

NOTIONS OF EQUALITY AND RIGHTS IN THE NEW ZEALAND FORESHORE AND SEABED DEBATE: FOUR PARADIGM POSITIONS

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INTRODUCTION

The importance of equality

In New Zealand, matters of right are hotly contested, often with equality arguments used as justification for various claims of rights. Equality itself is a loaded and highly contested concept. As Ronald Dworkin noted, ‘People who praise it or disparage it disagree about what they are praising or disparaging’.¹ Its history is long and it has figured in many different contexts and has been given many different meanings, often at odds with each other.² Concepts of equality have been passed down infused with widely divergent values and connotations.³ As J R Lucas contended:

EQUALITY is the great political issue of our time... Equality – there men have something to die for, kill for, agitate about, be miserable about. The demand for Equality obsesses all our political thought. We are not sure what it is... but we are sure that whatever it is, we want it: and while we are prepared to look on frustration, injustice or violence with tolerance, as part of the natural order of things, we will work ourselves up into paroxysms of righteous indignation at the bare mention of Inequality.⁴

Although Lucas was writing over thirty years ago, his assessment is pertinent to New Zealand’s foreshore and seabed debate. Across all sectors of society and from opposing sides of the debate, people made claims for equality, against what they perceived to be inequality.

The recurring theme is that Māori and Pākehā may have separate and contradictory conceptions of equality. This paper therefore offers focused discussion on these separate and contradictory conceptions within the context of the foreshore and seabed debate.

To facilitate the discussion I will highlight the four paradigm positions on equality and rights that emerged throughout the debate. Many different people expressed these

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¹ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000) 2.

² Polyvios G Polyviou, *The Equal Protection of the Laws* (1980) 5.

³ *Ibid.*, 7.

⁴ J R Lucas, ‘Against Equality’ (1965) 154(1) *Philosophy* 296.

different paradigm positions during the debate, but they are most clearly portrayed in four key documents:

- Don Brash's "Nationhood" speech;⁵
- Michael Cullen's policy statement;⁶
- the Treaty Tribes Coalition's submission;⁷ and
- the *Paeroa Declaration*.⁸

Together these documents represent the broad spectrum of views on equality and rights exhibited during the debate. While these documents were issued during a short space of time, the equality and rights arguments within them span millennia, some finding their basis in the teachings of Aristotle, others in more contemporary legal philosophy.

However, before I continue on to discuss the four paradigm positions on equality and rights in the foreshore and seabed, I feel it is important that I briefly outline the debate itself.

The foreshore and seabed debate

The debate erupted in New Zealand after the Court of Appeal, on 19 June 2003, released its *Ngati Apa v Attorney-General*⁹ (*Ngati Apa*) decision. The Court found that Māori could apply to the Maori Land Court¹⁰ to have their customary rights in specific foreshore and seabed determined. The foreshore is the area next to dry land that is neither always wet nor always dry, due to the ebb and flow of the tide.¹¹ The seabed is permanently covered by water, and commences where the foreshore ends.¹²

⁵ Don Brash, 'Nationhood: An Address by Don Brash Leader of The National Party to the Orewa Rotary Club on 27 January 2004' (2004) http://www.national.org.nz/speech_article.aspx?ArticleID=1614 (Accessed 14 April 2008).

⁶ Michael Cullen 'Challenge to find balance on issue of foreshore rights' *Otago Daily Times* (Dunedin, New Zealand) 18 February 2004, 19.

⁷ Treaty Tribes Coalition, *One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue*, (Christchurch: Treaty Tribes Coalition, 2004). This submission was prepared for and presented to the then New Zealand Political Party Leaders on 26 February 2004. The Labour-led Coalition Government rejected it outright. See: The Treaty Tribes Coalition, "Government Unleashes Fury Over Seabed" *Press Release*, 27 February 2004. <http://www.scoop.co.nz/stories/PO0402/S00167.htm> (Accessed 3 September 2009).

⁸ For the full text of the *Paeroa Declaration* see *Te Takutai Moana: Economics, Politics and Colonisation Series vol. 5*, (2nd ed 2003), 11 http://www.kaupapamaori.com/assets/iri/takutai_publicationv2.pdf (Accessed 28 August 2009).

⁹ [2003] 3 NZLR 643.

¹⁰ A specialist court established under *Te Ture Whenua Maori Act 1993* to hear matters on Māori land.

¹¹ Tom Bennion, Malcolm Birdling and Rebecca Paton, *Making Sense of the Foreshore and Seabed: A special publication of the Māori Law Review* (2004) 6.

