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Reconstituting the Constitution

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1.3.7 New Zealand's Tradition of Constitutional Change is Evolutionary and "Pragmatic"

"New Zealand's political history has been experimental but, very importantly, not revolutionary".[93] This pattern dated from the state's very beginnings. And, "[a]bstraction has little tradition of popular following in Aotearoa New Zealand. Institutionally, we have tended to favour the simple, accessible and pragmatic".[94] Indeed, radical, revolutionary constitutional change is undesirable (and anyway does not fit with the New Zealand tradition). Although some constitutional changes need immediate attention, New Zealand is not undergoing the kind of constitutional crisis that would have to be dealt with through fundamental constitutional restructuring.

1.3.8 Whether or Not New Zealand Adopts a Written Constitution, Constitutional Codification Had Been Recently Increasing

Particularly over the last decades, and especially since the Constitution Act 1986, there had been considerable legislative and bureaucratic codification of New Zealand's constitution. There were many reasons why this had happened, including anticipating and responding to electoral system change and the increased awareness of rights-based issues. It is worth noting that this trend has happened elsewhere, even in Westminster states with written constitutions.[95] Contemporary political and social complexity tends to lead to the evolution and recording of rules.

1.3.9 Future Constitutional Reforms Must Use Legitimate and Appropriate Change Processes

There was universal agreement that, when embarking upon constitutional change, legitimate reform processes must be used. Future reforms must be made in a manner that is regarded as democratically fair by citizens and elites. This issue was closely related to the problematical question of who owns the constitution, and who should

[93] Moloney (2006).

[94] Macdonald (2000), p. 87.

[95] Rhodes et al. (2009) (p. 88) note that "constitutional conventions have been codified as governments have attempted to provide guidelines for politicians and officials". Also, "the codification of conventions and practices has blurred the distinction between written (codified) constitutions and unwritten constitutions".

own it. Nevertheless, further constitutional change did not await such a settlement, as is explained in the next section of this paper.

1.4 Rebuilding the Constitution, 2000–2010: Debate, Change, and No-Change

During the first decade of the twenty-first century some interesting public debates occurred. Here I focus on two: the relationship between the judiciary and Parliament, and the future of the Māori seats.[96]

Justice Thomas helped revive the debate concerning the limits of parliamentary sovereignty, arguing that the uncertainty as to whether or not courts would strike down "legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament's conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power".[97] The term "parliamentary sovereignty" is a "misnomer" because "sovereignty rests with the people" in a fully democratic state.[98] The courts should not defer to parliamentary supremacy.

Michael Cullen, Leader of the House and Deputy Prime Minister at the time, responded. Because the most fundamental norm was representative government, the Parliament must be the supreme authority and "[t]he idea of parliamentary supremacy over fundamental norms suggests a dichotomy which I would argue does not exist".[99] It was Parliament's prerogative, not the courts', to make and amend the law. However, parliamentary sovereignty is "moderated" by established processes and conventions, international obligations, and the electoral cycle.[100] Cullen opposed judicial review of legislation leading to the formal separation of powers and to "the politicisation of the judiciary and to protracted and possibly intractable disputes over turf".[101] This debate followed similar themes to those discussed in *Building the Constitution*.

There was also a polite and public dispute between the Chief Justice, Sian Elias and the Prime Minister, Helen Clark and her previous Attorney-General, Margaret Wilson on the relationship between Parliament and the judges and on court administration.[102] Interestingly, "Arguments between the prime minister and the chief

[96] Prebble (2010), especially pp. 89–104.

[97] Thomas (2000), p. 8.

[98] Ibid, p. 21.

[99] Cullen (2005), p. 1.

[100] Ibid, p. 2.

[101] Ibid, p. 3.

[102] See Sian Elias's response, (Elias 2004), B5.

justice in 2004–2005 about the administration of the courts were interpreted by the media more as a personal matter between Helen Clark and Sean Elias than as a question of 'separation of powers'".[103] Another example of the tension that can exist between the political executive and the judiciary was in mid-2009 when the Minister of Justice, Simon Power, criticised the Chief Justice for commenting on parole, sentencing, and the high number of New Zealanders imprisoned.[104] In practice, if not in theory, the concept of separation of powers between the judiciary and Parliament is not always clearly understood in New Zealand.

