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The Public Administration of Justice in the Courts

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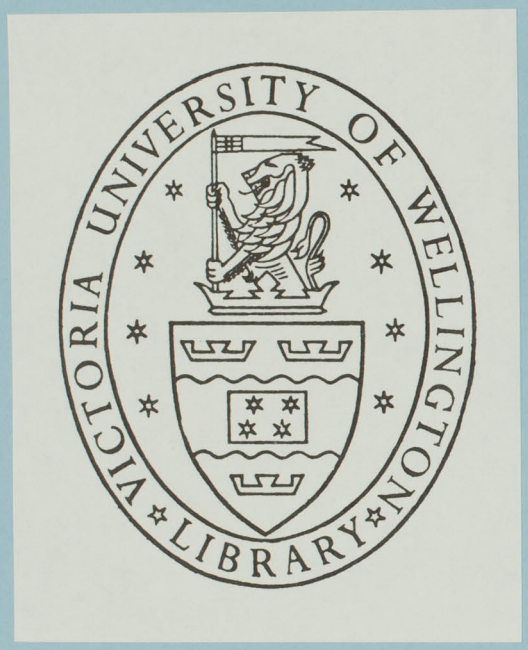
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INTRODUCTION

"Publicity is the very soul of justice"

It is a fundamental principle of our justice system in New Zealand 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 even this 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 paper will examine in detail this principle of New Zealand law that justice in the courts is administered openly and in public[2]. It is not however possible to examine every facet of this principle, or to discuss many of the areas in detail, thus the paper will highlight issues of interest.

This Publicity Principle was inherent in our system, but has in more recent times been 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.[3] Article 2 states that one of the duties of states who

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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] The paper will be limited to an analysis of the publicity principle in the courts and will not cover pretrial proceedings or hearings in Chambers.

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

are parties to it is "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the...Covenant."[4]

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 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.

The paper will analyse how New Zealand law can be reconciled with Article 14(1) and whether this provision creates any obligations which are not being fulfilled in New Zealand at the present time. This is the first of several themes which will be discussed throughout the paper.

Secondly there will be an analysis of whether the publicity concept is synonymous in criminal and civil areas. Finally the paper will look 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 paper aims to 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. The law relating to name suppression will be examined in detail as there are valid arguments that the rationale for the principle does not apply to it.

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[4] Article 2 International Convention on Civil and Political Rights 1968.

The structure of the paper is as follows:

1) Part One of the paper sets out the general concepts that will be used in the rest of the paper. This involves examining both what is meant by the Publicity Principle, and why that principle exists within the judicial system.

The starting point is an analysis of what is generally meant by the notion of open and public hearings in the administration of justice. This concept will incorporate Article 14, present New Zealand statutory law and some judicial statements from the principal cases in the area. The paper then deals with the rationale for the open justice system. Different reasons which have been propounded are critically analysed, and some further reasons are suggested.

2) Part Two of the paper briefly discusses the extent of the coverage of the Publicity Principle. Two areas of law, the family law area and juvenile offending, are examined to analyse why and in what ways they are apparently exempt from the principle. The factors which override the Publicity Principle are also analysed.

3) Finally the discussion moves on to deal with the various procedures which are used by courts to provide exceptions to the openness concept. The paper considers the reasoning behind the exceptions, how they work, and whether they are justified in a justice system which prides itself on its open access.

Each exception is discussed in relation to the Publicity Principle itself and the rationale for the principle.

This paper contends that there are good reasons for the principle in our system, and that in general we should be careful to weigh all the competing factors involved, before allowing exceptions to become widespread. It will also be contended that there are 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.

PART I - 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*[5]. . . applied in New Zealand in *C* v *C*[6]. . . 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."[7] 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*[8] considers the question of what is an open hearing. In that case the two parties had been married, but in 1931 the husband began divorce proceedings against the wife. He accused her of misconduct with a named party and she made no defence against this allegation. The case was heard in the Judges' law library of the court house and a divorce was granted.

When the divorce became absolute, and the parties were entitled to marry again, the husband married the former wife of the person with whom Mrs McPherson had allegedly been having an affair. Mrs McPherson then applied to the court for the divorce to be declared void on the grounds that Mr McPherson had committed perjury at the divorce hearing and that the divorce hearing had not been in open court.

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

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

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

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

The main question to be decided in the case was whether the hearing had taken place in open court, considering that it was held in the judges' law library.

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, it was hindered with respect to the library, as this was approached through double doors one of which had on it a sign saying "private". 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.[9]

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"[10], but that[11]

> 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.[12]

This case clearly illustrates that at common law the general principle is that court proceedings should be open to members of the public. It is also clear that this principle is accepted and entrenched in New Zealand law, not only

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[9] Above n 8, 200.

[10] Above n 8, 200.

[11] Above n 8, 200.

[12] Above n8, 197.

by common law and statute, but also by the ratification of the International Convention on Civil and Political Rights.

There are still some questions which must be examined before the Publicity Principle can be fully understood: who is meant by the public; to what does the principle apply; and whether the right to a public hearing belongs solely to the individuals involved or whether the public has an independent right of access?

1) Who is 'the Public'?

The first questions that must be addressed are who is meant by the public and why are the media included in this term? While the parties involved in a dispute are a subset of the public, and 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."[13] 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".[14]

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

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[13] J Resnik "Due Process: A Public Dimension" (1987) 39 Univ of Fla LR 405, 407.

[14] Above n1, 144.

[15] *Attorney-General* v *Leveller Magazine* [1979] AC 440, 450.

Certainly Lord Denning who described the media as the "watchdog of justice"[16] takes a generous view of their work:[17]

> 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 jeopardize the fair trial of the accused.

It is the positive role which is protected in New Zealand law as the media, in some circumstances, have greater rights of access to court hearings than the public. Reporters are seen as the public's representative, and bring a minimum element of openness to the proceedings, while other factors can be safeguarded by excluding the general public and restricting publication of details of the hearing. In some instances then a particular group of the public, the media, is singled out to have access to hearings while the general public is excluded.[18]

2) The Application of the Principle

The right to a public trial applies to both criminal and civil cases, and to higher review authorities.[19] It applies generally to both the evidence and the judgment of the court.

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16 Rt Hon Lord Denning "A Free Press" 17 Bracton LJ 13,13.