¹² *Ibid.* Currently, in New Zealand law, the foreshore and seabed is defined under s 5 of the *Foreshore and Seabed Act 2004* as:

foreshore and seabed----

- (a) means the marine area that is bounded,—
- (i) on the landward side by the line of mean high water springs; and
 - (ii) on the seaward side, by the outer limits of the territorial sea; and
- (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
- (c) includes the bed of Te Whaanga Lagoon in the Chatham Islands; and

The debate became a question of should any Māori claims to the foreshore and seabed be recognised or should the foreshore and seabed be owned absolutely by the Crown, that is, the New Zealand state?

The Labour-led Coalition Government sought to answer that question, and close the debate, when parliament passed the *Foreshore and Seabed Act 2004* on 18 November 2004. The Act vests full legal and beneficial ownership over the public foreshore and seabed in the Crown.¹³ This ownership is qualified by the guarantee of public access, along with a number of ancillary rights, over the public foreshore and seabed.¹⁴ The Act removes the previous jurisdiction of the Maori Land Court to hear and determine Māori customary claims relating to the foreshore and seabed,¹⁵ and replaces it with a new mechanism to recognise non-exclusive Māori customary use rights that previously could have been recognised at common law.¹⁶ The Act, therefore, sets out that the only Māori claims to the foreshore and seabed that can be recognised are those that derive their legitimacy from this legislation. Māori claims to ownership over the foreshore and seabed are extinguished.

The debate, however, continues today, with the recent announcement on 30 June 2009 of the Ministerial Review Panel's report on the *Foreshore and Seabed Act: Pākia ki uta, pākia ki tai*.¹⁷ The Report recommended repealing the Act and passing new interim legislation that would be built on a principled framework before undertaking negotiations to determine which Māori claims to the foreshore and seabed should be recognised.¹⁸

THE FOUR PARADIGM POSITIONS

The four paradigm positions on equality and rights in the foreshore and seabed debate are distinct and conflicting positions. These different equality positions support and legitimise different notions of rights. Some of the positions support the concept of separate Māori property rights, albeit to varying degrees, and with different legal foundations. However, one position espouses the notion of equal property rights for all in the foreshore and seabed. These paradigm positions on equality sit along a spectrum of recognition of Māori rights, that I have termed the "Equality and Rights Spectrum". At one end are the equality theories that dispel the legitimacy of separate Māori rights in the foreshore and seabed, while at the other are the theories that support full and exclusive Māori title.

(d) includes the air space and the water space above the areas described in paragraphs (a) to (c); and

(e) includes the subsoil, bedrock, and other matters below the areas described in paragraphs (a) to (c)

¹³ Section 13(1) *Foreshore and Seabed Act 2004*.

¹⁴ *Ibid*, ss 7-9.

¹⁵ *Ibid*, s 12.

¹⁶ *Ibid*, ss 49-65.

¹⁷ Ministerial Review Panel, *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel. Ministerial Review of the Foreshore and Seabed Act 2004*. Vol 1. <http://www2.justice.govt.nz/ministerial-review/report-ministry-review-panel.html> (Accessed 3 September 2009).

¹⁸ *Ibid*, 151-159.

Formal equality and no legitimate separate Māori rights

The first paradigm position sits at one end of the spectrum. This position espouses the notion of the same property rights for all in the foreshore and seabed. It denies the legitimacy of separate Māori rights in this zone, as that would be discrimination. I have termed this position the “formal equality and no legitimate separate Māori rights” position.

This formal equality position was utilised by Don Brash, the then leader of the opposition National Party, in his “Nationhood” speech on 27 January 2004.¹⁹ His speech focused on what his party perceived as Māori racial separatism and the need to treat all New Zealanders equally under the law.

Brash advocated Crown ownership of the foreshore and seabed.²⁰ He argued that the Labour-led coalition government, through the proposed legislation, would bestow vast powers on Māori, over and above their traditional, limited customary rights.²¹ He claimed these powers would include the ability to veto development in the foreshore and seabed.²² He continued to state that the government’s policy would award Māori a new role in the management of the coastline.²³ To him, the customary title that could potentially be recognised would give Māori commercial development rights that would deny public access.²⁴

The views expressed in the speech also represented one common public view on the issue at that time. Brash had touched a raw nerve among many New Zealanders who believed Māori had derived advantages from the government that were denied the rest of the population.²⁵

Brash’s position was concerned with similarities between people. His language was that of formal equality, a principle that Aristotle formulated: “Treat like cases alike”.²⁶ Brash’s basic premise was that Māori and other New Zealand citizens are all alike, we are

¹⁹ Brash, above n 5.

