

Some Customary Legal Concepts in Māori Traditional Migration Accounts

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1. Introduction

1.1. This Paper began with an interest in whales – ngā parāoa. We were intrigued by the recurrence in traditional accounts concerning the first arrivals of important migration canoes in Aotearoa of the finding of stranded whales and disputation about rights to them. From the lawyer's point of view they presented the paradigmatic case – rival claims settled by recourse to normative principle based on determination of relevant fact. Could these accounts tell us anything about the customary law of those Polynesian settlers who brought their waka across Te Moana nui a Kiwa and of the societies they founded in the new land?

1.2. Whether these traditional accounts are viewed as 'history', in the sense of literal truth, or as stylised explanation of origins, or as a device for teaching the values and techniques of the founding group to successive generations – or as a combination of all three – is an inquiry which we are fortunate to be able to leave aside. For our present purposes it is enough to observe that the accounts have a place in the cultural traditions of the tribes, dating from 'time immemorial', to use the phrase of the English common law in relation to custom.

1.3. In this Paper we will begin by setting out three elements from the traditional migration accounts chosen for their exemplification of apparent normative principle. The three elements we propose to lay before you are:

1. The substantive and procedural principles emerging from the disputes about the ownership of whales found stranded on the beach.
2. The principle expounded in relation to valuables discarded by a previous owner and recovered by another party.
3. The principle applied in relation to the misuse of rights granted for one purpose and applied for another purpose adverse to the grantor.

1.4. We cannot escape the burden of supplying the best evidence for these elements from the traditional stories, and of providing an account of the sources from which these may be studied. To this end, Joeline Seed-Pihama undertook to study the relevant records, particularly the Grey Papers in the Auckland Public Library, with a view to tracing the information and sources used by Sir George Grey in compiling the narrative which now

serves as the principal written record of the stories of the great migrations across the Pacific to the new land of Aotearoa. The texts in the following section, and the comments on them, are the result of Joeliee's researches.

2. Three Solutions to Disputes from Traditional Accounts

2.1 Traditional accounts

The tribes of Aotearoa trace their origins, and in many cases their links, to the canoe in which their ancestors arrived in the new land. These sometimes differing tribal accounts of the reasons for departure from the homeland, the circumstances of the voyages across the Pacific, important incidents on the journey or connected with the voyagers, and the place and manner of arrival are all explicated in traditional forms such as: narrative, song, place names, carving, proverbs, etc., which were performed by those with the knowledge to do so. During the mid to late 1800's many of these accounts, songs, etc. began to be written down with the language and skills newly learned, principally from the Church missions, and then passed on to prominent European writers to be published. This is exactly the case with each of the following accounts.

2.2. Methodology

Before discussing of the accounts within this paper the process by which they were chosen must be explained. Simmons¹ states that in order to ascertain the authenticity of a traditional account the informant and recorder must be examined. He suggests the following as the standards by which reliability can be judged:

- 1. His tribe should be identified.*
- 2. His position in the tribe and general reputation need to be known.*
- 3. He should, if possible, be an acknowledged authority in the tribe on traditional matters.*
- 4. He should know a fairly wide knowledge of tradition, not just of one story alone.*
- 5. The purpose for which the information is given, to whom, and why; whether it was part of a speech, or given privately, or for a reward, or to preserve it for posterity, or to enhance the status of the informant or his*

Simmons (1976:11-12) also gives five criteria by which to ascertain of the authenticity of a traditional text: *1. Occurrence in a number of sources..., 2. Occurrence in songs and chants..., 3. Persistence to present times..., 4. Occurrence in early sources..., and 5. Genealogical validation.*

Throughout the research process Simmons' criteria has been applied in order to help assess the differing versions of these accounts. However, even Simmons (1976:10) points

¹ D. R. Simmons (1976). The Great New Zealand Myth. Wellington: A. H. & A. W. Reed Ltd. p 9.

out, ‘...it is one thing to say what authentic tradition must or must not be, but it is another to determine how to apply the criteria to given examples.’

Thus, at times judgements have had to be based on past experience and my own knowledge in this area. Interestingly, some of the elements of these stories are found in several canoe traditions sometimes with the actors having names peculiar to the different canoes. The popularity of the stories seems to be evidence of the acceptability of the values and principles which they carry.