17 Above n16, 13.

18 See Part II and Part III(A).

19 Above n 1, 146.

Lord Diplock stated in *Attorney-General v Leveller*[20] that in criminal trials at least, all the evidence should be communicated to the court publicly. Lord Diplock's focus on the evidence in criminal trials is because in this area the state has so much control over the individual and the deprivation of personal liberty is at stake. If the public knows the grounds on which a charge is based, this provides a check on the state's power and protects the individual's freedom. The question can then be asked as to whether there are in fact two different principles of Public Justice, one for criminal trials and one for civil trials?

Article 14 does not draw this distinction between criminal and civil matters, it simply states the general rule that proceedings should take place in public, and it is this approach which is reflected in New Zealand.

While Article 14 does not specifically deal with evidence, it does state that judgments rendered in civil or criminal hearings shall generally be made public. The fact that Article 14 deals with the judgments of cases separately, and that it allows for fewer exceptions to this rule than to the general rule concerning proceedings, shows that public judgments are the fundamental feature of the public justice concept. It seems that in almost all circumstances, a public judgment is the minimum requirement of the Publicity Principle.

This minimum requirement is not as clear as is at first apparent. The wording of the Article raises an interpretation issue as to whether judgment means the judge's reasoning and the result, or just the 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

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[20] Above n 15 , 450.

> 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 for example in 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 point was raised in *Lake* v *Lake*[21], 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"[22], 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*[23] which would make the civil law consistent with the criminal law. However in doing so this would drastically reduce the effect of this minimum requirement. Without either the evidence or the reasoning of the judge it is not possible for the public to analyse the judge's result. The effect of this approach would be to severely

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

[22] Above n21, 344.

[23] Above n21, 344.

limit the effectiveness of Article 14 as a protection against closed and secret hearings, (as is the provision in the Criminal Justice Act 1985).

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 a very limited number of cases. It is this latter approach which would be consistent with the purpose of Article 14.

3) A Public Right or an Individual Right ?

The Publicity Principle expounded in Article 14 is framed in terms of the individual's right to have a public hearing[24], rather than the public's right of access to hearings. This wording could almost 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*[25] 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.[26]

In the United States *Richmond Newspapers, Inc* v *Virginia*[27] dealt with 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. Chief Justice Burger in the Supreme Court stated that the 1st and 6th Amendments

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

[25] Above n15.

[26] See also the case of *McPherson* above n8, where it was also held that the public have a right of access to a court of justice.

[27] *Richmond Newspapers, Inc* v *Virginia* (1980) 448 US 555, 580.

to the Constitution gave the press and the public the right of access to trials.[28]

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"[29] "in a public court with open doors."[30] 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 was public, unless it fell within one of the acknowledged exceptions.[31] 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 under New Zealand law for the parties at a proceeding to opt to have a closed hearing. Thus in this country the right to an open court system lies with the public rather than the parties to the hearing. In effect New Zealand law is a step ahead of the position envisaged by Article 14. That provision aims to defend people from totalitarian regimes, rather than to go so far as to protect the public's right of access to the courts.

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28 Above n 27, 580.

29 Above n 7, 51.

30 Above n 7, 51.

31 See Part III.

Summary

The Publicity Principle means that in New Zealand there is a general rule that all court proceedings are open to the public. It is not necessary for any members of the public to be present at a hearing for the hearing to be 'open', but there must not be any restriction on public access. In this country the Publicity Principle protects the public's right of access as well as the individual's right to a public hearing.

In most circumstances the general public and the media have the right to be present at court proceedings, to hear the evidence, and the court's decision and reasoning. The minimum requirement of the Publicity Principle is that in every criminal case the decision or verdict of the court must always be made public. It is not clear whether the courts will adopt this approach in the civil area when exercising their inherent jurisdiction; or whether a more generous definition of 'judgment' will be adopted, so that the reasons of the court are included in this minimum requirement.

The fact that there is a minimum publicity requirement stresses the importance of the Publicity Principle. Why then is the public administration of justice so important in our society today?

B) THE RATIONALE FOR THE PUBLICITY PRINCIPLE

The paramount concern of the Publicity Principle is to ensure that justice is done.[32] 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.[33]

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."[34] Another suggestion is that according to ancient notions a court hearing is necessarily a public occasion.[35]

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[32] Above n 5, 437.

[33] Above n 27, 573 per Chief Justice Burger

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

[35] G Netthiem "The Principle of Open Justice" Tasm U L Rev (1984) 8 no 1, 25, 26.

In the early nineteenth century Jeremy Bentham extolled the virtues of a public justice system:[36]

> Without publicity, all other checks are fruitless: in comparison of publicity, all other checks are of small account. It is too publicity, more than to anything else put together, that the English system of procedure owes it being the least bad system as yet extant, instead of being the worst.

Judith Resnik, in her article "Due Process: A Public Dimension", suggests that there are several problems in the notion that historical background is a reason for the Publicity Principle.[37] She claims that while it is difficult to establish what past practice was in this regard, it is clear that it was varied and that it is too enthusiastic to suggest that there was an "unbroken" line of case law in this respect. However this criticism may be too harsh as it is based on Resnik's claim that "the Chief Justice asserted that he had found an "unbroken line of open access to trials . . ."[38]; in fact his claim concerned only a "presumption of open access".[39]

Resnik's other criticism is fairer; she asserts 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."[40] 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 rationalize the principle.

Procedure does change over time[41], and historical precedent does not necessarily lend merit to a practice. For example, historically proceedings

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[36] J Bentham as quoted in *Works of Jeremy Bentham* Vol 4 Ed Bowring, 317.

[37] Above n 13, 409- 412.

[38] Above n 13, 411.

[39] Above n27, 573

[40] Above n13, 411.

[41] For example Resnik points out the developing procedure with jurors who used to be chosen for their direct knowledge of disputed events.Above n13, 411.

concerning family matters were held in open, public courts, even though they concerned such specifically private matters. In the case of *McPherson* v *McPherson* [42] 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 recognized 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 of the Publicity Principle, 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."[43] Publicity gives the proceedings formality and it "is the authentic hall-mark of judicial as distinct from administrative procedure..." [44]

In New Zealand 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."[45]

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[42] Above n8, 201.

[43] Above n13, 412.

[44] Above n8, 200.

[45] Above n13, 407.

