem as drastic as an in camera hearing, it is a significant exception to the Publicity Principle. Under the principle it is of vital importance, that where possible, the evidence should be heard in public as this forms the basis for the court's decision. The decision cannot be judged by the public if the grounds on which that decision is based are not known. This defeats the notion of justice being seen to be done.

(ii) Forbidding the publication of the name of any witness or any particulars which would identify the witness.[90]

(iii) Stating that the hearing will take place **in camera** - this means the judge can exclude any person not involved in court business either for the whole proceeding or for any part of it. This power is fettered by section 138(3) which states that news media reporters cannot be excluded from proceedings except where the interests of the security or defence of New Zealand require.

Section 138(6) states that the "announcement of the verdict or decision of the court ... and the passing of sentence shall in every case take place in public..." The subsection allows the court to refrain from making public all the facts or reasoning on which the decision is based in exceptional circumstances. This is in accordance with Article 14 if the strict interpretation of "judgment" is adopted.

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88 Section 4, New Zealand Bill of Rights.

89 Section 141, Criminal Justice Act 1985 allows publication of material subject to a suppression order, by or at the request of the police.

90 See below Part IV(A) (1) (b) and (2).

(b) The circumstances when suppression orders can be made:

> Since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from [the principle of open justice] where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule.[91]

The circumstances in which a judge can make these orders are as follows:

(i) The interests of justice

One reason for suppression in the criminal context is where it is in the interests of justice, referring to either justice between the parties or justice in the wider sense. It may be necessary in the interests of justice to clear the court if the public are causing disturbances. Justice in the wider sense may require that a witness's evidence is heard in camera and their name suppressed, for the protection of that person, but also so that in future cases witnesses will come forward knowing that they will be protected. This reasoning does assume that potential witnesses know that this procedure exists. Another example of justice in the wider sense is where the court hears evidence concerning fraud charges in camera so that the crime cannot be copied.

Article 14 incorporates this ground, but gives it a more restricted reading; the court can exclude the public or the press "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Section 138 probably does not conflict with Article 14 as it is likely that the court would have regard to this restriction implicitly, when making an order. Article 14 also lists separately the ground of public order, but in New Zealand this falls within the interests of justice reason.[92]

(ii) Public morality

If the evidence of a crime was of such a nature as to offend the public morals the courts would order that this evidence be heard in camera, and that it could not be published. This is an example of the courts ascertaining the public's values on a matter. This could be one instance where publicity in previous cases may help judges to decide whether suppression should be ordered.[93] This reason is rarely used in New Zealand today, and where evidence of a sexual nature is suppressed it is on the grounds of protection of the victim rather than the public morals.[94]

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91 Above n 14, 450.

92 See G Nettheim "Open Justice versus Justice" (1983 - 1985) 9 Adel LR 487, 488 - 492.

93 Above n12, 417.

94 The protection of public morals was used to suppress some of the evidence heard against the Labour MP, Gerald O'Brien who in 1976 was charged with indecently assaulting two youths. See below in Part IV A (2).

(iii) Protection of the reputation of any victim of any alleged sexual offence or offence of extortion

Article 14 does not specifically mention the victims of alleged sexual offences or offences of extortion, although it incorporates a wider ground that is absent in section 138, namely that the public can be excluded if it is the interests of the private lives of the parties. As section 138 is a code in respect of the circumstances in which suppression orders can be made, it actually acts to limit this ground to only the victims of these two offences.

There is an overlap in the sexual offences area with section 375(4) of the Crimes Act 1961 as enacted by the 1985 amendment. This states that in cases involving sexual violation the court has the discretion to make an order forbidding publication of any account of the offence "if the court is of the opinion that the interests of the complainant so require".

(iv) The security or defence of New Zealand

Suppression of information can be required when it is necessary for the security or defence of New Zealand. This justification for an exception was originally enacted in the Official Secrets Act 1951. In *Taylor* v *Attorney-General*[95] a court order had been breached that prohibited anything being published that would identify two secret service agents who were witnesses in a criminal action against a defendant charged under the Official Secrets Act 1951. The order was justified on the basis that it was for the protection of the security of New Zealand, and letters were used to refer to each agent enabling the trial to be heard in public and reported in the media.

