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Announcements

Collected Papers by the Right Honourable Sir Geoffrey Palmer QC
Part III Constitutional Law, Government and Reform: *Fitzgerald v Muldoon*

The Palmer Series collects the papers of the Right Honourable Sir Geoffrey Palmer QC, Distinguished Fellow of the Victoria University of Wellington Law Faculty. The series is sponsored by an anonymous donor whom the Faculty gratefully acknowledges.

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["New Zealand and the Glorious Revolution"](#) 

New Zealand Law Journal, No. 12, 1976

[Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 12](#)

[SIR GEOFFREY PALMER QC](#), Victoria University of Wellington

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The decision in *Fitzgerald v Muldoon* is an occasion for dancing in the streets. It affirms in ringing terms the classical orthodoxy of our constitutional arrangements, and stands as a signal example of the contribution that tradition in the culture of the law can make to ordered liberty. It also removes some of the effects of the Attorney-General's unfortunate exercise of his power in April 1976 to stay private prosecutions arising out of the same conduct of the Prime Minister dealt with in the case.

The case dealt with the statement, issued by the Prime Minister in December 1975, that the New Zealand superannuation scheme would cease with immediate effect and that empowering legislation with retrospective effect would be introduced early in 1976. The plaintiff sued the Prime Minister, the New Zealand Superannuation Board, the Attorney-General and the Controller and Auditor-General. Against the Prime Minister the plaintiff sought a declaration that the announcement that the statement constituted an exercise of a pretended power of suspending of laws or of the execution thereof and was accordingly illegal by virtue of s 1 of the Bill of Rights 1688.

The Chief Justice vindicated principle by declaring that the announcement was illegal as being in breach of s 1 of the Bill of Rights 1688. He held that by making the statements he did the Prime Minister was purporting to suspend the law without the consent of Parliament.

The Judges in New Zealand rarely have occasion to pass upon the basic elements of our Constitution. For this reason our constitutional law tends to be rather sterile. It has a tendency to be dominated by theory and history. The cornerstones of our system are Magna Carta, The Petition of Right, The Bill of Rights and the "spirit" of our Constitution. Not for us the passionate controversies involved in protecting liberty by constitutional litigation in the American fashion. We tend even to be suspicious of the federal boundary rides conducted by the High Court of Australia in its constitutional jurisdiction. We have put our trust in Parliament. On that we have staked our all. And it is at that very point that the Chief Justice has given us aid and comfort. His subject was the rule of law. His message was that no one was above the law, that it applies to the mighty as to the humble. The point was also procedural. No one doubts the legitimacy of a legitimately elected Government changing the law. But the means by which change must be achieved continues to be of utmost importance to our democracy. The proper forms must be observed.

["The Courts are Open"](#) 

New Zealand Law Journal, No. 13, 1976

[Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 13](#)

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Easy access to the Courts for the speedy resolution of disputes lies at the heart of our system of justice. While such a principle seems so obvious that it is usually taken for granted, it has been both explicated and buttressed by the recent decision of Beattie J in *Fitzgerald v Muldoon*. The plaintiff in that case argued that although the monetary value of the case was minor it was one of serious constitutional importance. The learned Judge found that if the action was adjourned until retrospective legislation was passed, the action would be stifled at birth, and that individuals should have the right to have their case heard. Such a decision demonstrates that the members of the judiciary are not prepared to resile from their role as the third branch of government. The deference paid to our Judges does not stem from their fancy titles, their striped pants or their homburg hats. It stems from an appreciation of their historic constitutional role. To maintain not only our deference but also our respect they must exercise those powers appropriate to the judicial branch.

["The Constitution and David Minogue"](#) 

New Zealand Law Journal 481, 1976

[Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 14](#)

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Mr. Michael Minogue MP has been trying to secure some basic understanding of how our system of Parliamentary democracy really works. In short, he concludes that the system does not function according to the principles upon which it is based. This is not a new revelation. In one sense Mr. Minogue is building on foundations laid by the Chief Justice in *Fitzgerald v Muldoon*. That decision made government by Prime Ministerial press release impossible. What the case told us was that the traditional balance of power in a formal sense between the legislature, the Executive and the judiciary will be preserved. Mr. Minogue is content with the traditional and formal division of powers. What he says amounts to a plea for putting some substance into the traditional forms. He would redress the balance against the executive by allowing citizens and MPs much greater access to information than they enjoy under existing laws.