The Social Contract theorists, Thomas Hobbes and John Locke, both suggest 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. Locke argued that in the state of nature[46]

> all men may be restrained from invading other's rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby everyone has the right to punish the transgressors of that law to such a degree, as may hinder its violation. For the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute that law . . . . And if anyone in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality where naturally there is no superiority or jurisdiction of one over another, what any man may do in prosecution of that law, every one must needs have a right to do.

He continues to explain what happens to law as political or civil society is set up:[47]

> because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto punish the offences of all those of that society: there, and there only, is political society, where everyone of the members hath quitted this natural power, resigned it up into the hands of the community . . . . And thus all private judgement of every particular member being excluded, the community comes to be umpire, by settled standing rules . . . .

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[46] J Locke *Second Treatise of Civil Government* as quoted in *Readings in Social and Political Philosophy*, ed RM Stewart (Oxford University Press Incorp 1986), 19.

[47] Above n46, 5.

Theoretically then it can be argued that each member of the community has an inherent right of access to the justice system, as the state holds this power only 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 to have 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 a public right of 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.

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[48]. The focus is on the monitoring of the judge's power:[49]

> If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or

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[48] For example see above n27, 592 and above n36, 305.

[49] Above n15, 450.

> 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.[50]

> 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... [and justly].

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."[51]

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[52]. 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, 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

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

51 Above n16, 13.

52 Section 23 The Constitution Act 1986.

the media about a judge's misdemeanour, eventually leading to the judge's resignation.

The legislature has recently recognized this role of the media as "the watchdog of justice"[53] 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.[54] 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.[55]

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.[56] 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 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

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[53] Above n16, 13.

[54] 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.

[55] Presumably the reasoning is that if something untoward were to happen 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.

[56] Above n27, 596 - 97.

private. Resnik points out that other 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, her example is that of the process of giving academic tenure.[57] This example may not be that analogous as it is a situation where opinion rather than factual evidence is given, within the closed community of a faculty, where lack of confidentiality may cause some detriment to the party giving the evidence.

In court hearings it would only be in very rare cases that a witness would be inspired to be honest by the knowledge that there were members of the public, or press present. Generally people who would lie, will lie whether the hearing is open to the public or not.

c) Deterrent and Punishment

In the criminal area publicity can act as both a deterrent and a punishment[58] 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. It is only in major cases that the public is likely to remember when the perpetrator of an offence has not been arrested.

Publicity is regarded by some offenders as a harsh punishment as it can damage a reputation in an area, especially if the offence relates in some way to the offender's work.

Sometimes the Legislature makes use of this aspect 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

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[57] Above n13, 416.

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

the offence is so grave that only in very limited circumstances should anyone be able to claim immunity from the publication of their misbehaviour. It is also probable that as the stigma for drink driving offences increases, this provision will act as a deterrent, if the names of such offenders are published regularly.

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".[59]

Norms are not concrete, "prefixed, [nor] independent of the disputes that they govern."[60] 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." [61]

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. During a proceeding the media also cannot help in the generation of norms as this would be prejudicial to the hearing and probably in contempt of court.

In the long term though, norms do develop as the media and public criticize and comment on the result of proceedings. This response will effect some

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[59] Above n13, 417.

[60] Above n13, 417.

[61] Above n13, 417.

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.

There are problems even with this long-term generation of norms. As Resnik recognizes 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 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.[62]

> 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:

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

> 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 criticized 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 lose 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.

An open justice system stops the public from building up imaginary and uncomplimentary pictures of the courts.[63] 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."[64]

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

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

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.[65]

Again this reasoning can be criticized 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 recognized that the courts must sometimes determine law as well as ascertain it. Theoretically the former is seen as the role of the legislature and not as a function of the courts. Thus in the past it has been claimed that

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65 Above n27, 572.

the law existed and the courts just declared what it was, but did not actually 'make' law. Practically it is obvious both that the courts do make law, and that it is necessary for this to be part of their function. Cooke P recently justified the court's law making function as "in a sense fill[ing] gaps in an Act."[66]

It can be argued that 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 a large majority of the population most of New Zealand's Legislation would be 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.[67] 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.[68] Without public trials, it is claimed that vigilante groups would be established.[69]

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[66] *Northland Milk Vendors* v *Nothern Milk Ltd* [1988] 1 NZLR 530, 538.

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

[68] Above n27, 572.

[69] Above n27, 572.

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.[70] 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 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

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[70] Above n13, 412 - 413

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.

Conclusion

The principal aim of an open court system is to ensure that the system is 'just' and is seen as being 'just'. Other than this, it is difficult to categorically state that there is one identifiable rationale which underlies the Publicity Principle.

Historically the open administration of justice is recognised as one of the Common Law traditions. On that basis alone any change to the principle would be the cause of public outrage. There are many advantages, to a public court system, for both the system itself and for the public. The public can play a useful role in the justice system by making the court's publicly accountable, thus justice is more likely to be administered fairly. Publicity can also help the actual process of administering justice, it may encourage witnesses to come forward and it can act as both a punishment and a deterrent.

The Publicity Principle can also be justified on the grounds that an open court system is fundamental to a democratic society and is thus important for the protection of the public from possible abuse of state power. It gives the public access to the law and builds up public trust in the system and ultimately in the state. Finally in some instances it gives the public an emotional outlet.

Some of these reasons are more persuasive than others as a justification for the Publicity Principle, but it is the fact that all have some validity which entrenches the principle so deeply in our society. It would be totally inconsistent with the principles of a democratic society if justice were administered behind closed doors.

It is for this reason that it is so important to analyse the exceptions to the principle which are accepted under New Zealand law.

PART II - AREAS TO WHICH THE PUBLICITY PRINCIPLE MAY NOT APPLY

The Publicity Principle states the general presumption that court proceedings should be conducted in public. Occasionally though, special circumstances dictate that this presumption be rebutted in favour of procedures designed to ensure justice is administered fairly in those particular hearings. These procedures which provide exceptions to the Publicity Principle will be examined in Part III of the paper.

However, in New Zealand there are two areas of law in which this presumption of openness has been reversed. Court proceedings relating to the family law and to juvenile offending are not subject to the Publicity Principle. This part of the paper will examine these exemptions and the reasons why the principle does not apply.