There is the danger that this exception will be used when it is not essential[96] as it is not possible for the public to check whether evidence is likely to endanger the security and defence of New Zealand if the public and the media are excluded when that evidence is heard. It is paramount that the courts are rigorous in examining the necessity of an order based on this reason and in fact it has been questioned as to whether the courts are really qualified to say what is and what is not a matter of national security.[97] Article 14 limits this ground, the public morality ground and that of public order as only applying "in a democratic society". "While permissible limitations must always be very narrowly construed and applied ... the reference to a democratic society underscores the especially restrictive character of the permissible limitations on public trials."[98]

95 Above n78.

96 In *Leveller Magazine*, above n15, the magazine reported suppressed information as a protest against the "excessive use" of this type of provision.

97 Above n74.

98 Above n43, 149.

(c) Breach of an order

Breach of a suppression order is not excused by pleading ignorance,[99] although this may be taken into consideration when a penalty is imposed. Any person who does not comply with an order under sections 138 to 140 is liable on summary conviction to a fine of up to $1000, except in the case of the in camera hearings where any breach or attempted evasion of the order may be dealt with as a contempt of court. Previous sections relating to suppression orders allowed imprisonment of up to three months for a breach of the order and while this is not a punishment in the Act, it is still theoretically available under contempt of court proceedings for breach of an order for an in camera hearing.

In *Leveller Magazine* a contempt of court charge in this circumstance was completely dismissed on the ground that the judge had not made the provisions of the order clear.[100]

> [W]here courts, in the interests of the due administration of justice, have departed in some measure from the general principle of open justice no one ought to be exposed to penal sanctions for criminal contempt of court for failing to draw an inference or recognise an implication as to what is permissible to publish about those proceedings, unless the inference or implication is so obvious or so familiar that it may be said to speak for itself.

(d) Media rights under section 138.

In New Zealand the media cannot be excluded from criminal trials unless it is in the interests of security and defence.[101] The courts therefore have a much more limited power in this regard than that suggested by Article 14. There are however restrictions, essentially at the discretion of the courts, on what the media can report.[102]

The media are considered to be the public's representative in cases which are heard in camera, and their express inclusion in the proceedings is aimed at being another check on the system. It attempts to ensure that justice is seen to be done and does not become a mystery locked away behind closed doors. Before section 138 was enacted by the Criminal Justice Act 1985, the media could be excluded if the judge felt that this was in the interests of justice. In practice, though, media organisations rarely have sufficient resources to enable a reporter to be present in court when there is a suppression order on publishing reports of the case. Also the effectiveness of the media as a mechanism for

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99 *Police* v *Thames Star Co. Ltd* (1965) 11 MCD 343.

100 Above n14, 453.

101 Section 138(3) Criminal Justice Act 1985.

102 Article 14 does not mention the powers of courts to restrict the publication of the reports of proceedings. Haji N A Noor Muhammad stated that "[t]he Covenant provision deals only with the presence of the press at trial and does not permit restriction on reporting by the press or other coverage of any criminal proceedings." Above n 104, 149. However in New Zealand as has been seen, the courts have wide powers to restrict publication. Article 14 cannot mean that there are to be no restrictions on publication as this would render meaningless the exceptions to the Publicity Principle that it does allow.

judicial accountability may be reduced as it was held in *R* v *X (an accused)* that section 138 allows written submissions to be received by a court when this is in the interests of justice,[103] thus the media would not hear the evidence.

Applications for review of a suppression order can be made by the parties to an action or by members of the media[104] who have standing by virtue of the fact that they are affected by an order. Practically, however, the affect of this right in some cases may be limited. For example in the American case of *Globe Newspaper Co* v *Superior Court*[105] the newspaper's appeal was not heard until nine months after the conclusion of the criminal trial to which the order related and the appeal was therefore dismissed.

2 *Name suppression orders*

Article 14 of the Convention on Civil and Political Rights does not expressly consider the courts' ability to suppress the names of people connected with a hearing. This may mean that the names of parties are not regarded as part of the Publicity Principle, so that no restriction is placed on the suppression of names; or alternatively Article 14 may intend to include the names of parties within the term "hearing", so that an open hearing would include the names of parties being publicly available. In New Zealand the criminal courts have wide powers to suppress the names of the accused, witnesses, or the victim; which suggests that the legislation does not regard Article 14 as limiting the courts powers to suppress names.