²⁰ *Ibid.*, 10.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, 11.

²⁴ *Ibid.*

²⁵ See Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, 2004) 397.

²⁶ Aristotle, *Nicomachean Ethics*, Book III, 3 1131a10-b16, at 1785, trans. W. D. Ross in Jonathan Barnes (ed) *The Complete Works of Aristotle: The Revised Oxford Translation. Electronic Version*, Vol. 2, *Bollingen Series LXXI* (1984)

<http://library.nlx.com/xtf/view?docId=aristotle/aristotle.02.xml;chunk.id=div.aristotle.v2.71;toc.depth=1;to c.id=div.aristotle.v2.71;brand=default;query-prox=> (Accessed 4 September 2009); Aristotle, *Politics*, Book III, 9. 1280a8-b14, at 2031: 12. 1282b14-a22, at 2035, trans B. Jowett in Jonathan Barnes (ed) *The Complete Works of Aristotle: The Revised Oxford Translation. Electronic Version*, Vol. 2, *Bollingen Series LXXI* (1984)

<http://library.nlx.com/xtf/view?docId=aristotle/aristotle.02.xml;chunk.id=div.aristotle.v2.91;toc.depth=1;to c.id=div.aristotle.v2.91;brand=default;query-prox=> (Accessed 4 September 2009).

all New Zealanders, we are all one people, so we must all be treated the same; i.e. that there must be one law for all.

However, obviously in the New Zealand legal system, there are many instances where people are treated differently. The theory of formal equality justifies this difference in treatment only where there is some relevant difference between them to validate the different treatment. Brash saw no such relevant difference here.

Brash argued for formal equality to be applied in its strictest sense. Strict equality is often followed in the legal sphere of civil, or human, rights and freedoms, where there are few relevant distinctions for treating people differently. On this view, all New Zealanders must have equal rights and duties. These rights and duties must be grounded in laws that apply to everyone. The indigenous status of Māori is not a relevant difference for treating Māori differently.

When applied in the foreshore and seabed debate, the theory of formal equality upholds the pre-*Ngati Apa* status quo; that is, that under the law all New Zealanders should have the same rights and duties in relation to the foreshore and seabed. Essentially, this claim is that there can be no exclusive ownership title, or exclusive use-rights granted to Māori, in the foreshore and seabed, as there are no relevant differences to justify such special treatment.

Equal consideration thesis and limited, codified Māori use rights

The second paradigm position is the then Labour-led coalition government's position that I have termed the "equal consideration and limited Māori use rights" position. This position sits beyond Brash's formal equality somewhere towards the middle of the spectrum. It recognises a limited range of Māori rights in the foreshore and seabed.

The then Deputy Prime Minister, Michael Cullen, announced this position when he delivered the Labour-led coalition government's Policy Statement on 18 February 2004.²⁷ The statement outlined the structure for the forthcoming legislation, the *Foreshore and Seabed Act 2004*.

The statement was embodied in the language of parliamentary sovereignty. Parliament is the ultimate authority in New Zealand law. As Cullen contended, it has the power to enact legislation to determine which rights in the foreshore and seabed are legitimate, and it is the proper agency to balance rights to reach 'an equilibrium where the reasonable expectations of all can be accommodated'.²⁸ The doctrine of parliamentary sovereignty was thus used to justify the government's decision to legislate.

In the statement the government outlined its framework as one that 'balances the rights we want all New Zealanders to enjoy and finds a secure place for the long-standing

²⁷ Cullen, above n 6.

²⁸ Cullen, above n 6.

customary practices of Maori'.²⁹ Consequently, the government sought to codify a limited range of Māori rights in the proposed *Foreshore and Seabed Act*. This was a continuation of past government policies that sought to transform Māori customary rights to those managed and maintained in a western legal framework. Māori rights that drew their legitimacy from *tikanga Māori*³⁰ or from the common law doctrine of native title, that were not codified in the new law, would simply be overridden. Thus, Māori common law rights amounting to full "ownership" would be extinguished under the government's policy.

Embedded in the statement, therefore, were specific government assumptions about Māori rights and the government's authority. Māori customary rights were to be given the same statutory status as other rights, and were therefore just one of many competing rights in the foreshore and seabed.³¹ The unique status of Māori as the indigenous peoples of New Zealand did not justify more differential treatment. In this way, Māori would have no greater claim to the foreshore and seabed than others. It must be noted that, as Māori are a minority, when balancing rights, the interests of the greater public will always outweigh the interests of Māori.