The Family Courts and the Youth Courts are specialist courts which have been set up in New Zealand with jurisdiction over these areas. "Quite often the reason for the establishment of such [specialized] courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice."[71] This is true of these two particular courts in New Zealand with respect to the publicity requirements, as both the courts are essentially of a closed nature.

Article 14(1) of the International Convention on Civil and Political Rights states that the minimum requirement of openness in court proceedings is that "any judgement rendered in a criminal case or in a suit at law shall be made public . . ." The Article allows only three exemptions to this minimum requirement: judgments do not have to be public where the interests of juvenile persons require that they should not be, where the proceedings concern matrimonial disputes or where the proceedings concern the guardianship of children. Under Article 14 these areas could also be exempt 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.

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[71] Above n 1, 144.

Thus it would appear that 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 is the approach used in New Zealand. Alternatively States could use a case by case approach, so that the Publicity Principle applied to the area, but that individual cases could be exempted from all or some of the requirements of the Publicity Principle. It is this approach which is now used in Canada with regard to juvenile offending.

A) THE POSITION IN NEW ZEALAND

The scheme of the New Zealand legislation that deals with the Family Court proceedings and proceedings against juvenile offenders are basically the same. The Family Proceedings Act 1980 and the new Children, Young Persons and Their Families Act 1989, which comes into force in November 1989, both restrict the openness of proceedings. In both the Family Court and the Youth Court, only people directly concerned with the hearing are permitted entry. Members of the general public are excluded, unless the judge gives them permission.[72]

Accredited news media reporters are allowed to attend hearings in Youth Courts only[73], although they are not permitted to report details of any proceedings without the court's permission,[74] and can never print the name of the child or young person appearing before the court, or any details which would identify them.[75] Theoretically this provides a check on the system,

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[72] Section 169 of the Family Proceedings Act 1980, and s166 and s329 of the Children, Young Persons, and Their Families Act 1989. Section 27A of the Guardianship Act 1968, and s27V Social Securities Act 1964 provide similar prohibitions in their relative jurisdictions. (s23 Adoption Act 1955 prevents any media inspection of adoption records.)

[73] Section 329 of the Children, Young Persons and Their Families Act 1989.

[74] Section 438 of the Children, Young Persons and Their Families Act 1989, which applies to both courts under the Act. There are some exceptions to this rule if the report is for the bona fide use of related professional bodies(s438(2))

[75] Section 438(3) of the Children, Young Persons and Their Families Act 1989.

but in practice this ban on reporting will generally stop journalists attending hearings.

Where proceedings concern the status of a marriage, the Family Proceedings Act 1980 allows the media to report the name and address of the parties, the name of the presiding judge and the order made by the court; unless the court orders otherwise.[76]

Publications of a bona fide professional or technical nature can be made providing they are intended for circulation to members of related professions.[77] Also **some** criminal proceedings related to the family law area are not protected as different policy considerations apply in criminal matters.[78]

Appeals from these courts are heard in the High Court and Rule 696 of the High Court Rules states that where a court is hearing a case on appeal, it

> shall have all the powers and discretions of the tribunal whose order or decision is appealed against -
>
> a) To hold the hearing or any part of it in private; and
>
> b) To make orders prohibiting the publication of any report or the description of the proceedings or any part of them.

B) THE REASONS FOR THE EXEMPTIONS

1) The Family Law Area

Historically in the family law area there was some tradition for public hearings. In the English case of *Scott* v *Scott* the House of Lords held that public access could not be restricted when hearings concerned divorce

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[76] Section 159 Family Proceedings Act 1980.

[77] Section 169(5) Family Proceedings Act 1980, and Section 438 of the Children, Young Persons and Their Families Act 1989.

[78] See s169(1) Family Proceedings Act 1980.

applications, because these hearings affected the status of the parties, and the public had a general interest in this which could not be excluded.[79]

Similarly in the Privy Council case of *McPherson* v *McPherson*, it was decided that divorce hearings should be held in open court.[80]

> So long as divorce, in contrast with marriage, is not permitted to be a matter of agreement between the parties, the public at large. . . are directly interested in them, affecting as they do, not only the status of the two individuals immediately concerned but, not remotely when taken in mass, the entire social structure and the preservation of a wholesome family life throughout the community.

The court in *Scott* v *Scott* decided that proceedings concerning wardship, and the relationship between guardian and ward, were of a different nature to divorce proceedings and were held to be "private family disputes" which had "no relation to the public administration of justice".[81]

In 1915 a divorce hearing was heard in camera, in the New Zealand case of *C* v *C*.[82] The court while accepting that the general principle was that such hearings should usually be held in open court, held that in this country section 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.[83]

The early legislation allowed hearings to be private only when this was necessary to protect the public morals. Gradually society's attitude of the

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[79] Above n5, 436.

[80] Above n8, 201. See also the earlier discussion of this case in Part I (A). The court held that in this case the divorce proceeding had not been heard in open court, but stated that the divorce was not void because of this.

[81] Above n5, 442. to an extent this point is incorporated into New Zealand Law by s159 of the Family Porceedings Act 1980.

[82] Above n 6.

[83] The case was a suit for nullity of the marriage on the grounds of impotency.

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

There is not then the same historical basis for the application of the Publicity Principle to the family law as there is in other areas. However many of the other reasons for the Publicity Principle do apply to Family Court proceedings. Family Court judges should be publicly accountable as the decisions which they make can affect people's lives to a great an extent, especially where the custody of children is involved.

Family proceedings commonly necessitate public policy considerations being examined, for example when the court determines what is in the best interests of the child. Yet public debate about proceedings is very limited due to the restrictions on media and public access to the Family Courts. This means that judges have little feedback from the community and there is not the same process facilitating the generation of norms as there is in other areas of law.

The Family Courts determine and ascertain law and it is no less important for members of the public to know that law than it is in any other area, except possibly the criminal law. "Because the courts are closed to the public generally, it must result in the community not being able to ascertain the attitudes of the courts and the operation of the legislation."[84]

The principle that 'justice must be seen to be done', may have a more limited application in this area. The family is largely seen as a private sphere where state interference should be kept to a minimum. At the same time the state has almost a monopoly in the aspects which it does regulate. It is not as essential that justice is seen to be done in this area as in criminal proceedings, as the state is unlikely to abuse its power in such a significant way as is theoretically possible in the criminal area. Yet there are decisions

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[84] PM Guest and M Gurvich *Divorce in Australia* (1979), 163.

which can have a profound effect on the life of an individual or child that this reason is still significant.