Section 140 of the Criminal Justice Act 1985 empowers courts hearing criminal cases, to suppress "the name, address, or occupation of the person, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification".[106] Unlike section 138, this section leaves judges with an unfettered discretion as there is no indication of when courts should exercise the power.[107] Name suppression orders can be made either permanently, if the applicant can show strong enough justification; or more commonly temporarily, on an interim basis to protect an accused until a verdict has been reached. Breach of a section 140 order can lead to a summary conviction and a fine of up to $1000.

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103 Above n87, 244.

104 In *Broadcasting Corporation*, above n50 the action was brought by the Broadcasting Corporation and New Zealand Newspapers Ltd , while Wellington Newspapers appealed against the order made in *R* v *Wilson* [1981] 1 NZLR 316, 324, see unreported Court of Appeal CA 79/81, 15 March 1982.

105 102 S Ct 2613 (1982).

106 Section 140(1) Criminal Justice Act 1985.

107 Section 140 does not apply to offences of driving while under the influence of drink or drugs. Section 61 Transport Act 1962 states that the court cannot suppress names of such offenders unless there are special reasons involved. See above Part II (B) (3).

a) The name of the accused

i) Interim name suppression orders

> Who steals my purse steals trash; ...
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.[108]

Name suppression orders can be granted on an interim basis to protect the name of an accused person until the verdict has been reached. The defendant can apply for an order at the time of the preliminary hearing on the basis that without it they or their family would suffer some particularly harsh detriment.

Section 140 of the Criminal Justice Act 1985 is silent as to how judges should exercise their discretion to grant name suppression orders, and judges differ considerably in their interpretation of which factors are relevant and persuasive. The decision to grant or refuse a name suppression order can be appealed, but "[b]ecause of the variety of human situations the matter must be left largely to the discretion of the judge to whom the application is first made".[109] Thus an appeal will usually succeed only on the grounds that "the Judge made a plainly wrong decision for some identifiable reason".[110]

It is not clear whether the amount of publicity that the accused will receive is a relevant factor in the exercise of the discretion. An accused may receive greater publicity because of their standing in the community, the nature of their job,[111] the type of offence, or because of some other specific feature of the case. *Dally* v *Police*[112] is a recent example of an application for name suppression based partially on the effects of widespread publicity. Paul Dally was charged with the murder of a young teenager named Karla Cardno. Dally's application for name suppression was refused, and was also denied on appeal by both the High Court[113] and the Court of Appeal.[114] The application was made on the basis that there had been widespread publicity of the case and that the publication of the accused's name before he had pleaded would "be seriously damaging to the safety of the appellant himself and his family".[115] Psychiatric reports relating to the personal circumstances of the accused were also submitted in support of the application. Jeffries J in the High Court acknowledged the significance of the widespread media

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108 W Shakespeare *Othello* Act III Scene 3.

109 *Dally* v *Police* (Unreported, High Court Wellington Registry AP 148/89, 13 July 1989) 5.

110 Above n 109, 5.

111 Professional or executive background alone does not warrant name suppression even if the applicant's livelihood is from business attracted by their name and reputation. *Goodson, Northfield and Kuegler* v *The Queen* unreported, Auckland registry AP73 - 75/90, 26 April 1990, 7.

112 Above n109.

113 Above n109.

114 *Dally* v *Police* (Unreported, Court of Appeal CA 204/89, 14 July 1989).

115 Above n109, 4.

attention given to the case as an argument supporting suppression,[116] although ultimately he decided that the District Court Judge was justified in refusing to grant the order on the basis of the Publicity Principle and the freedom of speech.[117] The District Court Judge had stated that the "main reason for declining the suppression was that the case was in the public spotlight and it would be wrong to mask the situation."[118]

In deciding whether to grant name suppression the courts must balance the detrimental effects of publicity on the accused and their family against the constitutional principles of the freedom of speech and the open administration of justice. The effect of publicity as a punishment has already been recognised in the article,[119] but as this punishment of the accused and their family often occurs before guilt or innocence has been decided, the area is especially controversial.