2.3. Te Arawa Canoe and the kura of Mahina

The following is our preferred version of this account:

Māori text²

Ka tata mai ki uta, kite rawa mai ki te Pōhutukawa o te tahatika e ura atu ana, ehara tau ana te tututupō ki te wai. Kātahi tētehi o ngā rangatira o te waka rā ka karanga ake, e! kua nui ake te kura o tēnei kāinga i te kura o Hawaiki, ka panga ahau i āku kura ki te wai, ehara, panga atu aua kura ki te wai, ko te ingoa te tangata ko Tauninihi, nāna i panga atu a Taiwhakaea. Ū rawa mai rā ki uta, eha [*sic*] kua pā atu ngā ringa ki aua Pōhutukawa, ana horo noa iho, kātahi rātou ka mahara he puāwai rākau ēnei mea. Ka raruraru ngā rangatira o runga i a Te Arawa mō te maumauranga o ā rātou kura i panga ai ki te wai, muri tata iho, ka kitea aua kura e Mahina, ā e takoto mai nei anō kei a te Whānau a Apanui.

Also, in order to further elaborate upon this event the following has been provided:

‘...Muri tata iho, ka kitea aua kura a Tauninihi ki te one o Mahiti, na Mahina i kite, rongo rawa ake kua kitea, tae rawa atu ki te tiki, kihai I riro mai, koia tenei pepeha mo te mea kite, e ka kitea te taonga makere, - Kaore e hoatu e a au, ta te mea ko te paekura a Mahina...³’

English text⁴

As they drew near to land, they saw with surprise some Pōhutukawa trees of the sea-coast, covered with beautiful red flowers, and the still water reflected back the redness of the trees. Then one of the chiefs of the canoe called out: ‘See there, *kura*⁵ are much more

² Te Rangikaheke (1849). Tūpuna. Originals held in the Auckland Public Library: Grey Collection, Māori Manuscripts, call no. GNZMMSS 44. p 926.

³ Sir George Grey (1854) Nga Mahinga a nga Tupuna Maori. London: George Willis. p 74.

⁴ Based on the translation by Sir George Grey (1854:142-3) with some modifications by Joeline Seed-Pihama. I would like to also acknowledge the assistance of Dr. Richard Benton with all three translations in this paper.

⁵ ‘kura’ is defined by Williams (1971:157-8) as:

plentiful in this country than in Hawaiki, so I'll throw my *kura* into the water'; and, so saying, he threw them into the sea. The name of that man was Tauninihi; the name of the *kura* he threw into the sea was Taiwhakaea. The moment they got on shore they ran to gather the Pōhutukawa flowers, but no sooner did they touch them than the flowers fell to pieces; then they found out that these *kura* were nothing but flowers. All the chiefs on board Te Arawa were then troubled that they should have been so foolish as to throw away their *kura* into the sea. Very shortly afterwards those *kura* were found by Mahina, and they are now with the Te Whānau a Apanui people.

‘... Very shortly afterwards the ornaments of Tauninihi were found by Mahina on the beach of Mahiti. As soon as Tauninihi heard they had been picked up, he ran to Mahina to get them again, but Mahina would not give them up to him; thence the proverb for anything which has been lost and is found by another person, “I will not give it up, ‘t [*sic*] is the red ornament which Mahina found.’⁶”

Discussion of sources

This version is taken from a Grey Manuscript, Tūpuna GNZMMSS 44:926, for which Wiremu Maihi Te Rangikaheke is the informant. It was written in Te Rangikaheke's own handwriting, in 1849. Grey published this section of the Te Rangikaheke's manuscript as an appendix in Ko nga Moteatea me nga Hakirara o nga Maori⁷ which was then republished in Nga Mahinga a nga Tupuna Maori⁸ and the translated version in Polynesian Mythology, and Ancient Traditional History of the New Zealand Race, as furnished by their priests and chiefs⁹.

‘...’

1. a. *Red, glowing.*
2. *Ornamented with flowers.*
3. *Precious.*
4. *Redden, paint red.*
5. *Red feathers...*
8. *Treasure, valued possession, darling....’*

⁶ Grove and Mead (2001). Ngā Pēpeha a ngā Tūpuna. Wellington: Victoria University Press. pp 91,105,174, 276, 281, 292, and 375. This proverb is noted as the equivalent for the saying ‘finders keepers’ and is described as a lesson that the value placed on an object may differ from person to person. This proverb is also used in response to someone trying to regain possession of an object previously abandoned.

This translation has been taken from: Sir George Grey (1855). Polynesian Mythology, and Ancient Traditional History of the New Zealand Race, as furnished by their priests and chiefs. London: John Murray. pp 142-3.

⁷ Sir George Grey (1853). Ko nga Moteatea me nga Hakirara o nga Maori. Wellington: Robert Stokes. p 1xii.

⁸ Grey (1854:74)

⁹ Grey (1855:142-3)

Te Rangikaheke, also known as Wiremu Maihi (William Marsh), or Wi Maihi, was born in about 1815, in the district of Rotorua. His father, also called Te Rangikaheke, was from the Ngāti Kereru sub-tribe of Ngāti Rangiwewehi of Te Arawa, and had kinship ties with Ngāti Rangitihi. At around 1849, Te Rangikaheke became Grey's live-in tutor of the Māori language and customs. Te Rangikaheke produced a very large body of written work as part of his work with Grey, in total he produced 21 manuscripts, and contributed to 17 more, all of which he wrote before 1854¹⁰.

