

THE NEOLIBERAL STATE,
RECOGNITION AND
INDIGENOUS RIGHTS

NEW PATERNALISM TO NEW IMAGININGS

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NEW PATERNALISM TO NEW IMAGININGS

Edited by Deirdre Howard-Wagner, Maria Bargh
and Isabel Altamirano-Jiménez



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Māori, the state and self-determination in the neoliberal age

Dominic O'Sullivan

Introduction

Māori pursue their claim to 'sovereign and economic independence' (O'Sullivan & Dana 2008: 364) in a neoliberal age of paradoxical influences. Neoliberal reforms to the public sector, beginning in the mid-1980s, have had significant yet inconsistent influence on Māori legal, political, economic and cultural opportunities. On the one hand, unemployment levels rose significantly as, for example, large state sector Māori employers were corporatised; while trade liberalisation compromised manufacturing's competitiveness. By 1992, Māori unemployment was 25 per cent, in contrast with a national rate of 10 per cent (Mitchell 2009). In 2018, the Māori labour force is growing and the unemployment rate has reduced to 12.2 per cent. While this is more than twice the national rate of 5.2 per cent, it is partly explained by a disproportionately young Māori population (Statistics New Zealand 2016). On the other hand, under the Treaty of Waitangi, Māori could advantageously challenge the terms of the privatisation of state assets.

Policy measures to reduce the size of the state have created opportunities for Māori to increase their collective wealth. They have contributed to the Māori asset base increasing from NZ\$9.4 billion in 2001 to NZ\$36.9 billion in 2010 to explain the rhetorical presumption that 'Māori business

is New Zealand business' (Westpac New Zealand 2014). At the same time, the neoliberal 'small state' philosophy has created opportunities for Māori to take greater responsibility for their own delivery of public services which has, in turn, enhanced self-determination.

The neoliberal constraints on Māori wellbeing that this chapter describes are significant, and the opportunities that it describes are not panaceas for just policy outcomes, but they are grounded in new relationships between Māori and the state where agency is privileged over subservience and perpetual victimhood. While I sympathise with the critique that Bell offers in this volume, I take a more positive position than that where the 'New Zealand state is not a fit subject for recognition politics' (Bell this volume, Chapter 4). Although it was not the state's intent for neoliberalism to facilitate 'recognition politics', such is the effect of the new Treaty jurisprudence emerging from Māori challenges to the privatisation of state assets, and judicial insistence that Māori occupy a distinct position within the modern state. Bell's concern is for political relationships of recognition *within* the state. These are significant, but so too are the relationships that self-determination presumes Māori will pursue beyond the state. It is these extra-state relationships that neoliberalism fosters in ways that were not previously available to Māori on a significant scale.

This chapter begins by explaining the neoliberal paradox that distinguishes contemporary Māori politics and policy. It then sets out some of the ways in which Māori economic entities position themselves to pursue collective interests and thus challenge the constraints of a neoliberal order while simultaneously pursuing its possibilities. Māori participation in the commercial fishing industry is discussed as an example. The chapter then discusses the opportunities for self-determination that Māori have found through neoliberalism's devolution of state functions and responsibilities to non-government entities. The opportunities that the Tūhoe tribe of the central North Island is pursuing are presented as one important example. However, further political and constitutional transformations are sought by, for example, the Iwi Chairs' Forum, and its broader aspirations are also discussed in this chapter. The chapter is ultimately concerned with neoliberalism as a context that is reshaping Māori relationships with the state, as well as Māori positions within the state.