In New Zealand there is added controversy as the law relating to name suppression was reformed in 1975 by the Labour Government. The Criminal Justice Amendment Act 1975 introduced sections 45B to 45D into the Criminal Justice Act 1954. While these provisions caused much political debate and were repealed a year later by the incoming National Government,[120] the reform did have merit. The thrust of section 45B was the prohibition of the publication of the name of a person accused of an offence until the person was convicted; if the person was acquitted then the prohibition was rendered permanent. There were some exceptions enacted to this general prohibition: publication was allowed if the accused did not want name suppression; or if the court decided that publication was desirable for public interest reasons[121] and ordered accordingly. The court could make such an order on its own motion, on the application of the prosecutor or on the application of a member of the public who reasonably believed that she or he, or a member of her or his family would be personally prejudiced if the name of the accused was not published.[122]

The present day section 140 of the Criminal Justice Act 1985 makes the general presumption that names will be published, unless there are very good reasons why publication should not occur. The 1975 reform in effect reversed that presumption so that the general position was that publication should not occur unless there were good reasons to the contrary. The basis of our present day system is essentially the Publicity

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116 Above n109, 2 and 4.

117 Above n 109, 5 - 6.

118 Above n109, 3.

119 See Part II (B) (3).

120 The National Government repealed the provisions as the Party had promised to do this in its election manifesto, essentially because the reform was seen as an infringement of the Publicity Principle. For example see NZ Parliamentary debates Vol 403, 1976: 118.

121 An example of this is where the charge relates directly to the applicant's employment which involves dealings with the public. In *Jones* v *The Police* unreported, Hamilton Registry AP201/89, 6 November 1989, 2, it was held that "the public was entitled to know that the appellant was suspected of offending in relation to monies entrusted to him in the [debt collection] business"

122 Section 45B (3), Criminal Justice Act 1954 as enacted by s17 of the Criminal Justice Amendment Act 1975.

Principle itself. It is argued that a presumption towards the suppression of names is an unjustified infringement of the principles of the open administration of justice and of the freedom of speech, both of which have historically been protected from such interferences. These justifications are not entirely persuasive especially when they are balanced against the arguments that do support this type of reform. Generally the reasons which underlie the Publicity Principle do not apply to the area of interim suppression of the accused's name. Law can be made, and norms generated, without the need to publish the name of the accused. Similarly judges would still be publicly accountable and the punishment aspect of publicity would be administered more fairly which would mean that justice was seen to be done. Thus the Publicity Principle applies to interim name suppression on the basis of tradition alone.

The argument that this is an infringement of the freedom of speech is also weak. In this country, freedom of speech is not an unrestricted freedom, as there are other interests which are also protected. For example the law of defamation protects people from false statements which could affect their reputation. If charges are brought against someone who is then found to be innocent, this can have a far more detrimental effect on a person's reputation than defamatory statements.

In democratic societies the belief that people are innocent until proven guilty is held to have at least the same constitutional status as the freedom of speech. The freedom to publish the names of the accused and subject them to the detrimental effects this may cause, is a breach of the principle that people are presumed innocent until proven guilty. People should not suffer the punishment of publicity until it has been proven before a court of law that they are indeed guilty. The publication of the name of a defendant can lead to serious adverse effects especially in small communities, or where certain offences are involved. If the accused is acquitted they can already have suffered severely from the publicity. Acquittals are often not as widely publicized, and some people may think that the person was guilty, but somehow managed to get off on a "technicality", as there is "no smoke without fire". Thus it can be essential that interim name suppression orders are granted. While the rhetoric of the court system is that an accused is presumed innocent until proven guilty,[123] the punishment of publicity can be meted out before a verdict is reached, with often long lasting effects.

This reasoning has been criticised as being[124]

> a misunderstanding of the famous "presumption of innocence", which in reality only applies during the trial of a charge. It would be wrong to imagine that the innocence of the accused is presumed at every other stage in the criminal prosecution.

This argument is supported on the grounds that if the presumption of innocence always applied then no one could ever be denied bail as it would be wrong to imprison

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123 The courts do not regard the presumption of innocence itself as sufficient to overcome the rule in favour of publication. Above n111, 6.

124 "Govt. should drop name suppression measure" *The Dominion*, Wellington, 15 May 1975.

someone who was presumed to be innocent. It cannot be disputed that the court's power to remand in custody conflicts with the presumption of innocence. However this measure is only used in cases where it is necessary to ensure the attendance of the accused at the trial. The publication of names, however, is not usually a justified departure from the presumption of innocence, and the reform suggested would allow publication when it was required to protect the public interest.