The other major debate that developed after *Building the Constitution* concerned the future of the Māori seats. These had existed since 1867, although there had been many reforms of the original model during the intervening years. In a speech to the Orewa Branch of the Rotary Club on 27 January 2004, the then Leader of the National Party and Leader of the Opposition, Don Brash, advocated the abolition of the Māori seats. His speech polarised New Zealanders on broader race matters as well as putting the Māori seats on to the public constitutional agenda. Until then, the major party (Labour and National) consensus had been that the seats would remain as long as Māori wanted them, although a minor party, ACT, had advocated abolition. From 2004 onwards, National advocated abolition of the seats. After the 2008 general election, the Māori Party, formed as a reaction to the Labour-led government's Foreshore and Seabed Act 2004, negotiated with the National Party for that Act to be reviewed, and for the establishment in 2010 of a group to consider constitutional issues. National agreed not to try to remove the Māori seats without Māori consent. In return, the Māori Party agreed not to seek entrenchment of the seats (one of its main policy goals) during the 2008–2012 parliamentary term.[105] The Māori Party agreed to support the National minority government on supply and confidence and was allocated two ministerial positions outside cabinet.

As well as the elite debates outlined above, the constitution continued to change after *Building the Constitution*. Alongside these further evolutionary and pragmatic changes went attempts to discuss and reform the constitution that were characterised by indecision with institutional inertia prevailing. I briefly summarise the events between 2000 and 2010 in Table 1.1.

1.4.1 Case-Study: The Supreme Court Act 2003

In *Building the Constitution* Colin James accurately predicted that appeals to the Privy Council would be "unlikely to survive this decade—if only because the Privy Council is itself tending to send cases back to the Appeal Court in preference to

[103] Sharp (2006), pp. 109–110.
[104] Elias (2009); and see Tiffen (2009).
[105] Māori Party (2008).

Table 1.1 Major constitutional statutes, reports and events between 2000 and 2010

Selected events and legislation	Description
2001 Public Audit Act	This Act, among other provisions, established the Auditor-General as an Officer of Parliament appointed by the Governor General on the recommendation of the House of Representatives.
2001 Electoral (Integrity) Amendment Act	Between 2001 and the 2005 general election (when the legislation expired) MPs who resigned or were expelled from their parliamentary parties had to vacate their seats, a provision that was used once (Donna Awatere-Huata, ACT MP, in 2005, a case that was heard by the Supreme Court in 2004 reported as *Prebble v Awatere Huata* [2005] 1 NZLR 289).
2001 The MMP Review Committee	The Electoral Act 1993 stipulated that a parliamentary select committee review the MMP electoral system and report back to Parliament before 1 June 2002. The cross-party committee (excluding New Zealand First, which boycotted it) adopted a unanimity, or near unanimity rule, and made no recommendations for change.[a]
2002 Local Government Act	The Act established governance principles for local government.
2003 Supreme Court Act	The right of appeal to the Judicial Committee of the Privy Council (United Kingdom) was abolished. A new, New Zealand Supreme Court was established. See the case-study below.
2004 Crown Entities Act	The Act provided a framework for establishing, governing, and operating Crown entities. It included accountability provisions.
2004 Foreshore and Seabed Act	This contested legislation placed the foreshore and seabed in Crown ownership, with Māori having highly restricted rights to claim ownership. The Bill's replacement was under debate during 2010 (see below).
2004 Appointing judges: a judicial appointments commission for New Zealand? A public consultation paper	This discussion paper was released for public comment. It suggested a possible judicial commission for New Zealand. No action had been taken by late 2010.
2005 Constitution Amendment Act	The amendments related to (a) the Crown's right to veto financial bills, and (b) the lapsing of bills, including the next Parliament's right to reinstate them. The changes were not controversial, although not insignificant, and arose from the 2003 report of the Standing Orders Committee.[b]
2005 The Constitutional Arrangements Committee	In its *Report on the Supreme Court Bill* the Justice and Electoral Committee stated that an inquiry into New Zealand's constitutional arrangements should be held. It was a response to submitters' concerns about, for example, the partnership principle inherent in the Treaty of Waitangi and the constitutional protections for the Treaty.[c] A parliamentary ad hoc select committee was convened to review the constitution.[d] The committee, boycotted by the National and New Zealand First parties,