The neoliberal paradox

Neoliberal values and practices simultaneously reinforce and confront colonial legacy; ‘a dualism of political space in which settler space is governed by liberal principles and native space is governed through conquest and occupation’ (Dahl 2016: 4). Neoliberalism’s focus on capital accumulation can be at the expense of cultural considerations and, in some jurisdictions, indigenous livelihoods (Friedman 1999, Kelsey 2005a, 2005b, Stewart-Harawira 2005, Fenelon & Hall 2008). Yet, Fenelon and Hall argue that ‘by their very continued existence [indigenous peoples] ... pose a major challenge to neoliberal capitalism on the ground, politically and ideologically’ (2008: 1872). For Lauderdale, globalisation causes ‘cultural assimilation’, which, in turn, undermines local and global democracy (2008: 1837). Stewart-Harawira argues that this is compounded by the ‘co-optation of tribal elites within a Western paradigm of corporatisation and co-modification’ (2005: 179). Friedman’s position is similar: there is a Māori tribal ‘movement from cultural identity to tribal property’ focused on ‘genealogical rights to means of production’ (1999: 9). In short, material accumulation and cultural identity are incompatible. However, it is also true that indigenous experiences are sometimes uncritically co-opted into non-indigenous campaigns of resistance to neoliberal imperatives. The outcome is to understate the absolute importance that Māori attach to material prosperity through participation in labour and commodity markets. It is, then, a neo-colonial dismissal of Māori agency to argue that the state has used the Treaty of Waitangi and settlements of its breaches to redefine ‘tino rangatiratanga [self-determination] to mean commercialised self-governance; and a central illusion of an autonomous Māori economy floating free of its New Zealand counterpart’ (Kelsey 2005a: 82). Instead, the Treaty affirms tribal independence or even nationhood. Māori politics’ distinguishing concern since 1840 has remained the protection of that nationhood within the New Zealand state. Yet, it is recognised that self-determination requires engagement with others, and that Māori economic opportunities do not, in fact, ‘float free’ of the Māori economy’s ‘New Zealand counterpart’.

It is also significant that Māori claims on the state transcend social democratic or egalitarian imperatives to address material disadvantage. These claims are grounded in rights of prior occupancy, relating especially to language, culture and natural resources. Substantive opportunities for participatory parity in the public life of the state is a further consideration.

As Bell notes, in this volume, Treaty settlements offer relatively limited financial compensation, but, together with the development of a comprehensive Treaty jurisprudence, they were sufficient to give some *iwi* (tribes) the economic importance to add to their moral and democratic claims to political voice.

Ironically, as Humpage observes, also in this volume, public dissatisfaction with neoliberal economic policies during the 1980s was the catalyst for the adoption of a proportional representation electoral system, which, in turn, increased Māori parliamentary membership to a proportionate share. However, as a further illustration of the philosophical inconsistencies that pervade Māori public policy, the question of guaranteed Māori representations on local authorities is sharply contested. Humpage shows the paradox through the Whānau Ora social policy and the work of the Ministerial Committee on Poverty, which both ‘challenge *and* extend a neoliberal agenda’ (Humpage this volume, Chapter 14).

Critiques of neoliberalism can overstate the tensions between cultural and economic aspirations; Māori thought positions the two as inextricably connected and is more likely to reflect Lauderdale’s observation of a people not ‘interested in reforming the world [capitalist] system ... [but] more interested in autonomy and collective determination’ (2008: 1837). In 2016, culture continues to distinguish attitudes to Māori economic development where ‘characteristics inherent in how Māori view the world ... [are] important in assessing and proposing Māori economic development policy’ (NZIER 2003).

Coleman et al. dismiss Māori economic agency when they describe the contemporary Māori economy as a ‘transformation of Māori from members of a tribal-based, communal culture at the beginning of the nineteenth century to members of an individualistic capitalistic culture at the end of the twentieth century’ (2005: 17). Rata similarly sets aside agency when she proposes that ‘tribal capitalism’ shows how ‘a local movement can become reorganised into the global system’ to create ‘doubly oppressive social and economic structures: the oppressive political and social relations of traditional societies in conjunction with the exploitative economic relations inherent to capitalism’ (2003: 44). However, Bargh’s introduction to the Māori economy, in this volume, describes quite a different set of relationships, assets and activities. As Bargh argues, it is an oversimplification to suggest that Māori are ‘only either champions or victims of neoliberal policies and practices’. It is more instructive to

consider what they want from economic and political activity, and the ways in which Māori are agents in managing neoliberalism's constraints and pursuing its possibilities. For example, Māori agency is evident in the non-market opportunities that Bargh shows Māori pursuing, as well as in the ascription of 'legal personhood' to a mountain as part of the Tūhoe Treaty settlement (Bargh this volume, Chapter 16). However, it is true that:

If Māori do not feel secure about their culture, commercialisation will be seen as a threat, and will be resisted. In this sense, grievances and insecurity spill over into a self-imposed limit on economic development (NZIER 2003: 18).

Iwi Authority Annual Reports, strategy papers and the work of national policy bodies such as the Federation of Māori Authorities (FOMA) show that Māori attention to neoliberal opportunities is, in fact, extensive (FOMA 2015). It is in this context that, in 2014, the Iwi Chairs' Forum sought a NZ\$1 billion public contribution to the development of 'underperforming' Māori land. The request appealed to restitutive justice, but was also pragmatically responsive to the Ministry of Primary Industries' projection of an NZ\$8 billion benefit, over 10 years, from the full utilisation of Māori land. The Ministry has projected a further benefit of the creation of 3,600 new jobs (Iwi Chairs' Forum 2014).

'Binary understandings of indigenous peoples as either ecological natives or colonised subjects are simplistic and inadequate' (Bargh 2012: 281). For example, in the context of contemporary Treaty of Waitangi claims to water rights:

it is necessary to avoid a sharp contrast between custom and commodity, between a spiritual conception of water and the commercial exploitation of water, or between pre-industrial or 'indigenous' conceptualisations of the commons and the seemingly irreversible global trend towards privatisation of the public domain (van Meijl 2015: 220).

Māori identity can be important to the ways in which economic aspirations are pursued. Identity can also contextualise the opportunities that are available to Māori.

Neoliberalism and collective economic development

The *iwi* is especially well placed to enhance group identity and use collective resources to integrate cultural and economic imperatives. Smith et al.'s (2015) study of four *iwis*' economic aspirations found that cultural values are paramount, but not exclusive, in framing Māori responses to neoliberal thought: 'financial gains and individual benefits should not outweigh those of the collective' (ibid., 93), which means that the individual liberal view that individual rights take precedence over the collective' is based on a false dichotomy. For indigenous peoples, corporate rights are necessarily preliminary to personal liberty. For the entities of Smith et al.'s study:

economic development is a component of a broader, integrated system of strategic thought, activity and kaupapa [philosophy], undertaken by the tribe in order for it to enhance and distribute mana [authority] and matauranga [knowledge]. It provides for social meaning and cohesion, identity, understanding of relationships ... amongst ourselves, but also between all people ... It provides for an understanding of benefits and burdens as part of a collective way of life ... it builds sustainable hapu communities and addresses the gaps and underlying unity structures, so that present and future generations enjoy oranga whanui [collective well-being], access to power influence and choice of their way of life (R. Gage, personal communication, 3 August 2011, cited in Smith et al. 2015: 77).

The *iwi*'s long-term focus challenges neoliberal capitalism but not in ways that understate the modern *iwi*'s certain and unapologetic pursuit of material wellbeing. The *iwi*'s permanency, geo-political attachment and trans-generational approach to investment gives it stability. Its purpose is not constrained by the immediate needs and expectations of private shareholders. Its trans-generational time horizon gives it a unique approach to economic growth. For example, one Māori Incorporation adopts a:

100 year strategic plan that builds on the [more than 100-year-old] founding principles: to retain ownership, tread lightly upon the land, engage with the local community and ensure our mokopuna's mokopuna [grandchildren's grandchildren] live a healthier, wealthier life (Westpac New Zealand 2014).

