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## A flawed Treaty partner: The New Zealand state, local government and the politics of recognition

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Since the establishment of the Waitangi Tribunal in 1975, the key mechanism of recognition for Māori in Aotearoa/New Zealand has been ‘Treaty settlements’. These settlements offer some (very limited) compensation for historical injustices, as well as limited recognition of tribes as political partners to the state (see, for example, Belgrave et al. 2005, Bargh 2007a, Mutu 2011, Wheen & Hayward 2012). However, local government entities, while important actors in the lives of *iwi* (tribes) and *hapū* (sub-tribes), are not Treaty partners and have an ambiguous role in the lives of post-settlement<sup>1</sup> Māori communities.

Unlike Australia, Canada or the United States of America, New Zealand’s political system is not federal. Government is instead divided between the central state and a range of territorially based local governance bodies, many with overlapping jurisdictions. In simple terms, regional councils govern the environment, their boundaries set by geographical features such

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1 The idea that Māori–state relations are now largely shaped by the ‘post-settlement’ era is not to suggest a time after settler colonialism, but to point to the large proportion of *iwi* and *hapū* who have concluded settlements to historical Treaty claims with the Crown. In 2014, the Office of Treaty Settlements (OTS) reported that 72 settlements had been concluded, covering 70 per cent of New Zealand’s landmass (OTS 2014). Also see this overview of settlements to mid-2017: [www.youtube.com/watch?v=4-1G0owx38U](http://www.youtube.com/watch?v=4-1G0owx38U).

as water catchment areas, while city and district councils govern the built infrastructure, with boundaries set around population areas. Then there are unitary authorities, such as Auckland Council, which combine the functions of regional and district/city governance. These arms of the state are hugely important for *iwi*, given the overlapping spaces of governance of *iwi* and local councils.

This chapter explores the current state of local government in Aotearoa/New Zealand as a partner to Māori tribes seeking recognition for their status as *mana whenua* (holders of territorial authority) and wanting to work in partnership with government as equal and self-determining entities. There is a growing literature on the relationship between local government and Māori, focusing on issues of Māori representation (for example, Waaka 2006, Hayward 2011a, Hayward 2011b, Sullivan & Toki 2012, Bargh 2013) and especially on partnerships between *iwi* and *hapū* and local bodies (for example, Lewis et al. 2009), particularly around environmental co-management and co-governance (for example, Coombes & Hill 2005, Te Aho 2010, Lowry 2012, Muru-Lanning 2012, Forster 2014, Bennett 2015). And as we advance into the post-Treaty settlement era in Aotearoa/New Zealand, the possibilities and problems of this local government relationship are coming more to the fore. Here I explore local government relationships with *iwi* Māori by turning the focus of recognition theory back on the settler state. My argument is that, taking the arms of central and local government together, the New Zealand state is not a fit subject for recognition politics. Particularly at a local government level, the New Zealand state suffers severe historical amnesia, and, more broadly, the New Zealand state can be characterised as an incoherent, shape-shifting subject, enacting partnership in one instance and not the next, and frequently guilty of insincerity, saying one thing while doing another. While the state demands specific modes of governance and behaviour of its *iwi* partners, its own conduct is less than exemplary as a partner in a politics of recognition.

The discussion is divided into three parts. The first part provides an overview of the Treaty settlement process as a politics of recognition within a neoliberal context, which fundamentally shapes the relationships between *iwi* and central government. The second outlines the current state of play in the structural relationships between *iwi* and local government. In the final part of the discussion, I briefly sum up the ways in which the Crown, taking local and central government arms together, fails as a subject of recognition politics.