Publicity is not only contrary to the presumption of innocence, it is also not applied on any equal basis. Cases are only publicized on the basis that they are newsworthy. This may mean that they involve some well known person or that there is something which is particularly unusual or horrific about the offence:[125]

> A greater amount of newspaper space is always likely to be given to cases involving persons of renown, wealth or social standing....The amount of space given...depends less on the gravity of the offence or the culpability of the offender than on the news value of the story.

While publicity is part of the price of being in the public limelight, the increasing number of cases coming before the courts means that the media do not have the resources to cover every trial or even a large proportion, resulting in cases being reported almost at random. Except in the instance of a big criminal case or of a hearing involving a renowned person, the likelihood of cases being reported can depend on such factors as the availability of a reporter, the volume of other news on the day and the discretion of the chief reporter. As publicity of criminal trials has a punitive effect this arbitrary reporting of cases does not sit well with the notion of everyone being treated equally by the justice system.

While there is often adverse feeling when the courts order name suppression for a person who is in the public eye, when a less renowned person would not be successful in a similar application, this may not be a reflection that the courts are applying name suppression unfairly, but rather that the courts realise that publicity is given on such an unequal basis. The reform suggested would ensure that the punishment of publicity was not generally imposed until there was a conviction, and was very rarely imposed if the person was acquitted.

Another argument against the reform was that if the media could not publish the names of accused or anything likely to lead to their identification, it would be difficult for the media to report the story, and could even result in it not being published because of its reduced news value. However, this overlooks the fact that these restrictions are only an interim measure and if the defendant was convicted the media could then publish a full story. At present most of the cases reported by the media have been concluded, so it unlikely that this type of provision would have such a profound effect. Also interim suppression would not apply in every case. There is a danger with blanket suppression of name orders in that there may be circumstances where it is in the public interest for

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125 M Jones *Justice and Journalism* (Rose, Chichester, 1974) 152 - 154.

the defendant's name to be known even in the interim. However, section 45B dealt with this eventuality, as the judge could make an order allowing publication.[126]

Interim name suppression may however lead to speculation and rumour about the identity of the defendant in a particular case. In small communities, or where the defendant is known to belong to a particular class of people, the wrong person may be suspected. While the defamation laws could protect these people to an extent, this alone would not solve the problem. However, section 45B gave the Court the power to allow publication if someone applied to the court on the basis of some personal prejudice arising from the suppression, or when the accused applied for such an order. While the latter occurance may be unlikely this did in fact happen when section was law. In 1976 a doctor, Erich Geiringer, was charged with raping one of his patients during a gynaecological examination. Geiringer agreed that his name should be published for the protection of other members of the profession. He was later acquitted.

Another example involved Gerald O'Brien, a Labour party MP. In 1976, following an incident at a Christchurch motel O'Brien was accused of indecently assaulting two males aged 16 and 17 years. Automatic name suppression was given to O'Brien under section 45B, but soon after O'Brien applied to have the suppression order removed. His counsel summarised the reasons for the application as:[127]

> [f]irstly, because O'Brien had nothing to hide and had no intention of hiding; secondly, because he was conscious of the position he held and, thirdly, because he wanted to relieve other people of the "burden of suspicion" which had been created by the media.

The Magistrate hearing the case later ruled that O'Brien had no case to answer on the charge. Before the name suppression was lifted TV2, the Christchurch Star and The Press reported stories which it was later held contained details likely to lead to the identification of O'Brien. Two stories were published in the papers and broadcast on the news by TV2. One concerned the charges against an unnamed North Island MP in the Christchurch Magistrates Court, while the other stated that O'Brien had been admitted to hospital in Christchurch, but did not mention any court proceedings. A charge against TV2 was dismissed, but the two papers were each fined $250 as they had stated that the MP was a Labour Party politician. By this time the National Party had repealed the relevant provisions and the charge was referred to as "a purely academic exercise" by counsel in the case.[128] Mr McLaren counsel for TV2 stated that the "very real difficulty an editor or a working journalist has in complying with [the Act]" had been illustrated.[129]

The example also illustrates another way that people who may be implicated because of the suppression of the accused's name can clear their names. Dr A M Finlay, Labour

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126 Section 45B (3) Criminal Justice Act 1954, as amended by s 17 Criminal Justice Amendment Act 1975.