Other sources of this account include one recorded by Edward Shortland in 1843, from an elderly Te Arawa priest, named Tatahau¹¹. Although the original version of this is written 6 years earlier than the one I chose, the description of the 'kura' event was too brief for the purpose of this paper, and I also could not find sufficient information on the informant to satisfy reliability¹². In addition, Tatahau refers to Rātā trees in his account, not Pōhutukawa trees which raises another reliability issue¹³. Another account of note was written by Eruera Te Uremutu¹⁴. Simmons (1976:160) gives the date it was written as 1846; however the names given in the whakapapa indicate sometime between 1860 and 1880¹⁵ which makes the account a less desirable one. Lastly, it should be noted that some versions written by Māori from the Tainui waka refer to the 'kura' incident as well. Jones¹⁶ briefly refers to the 'kura' incident, claiming Taininihi and Haapopo as the actors. He also includes Taininihi as a member of the Tainui canoe¹⁷. However, it is not clear who his informant was for this information and further investigation would be needed to further determine the authenticity of this version.

Finally, the version given by Te Rangikaheke was chosen as the preferred example within this paper as he was a respected leader and orator of Te Arawa, this version is one of the earliest recordings of this account, which provides a good description of the 'kura' event without the use of doubtful or foreign concepts or terms.

¹⁰ Part of this information is compiled from: Curnow, Jenifer. 'Te Rangikaheke, Wiremu Maihi ? - 1896'. Dictionary of New Zealand Biography. <http://www.dnzb.govt.nz/>

¹¹ Edward Shortland (1856). Traditions and Superstitions of the New Zealanders. London: Longman, Brown, Green, Longmans & Roberts, Paternoster Row. p 11.

¹² This is not to say that Tatahau was an unreliable source, but only that perhaps a more in depth examination needs to be undertaken, which would have been outside the scope of this paper.

¹³ In order to settle the Pōhutukawa vs. Rātā tree debate, further research needs to be carried out as to which type of tree may have been growing around Whangaparāoa at the time of the Te Arawa arrival. Although, Hiroa does seem to suggest that they were Pōhutukawa trees in his book: Te Rangi Hiroa (1950). The Coming of the Maori. Christchurch: Whitcombe and Tombs Ltd. p 50.

¹⁴ Eruera Te Uremutu (1860-1880). Some Arawa legends. Alexander Turnbull Library, Wellington, MS-Papers-1187-191.

¹⁵ See: Provenance notes on the record page of this manuscript.

¹⁶ Pei Te Hurinui Jones (1995). Nga Iwi o Tainui. Auckland: Auckland University Press. p 36.

¹⁷ Jones (1995:29)

2.4. Discovery of a whale

The following is our preferred version of this account:

Māori text¹⁸

Ka kōrero kia tāraia he waka, ko Te Arawa tō mua, muri iho ko Tainui, ko Kurahaupō, ko Takitimu, ko Aotearoa, ko ngā waka ēnei i hoe mai ai ngā tūpuna, ka tuia a Tainui, ka mate te tamaiti a Manaia, ka tanumia ki ngā marama [*sic*] o Tainui ka rewa a Te Arawa ki te wai, ka karangatia mai a Ngatoroirangi ki te kai i te peka o Te Arawa, ka karangatia mai hoki te wahine a Kearoa ki te kai i te peka wahine, kāore he nukarau nā Tamatekapua, ka tangohia a Ngatoroirangi ki runga i a Te Arawa, ko Tainui kē tōna waka, ka hoe mai a Te Arawa, nō muri ko Tainui, ka whakahekea a Te Arawa ki te waha o Te Parata, ka tūpou te moenga o Kearoa, ka karanga, Ngatoro e, ka taka te urunga o Kea, ka whiua te huihui tahā ki te moana, ka whakahuatia te karakia...

Ko te unu o Te Arawa tēnei karakia. Ka ū a Te Arawa ki Whangaparāoa ka kitea te ika moana e pae ana i uta, ka ū mai hoki a Tainui ki reira anō, ka tautohetohe ki tā rāua ika, ka mea a Tainui nānā te ika, ka mea a Te Arawa nānā te ika, kātahi ka titiro ki ngā toko o te tūāhu, ko tā Arawa he maha, ngā toko o tana tūāhu, ko tā Tainui i tunua ki te ahi, kia hohoro ai te maroke, ka herea te taura ki te kauae o te ika, nō reira i riro ai i a Tainui tā rāua ika.