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Table 1.1 (continued)

Selected events and legislation	Description
	received 66 submissions. There were no public hearings. The committee recommended that there be more public education on constitutional matters and that the government might consider establishing an independent institution to foster understanding and debate.[e] The recommendations were not implemented. The Report contains supporting expert material on the constitution.
2006 Report of the Privileges Committee	Parliament's Privileges Committee considered the case of Television New Zealand and its punitive treatment of its Chief Executive (Ian Fraser) after he gave evidence to a select committee. The Privileges Committee fined TVNZ, the first fine for over 100 years.[f] The case raised questions about the scope of parliamentary privilege and the House of Representative's powers.
2005 and 2008 post-election government support agreements	The conventions around the definition of the political executive and its behavioural rules continued to evolve. In 1999, collective cabinet responsibility had been modified to enable "agree to disagree" arrangements between parties in coalition with each other. In 2005 and 2008 ministers from support – not coalition – parties were appointed outside cabinet. They were bound by collective cabinet responsibility only on those issues for which they had portfolio responsibilities.[g]
2007 Electoral Finance Act	This controversial Act was repealed in 2008 after it was widely criticised as too restrictive. The Electoral (Finance Reform and Advance Voting) Bill was being considered by the House during 2010.[h]
2007 Regulatory Responsibility Bill	This Bill was introduced in 2007 and was reported on by the Commerce Committee. Then it was the topic of the Regulatory Responsibility Taskforce, which reported back with a draft Bill in 2009. Public submissions closed on 27 August 2010. The Bill aims to advance principles against which legislation can be judged for compatibility with those principles.
2010 Electoral (Administration) Amendment Act	This Act amalgamated the functions of the former Electoral Commission and the Chief Electoral Officer into one Crown entity, a new Electoral Commission, and repealed the relevant sections of the Electoral Act 1993 establishing the previous Electoral Commission.
2008–2010 The creation of Auckland "super city"	The Labour–Progressive minority government, defeated in 2008, had established a royal commission on Auckland government. The incoming National-led government disregarded much of the report, including its recommendation for Māori representation on the new Auckland regional council and, in a suite of acts, abolished the existing local authorities and implemented an Auckland "Super City" in time for the 2010 local elections. Although an ad hoc parliamentary select committee heard submissions on the changes, no referendum of Auckland citizens was held.

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Selected events and legislation	Description
2010 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act	This Act, passed under urgency in the House (including bypassing the select committee process), replaced the elected members of Environment Canterbury with appointed commissioners with strong powers. It also abolished the forthcoming 2010 elections for membership of Environment Canterbury.
Head of State Referenda Bill 2010	Keith Locke, Green Party MP, put forward a member's bill that set out three options: the status quo; a New Zealand head of state determined by a 75% majority in the House; or a New Zealand head of state directly elected through a Single Transferable Voting ballot. The Bill did not pass its First Reading and therefore was not referred to a select committee.
2010 Electoral Referendum Bill	The Bill set out two questions about the electoral system that would be put to voters at the 2011 general election. The Bill was the product of the National Party's promise to allow voters to reconsider the MMP electoral rules.
2010 Canterbury Earthquake Response and Recovery Act	A severe earthquake hit the Canterbury region on 4 September. On 14 September, after being passed through all its stages in one sitting day through leave of the House (unanimous agreement), the Bill became law. Unprecedented (and unconstitutional) powers were given to the newly appointed Minister for Canterbury Earthquake Recovery and to the Executive Council. The only legislation exempt from the Act was the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and the Bill of Rights Act 1990. The Act's date of expiry was 1 April 2012.[i]

[a]MMP Review Committee (2001); and see Church and McLeay (2003), pp. 245–254; and Palmer and Palmer (2004), pp. 34–38

[b]Palmer (2007). Only six submissions were received. Palmer reports (pp. 594–596) that the amendments were approved and included in a statutes amendment bill, after agreement on the process was reached through consultation with all party leaders. The government then introduced two new Supplementary Order Papers that made significant changes to the amendments, one of them introduced after the second reading of the relevant bill. Palmer (p. 596) comments that the process was "constitutionally outrageous!"