127 "Court Lifts Name Ban on Gerald O'Brien" *Christchurch Star*, 18 June 1976.

128 "Charges against newspapers and TV2 called 'academic'" *The Press*, 26 November 1976.

129 Above n127.

spokesman on justice in 1976, who had been instrumental in passing the Amendment Act 1975 issued a disclaimer to the Christchurch Star on 16 June, when O'Brien's name was still suppressed, dissociating himself and three other Labour MPs who were visiting Christchurch from the indecency charge.[130] Dr Finlay stated that he had not breached the law by limiting the field of MPs by his disclaimer.

While there is historically a basis for the names of accused people being in the public domain before verdicts are reached, this does not justify the practice. A reform on similar lines to the Criminal Amendment Act 1975 would protect the rights of an accused person and their family without significantly affecting the other reasons for the Publicity Principle, as the rest of the proceeding would still be public. It would also ensure that the presumption of innocence was upheld; and that people who were acquitted were not punished by publicity.

If this reform was adopted it would be substantially weakened if MPs abused their parliamentary privilege by naming defendants in Parliament. This happened in 1988 when Mr Bolger made public the name of a man charged in relation to alleged Inland Revenue Department fraud, and that of another man charged with conspiring to defraud the Department, and when Mr Banks named a Justice Department employee who was charged with offensive behaviour.

ii) Permanent name suppression orders

The standard to be satisfied before a permanent name suppression order will be granted is substantially higher as the offender has been convicted and in most cases should bear the consequences of their action. Usually a permanent order would only be granted in exceptional circumstances where publicity would be highly damaging to the defendant or the defendant's family.[131] While publicity as a punishment is one of the reasons for the Publicity Principle, it is not applied on an equal basis. This conflicts with the constitutional principle that everyone is equal before the law.

If the amount of publicity that a particular person is likely to receive means that they are punished to a much greater extent than would ordinarily be the case, this may justify a permanent name suppression order. Similarly if the detrimental effect of publicity greatly outweighs the seriousness of the crime, a final name suppression order may be granted. In *B* v *Police*[132] the defendant was charged with discharging a firearm near a dwelling house so as to frighten the occupant. His application for permanent name suppression was granted on appeal in the High Court essentially on the basis that it was a minor charge to which he had pleaded guilty and which was unlikely to be

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130 "Dr Finlay: A reply" *Christchurch Star*, 18 June 1976.

131 For example in *G* v *Police* unreported, Christchurch Registry, AP166/90, 17 July 1990, the fact that the applicant had already lost one job as a result of an indecent exposure charge and would be likely to lose his current job persuaded the judge that name suppression was justified in this case. (A contributory factor was that he had undertaken counselling.)

132 Unreported, Christchurch Registry AP17/90 5 February 1990.

repeated, and yet the affects of publicity would substantially interfere with his occupation as a school teacher.[133]

In some circumstances a defendant may apply for a name suppression order even though they have been acquitted. While the court may be more willing to grant an order in this circumstance, acquittal itself is not a ground for a final name suppression order.[134]

b) The names of the witnesses

Generally the suppression of the names of witnesses in proceedings is governed by section 138(2)(b) of the Criminal Justice Act 1985 rather than section 140.[135] This suggests that an order suppressing the names of witnesses can only be made in the circumstances set out in section 138.[136] It is not clear why the legislature dealt with suppression of witnesses' names in this way, but it does mean that there is a greater restriction on judges' discretion to grant these orders. Also section 139A protects the identity of any person under the age of seventeen who is called as a witness in criminal proceedings, by a blanket prohibition on publication, providing this does not prevent the name of the defendant or the nature of the charge from being published.[137]

A more recent case which was similar to the New Zealand case *Taylor*[138] is *Attorney-General* v *Leveller Magazine*.[139] The case concerned a contempt of court charge in respect of the publication of the name of a witness which had been the subject of a suppression order. The contempt charge did not suceed as the court order had not been clear enough, but the decision to suppress the name of the witness was upheld. Lord Diplock believed that the Magistrates had the authority to order the suppression, as the other alternative would have been for the evidence to be heard in camera.[140] Lord Diplock felt that suppressing the witness's name was a "much less drastic derogation from the principle of open justice".[141] It is clear that a court should where possible use name suppression orders, or suppression of evidence orders to circumvent the need for in camera hearings. This is in accordance with the Publicity Principle as in camera hearings are obviously the greatest infringement on the public administration of justice.