## Central government, neoliberalism and the politics of recognition

At its Hegelian roots, recognition theory is about the struggle to achieve a relationship of equals between two subjects. To recognise the subjectivity of another is to recognise their equal and autonomous status as self-determining people worthy of respect. The language of partnership, which dominates the relationship of the New Zealand state and *iwi* Māori, points towards this understanding; although, in practice, state–*iwi* partnerships fall short of this ideal. Treaty settlements in the New Zealand system provide limited reparation for lost lands and historical injustices. Settlements have three components: an historical account of the Crown’s injustices towards the people concerned and an apology for those; forms of cultural redress, which may include renaming of significant places, the return of land and co-governance arrangements over public lands; and forms of financial redress, which may involve a monetary payment and the transfer of property. The aim is to provide a degree of closure on historical injustices and an economic basis for future economic development for *iwi* and *hapū*, succinctly captured in the title of the Office of Treaty Settlements’ (OTS 2015) guide to Treaty claims, *Healing the past, building a future*.

As in other jurisdictions, the era of recognition of Māori has coincided with that of neoliberal politics and economics, and neoliberalism has shaped and constrained the forms of recognition on offer. While neoliberal politics differs across time and place, I use this term to capture three fundamental tenets of the ideology: a belief in the supremacy and superiority of market forms and disciplines; a concomitant mistrust of the state as an economic and social actor; and a singular concern with the economic activities and responsibilities of individuals (and collectives), with other spheres of individual and community life deemed private matters, and choices (for brief overviews, see Bargh 2007b, Humpage 2017).<sup>2</sup>

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2 Some of the variability of successive neoliberal governments in New Zealand is evident in the differing views on ‘special rights’ for Māori, something the Labour-led governments up until 2004 were broadly in sympathy with. However, in early 2004, the then National Party leader, Don Brash, gave a speech (commonly known as the ‘Orewa speech’) in which his attack on ‘race-based rights’ led to a surge in support for his party. Subsequently, whichever party has held political power, the neoliberal dislike for any ‘special rights’ and provisions has been evident in their policy towards Māori. At the same time, however, this has been held in check by the mixed-member proportional political system and competition between the two main parties for the support of Māori voters (see Humpage this volume, Chapter 14).

The neoliberal preference for market over state provision of services led to policies that opened up spaces for indigenous communities to pursue a degree of self-determination. Devolution, contracting social service provision to private providers, enabled the development of Māori providers contracted to deliver services to their own communities (Bargh 2007c: 36–7, Workman 2017: 180–1). In terms of marketisation, subjecting state activities to market disciplines, the *State Owned Enterprises Act 1986*, which legislated for government entities to operate as commercial businesses (in some cases in preparation for privatisation), created significant opportunities for Māori groups. Section 9 of the Act, which ruled that '[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi', provided an avenue for Treaty claims and court cases that resulted in the development of Māori broadcasting systems, and in various public lands being set aside for return in subsequent Treaty claims prior to state assets being either privatised or marketised (see Bargh 2007c: 29–30).

The neoliberal ethos is also clear in the emphasis on Māori economic development in Treaty settlements. As Fiona McCormack (2011: 283) argues, 'the spaces opened for indigeneity under neoliberalism reflect market rather than democratic rationality', or, we might add, rather than a distinctly Māori rationality or value base (Kelsey 2005). For the neoliberal state, Māori economic development is in keeping with its primary understanding of citizens as economic and market actors, with the added pay-off that Māori economic development is expected to lessen the Māori welfare 'burden'. To a degree, this emphasis dovetails with indigenous desires for sovereignty/autonomy, providing the opportunity to achieve greater economic self-determination, to be pursued also with the hope that economic power can be leveraged to gain greater political self-determination (Durie 2011: 198–200). Consequently, *iwi* and *hapū*, by and large, have taken up the opportunities on offer. For example, the two *iwi* whose settlements were concluded more than 20 years ago, Waikato-Tainui and Ngāi Tahu, are now significant economic actors both regionally and nationally. Beyond these most prominent examples, there are many cases nationwide where the 'temporary alignment' (Lewis et al. 2009: 181) between neoliberal and *iwi* political projects has enabled *iwi* to pursue their own cultural and social, as well as economic, agendas.