[c]Justice and Electoral Committee (2003), p. 52.

[d]A paper from the chair of the Cabinet Policy Committee, the Prime Minister, Helen Clark, recommended that such a committee be established, stressing: the need to review other countries' experiences of constitutional reform; and the opportunity to have a "public dialogue" on the Treaty of Waitangi (Clark undated)

[e]Constitutional Arrangements Committee (2005). The committee was chaired by the Leader of the United Future Party, Peter Dunne. The ACT MP dissented from the majority views

[f]Prebble (2010), pp. 122–124. The House of Commons has not fined anyone since 1666

[g]See especially Boston and Bullock (2009), pp. 39–75

[h]See Geddis (2010)

[i]As is obvious, this legislation occurred after the 2010 constitutional conference

deciding them finally".[106] In 2003, appeals to the Judicial Committee of the House of Lords were indeed abolished, and a New Zealand Supreme Court was constructed. Because this was the most important constitutional change of the new century's first decade it is worth analysing. Further, though, this particular constitutional event deserves detailed consideration because it illustrates several of the main themes of the 2000 constitutional conference, especially the relationship between national identity and the constitution, the relationship between Māori and the constitution, and the question of how to change the constitution – determining the legitimate mode of reforming particular aspects of the constitutional structure. There was also the policy problem, not unique to this particular issue, of what should replace the status quo.[107]

After the enactment of the Statute of Westminster 1931 by the British Parliament, independent countries within the Commonwealth could pass laws removing themselves from the jurisdiction of the Privy Council. New Zealand finally enacted the Statute in 1947, enabling the abolition of the right of appeal to the Judicial Committee of the Privy Council from that date onwards but it was not until 2003 that Parliament passed the Supreme Court Act 2003 establishing a final appellate body above the existing New Zealand Court of Appeal. It is worth noting that only a small number of cases (albeit, by definition, important ones) had been referred to London in recent years: 17 matters in 2002 compared with 665 to the New Zealand Court of Appeal.[108]

From the 1978 *Report of the Royal Commission on the Courts* onwards, similar arguments for and against abolition were put forward, with each official report weighting them differently.[109] There were four main areas of contention: the quality of British compared with New Zealand judges, including the quality of their judicial decisions; issues relating to New Zealand's national identity and its relationships with the rest of the judicial world; the implications of abolition for Māori and the Treaty of Waitangi; and, more prosaically, the relative financial costs and benefits of retaining the right to appeal to London. Underlying the debate was the sotto voce theme of New Zealand's gradual movement away from mother Britain, perhaps towards becoming a republic.[110]

For Māori, the right of appeal was closely associated with their rights under the Treaty of Waitangi 1840 which had been signed by a majority of Māori chiefs and, on the other side, by the representative of Queen Victoria. Abolition or retention of the right of appeal was also linked with wider constitutional issues.[111] Māori cited the numerous examples of New Zealand courts disregarding Māori rights, and some

[106] James (2000a), p. 10. In this section I have used sections of an earlier, unpublished paper: McLeay (2004).

[107] See Eichelbaum (2000), p. 52.

[108] Justice and Electoral Committee (2003), p. 44.

[109] Royal Commission on the Courts (1994); McGrath (1994); and Wilson (2000).

[110] See James (2004).

[111] See especially Māori Committee to the Law Commission (1995).

cases where the Privy Council over-ruled the local courts. This hostility to abolition had persisted despite the growing unwillingness on the part of the English judges to deal with Treaty concerns, and their inadequate knowledge of those concerns and their wider historical and cultural context.

Commercial and business interests also opposed change, arguing that New Zealand needed the expertise and remoteness (and hence objectivity) of the British judges, and that the Privy Council decisions provided a stable common law environment in which to do business. Naturally, too, the abolition of the right of appeal to the Privy Council was a lively issue within the legal community itself, with practising lawyers, academic lawyers, judges, and the various professional bodies such as the New Zealand Law Society and the New Zealand Bar Association, involved in debate.