It can be seen that parts of the rationale for the Publicity Principle do apply to Family Court hearings, and certainly there is not a consensus of opinion on the closed nature of these hearings.[85]

> [T]here are real dangers in allowing proceedings to be, in effect, 'secret' proceedings. The element of secrecy does much to excite the imagination of some members of the public who regard it with a high degree of suspicion.

One of the main arguments propounded by the advocates of open family hearings is that the family is one of the most basic institutions of our society, so it is in the public interest that the public is involved in hearings concerning the regulation of the family unit. This is especially the case as so many people can be affected by the decisions made in the court. An Australian judge in 1955 said in respect of adoption disputes that:[86]

> [t]he public ought to have the opportunity to watch and criticise the operation of social legislation such as this, which so profoundly affects the rights and indeed the whole lives, of all the parties to every adoption, and which may profoundly affect the lives of many of their relatives as well.

While there is a persuasive basis for the application of the Publicity Principle, justice in the Family Courts cannot be seen to be done in New Zealand today. The reason for these closed proceedings is the belief that there are factors which are of greater importance than the Publicity Principle, which must be protected.

The individual's supreme right to privacy in the family area overrides the public right of access to the Family Courts. This protects the notion that the family is a private area rather than one of public concern, while still allowing

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[85] Above n84, 163.

[86] *A* v *CS* (No 1) (1955) VLR 340, 361 per Sholl J.

the state some means of regulating certain aspects of family relations. In more recent times society has begun to recognize that the family is not a totally private sphere, for example with the increased reporting of incest and domestic violence, yet the essentially private nature is still seen as paramount, except in the more extreme circumstances.[87]

Another concern which is protected by the closed nature of the courts is that proceedings in the Family Courts are of a more informal nature. The parties should feel free to speak candidly to the judge and should not be intimidated by the presence of the public or in particular the media. The Family Court procedure was 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.

Finally in New Zealand there is a no fault basis to divorce applications, however if the media were free to publish reports of proceedings this could jeopardize the no fault principle, depending on the standard of the reporting. The aim of the Act is to stop "publication of possibly embarrassing material about court applicants in scandal-hungry newspapers"[88]

There are valid arguments for and against the application of the Publicity Principle to this area of the law, but the private nature of the proceedings are seen as the overriding factor.

2) Juvenile offending

According to Article 14 proceedings concerning juvenile offenders can be closed if the private lives of the parties require this, and the judgment need not be made public if that is in the interests of juvenile persons. This can provide a framework for countries to make the area of juvenile offending a

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[87] Different considerations apply to these criminal areas of the Family Law. Domestic violence allegations may be prosecuted in public, but incest charges are heard in camera to protect the identity of the child.

[88] P Tennison Family Court -The Legal Jungle (Tripart Marketing Pty. Ltd 1983), 91.

blanket exemption to the Publicity Principle, and it is this approach which New Zealand law has adopted.

Juvenile offending requires that the courts sometimes determine law, and social norms or public policy, just as proceedings against adult offenders do. This area also requires that justice is done and is seen to be done, but it may be of even greater importance for juvenile offenders, as they are often less able to help themselves, and are more likely to be the victims of circumstance.

However, there is not the tradition in this area that hearings are conducted publicly. New Zealand established Children's Courts under the Child Welfare Act in 1925. Before this time cases concerning juvenile offenders were heard in the ordinary courts, albeit sometimes in chambers.[89] From the time that these separate courts were established with jurisdiction over child and youth offenders, there have been restrictions placed on the openness of their proceedings. The new Children, Young Persons and Their Families Act 1989, still contains these restrictions.

In New Zealand, then, traditionally these courts have been closed to the public. However in Britain where children's courts have existed since the 14th Century[90], there was a much greater reluctance to closing the proceedings. Gladstone is quoted as saying,[91]

> A certain measure of publicity for the proceedings of Courts of Justice seems to me to be desirable, and this no less for Juvenile Courts than for others. I should view with considerable apprehension a state of things in which no notice was taken in the public Press of the mode in which delinquent children were dealt with by the Courts of summary jurisdiction.

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[89] Above n 58, 347.

[90] In the 14th Century the Chamberlain's court in London dealt with child and youth offending. See above n58, 347.

[91] Reported in LXXXV JP 126 (1909) as quoted in above n58, 347.

The situation was changed in 1933 and is now similar to the position in this country.

In Canada, the position has recently been reversed. Prior to the Canadian Charter of Rights, the courts held that section 12(1) of the Canadian Juvenile Delinquents Act 1970, which stated that trials of children shall take place "without publicity", meant that juvenile trials must be held in camera.[92] Thus the pre-Charter position was that the Publicity Principle did not apply to juvenile trials.

In 1982, after the introduction of the Canadian Charter of Rights, the courts decided that section 11 paragraph d(4) of the Charter which gives everyone charged with an offence the right to a "fair and public hearing", has changed the position in this respect.

Re Edmonton Journal and Attorney-General for Alberta [93] concerned an application for a declaration that section 12(1) of the Juvenile Delinquents Act 1970 was inconsistent with section 11 of the Charter. The court held that the words in section 11(d) of the Charter applied to children to guarantee that when charged with an offence they are entitled to a "fair and public hearing". In effect this allows members of the media and the public to be present, although the media cannot report anything which would disclose the child's identity.[94] The court recognised that there would still be some cases where in camera hearings were necessary to "protect social values of superordinate importance."[95] It was not thought that this justified holding all juvenile cases in camera.[96]

> The superordinate importance of being able to hear juvenile trials *in camera* is not doubted. But what superordinate importance is there in

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92 See *C.B v The Queen* (1981) 62 CCC (2d) 107.

93 *Re Edmonton Journal and Attorney-General for Alberta et al* (1983), 4 CCC (3d) 59.

94 *Regina v R.J* (1982) 68 CCC (2d) 285.

95 Canadian Charter of Rights Annotated vol 2, 16.4 - 23. Under s1 of the Charter public accessibility to hearings can be restricted on this ground.

96 Above n93, 69.

> holding all of such trials *in camera*? The rationale for the blanket rule is the protection of the child. That protection can be secured in individual cases by the presiding judge without a requirement that all such trials be held *in camera*. Such a rule is inconsistent with the right to a public hearing.