At the same time, however, there are significant problems in combining neoliberal and indigenous political projects. To be recognised as 'post settlement governance entities', *iwi* leadership bodies must adopt corporate

forms commensurate with neoliberal governance (Bargh 2007c, Joseph 2012: 161–2). Further, the growing wealth of *iwi* itself, in a situation where neoliberal economics is simultaneously impoverishing Māori individuals and families at the other end of the class spectrum, is seen to cause problematic divisions within the Māori world (Poata-Smith 2004). The Crown's focus on settling with large *iwi* groupings is also seen by many as eroding the power of *hapū*, the more traditional bodies of Māori governance in the precolonial era (for example, McCormack 2012). Thus, in addition to growing class divides, the institution of corporate tribal governance can have the effect of alienating *hapū* from *iwi* governance, and alienating tribal assets from the community itself (for example, McCormack this volume, Chapter 15, Muru-Lanning 2016). More broadly, the political desires of *iwi* and *hapū* for meaningful political power sharing remain largely unrecognised by the Crown (Bargh 2012), so that, overall, a number of critics argue that neoliberal state recognition is purely colonialism in a new guise (for example, see Kelsey 2005, Bargh 2007a, Coulthard 2014).

In her overview of 'the post-settlement world (so far)', Maria Bargh points to the differing expectations of Māori and the Crown regarding Treaty settlement. As she says, Māori want to share political power via structural changes to Aotearoa/New Zealand's governance arrangements in ways that incorporate *tikanga* Māori (Māori law) (Bargh 2012: 166). In contrast, the Crown is interested in Māori economic development and 'restoring the relationship between the claimant group and the Crown' via acknowledgement of, and partial reparation for, historical breaches of the Treaty (OTS n.d., cited in Bargh 2012: 168). But despite the rhetoric of 'restored' relationships (restored to what, we might ask), in many respects the relationship of Crown with *iwi* post-settlement is more of the same and new Treaty breaches continue to occur (for example, the foreshore and seabed debacle in 2004).<sup>3</sup> As Bargh asks, 'How can a relationship be restored when one side of the relationship, such as the Crown ... is determining the process and taking limited responsibility for changing their fundamental attitudes, let alone their behaviour?' (2012: 168). This point is echoed by McCormack (this volume, Chapter 15) when she notes that Waitangi Tribunal investigations typically leave unexamined

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3 There is an extensive literature on the racist and colonial nature of the *Foreshore and Seabed Act 2004* (for example, Charters & Erueti, 2005, 2007).

the political and economic structures that produce and maintain colonial relations. The current form of the politics of recognition then does not really challenge the New Zealand state to reform itself.

## Local government and Māori

While the central government's relationships with *iwi* Māori falls short of full partnership, those of local government are even more problematic. The traditional *rohe* (territories) of *hapū* and *iwi* are obviously regionally based. And while the boundaries of local authorities do not exactly coincide with *iwi* boundaries, these government entities are extremely important actors in the lives of *iwi* trying to get on with, in many cases now, their post-Treaty settlement lives. In this context, there are at least two major interconnected problems in the structural foundations of *iwi*-local government relations: the issue of Māori political representation on local councils and the issue of the status of local government as Treaty partners.

The issue of Māori representation has received a lot of attention in the New Zealand media in recent times. At national level, there are currently seven dedicated Māori seats in the parliament of 120 members, with Māori voters having the option every five years to enrol on either the Māori or general electoral roll and the number of Māori seats being adjusted to reflect the proportion of the population on the Māori roll.<sup>4</sup> Since the *Local Electoral Amendment Act 2002*, local government entities have had the option of establishing similar dedicated Māori seats on councils, although only one, The Bay of Plenty Regional Council, has successfully done so, establishing three Māori constituencies alongside four general constituencies, thus ensuring fair representation for the 28 per cent of the local population who are Māori.