The 1984–1990 Labour government public sector and constitutional reform programme had included abolishing appeals to the Privy Council.[112] This objective had not been achieved, however, perhaps because the issue had been crowded out by other priorities in a hectic legislative programme. Besides, the Law Commission did not produce its report on the issue until 1989 and by that time the Labour government was in disarray. Between 1990 and 1993 the National government restored the Privy Council issue to the governmental agenda. The then Attorney-General said, however, that "abolition would be effected only with the 'broad support' of the House of Representatives".[113] National's Bill did not survive the general election at the end of 1996 because National had agreed as part of its coalition negotiations with New Zealand First that the Bill would not be proceeded with.

The Labour–Alliance minority government formed in late 1999, which depended on the votes of the Green Party for votes of confidence in the House, favoured abolition. A discussion paper received 70 submissions "and these indicated that should appeals to the Privy Council cease then the best model would be a stand-alone court sitting above the Court of Appeal. . .".[114] But no bill was introduced until after the next (early) election in 2002, and that election produced different parliamentary dynamics. The Alliance had split during the latter part of the previous term and only two former members of that party, who were now in a new party, Progressive Coalition, were re-elected to support Labour. Again there was a minority coalition government, this time dependent on a centre-right party, United Future, with which the Labour and the Progressives forged an agreement whereby United Future promised its votes on supply and confidence in return for certain policy and consultation arrangements. As a backstop, the Labour–Progressive government had an informal arrangement with the Greens for support on particular issues.

[112] Palmer (1992), p. 90.

[113] Parliamentary Library (2003), p. 3.

[114] Justice and Electoral Committee (2003), p. 3.

Despite other formulae being supported by judicial experts (including having only one level of appeal), constructing a second appeal court, above the High Court, seemed most likely to placate the opponents of abolition. This assessment was reflected in the Supreme Court Bill. The Attorney-General called on the precedents provided by her predecessors to justify the legislation:

> For more than 20 years, successive Attorneys-General, of both Labour and National-led governments have warned of the need to address the future arrangements for New Zealand appeals made to the Judicial Committee of the Privy Council in London. It is now apparent the Privy Council does not adequately meet our society's needs of a final appellate court, and that change is required.[115]

If Margaret Wilson had thought that this might stimulate the National Party into supporting the Bill she was wrong. That party had lost seats at the previous election, was low in the opinion polls, and was fighting to keep its position as the main opposition party in an increasingly crowded centre-right policy space. Besides, business was a key constituency, one that could not be left to ACT to respond to. For some time previously the issue had remained largely within the discourse of the judicial and public sector chattering classes. Then the small, right-wing party, ACT, along with the National Party, turned the issue into a populist one. National reversed its previous, pro-abolition stance.

The Labour-led government decided to abandon the search for cross-party consensus and pursue reform, despite, also, Labour's relationship with Māori who had traditionally supported Labour with their votes. There was no immediate reason for change. There had been no crisis that required a response, such as judicial inadequacy or scandal. Perhaps the role played by Margaret Wilson, the Attorney-General was a crucial one: individual constitutional entrepreneurs should not be underestimated in explanations of change in this policy area. Besides, Labour promised to establish a New Zealand final court of appeal in its 2002 election manifesto.[116]

After its first reading, the Supreme Court Bill was sent to the Justice and Electoral Committee for consideration. Although this committee was chaired by a Labour backbencher the government did not have a majority on it, but it garnered sufficient support to recommend "by a majority" that Parliament pass the Bill.[117] The ACT, National, New Zealand First, and United Future parties all criticised the legislation. There were 312 written submissions on the bill, 47.4% supporting the Supreme Court and 43.5% advocating retention of access to the Privy Council. [118] The Committee also asked six judicial experts to make submissions. There were 38 submissions from Māori, mostly opposing the legislation. One complaint was that

[115] Wilson (2002).

[116] New Zealand Labour Party (2002).

[117] Justice and Electoral Committee (2003), p. 1.

[118] Ibid, pp. 5–7.