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133 Above n132, 3 - 4.

134 *George* v *Police* unreported, Invercargill Registry AP 12/90, 23 February 1990.

135 Section 140 of the Criminal Justice Act 1985 states that it applies only when the name suppression power has not been expressly dealt with elsewhere. As s138 specifically deals with the suppression of witnesses names this would take precedence over s140.

136 See Part IV(A)(1).

137 See also Part IV (A) (2)(c).

138 Above n78 as discussed above in Part IVA) (1) (b) (iv).

139 Above n 15.

140 Above n15, 451.

141 Above n15, 451.

c) *The name of the victim*

The suppression of victims' names is not expressly dealt with in the Criminal Justice Act 1985, except with regard to alleged sexual offences. Generally section 140 states that the court has the power to suppress the name of the accused or "of any other person connected with the proceedings", which presumably would include the victim:[142]

> the approach to be taken is to ascertain whether the interest of the victim is such as to outweigh the general public interest in the freedom of the press, accessibility to the Courts by the public, and the general desirability that persons with particular proclivities to offending are known to the community.

Section 139 of the Criminal Justice Act 1985 states that in cases of sexual offences against sections 128 to 142A of the Crimes Act 1961 there is a restriction on publication of the name of the victim (or alleged victim), or any name or particulars which would lead to their identification. There is an absolute prohibition if the offence is against section 130 or 131 of the Crimes Act, or where the victim is under sixteen years of age. If the offence is not against section 130 or 131, the court has the discretion to allow publication. The focus of this section is therefore the reverse of the Publicity Principle; here the general rule is for suppression of anything that may identify the victim. The onus is on the person wishing to publish to persuade the court to allow them to publish.

B *Suppression in the Civil Area*

In the civil area the courts have an inherent jurisdiction to make any order necessary for the administration of justice, including orders suppressing certain information and orders to hold hearings in camera.[143] While the power is less frequently used than in the criminal area, it is very wide by allowing any type of order to be made. However, the circumstances where orders can be made are probably more limited than those given in section 138 of the Criminal Justice Act 1985 or under Article 14. In civil cases orders can only be made where they are necessary for the administration of justice. Even with a generous interpretation of this phrase it would be difficult to include within it the public morals or the interests of the private lives of the parties.

A common example of when suppression is necessary for the administration of justice is where courts hear in camera, applications for cases to be heard in camera or applications for injunctions. Usually if the reasons for requiring secrecy in a case were made public there would be no point in the case being kept behind closed doors. In *Skope Enterprises Ltd* v *Consumer Council*[144] the application for an injunction to restrain publication of matter prejudicial to a fair trial of another action was ordered to be held in camera otherwise the injunction would have been rendered futile. In *A* v

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142 *James* v *Police* unreported, Hamilton Registry AP197/89, 17 October 1989.

143 For example see *Skope Enterprises Ltd* v *Consumer Council* [1973] 2 NZLR 399.

144 Above n143.

Y&Z[145] it was held that it was not necessary for the administration of justice for a case to be heard in camera because the defendant was "in a state of chronic pathological anxiety....due to a fear of publicity" which could result in her evidence being unreliable and incoherent if the court was open.[146]

In *Scott* v *Scott* [147] Viscount Haldane LC held that the application of the inherent jurisdiction did not depend on judicial discretion but on the demands of justice.[148] However Lord Halsbury thought that the power was too wide and could be misused, as individual judges would have different opinions as to when "the paramount object could not be attained without a secret hearing".[149] The danger of the courts using these powers under the inherent jurisdiction was evidenced in the *Minister of Foreign Affairs* v *Benipal*.[150] This case concerned an appeal against interlocutory orders made in the High Court by Chilwell J at the outset of a hearing of an application for judicial review. The orders were to protect the confidentiality of some of the applicant's evidence. The orders allowed an affidavit and an annexure to be given to the judge, and the applicant's counsel to address a communication to the judge in a sealed envelope, without the other party being allowed to view the evidence or the submissions. The reason for the orders was the applicant's submission that if the evidence came to the attention of the Indian Government, the person who sent it to the applicant would be "in real danger of arrest, torture or death".[151] The order was particularly draconian as it gave the opposing party no chance to challenge the evidence or the submissions. This breached the principles of natural justice as only one side of the case was heard on these issues. The Court of Appeal held that this was a miscarriage of justice. Woodhouse P agreed that courts had the power, under their inherent jurisdiction, to adopt "[e]xceptional steps of a procedural kind ... where this is essential in the interests of justice", but stated that none of the authority cited "involves the objectionable and irregular influence of listening only to one side".[152]