Māori participation in the commercial fishing industry demonstrates a particular form of engagement with global capitalism, which McCormack describes, in this volume, as a ‘neoliberal “opening of spaces”’. However, she also explains the cultural contradictions in the commodification of fisheries, and notes that the integration of returned assets into capitalist markets can ‘lead to new and more permanent forms of loss’ (McCormack 2016). However, the fisheries example does illustrate, again, the ways in which Treaty settlements are helping to assert a culturally framed commercial identity focused on the ‘reinvention of the relationship between “coloniser and colonised”’ (Johnson 2008) to recognise that:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (United Nations Declaration on the Rights of Indigenous Peoples: Article 5).¹

It was from this same perspective that, in 1992, Māori responded to a government proposal to bring market discipline to fisheries management through tradeable quota. Māori raised a number of questions about ownership of the fisheries that challenged government presumptions of resource ownership: Who actually owns the fisheries? Whose are they to sell or allocate to private commercial interests? Was the proposal a ‘commodification of the common heritage’ (Frame 1999: 23) that extinguished a Māori property right? Certainly, a case was made to the Waitangi Tribunal that the Quota Management System (QMS) was ‘a transfer by the Crown of fishing rights that the Muriwhenua people have not relinquished’ (De Alessi 2012: 401).

The claim was upheld. The settlement that was negotiated to allow the QMS to proceed was the establishment of a Māori Fisheries Commission, Te Ohu Kaimoana, that was allocated 10 per cent of the inshore fishery.

[T]he introduction of a property rights systems for fisheries not only gave rise to the largest indigenous rights claim in the country’s history, it also provided the means for indigenous rights to be recognised, ensuring the sustainable utilization of fisheries, while providing for indigenous rights holders to realise their own ... social and economic aspirations (Hooper 2000: 18).

¹ For the full text of the United Nations Declaration on the Rights of Indigenous Peoples, see www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

A further claim to the Tribunal was that earlier actions of the Crown had impeded the Māori fishing industry's commercial development and that further redress was justified. The settlement of that claim and further commercial growth meant that by 2015 the Commission held net assets to the value of NZ\$227 million, while the *iwi*-owned Aotearoa Fisheries Ltd recorded a NZ\$22 million profit for the year ended September 2014 (Aotearoa Fisheries Limited 2015).

Māori fishing has become a significant contributor to the New Zealand economy. However, in 2016, the government proposed creating a 620,000 km² marine sanctuary around the Kermadec Islands, which Māori have challenged as inconsistent with the original settlement on the grounds that it would extinguish a property right that cannot ordinarily occur without compensation.

The government itself was divided on the issue. The senior Coalition partner, the National Party, was committed to the sanctuary, with the Māori Party being concerned to protect fishing rights, while also objecting to the precedent that would be set if a condition of a Treaty settlement were set aside. The Prime Minister's announcement that the proposal would not, for the moment, be pursued illustrated the contemporary significance of the Māori democratic position *within* the state. That position has evolved with the gradual increase in the relative Māori population status, increasing collective and personal wealth and significant increases in the proportion of Māori Members of Parliament, due to the changes to the electoral system introduced in 1996: 'We are not about to go and do something that is going to cause the Māori party to walk away. If we have to wait a while we have to wait a while' (Key, cited in Jones & Trevett 2016). There is, however, the possibility that the sanctuary could proceed with appropriate compensation negotiated between the government and Te Ohu Kaimoana, especially as for Te Ohu Kaimoana the point is more one of principle than potential financial loss. Te Ohu Kaimoana holds 15 per cent of the proposed sanctuary's quota, valued at approximately NZ\$65,000 a year (Gillspie 2016). The issue is one of equally respecting the property rights that underlie neoliberal economic imperatives.