While many councils have considered the issue (see Human Rights Commission 2010), very few have tried to implement Māori wards and, to date, no others have been successful. The reasons for this failure are telling. The *Local Electoral Amendment Act 2002* stipulates a number of ways in which local government bodies may modify their systems of representation, but of them all, only the option of establishing Māori wards or constituencies can be overturned by a referendum of voters, this provision effectively acting as a democratic check on the power of

4 See [www.elections.org.nz/events/past-events/maori-electoral-option-2013](http://www.elections.org.nz/events/past-events/maori-electoral-option-2013).

councils to enact this change. At least two councils—the Far North District Council and Whakatane District Council—have taken the issue straight to the voters, running polls on their electorates. In both cases, the proposal was voted down. In New Plymouth, the council exercised its right to establish Māori wards, only to have members of the public make use of the provisions of the act to force a referendum on the issue.<sup>5</sup> Pākehā Mayor of New Plymouth Andrew Judd has become a national figure since leading this struggle for improved Māori representation in the city's council, and has since described the provision to establish Māori wards as 'not sincere'.<sup>6</sup>

When the existing local bodies were being amalgamated to form the Auckland 'super-city' in 2010, the issue of Māori representation gained high public profile. The Royal Commission on Auckland Governance, set up to advise on the form of the new council, recommended the establishment of three Māori seats on the council, two elected by voters on the Māori roll and one appointed *mana whenua* representative to represent the interests of local tribes (see Human Rights Commission 2010: 22–7). However, the then Minister of Local Government and neoliberal ACT Party leader Rodney Hide was vehemently opposed to the establishment of Māori seats (an example of undemocratic 'special rights' in his view), and the compromise solution was the establishment of an unelected Independent Māori Statutory Board to advise the council on issues relevant to Māori. Ironically, periodic grumblings now surface about the unelected nature of this board, with the focus being on undemocratic Māori 'privilege' rather than government policy failings.

Māori individuals may of course stand for election to local bodies and some do. Even so, as an ethnic group, Māori are 'chronically underrepresented' in local government, making up only 3.6 per cent of councillors in 2007 for close to 15 per cent of the population at the time (Hayward 2011a: 187, n. 2). In addition, these councillors, elected to general seats, are not mandated to represent Māori per se but the community as a whole, so that arguably Māori issues and interests are even more seriously underrepresented within the local government sector than even these figures suggest.

5 Councils must issue a public notice of their intention to establish Māori wards and a petition of at least 5 per cent of the voters in the electorate can force a referendum on the issue.

6 See [www.radionz.co.nz/national/programmes/morningreport/audio/201815732/call-for-candidates-to-take-a-stand-on-Māori-representation](http://www.radionz.co.nz/national/programmes/morningreport/audio/201815732/call-for-candidates-to-take-a-stand-on-Māori-representation).

While the issue of Māori representation focuses on the place and role of Māori *within* councils, the issue of Treaty partnerships between councils and *iwi* is one of the relationship *between* Māori and councils. What is the state of the Treaty *partnership* in our society at this level of local government? Reading the settlement deeds the Crown draws up with *iwi* and the apologies the Crown makes, there are many fine words acknowledging the ways the Crown has failed to recognise the *rangatiratanga* (chiefly authority/sovereignty) of *iwi* in the past, acknowledging the historical wrongs that have been committed, and expressing the Crown's desire to now build new Treaty-based relationships with *iwi*. In these apologies, the Crown seeks to set the history of colonial injustice in the past and commits itself to non-colonial relations in the post-settlement era (although with the shortcomings noted in the previous section). But where does local government sit in these new Treaty-based relationships? What are their responsibilities to Te Tiriti? As Janine Hayward (2011b: 79) succinctly puts it, when the Crown devolved *kawanatanga* (governmental) responsibilities to local bodies they completely failed to also devolve the Treaty guarantee to protect *tinu rangatiratanga*.<sup>7</sup>