Implicit in the very notion of balancing rights are equality concepts. Here, the government was articulating a different position on equality, which can be termed 'the equal consideration of interests [thesis]'.³²

Ultimately, this theory of equality prescribes, much like formal equality, that all persons are equal, and thus human concerns should be approached in an even handed and neutral way.³³ But it gives the notion a more procedural content. Its meaning can be taken to be that the appropriate decision maker should take into account and consider impartially all peoples rights, and accord equal respect and concern to them.³⁴ Consequently, benefits can be allotted and burdens imposed only after all claims have been fairly and impartially evaluated.³⁵

On this view, in the context of the foreshore and seabed debate, Māori do possess limited use-rights in the foreshore and seabed, and these are equal in value to the public rights of access and navigation. They deserve equal consideration before determining which rights will be recognised, and which rights will be limited or overridden.

Procedural equality and the right of Māori to go to court

The even more procedurally oriented position is that which was advocated by the Treaty Tribes Coalition, which I have termed the "procedural equality and the right of Māori to go to court" position. This position recognises legitimate separate Māori rights in the

²⁹ Cullen, above n 6.

³⁰ Māori customary values and practices (Section 4 *Te Ture Whenua Maori Act 1993*).

³¹ See s 4 *Foreshore and Seabed Act 2004*.

³² Polyviou, above n 2, 11.

³³ *Ibid*, 12.

³⁴ *Ibid*.

³⁵ *Ibid*.

foreshore and seabed and sits somewhat in the centre of the spectrum. This is because it recognises that there could potentially be full and exclusive Māori title in the foreshore and seabed, but it does so within a western legal framework that does not fetter the sovereignty of Parliament.

On 26 February 2004, the Treaty Tribes Coalition, who are a coalition of several coastal *iwi*,³⁶ including Ngāi Tahu,³⁷ released its submission, 'One Rule of Law for all New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore and Seabed Issue'.³⁸ The Coalition's submission offered a different perspective to those of the other *iwi* and *hapū*³⁹ who signed the *Paeroa Declaration*.⁴⁰ The submission was a direct response to Brash, and the views within it provide a pertinent counter to his claims.

The Coalition proposed that the Attorney General appeal the *Ngati Apa* decision and that the Maori Land Court be allowed to hear the cases before it and make a determination concerning Māori claims to rights over specific areas of the foreshore and seabed.⁴¹ Then, argued the Coalition, should the Maori Land Court find that applicants had customary ownership, that is that the Court determined that the group held land in accordance with *tikanga Māori*,⁴² or other analogous rights, the Crown and the applicants could enter negotiations informed by that final determination of the Court.⁴³

This submission was rejected outright by both the Labour-led coalition government and the National Party.⁴⁴ Interestingly however, both the ACT New Zealand Party and the New Zealand Business Roundtable, two right-wing, business oriented groups, whose objectives often clash with those of Māori, supported the submission's conclusions.⁴⁵

³⁶ Tribe or tribes.

³⁷ Ngāi Tahu are a Māori people of Te Waipounamu (the Greenstone Isle) or the South Island. They hold tribal authority over eighty percent of the South Island, including where this author lives. Ngāi Tahu are the *iwi* comprised of Ngāi Tahu whānui; that is, the collective of the individuals who descend from the five primary hapū of Waitaha, Ngāti Mamoe and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tūāhuriri and Kai Te Ruahikihiki. (Section 2 *Te Runanga o Ngai Tahu Act 1996*). They hold authority over 80 per cent of the South Island. Throughout the South Island, there are 18 local Ngāi Tahu rūnanga (tribal groups). (See the Te Rūnanga o Ngāi Tahu .website <http://www.ngaitahu.iwi.nz> (Accessed 3 November 2008)).

³⁸ Treaty Tribes Coalition, above n 7.

³⁹ Sub-tribe or sub-tribes.

⁴⁰ The equality claims made within the *Paeroa Declaration* will be discussed in more depth shortly.

⁴¹ Treaty Tribes Coalition, above n 7, 13-14.

⁴² Section 129(2)(a) *Te Ture Whenua Maori Act 1993*.