Devolution and Māori self-determination

The neoliberal political imperative to reduce the size of the state also influences contemporary Māori policy possibilities. Supporting policy measures have created opportunities for Māori to increase their collective wealth, and participate in culturally framed health and education delivery, for example. Māori claims against the privatisation of state assets, on the grounds that natural resources such as land, fisheries, water and the radio spectrum are not always and necessarily the Crown's to sell, have been used to rebalance relative political authority and pursue those opportunities for self-determination that neoliberalism's smaller state presents. In these ways, it may be that indigeneity provides a significant challenge to neoliberal imperatives. Indeed, the contemporary tribe is especially well placed to enhance group identity and use collective resources to integrate cultural and economic imperatives. It is deliberately focused on transcending colonial subjecthood, using the opportunities and resisting, rather than being defined by, the constraints of neoliberalism.

The proposition that public decisions and policymaking best occur at the closest possible point to policy delivery is consistent with King Tawhiao's² still influential account of self-determination: 'Maku ano e hanga toku whare—I will build my own house'—a principle that is foundational to Tawhiao's Waikato *iwi's* contemporary development strategies (Waikato-Tainui 2015). The same principles inform the Tūhoe people's negotiations with the Crown to assume responsibility for housing, schools, health care and welfare benefits in its tribal area. Tūhoe is motivated by a belief that 'we can design a system where there is a transition from benefits to wages and salaries' (Kruger, cited in Collins 2015). The Crown and Tūhoe would share the savings, creating a financial incentive for both parties. The policy question raised in the government-commissioned report on the proposal's feasibility, *Decentralising welfare—Te mana o tūhoe* is:

If you take a portion of core Government service and devolve to any group how might you do that in a way that incentivises the agent to achieve positive outcomes while protecting Government exposure to risk ... ?
(Moore et al. 2014: 7)

2 Tawhiao was the third Māori King, he reigned between 1860 and 1894.

The presumption is that Tūhoe ‘could get better results ... because of the knowledge, proximity and influence with the potential beneficiaries’ (ibid.: 33).

The proposal is politically and constitutionally difficult as Tūhoe and the Crown seek alignment between the aspiration to self-determination and the neoliberal principle of devolution to address a policy problem where the lifetime costs of welfare for the 29 per cent of the Tūhoe population in receipt of benefits is NZ\$78.1 billion. This includes 4,000 16- and 17-year-olds for whom the lifetime cost is NZ\$1 billion (Moore et al. 2014). Tūhoe welfare dependency is the outcome of profound policy failure, including, especially, the impact on employment levels of the corporatisation of the state forestry industry during the 1980s and 1990s. Neoliberalism contributed to a serious policy problem, but now finds itself at the centre of Tūhoe-initiated solutions.

Decentralising welfare notes the aspiration to ‘become independent of the Government, generate its own revenue and become self-sustaining’ (Moore et al. 2014: v). In particular, ‘Tūhoe consider youth parenting and unemployment as an area where they could improve social outcomes for both current and future generations—a concept entirely consistent with mana motuhake [self-determination]’ (Moore et al. 2014: 10).

The proposal’s success is dependent on a series of complex variables, including the capacity to develop functioning and culturally responsive education and labour markets as poor schooling outcomes and a small local labour market have been further contributors to Tūhoe dependence. The Tūhoe intent is to redirect welfare expenditure to labour market development and to support ‘changing a mindset in Tūhoe around being beneficiaries of the state’ (Kruger, cited in Moore et al. 2014: 42).