Māori had been insufficiently consulted (although the Committee had met with Māori representatives).[119]

A new issue then appeared on the agenda: the question of legitimate process. ACT, the Business Roundtable, and the Federation of Māori Authorities advocated holding a referendum on the issue, a proposal that had been canvassed in the Committee's report and rejected by the majority,[120] arguing that the issues were too complex for a referendum and that such a debate would damage the judiciary.[121] The ACT, National and New Zealand First MPs considered that, if a referendum were not to be held, then the bill should not be passed unless there was "cross-party consensus on the bill, for example a 75 per cent majority in the House".[122]

The bill was passed with 63 votes in favour (Labour, the Progressive Coalition and the Green Party) and 53 votes against. The government's support party, United Future (with eight MPs), had initially backed the legislation. It then backed away from it, saying that it could not vote for the bill because business interests were against it.[123] Despite its previous attempts while in government to finish appeals to the Privy Council, the National Party (27 MPs) opposed the bill, stating that it would repeal it when it regained power and request the British to permit appeals to the Privy Council from New Zealand to be reinstated. ACT's nine MPs also opposed the bill (although not all its MPs were in the country at the time to cast their votes). Further, New Zealand First (13 MPs), opposed the legislation. Had the government been supported by that party, or if United Future had not changed its mind on the matter, the Bill would have had more substantial parliamentary backing, helping legitimate the process and the decision. The relatively narrow margin by which the Bill passed simply added another argument against its perceived legitimacy.

This important reform shows how the substance of constitutional change and its perceived legitimacy are closely connected with the reform process itself. Was abolition of sufficient importance to be treated as a major constitutional change and, if so, was it legitimate for the Bill to have been passed without either a parliamentary supra majority or public approval through a referendum? Interestingly, the government could argue that it had a mandate for change, a justification accepted by Kenneth Scott many decades ago: "When the electors give a government a mandate they give it permission to use its majority to make a particular constitutional change."[124] However, Scott also points out that the doctrine would be less frequently invoked in the future under majority single-party government, also because

[119] Ibid, pp. 24–27.
[120] Ibid, pp. 18–21.
[121] Ibid, pp. 20–21.
[122] Ibid, p. 22.
[123] Tunah (2003).
[124] Scott (1962), p. 52.

of special laws and conventions, including the entrenched provisions of the Electoral Act 1956 (and, we might add, its successor, the Electoral Act 1993).[125] It might also be the case that the fact that MMP had been implemented through a referendum affected interest group and voter notions of due process on constitutional change issues. Indeed, citizens favoured being given a direct voice on the abolition of appeals to the Privy Council. A New Zealand Herald–Digi Poll on the eve of abolition asked, "Do you support the abolition of appeals to the Privy Council?" The responses were (leaving aside the non-responses and don't knows): Yes, 36.1%; No, 47.9%. When asked, "Do you think this is a change that should be put to a referendum?" 79% agreed while 16.2% disagreed.

The debate on the Supreme Court Act 2003 thus illustrated many of the dilemmas and questions about constitutional change, both substance and process, that had dominated the 2000 constitutional conference.

1.5 Constitutions and the Problem of Process

The question of legitimate political process is perhaps the most fundamental of all constitutional issues. This can be seen from the deliberations at the conference on *Building the Constitution,* from the deliberations of *Reconstituting the Constitution* that provide the chapters of this, later book, and from the story of the constitutional developments during the intervening decade. Change processes that are fair and democratic are at the heart of constitutionalism. If the elites get the process of change wrong, then the legitimacy of the reforms themselves can be challenged. But getting the process right is not easy, especially when the constitution itself provides so few indicators of how it can be legally, legitimately and feasibly rebuilt. The Constitution Act 1986 and the Electoral Act 1993 stipulate that certain fundamental features (including the age of voting, the type of electoral system and the triennial parliamentary term) can be changed only by referendum or by three-quarters of all MPs voting in favour of a reform. But most aspects of the New Zealand constitution including, for example, the Māori seats, can be changed by simple majority of the House of Representatives. Neither the constitutional conference in 2000 nor its successor in 2010 tackled the question of process directly, focusing rather on the substantive issues relating to the New Zealand constitution.

There are myriad questions about the political process of constitutional change. Of course citizens should be involved, but how? Through consultation and submissions or through the ballot box, for example? And on what constitutional issues should Māori make the decisions, or make the decisions as one of the two Treaty partners, or contribute as individual citizens? Which issues should be decided upon by Parliament? By judges? By the people? The whole question of

[125] Scott (1962), p. 54.