⁴³ Treaty Tribes Coalition, above n 7, 13-14. The Treaty Tribes Coalition's principle based solution was further articulated by the Chair of the Treaty Tribes Coalition, Harry Mikaere, in a speech on 15 March 2004. The text of this speech is available at: Treaty Tribes Coalition, 'Speech Harry Mikaere Chair Treaty Tribes Coalition' *Scoop Independent News*, 15 March 2004 <http://www.scoop.co.nz/stories/PO0403/S00108.htm> (Accessed 19 August 2008).

⁴⁴ See Treaty Tribes Coalition, 'Government Unleashes Fury Over Foreshore' *Scoop Independent News*, 27 February 2004 <http://www.scoop.co.nz/stories/PO0402/S00167.htm> (Accessed 19 August 2008).

⁴⁵ See ACT New Zealand, 'Treaty Tribe's Right, says Franks' <http://www.act.org.nz/node25336> (Accessed 19 August 2008); Business Round Table, 'Business Roundtable Welcomes Treaty Tribes Coalition Initiative' (27 February 2004) <http://www.nzbr.org.nz/documents/releases/releases-004/040227TreatyTribes.htm> (Accessed 19 August 2008). The New Zealand Business Roundtable is an organisation comprising primarily chief executives of major business firms. Its founding belief is that a

These two groups are focused on the retention and protection of property rights, so supported Māori in their call for recognition of their property rights.

The notion of procedural equality is a respectable version of equality before the law and also requires there to be one law for all. However, unlike the notion of one law for all that the theory of formal equality promotes, not all people are viewed as entitled to exactly the same substantive rights. The notion of one law for all endorsed in procedural equality recognises that people may have different substantive rights and maintains that these different rights should be treated equally in terms of the procedural protection they receive in the courts. Thus customary Māori property rights deserved the same protection as individuals' property rights.

Procedural equality demands that the rule of law is followed via the adjudication of rights in the courts, and that the doctrine of separation of powers is strictly maintained. Using this theory, the Coalition argued, in complete contradiction to Brash and the National Party and Cullen and the Labour-led government, that the courts were the proper authority to determine rights and Parliament must not interfere with due process and the decisions of the judiciary.⁴⁶

Consequently, when utilised in the foreshore and seabed debate, this version of procedural equality claims that the courts may decide that Māori possess property rights, which come from *tikanga*, which is recognised in the doctrine of native title and article two of the Treaty of Waitangi (the Treaty).⁴⁷ These rights would be communal and customary. They would also reflect the concept, found in *tikanga*, that individuals and groups may possess rights in land under water, and in some instances these rights may extend to full, exclusive title. It would be open to the courts to recognise that Māori property rights in the foreshore and seabed were just as legitimate as those founded in fee simple title. These rights deserved the same protection under the law and Māori deserved the right to go to court to have their rights determined just like anyone else.

Equality of recognition and full Māori rights

Finally, the last paradigm position is that of equality of recognition and full Māori rights; a position that the signatories to the *Paeroa Declaration* utilised. The signatories themselves spoke in indigenous rights terms and utilised the equality theory that encompasses full and exclusive Māori ownership of the foreshore and seabed. This position of "equality of recognition and full Māori rights" sits at the far end of the spectrum and supports Māori rights to a much greater extent than is currently recognised in the New Zealand legal system. It recognises rights based on *tikanga Māori*, and it also

healthy, dynamic business sector and open and competitive markets are fundamental to the achievement of a prosperous economy and fair society. Members represent most of the large business interests in New Zealand and are drawn primarily from the private business sector. For more information see its website: <http://www.nzbr.org/nzindex.asp> (Accessed 21 October 2008). The ACT New Zealand political party grew out of the Association of Consumers and Taxpayers in 1993, from which it gets its name. ACT espouses free market liberal points of view, and ascribes to the political ideology of classical liberalism. For more information see its website: <http://www.act.org.nz> Accessed (21 October 2008).

⁴⁶ Treaty Tribes Coalition, above n 7, 2, 8, 9, 11.

⁴⁷ The foundational agreement reached in 1840 between Māori leaders and the British Crown.

disputes the unfettered power of Parliament to displace those rights. It maintains that the proper authority to decide matters of Māori rights rests with *iwi* and *hapū*, not Parliament.