The Tūhoe intention is a dramatic reconfiguration of the relationship between itself and the state. Relationships with the state are an ongoing concern for Māori politics and, in 2010, as a mark of the political significance of the growth in collective Māori wealth, the national Iwi Chairs’ Forum established an Independent Working Group on Constitutional Transformation. Its purpose was to develop models of constitutional inclusivity with reference to the Declaration of Independence (1835), the Treaty of Waitangi (1840) and ‘other international human rights instruments’ (Independent Working Group on Constitutional Transformation 2016: 7). The working group’s establishment was the

product of self-determination outside the state. Its report was supported by a United Nations' fund established to facilitate the implementation of the Declaration on the Rights of Indigenous Peoples (UNDRIP) to 'express the wish for Māori to make decisions for Māori' (Independent Working Group on Constitutional Transformation 2016: 8). The working group's report, *Matike Mai Aotearoa*, is representative of a broad body of contemporary Māori political thought, helping to clarify questions of what Māori mean by self-determination and showing that Mörkenstam is correct to argue that self-determination's recognition at international law does challenge 'the traditional nation-state centred understandings of political rights and democracy' (2015: 634), which, in turn, challenges the idea of sovereignty as the concern of states alone.

The report is likely to attract criticism. However, in the present context, it is not the merits of its substantive recommendations that are important, but that neoliberal developments over the past 30 years have reconfigured Māori relationships with the state, and positions within the state, to create greater opportunities for collective deliberation in constitutional and political discourse.

Questions about the potential Māori position within the state, in the neoliberal age, are also raised by the Waitangi Tribunal's (2014) finding that in acquiescing to the Treaty of Waitangi, Māori chiefs did not cede sovereignty to the British Crown. The New Zealand Government contests the finding, but, for the Māori claimants, a long-held position is affirmed. From either perspective, questions of what sovereignty means are important to the Tūhoe aspiration described above and to how one might evaluate *Matike Mai*. The finding suggests that state sovereignty is not the all-encompassing power that Hobbes imagined (1988). Nor is it the 'unconstrained' concern of biculturalism's 'Pakeha' Crown (O'Sullivan 2007).

Māori are not entirely excluded from national sovereignty. However, the extent to which they are included, and in which ways, are matters of ongoing political contest. The contest is not always distinguished by what Macedo (1997) calls the liberal virtue of public reasonableness. Yet, the Tribunal finding adds to the moral persuasiveness of arguments for substantive and meaningful shares in national sovereignty. It shows the importance of conceptual clarity on the meaning of sovereignty; a meaning that is morally just, pragmatic and relevant to contemporary Māori claims on the state. However, at the very least, Māori claims to

self-determination in the neoliberal age are supported by a construct that, at the very least, accommodates *particular* Māori claims, not as junior partners in a bicultural relationship, but as equal participants in a common body politic as holders of rights that are distinct from, but do not supersede, the rights that they enjoy individually in common with other citizens.

Conclusion

Neoliberal political and economic theories have contextualised Māori public policy over the last 30 years. The neoliberal age needs to work for Māori if it is to work for New Zealand. These theories' influences are both transformative and paradoxical. On the one hand, material and political inequality explains Friedman's argument that 'liberation from one form of oppression [colonialism] can lead to another integrative process and new forms of class differentiation' (1999: 1), causing 'socio-economic depression and further cultural suppression' (Fenelon & Hall 2008: 1874). On the other hand, political reforms intended to support neoliberal economic aspirations created opportunities to reconfigure the nature of national sovereignty and to begin a new Treaty of Waitangi jurisprudence that has altered the ways in which Crown and Māori entities engage. Opportunities were also created for extra-state economic opportunities that Māori actively pursue as self-determination. Critiques of neoliberal philosophy are, then, wrong to cast Māori as perpetual victims (MacDonald & Muldoon 2006), bereft of agency and devoid of thought about the aspirations they wish to pursue and how they will use traditional tribal structures to support these aspirations.

The possibilities for Māori self-determination are broad and multifaceted. They exist beyond the neoliberal paradigm, as much as they exist within it. The common ground is the cultural purpose that is associated with economic activity. While there are arguments for further and more substantive forms of recognition, for more far-reaching expressions of belonging together differently (Maaka & Fleras 2005), it remains that the neoliberal age has gone a significant way towards explaining contemporary opportunities for self-determination; opportunities of an order not otherwise seen since British settlement.

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