Under the *Local Government Act 2002*, local authorities do not have the status of a Treaty partner. Instead, they have a range of responsibilities to involve Māori in decision-making, to take account of Māori 'culture and traditions with their ancestral land, water, sites, waahi tapu, [sacred sites] valued flora and fauna, and other taonga' and to have processes in place for consultation with Māori. The only references to *iwi* and *hapū* appear in Schedule 3 of the Act, which deals with the process by which councils may seek to amalgamate to create unitary authorities. Tellingly, councils must consult *iwi* and *hapū* if they wish to reorganise the system of governance (although they are not bound to heed their views), but not in their day-to-day operations. While the Crown recognises *iwi* (even if inadequately), they do not oblige local government to do so. From the local government perspective then, *iwi* and *hapū* are just convenient organisations to liaise with to meet their obligations vis-à-vis consulting and involving Māori in decision-making. There is no obligation for local bodies to recognise the territorial authority of *iwi* or their status as Treaty partners. Hence, while

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7 Article 1 of Te Tiriti o Waitangi (the Māori language version of the Treaty of Waitangi, i.e. the version most Māori leaders signed) grants the right of *kawanatanga* (governance) to the Crown. Article 2 recognises and confirms the ongoing *rangatiratanga* (chiefly authority) of Māori tribal leaders.

most local councils have consultation processes in place with Māori, and some have co-management arrangements over specific resources, these processes fall far short of the governance partnerships that *iwi* are seeking.

This failure to require local authorities to act as Treaty partners is a major flaw in New Zealand's governance arrangements and in the Crown's enactment of its role as Treaty partner. The New Zealand state is effectively split into national entities with the status of Treaty partners and regional entities without, leaving *iwi* caught between the fine rhetoric of partnership in Treaty settlements and the reality of being just another community interest group at home. The only exceptions to this are where the economic power of the local *iwi*, post-settlement, is such that they cannot be ignored—for example, Ngāi Tahu and Waikato-Tainui. In such cases, classic neoliberal privileging of economic power, rather than any commitment to the Treaty, drive the recognition of *iwi* partners (Livesey 2017). As the Constitutional Advisory Panel (2013: 44) very moderately observed:

Councils are under no imperative to engage with *iwi* and hapū. *Iwi* representation, even by the creation of Māori wards, is reliant on individual personalities within each council. It is undesirable that Māori representation in local government continue in this ad hoc manner. Each local authority may determine the mechanisms for fulfilling their obligations to consult *iwi*. While this approach enables flexibility to find a solution which fits local conditions, it means that there are considerable differences across the country. Such inconsistency can lead to impressions of unfairness and inequality.

If we consider the issue of land, which is at the heart of much of the engagement between *iwi* and councils, we get some sense of the problem this split in the nature of local and central government creates for *iwi*. Historically, local councils have frequently taken Māori reserve land for public works. As academic and Waitangi Tribunal member, Ranginui Walker (2016: 21), notes:

The pattern of local councils taking land has been so widespread and consistent around the country that it is difficult not to conclude that Māori land was deliberately targeted by local bodies because it was easier and cheaper to access than general land.

But, as Walker goes on to say, given that local authorities are not partners to the Treaty, no Treaty claims can be laid against them. This means that:

councillors are distanced from the angst of iwi caused by their exploitive behaviour, so they never learn. Nor are they obliged to attend Waitangi Tribunal hearings where iwi air the pain of their grievances and disempowerment *vis-a-vis* local government. Consequently, local bodies are not *au fait* with the Treaty discourse between iwi and the Crown (ibid.).

Overall, the picture of the local government relationship with *iwi* is complex and ineffective. While local councils must consult and take cognisance of Māori interests, their legislative and structural arrangements provide no clear guidance on how this is to be done, and in fact make it difficult, while rendering genuine partnerships impossible.