The court decided that section 12(1) of the Juvenile Delinquents Act 1970 should be read by replacing "shall" with "may", so that judges have the discretion to order that a hearing should take place in camera when it is necessary for the protection of the child.

In Canada then, since the Charter of Rights was introduced it has been held that the Publicity Principle does apply to the area of juvenile offending, although in individual cases exceptions can be made where necessary. The importance of the Publicity Principle has taken precedence over the blanket protection of young offenders.

In New Zealand the position is different, the present practice is that proceedings concerning juvenile offenders have been granted, by statute, exemption from the Publicity Principle.The policy reasons for this are two-fold.

First, it is thought that young people should not be branded at an early age as criminals and stigmatized; "no matter how serious or how trivial the charge, impulsive behaviour and youth seem to go together."[97] The justification then is that publicity in this area may severely breach the interests of justice, as the punishment aspect of publicity may be too adverse on young offenders, many of whom will not re-offend. "Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."[98] Closed hearings are a concession to the fact that young offenders are minors, and the restrictions on publication of proceedings

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[97] Above n58, 348.

[98] Above n1 146.

reduces the chances of the offender being stigmatized at school or in the community.[99]

> [A] child should be given the chance to offend and be dealt with in camera before becoming publicly responsible and responsible for the bad upbringing he has received. No one will ever know how many useful adult members of New Zealand society today were saved from a life of crime by the act that their first indiscretion was dealt with firmly, fairly and in private in a Children's Court.

Rhetoric indeed, but this may overstate the damaging effect of publicity as people are unlikely to remember the names of offenders, unless they know the youth.

Secondly it is believed that hearings will be more successful if the judge can speak candidly and openly about the person's background and situation, without risking this material turning up later in the news stories. A public hearing may reduce the effectiveness of the court by increasing the formality and making the youth, and any witnesses, less willing to speak freely.

Another reason which has been suggested is that publicity "may create 'young heroes' whose behaviour will be copied, or at least become regarded as normal, through the frequency of its description in public."[100] This latter reason is not very persuasive as it could apply almost equally well to adult offending, but it is not a realistic argument against the open administration of justice.

There are justifications for these closed proceedings, especially as the legislation does provide, at least theoretically, some checks.[101]

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[99] Above n58, 350.

[100] Above n58, 348.

[101] Reporters are allowed in the Youth Court, also the judge can admit entry to other members of the public, *s* 438 and *s*329 Children, Young Persons, and Their Families Act 1989.

Conclusion

There are obvious parallels between the procedures which apply to the Family Courts and those used in the Youth Courts, and the reasons for those procedures. Juvenile offending and the family law are two areas which have been exempted from the Publicity Principle, even though in general the rationale for that principle applies to them. There are, however other paramount factors which Parliament have seen as outweighing the need for publicity. The overriding considerations are the protection of private rights and the safeguarding of the nature of the procedure used by the courts.

It is not accepted uncontroversially that these areas should be totally exempt from the Publicity Principle. One possible reform which could protect many of these concerns would be to allow the judges to make public their decision and reasoning in cases which were of public importance. While this is not a total solution - as for example it would not significantly enhance public accountability because the judges would decide which judgments should be made public - it would serve to educate the public about that aspect of the law and to some extent about the procedure of the courts. It would also facilitate public debate which would help in the development of social norms.

An alternative reform would be to adopt an approach similar to the one which is used in Canada in respect of juvenile offenders. This would mean that the Publicity Principle applied to these areas, but that the exceptions to the principle were applied on a case by case basis where they were necessary.

Perhaps these considerations lead to an even more basic question of whether the court system is the appropriate forum for either of these areas? "It is now widely accepted that the cherished ideal of the therapeutic social agency to help children in trouble is unrealistic and inappropriate for an entity that calls itself a court."[102]

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[102] Council on the Role of Courts. *The Role of Courts in American Society* (St Paul, Minn: West Pub. Co 1984), 138.

PART III – THE EXCEPTIONS TO THE PUBLICITY PRINCIPLE

The principle that justice in our courts must be administered openly and in public has been examined in Part I of this paper. While this principle is of constitutional importance in encouraging the fair and proper running of our justice system, it is inherently necessary for such a principle to have some exceptions if it is to produce overall fairness in the court system. There will always be some situations in which other considerations override the Publicity Principle, and information concerning the proceedings should be suppressed,[103]

> 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 recognizes 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 press 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.

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[103] Above n6, 437-438.

"[I]n no case is 'closing' the trial to be allowed to prejudice the defendant's right to a fair trial."[104] Also Article 14 still requires the minimum public justice component that all judgments rendered in civil or criminal hearings shall be made public, except in very limited circumstances.[105]

The laws of New Zealand also recognize 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[106], although there are also some statutory exceptions.[107]

In the criminal area, Parliament has legislated so that the courts no longer have this unfettered discretion. Instead the Criminal Justice Act 1985 allows the courts to make exceptions to the principle of the public administration of justice only if the case fits within one of the set circumstances.

Suppression orders vary from suppression of the names of the parties or witnesses, or censorship of evidence, through to the extreme situation of the case being heard in camera (that is proceedings in a closed court.)

While it is essential that the courts have this control over the openness of proceedings if the system is to work efficiently and fairly, this control does open the system to possible abuse. Courts may use these powers in circumstances where they are not be justified, or the court may make an order which is wider than is necessary.

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[104] Haji N A Noor Muhammad "Due Process of Law for Persons Accused of a Crime" from Henkin (ed) *The International Bill of Rights* (1981), 149.

[105] The only exceptions to this are those discussed in PartII, namely where the interests of juvenile persons otherwise requires, where the proceedings concern matrimonial disputes, or where the proceedings concern the guardianship of children.

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

[107] See the discussion of the Family Proceedings Act 1980 in Part II.

The reasons which are used to justify suppression orders are framed very widely[108], 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.[109] The situation is more prone to abuse as often, all the usual checks and balances have been removed. For example, 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.

While it seems dramatic to discuss the possibility of abuse by the courts, this danger was realized 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*.[110]

In the civil context interlocutory orders made in the High Court in *Minister of Foreign Affairs v Benipal* 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. [111]

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

[109] *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 1965), 19.

[110] Above n 50.

[111] This was the situation in both *Richmond Newspapers, Ltd* above n 27, and the *Broadcasting Corporation* above n50.