It appears that the courts' inherent jurisdiction is now limited so that courts cannot allow evidence to be admitted which is to remain secret from the other party. However, the fact that such abuses can occur suggests that Parliament should legislate to give the courts some guidelines as to the types of orders that can be made, and the circumstances in which such orders should be made. In practicality it is ultimately left to the individual judge's discretion as these types of guidelines are so broad as to be almost meaningless.

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145 Unreported, Timaru Registry, Apps112/87

146 Above n143, 2 and 7.

147 Above n4.

148 Above n4, 435.

149 Above n4, 442 - 443.

150 Above n76.

151 Above n76, 760.

152 Above n76, 763.

V CONCLUSION

There is a general principle in New Zealand that justice should be administered openly and in public. This Publicity Principle gained constitutional status with the ratification of the International Convention on Civil and Political Rights. The principle hinges on the right of access to court proceedings by the public and the media.

The paramount reason for the Publicity Principle is that it ensures that justice is done, between the parties, and on a much larger scale. The open administration of justice gives the courts a level of public accountability, which increases the public's trust in the system. It also ensures that the public has some access to the law that is applied by the courts as well as the law that is enacted by our legislature.

There are some areas of law to which the rationale for the principle may substantially apply, but there are other factors which override its application. A just system must have the flexibility to account for these factors. In New Zealand alternative justice systems have been established for the resolution of family matters and for juvenile offenders.

Sometimes justice cannot be done unless there are exceptions made to the Publicity Principle. Certainly, in general, justice should be seen to be done. However it is not always necessary that justice is seen for it to be done. There are situations where limits imposed on the openness of court proceedings are the fairer and more equitable alternative.

In the civil area the court's powers to grant suppression orders fall within the court's inherent jurisdiction and any type of order can be made if it is necessary for the administration of justice. This does leave the area open to abuse and it may be time for Parliament to consider codifying the court's powers in this area. However, applications for suppression orders and in camera hearings are not as common in the civil area and the dangers of abuse often not so serious.

In the criminal area the Criminal Justice Act 1985 revised the statutory provisions dealing with the court's powers to suppress information relating to criminal cases. The new provisions were enacted as a total substitute for the common law inherent jurisdiction which the courts previously exercised. Limits were placed on the types of orders available, but the situations where orders can be made were kept so broad as to hinge totally on precedent cases and judicial discretion. It is not realistic, however for the legislature to lay down a test for the exercise of these powers as each case varies to such a great extent. The provisions did successfully deal with many of the issues which had been raised in the courts. Problems which remain are unlikely to be solved by further enactments as they are the problems which are inherent in any area of the law where juxtaposed fundamental constitutional principles must be balanced. Here the principles of the freedom of speech and of the press and the concept of the open and public justice system must be reconciled with the principles that everyone is entitled to a fair trial, to basic privacy and to be presumed innocent until proven guilty. Principles

of such paramount concern are bound to cause problems in areas where they are in conflict.

In the criminal area there are often compelling reasons why judges should grant interim name suppression for the accused, and these reasons can far outweigh the public interest in allowing publication. The affects of publicity can be a very severe punishment which is not imposed by Parliament and the courts, and which can affect people even before their case has been decided. The presumption of innocence has been disregarded in this area. Appropriate reform could be provisions similar to the such that the presumption is that names are suppressed on an interim basis until the case has been decided, unless there is some overriding reason why the name should not be suppressed.

In general New Zealand law complies with the requirements laid down by Article 14(1). However, Parliament should not rest easy as there are areas of the court system in which reform is necessary if the Publicity Prinicple is to remain an instrument of the fair administration of justice.