## The Crown as flawed subject of recognition

The overall tenor of the critical literature on the politics of recognition as it relates to indigenous peoples and settler states is that the power imbalance in these relationships sets the settler state up as the *recognisor* with indigenous communities in the role of *recognisee*, expected to reshape themselves into recognisable forms to receive what limited provisions the settler state is willing to offer (Povinelli 2002, Bell 2014, Coulthard 2014). As McCormack puts it (this volume, Chapter 15), contemporary recognition politics ‘incongruously, may strengthen the capacity of the state to shape and neutralise opposition’. The state holds at least most of the cards in the negotiations with *iwi*, and indigenous communities are, to varying degrees depending on the particulars of different systems, required to establish their recognisability. Not only must they provide evidence of their peoplehood, they must also modify their structures and processes to meet the requirements of the neoliberal state. It is here that critical work on recognition by the neoliberal state has pointed to the ways in which indigenous entities have been obliged to take on capitalist and neoliberal forms, values and processes to be ‘recognisable’ and to receive what benefits and powers the settler state is willing to offer (see Bell 2014: 149–72 for a more detailed overview).

In this final section of the chapter, I turn the lens of judgement on the New Zealand state, and particularly on the differences between central and local government outlined above, to consider whether or not the state is a fit subject for recognition politics. Does the New Zealand state

exist in a form that warrants recognition from *iwi* Māori? Is it capable of recognising indigenous partners? Looking back over this brief overview, three crucial flaws are clearly evident in the subjectivity of the New Zealand settler state as Treaty partner: the state is an incoherent, insincere and severely amnesiac subject, unfit for the politics of recognition.

The split structures and responsibilities of the New Zealand state make it a shape-shifting, fragmented or incoherent subject when it comes to relationships with *iwi* Māori. While both central and local arms of the state can breach the Treaty, only central government can be held accountable for such breaches. The arm of the state that *iwi* and *hapū* have the most to do with in the day-to-day enactment of their sovereign and guardian status in their traditional territories is not their partner in this process. Instead, by and large, local government is a hindrance, unable to recognise who they are. This colonial ‘business as usual’ at local government level is a clear example of Bargh’s point (2012: 168) about the limited nature of change on the part of the state.

Further, while central government acknowledges past injustices and speaks fine words of restored relationships, it also handicaps local government relationships with *iwi* Māori. As the *Local Electoral Amendment Act 2002* demonstrates, the gesture made towards Māori representation has proven to be empty and ‘insincere’, open to the whim of the general electorate where the dislike of anything deemed ‘special rights’ for Māori almost inevitably results in any move for Māori representation in local government being overturned.

The inability to recognise *iwi* and *hapū* for who they are is compounded by the amnesiac nature of local councils. As Walker (2016) notes, councils are not obliged to hear or even read the histories of Treaty injustices perpetrated in their territories and to which they themselves have frequently been party. This means their memory does not extend beyond the electoral cycle and the lifetimes of the legislation that binds their activities. Councillors in meetings with *iwi* leaders will more often than not know nothing of the history of the land over which they are empowered to exercise governance rights. How then can *iwi* leaders negotiate with such amnesiac subjects as equals?

Finally, these failings of the New Zealand state point to another major gap at the societal level in grappling with *iwi* sovereignty and partnership: the lack of consideration being given to the role of *tangata*

Tiriti/non-Māori New Zealanders as treaty partners. Biculturalism, despite the suggestion in the term of ‘two cultures’, has largely been about the relationships between Māori and government, with the rest of New Zealand society largely unengaged from the process. The referendums overturning almost all local body attempts to institute Māori wards and constituencies point to this wide societal ignorance of the significance of Māori indigenous status as a major problem New Zealand society has yet to grapple with.

In sum, a focus on the relationship between local government and Māori adds to our understandings of the limitations of the articulation of neoliberalism and the politics of recognition in Aotearoa/New Zealand. Not only does neoliberalism distort recognition politics to privilege economic structures, relations and interests over Māori sovereignty, values and practices, but a focus on local government highlights significant features of the fragmentary and unreliable nature of state engagement as a Treaty partner. Turning the gaze of recognition on the state, to look at central and local government as parts of a whole, allows us to see the ongoing amnesiac, incoherent and shape-shifting character of the state that *iwi* and *hapū* must treat with.

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