Minogue seems to be suggesting that debates in Parliament would actually change members' minds. Members would put forward their genuine views rather than their party's policy. It sounds a little like the sort of legislature where no whips exist and no party discipline either. In practice the quality of legislation would be worse, almost certainly, than it is now. Some intermediate position between party discipline and a free-for-all may exist but the aim should be greater accountability to the public by the executive.

The Minogue argument overlooks the importance of the mass of publically available information. Members of Parliament in New Zealand suffer from information overload. Much of the information needed by MPs to question the domination of the executive lies in sources already available to them. The most obvious way to cut down the work load and allow Members time to absorb information available to them would be to increase the numbers.

The unrivalled simplicity of our unicameral Parliament has not been accompanied by a heightened sense of restraint in the single chamber. Instead we take full advantage of the opportunity we have to legislate quicker than anywhere else in the Western world. We pass far too much legislation and pass it far too quickly. One of the most fearful instruments of executive domination flows from the regulation making power of the executive. For sheer speed, lack of warning, absence of consultation and debate nothing beats regulations. New Zealand does very little to protect itself from an excess of power in regulations.

Mr. Minogue prefers to revitalise and reform Parliament. The task should not be regarded as impossible, but if Parliament does not prove equal to the task we shall have to investigate again the judiciary and the possibility of handing the Judges new weapons, such as a Bill of Rights with judicial review. Should Mr Minogue's crusade succeed, it will result in improved legislation prepared in a more deliberative manner.

["The Separation of Powers in 1984"](#) 

New Zealand Law Journal, p. 178, June 1984

[Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 15](#)

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For a long time New Zealand has looked to the United Kingdom as the source of its Constitutional Law. But the simple verities of Dicey in parliamentary sovereignty do not seem so secure to us as they once did. Given Lord Scarman's suggestions that the time has come in the United Kingdom for a reassessment of the safeguards offered by the system, it must certainly force New Zealanders to examine their own condition. It is important to reflect on the differences between the New Zealand situation and that of the British. Some of the checks against the abuse of power which exist in Britain are singularly lacking in New Zealand's parliamentary system. Whereas Lord Scarman observes that the House of Commons is not sovereign, the New Zealand House of Representatives can assuredly destroy the system if it wishes. The ability of the New Zealand executive to dominate is much more easily accomplished in a small parliament. Government by caucus is a reality in New Zealand in ways which are simply impossible in larger parliaments. Developing caucus domination has reduced some of the vitality of New Zealand Parliament even when the vigour of its select committees has been increasing. There are many respects in which the New Zealand Parliament is deficient in holding the executive to account. There has also been a decline in the doctrine of ministerial responsibility, a failure to accept the conventions upon which the protection of that doctrine depends.

The necessary conclusion is that the first priority is to change the way the New Zealand Parliament works. The absence of a written Constitution, a Bill of Rights, an Upper House, a Federal System or any of the other usual institutions of modern constitutional democracy simply demonstrates the conceptual sterility of the New Zealand tradition, and it is because of this sterility that efforts should be made to change it. A redistribution of powers between the three branches of government should be undertaken. The first issue to confront is whether New Zealand requires a written Constitution. A Bill of Rights alone would offer great advantages. It would ensure that fundamental values are protected and would restrain the abuse of power by the executive in Parliament. It would provide an important source of education about the importance of fundamental freedoms in a democratic society and would allow a remedy to individuals who had suffered under a law which breaches the Rights. New Zealand has become a pluralistic society with significant minorities whose interests must be protected, and in that context New Zealand needs a commitment to a set of democratic Rights and Freedoms through a Bill of Rights.

["Muldoon and the Constitution"](#) 

Margaret Clark (ed) 'Muldoon Revisited' (Dunmore Press, Palmerston North, 2004)

[Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 16](#)

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This paper discusses the impact that Muldoon had on the New Zealand constitution. It explains the New Zealand unwritten constitution and considers how Muldoon's behaviour cannot be described as 'unconstitutional' in the same way that a United States politician could be so described. It evaluates Muldoon's political style, use of power, conduct of Parliament and reversal of

court decisions, but also recognises Muldoon's positive impacts upon the New Zealand constitution that were achieved through the implementation of the Official Information Act 1981.

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About this eJournal

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the [Law School](#) has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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