The following discussion will look at the law relating to these exceptions in both the civil and the criminal context, although the focus will be on the criminal law as this is where the exceptions are more frequently used; and where any abuse of the court powers would be the most dangerous. The extent that these exceptions infringe on the application of the Publicity Principle will be analysed, and some possible reforms will be discussed.

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[112] and orders to hold hearings in camera.[113]

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* Sir Richard 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.[114]

If this was 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*[115] Viscount Haldane LC held that this power was justified as the application of it did not depend on judicial discretion but on the demands of justice.[116] However the Earl of 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."[117]

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

113 Above n 50.

114 Above n112, 680.

115 Above n5.

116 Above n5, 435.

117 Above n5, 442-443.

As has been mentioned, these misgivings about the inherent powers seem to have been proven correct in the case of *The Broadcasting Corporation* v *Attorney-General*.[118] 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 recognized 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.[119]

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 *Broadcasting Corporation*.[120]

Sections 138 to 141 of the Criminal Justice Act 1985 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

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118 Above n50.

119 Above n50, 128.

120 Above n50.

are in total substitution for the inherent jurisdiction which the courts[121] 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.[122]

> 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.

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.

The section allows the courts in certain circumstances to make the following orders on either a temporary or permanent basis.

1) 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 'justice seen to be done' notion.

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

122 *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.

2) Forbidding the publication of the name of any witness or any particulars which would identify the witness.[123]

3) 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 part of it.

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 does allow 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.

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 fustrate 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.[124]

The circumstances in which a judge can make any such order are when it is required by:

- the interests of Justice
- public morality
- the reputation of any victim of any alleged sexual offence
- the reputation of any victim of any alleged offence of extortion
- the security or defence of New Zealand.

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[123] See below Part III (A) (1) (b) and (2).

[124] Above n 15, 450 .

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' 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 in later cases witnesses will know that this will happen.

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.[125]

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

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

previous cases may help judges to decide whether suppression should be ordered.[126]

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.[127]

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

Article 14 does not specifically mention the victim's of alleged sexual offences or offences of extortion, although it incorporates a wider ground that is absent in section 138, 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. The notion here is to protect the sensibilities of the victims.

There is also 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 ground was originally enacted in the Official Secrets Act 1951. In *Taylor* v *Attorney-General*[128] 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

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[126] Above n13, 417.

[127] The protection of public morals was used to supress 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 III (A) (2).

[128] Above n112.

against a defendant charged under the Official Secrets Act 1951. The order was made for the protection of the security of New Zealand, while the use of letters to refer to each agent resulted in the trial being able to be heard in public and reported in the media.

There is the danger that this exception will be used by the prosecution when it is not really necessary.[129] It is important that the courts do look into the reasons why suppression is necessary for the security of the country. Although it has also been questioned as to whether the courts are really qualified to say what is and what is not a matter of national security.[130]

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."[131]

c) Breach of an order

Ignorance of a suppression order is no excuse for breaching one,[132] although this may be taken in to 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.

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129 In *Attorney-General* v *Leveller Magazine*, above n15, the magazine reported suppressed information as a protest against the 'excessive use' of this type of provision.

130 Above n109.

131 Above n104, 149.

132 *Police* v *Thames Star Co. Ltd* (1965) 11 MLD 343.

According to *Leveller Magazine* for there to be a contempt of court punishable by imprisonment, the judge must have made the order clear.[133]

> [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.

The contempt of court charge was completely dismissed for this reason.

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.[134] The courts therefore have a much more limited power in this regard than that suggested by Article 14. There are however, restrictions on what the media can report, essentially at the discretion of the courts.[135]

The media is 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

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[133] Above n15, 453.

[134] Section 138(3) Criminal Justice Act 1985.

[135] 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 meant that there are to be no restrictions on publication as this would render meaningless the exceptions to the Publicity Principle that it does allow.

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 organizations 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.

In *R v X (an accused)* the Court held that under section 138 written submissions can be received by a court when this is in the interests of justice.[136] In this way the evidence would not be heard by the media, which would reduce the effectiveness of the media presence as a check.

Applications for review of a suppression order can be made by the parties to an action or by members of the media.[137] The latter allows the media to be heard as a party affected by the order, although in some instances the practical effect of this right may be limited. For example in the American case of *Globe Newspaper Co. v Superior Court*[138] 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.

e) Limitations to the Orders

There are two statutory limitations to the orders under section 138. There is a public right to search for and take copies of the register of persons committed for trial and sentence.[139] However if an order has been made to the contrary these details cannot then be published so the orders are not substantially limited by this right.[140]

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136 Above n122, 244.

137 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 15 March 1982, Court of Appeal CA 79/81.

138 *Globe Newspaper Co. v Superior Court* 102 S. Ct. 2613 (1982).

139 Criminal Proceedings (Search of Court Records) Rules 1974.

140 Above n50, 127.

Section 141 of the Criminal Justice Act 1985 lays down exceptions for publication of material by or at the request of the police when there is a suppression order relating to that material.

2) Name Suppression Orders

Article 14 of the Convention on Civil and Political Rights does not expressly consider the courts' ability to suppress the name 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 this country the criminal courts have wide powers to suppress the names of the accused, witnesses, or the victim; which suggests that New Zealand law 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."[141] Unlike section 138, this section gives no indication of when courts should exercise this power.[142]

Name suppression orders can be made either permanently, if the applicant can show strong enough justification; or temporarily; and they are commonly used 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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[141] Section 140(1) Criminal Justice Act 1985. This can include Companies, see above n63, 194.

[142] Section 140 does not apply to offences of driving while under the influence of drink or drugs. S61 Transport Act 1962 states that the court cannot suppress names of such offenders unless there are special reasons involved. See above Part I (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."[143]

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."[144] Thus an appeal will usually succeed only on the grounds that "the Judge made a plainly wrong decision for some identifiable reason."[145]

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, the type of offence, or because of some other specific feature of the case. *Dally* v *Police*[146] is a recent example of an application for name suppression based partially on the effects of widespread publicity.

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[143] W Shakespeare *Othello* Act III Scene 3.

[144] *Dally* v *Police* Unreported, 13 July 1989, High Court Wellington Registry AP 148/89, 5.

[145] Above n 144, 5.

[146] Above n144.