The *Paeroa Declaration* was signed on 12 July 2003 at a national gathering of *iwi* at Ngahutoitoi Marae in Paeroa.⁴⁸ In it the signatories made it clear that they claimed ownership of the foreshore and seabed.⁴⁹ This ownership was sourced in *tikanga Māori*, and was reaffirmed in article two of the Treaty.⁵⁰ The signatories also emphasised that these rights were not new; they existed before the signing of the Treaty, and had never been relinquished.⁵¹ They also made clear that the status of Māori as the indigenous peoples of New Zealand entitled them to these property rights.⁵² Thus, in reality, the signatories were arguing that *tikanga* should be recognised as a legitimate source of law, and these rights should be recognised in their entirety in the state legal system.

The signatories were making sovereignty arguments. They were talking in Treaty partnership terms, but they went one step further in stating that they should have the last say. This implied that the sovereignty exercised by Parliament was a fettered one, and that the ultimate authority to determine Māori rights rested with *iwi* and *hapū*. To the signatories, the decision was one about property rights and this kind of decision rested with each tribe as an exercise of their *tinio rangatiratanga*⁵³ guaranteed in article two of the Treaty.⁵⁴

The *Paeroa Declaration* was therefore founded on assertions concerning indigenous rights and Māori sovereignty, rather than equality arguments. On one view of it, the claim to Māori sovereignty contradicts the notion of equality, as does any strong claim to sovereignty, including Cullen's claims for parliamentary sovereignty, because a claim to sovereignty is a claim to exercise paramount authority, an authority that is not shared with any other group or body. As Patrick Macklem acknowledged, 'recognition of special political jurisdictions on the basis of indigenous difference appears to clash with political and ethical, if not constitutional, commitments to equality'.⁵⁵ This clearly showed that although claims to rights and equality can be complementary, this is not always the case. Sometimes they conflict.

However, there is one form of equality embedded in the *Paeroa Declaration*, that of the concept of equality of peoples,⁵⁶ a form of equality akin to that existing in the United States between the Federal Government and First Nations Peoples. Under this concept of equality, the proper measure of the distribution of sovereignty is equality between

⁴⁸ A North Island town just south of the Coromandel Peninsula.

⁴⁹ The *Paeroa Declaration*, resolution one.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, resolution two.

⁵² *Ibid.*

⁵³ Chieftainship.

⁵⁴ Moana Jackson, 'Backgrounding The Paeroa Declaration' *Te Takutai Moana: Economics, Politics and Colonisation Series vol. 5*, (2nd ed 2003) 39.

⁵⁵ Patrick Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45(5) *Stanford Law Review* 1311, 1314.

⁵⁶ See *ibid.* for a detailed discussion on the concept of equality of peoples.

peoples, not equality between individuals.⁵⁷ That is, while the concept of Māori sovereignty over the foreshore and seabed may deny equality between Māori and non-Māori at the level of the individual in the distribution of resources, at a higher level it recognises equality between the Crown and Māori as two equal but separate sovereign powers, or as equal partners as envisioned under the Treaty.

Thus, implicitly, what the signatories were arguing for was equality of recognition.⁵⁸ Equality of recognition can be viewed as a subset of equality of peoples, and is the type of equality colonised minorities claim around the world when they call for state institutional and jurisdictional spaces to be carved out in a way that recognises their right to self-determination. In New Zealand, equality of recognition requires that the institutional and jurisdictional resources and spaces of New Zealand's legal system should equally recognise the Māori and the Pākehā identities.

Accordingly, when applied to the foreshore and seabed debate, the notion of equality of recognition would see the Crown and Māori as two equal but separate sovereign powers, or as equal partners as envisioned under the Treaty. On this view, *iwi* and *hapū* would have the right to determine which rights are legitimate in the foreshore and seabed because their sovereignty to do so was never ceded. If a tribe decided to recognise exclusive title, and created distinctions in property entitlements at the individual level, this would not be inequality under this theory. Equality would be maintained as the sovereignty of *iwi* and *hapū* would be recognised as equal to that of the Crown.

CONCLUDING REMARKS

During the foreshore and seabed debate people employed completely different notions of equality and rights. This meant that everyone was using the same terminology but talking past each other. This in turn fuelled the debate and created greater misunderstanding.

In order to maintain fair dialogue over the notion of Māori rights, these equality paradigms must be part of the discussion. Otherwise we will continue to talk past each other, and there is the very real risk that New Zealand will continue to have debates over Māori rights that divide the country and leave its peoples feeling subjugated and discriminated against.

⁵⁷ *Ibid*, 1315.

⁵⁸ See: Alan Pattern, 'Equality of Recognition' in Catriona McKinnon and Iain Hampsher-Monk (eds), *The Demands of Citizenship* (2000) 193 for a detailed discussion of the concept of equality of recognition.