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[147] and the Court of Appeal.[148] 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."[149] 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 attention given to the case as an argument supporting suppression[150], although ultimately he decided that the District Court Judge was justified in refusing to grant name suppression on the basis of the Publicity Principle and the freedom of speech.[151] However the District Court Judge 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."[152]

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 paper[153], but as this punishment of the accused and their family can occur before guilt or innocence has been decided, the area is especially controversial.

In New Zealand the situation is particularly interesting 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

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147 Above n144.

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

149 Above n144, 4.

150 Above n144, 2 and 4.

151 Above n 144, 5-6.

152 Above n144,3.

153 See Part I (B) (3).

the Criminal Justice Act 1954. While these provisions caused much political debate and were repealed a year later by the incoming National government[154], the reform did have merit.

The thrust of section 45B was the prohibition of 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 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.[155]

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 the 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 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

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154 The National Government repealed the provisions as they had promised to do this in their election manifesto, essentially because they were seen as an infringement of the publicity Principle. For example see NZ Parliamentary debates Vol 403, 1976: 118.

155 Section 45B (3) Criminal Justice Act 1954 as enacted by s 17 of the Criminal Justice Amendment Act 1975.

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. 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, 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[156]

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156 The Dominion "Govt. should drop name suppression measure" 15/5/75.

> 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 justified 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 someone who was presumed to be innocent. It cannot be disputed that the court's power to remand in custody does conflict 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.The reform suggested would allow publication when it was required by the public interest.

The punishment of 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.[157]

> 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 does 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

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

effect this arbitrary reporting of cases does not sit well with the notion of everyone being treated on an equal basis 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 realize that publicity is given on such an unequal basis. The reform suggested would ensure that the punishment of publicity was not imposed on anyone until there was a conviction, and that it was never 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 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.[158]

Another problem with name suppression is that it could 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 some 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

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

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.

It may seem unlikely that any accused person would apply for the court to make their name public, but in practice this did happen when section was law.

In 1976 a doctor, Erich Geringer, was charged with raping one of his patients during a gynaecological examination. Geringer 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 s45B, but soon after O'Brien applied to have the suppression order removed. His counsel summarised the reasons for the application as:[159]

> [f]irstly, because O'Brien had nothing to hide and had no intention of hiding; secondly, because he was concious 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.

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159 "Court Lifts Name Ban on Gerald O'Brien" Christchurch Star 18/6/76.

The charge against TV2 was dismissed, but the two papers were fined $250 each 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.[160] 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.[161]

This 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 Findlay, Labour spokesman on Justice in 1976, who had been instrumental in passing the Amendment Act 1975 issued a disclaimer to the Christchurch Star on June the 16th, when O'Brien's name was still suppressed, dissociating himself and three other Labour MPs who were visiting Christchurch from the indecency charge.[162] Dr Findlay 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 persisted in abusing their parliamentary privilege by breaching suppression orders by naming defendants in Parliament.

This happened in 1988 when Mr Bolger MP 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 Mr

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160 "Charges against newspapers and TV2 called 'academic'" The Press 26/11/76.

161 Above n160.

162 "Dr Findlay: A reply" Christchurch Star 18/6/76.

Banks MP 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.

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.

b) The Names of the Witnesses

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[163]. This suggests that an order suppressing the names of witnesses, can only be made in the circumstances set out in section 138.[164] 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 judge's powers to grant these orders.

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163 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 section 138 specifically deals with the suppression of witnesses names this would take precedence over s140.

164 See above, Part III (A)(1).

A more recent case which was similar to the New Zealand case *Taylor*[165] is *Attorney-General v Leveller Magazine*.[166] 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 succeed 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 of to be heard in camera.[167] Lord Diplock felt that suppressing the witness' name was a "much less drastic derogation from the principle of open justice".[168]

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.

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.

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.

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[165] Above n112 as discussed above in Part III(A) (1) (b) (iv).

[166] Above n 15.

[167] Above n15, 451.

[168] Above n15, 451.

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.

In cases of sexual offending the public interest is best served by suppression to protect the victim (especially if a child is involved), even if this necessitates the suppression of the offender's name. There is no reason why the victim's name should be published, and suppression in this instance does not infringe to any large extent on the principle of public justice.

For the sake of practicality it is easier if the names of victims are not suppressed, but there could be a reform in this area so that if the victim of any offence did not wish to be named, then suppression could be obtained. There is no justification for publishing the victim's name, and a restriction on the publication would not offend the rationale of the Publicity Principle.

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[169].

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 in the criminal area 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 the case of *Skope Enterprises Ltd* v *Consumer Council*[170] 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 the case of *Between A and F&Z*[171] 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.[172]

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

170 Above n169.

171 *Between A and F&Z* Unreported. Timaru registry Apps112/87

172 Above n171, 2 and 7.

In the English case of *Scott* v *Scott*[173] Viscount Haldane LC held that the application of the inherent jurisdiction did not depend on judicial discretion but on the demands of justice.[174] However the Earl of 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."[175]

The danger of the courts using their powers under the inherent jurisdiction was evidenced in the *Minister of Foreign Affairs* v *Benipal*.[176] 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."[177]

The order is particularly draconian as it gives the opposing case no chance to challenge the evidence or the submissions. This breaches the principles of Natural Justice as only one side of the case was heard on these aspects. 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."[178]

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173 Above n5.

174 Above n5, 435.

175 Above n5, 442-443.

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

177 Above n176, 760.

178 Above n176, 763.

It would appear that the courts inherent jurisdictions now limited so that courts cannot allow evidence to be admitted which is to remain secret even 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. Guidelines could also be given as to the circumstances in which such orders should be made, but, as is illustrated in the criminal area, these types of guidelines are so broad as to be almost meaningless.

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. 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. The open administration of justice gives the courts a level of public accountability, which increases the public's trust in the system.

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 are 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, is to be innocent until proven guilty and is entitled to basic privacy. 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 effects of publicity can be a very severe punishment which is not imposed by Parliament and the courts under our law, and which can effect people before their case has been decided. The presumption of innocence has been disregarded in this area.

It has been established in the family law area that there are considerations which overrule the openness of our justice system, such as privacy. It is time that this policy was taken further to protect the individual interests of accused before convictions are entered.

In general New Zealand law does comply 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 Principle is to remain an instrument of the fair administration of justice.

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The public administration of justice in the courts