English text¹⁹

It was decided that canoes be made and Te Arawa was the first, then Tainui, Kurahaupō, Takitimu and Aotearoa. These were the canoes which the ancestors paddled here. When Tainui was being fitted out Manaia's son was killed and buried amongst the chips of Tainui. When Te Arawa was floating on the water they called out to Ngatoroirangi to remove the tapu o Te Arawa, they also called out to Kearoa to come and remove the women-related tapu²⁰. It was not through deceit by Tamatekapua that Ngatoroirangi was taken onto Te Arawa, although Tainui was his canoe. Te Arawa left followed by Tainui. Te Arawa was taken into the mouth of Te Parata, and Kearoa's bed was swept away and they called out "Ngatoro, Kearoa's pillow has fallen". Bunches of calabashes were thrown into the sea, and then the karakia was chanted (by Ngatoro)...

...This karakia was the extraction of Te Arawa. Te Arawa arrived at Whangaparāoa and a sea fish was seen lying on the shore. The Tainui arrived there too and they disputed over

¹⁸ Te Rangihaeata (1851). Genealogy and an account of the migration to, and early movement in New Zealand. Originals held in the Auckland Public Library: Grey Collection, Māori Manuscripts, call no. GNZMMSS 77. pp 10&11.

¹⁹ This translation is based on Simmons (1976:169); however some large changes have been made to make the translation suit a more contemporary audience.

²⁰ Both Ngatoroirangi and Kearoa were called onto the canoe to remove tapu; however the tapu removed by each was different in nature, according to their sex.

that fish. Tainui said it was their fish while Te Arawa said it was theirs. Then they looked at the poles of the altars; those of Arawa were numerous, while Tainui had baked theirs over a fire to speed up the drying, there was also a rope tied to the jaw of the fish and by that Tainui attained their fish.

Further interesting and supportive information given during a wānanga (seminar) with our colleague, Dr. Tui Adams²¹:

In 1990, Dr. Tui Adams travelled with the Māori Queen, Dame Te Arikinui Te Atairangikaahu to the Kauae Tangohia Marae in Whangaparāoa to meet up with Pene Ruruku, who had built a waka (canoe) and along with some others was sailing it from Nelson to Whangaparāoa as part of the 150th anniversary of the Treaty of Waitangi celebrations. Dr. Tui Adams kindly describes his visit as follows:

‘...The name of the whareni (meeting house) there was ‘kauae tangohia’ (removed jaw) and I believe it had something to do with the fish that was stranded on the beach... I believe it was a tohorā (whale) because the fish that is depicted on the wall of the whareni is a tohorā....’

He then goes on to say:

‘...It came the day for us to go down actually onto the beach and we... you sort of had to come backwards a little bit along the coast and then across some sand dunes and that, to where the rock was that our original waka, Tainui and Te Arawa tied up to....’

2.5. Discussion of Sources

This version is taken from a Grey Manuscript, Genealogy and an account of the migration to, and early movement in New Zealand. GNZMMSS 77: 10 & 11. The account was dictated by Te Rangihaeata and written by Matene Te Whiwhi in April, 1851. Grey published part of this version in Nga Mahinga a nga Tupuna Maori²² and a somewhat elongated, translated version has been published in Polynesian Mythology, and Ancient Traditional History of the New Zealand Race, as furnished by their priests and chiefs²³.

However, the somewhat disturbing aspect of these publications is the fact the Grey has added parts of the ‘whale’ account by Te Rangihaeata (see above) with parts of Te Rangikaheke’s version of the ‘kura’ to form one story, which he calls ‘The voyage to New Zealand’. In fact these are two different accounts, taken from two different sources, and two different tribes. Although several accounts claim that the Tainui and Te Arawa

²¹ Dr. Tui Adams (15th July, 2004). Pū Wānanga Seminar. Te Awamutu, at the Wānanga o Aotearoa Head Office. Attended by Joeliee Seed-Pihama and Robert Joseph.

²² Sir George Grey (1854:75)

²³ Sir George Grey (1855: 143)

canoes arrived around the same time, this still does not justify the amalgamation of two accounts into one tradition.

It would seem that Grey's intention was to support the idea of a 'fleet theory', or perhaps he merely wanted to make the account more understandable to a European audience. Whatever his reasoning, such cavalier treatment of sources is clearly a departure from any rigorous scholarship. Each version of these accounts (and there are many from different tribal sources and individuals) must be viewed as important and significant on its own, in its own context. Once the factors which point to the authenticity of an account have been addressed and reliability has been established, researchers of Māori traditions must take into account that these accounts are significant within their respective tribes. Whether, the accounts are viewed as historical, pedagogical, or as mere legend, the point should be that they have been recorded by reputable Māori sources and should be viewed as such, and treated with respect.

Another version of this account has been written by Hoani Nahe²⁴, and published by John White along with a version of Grey's 'The voyage to New Zealand' in The Appendix to the Journals of the House of Representatives of New Zealand²⁵. Although these versions may seem more in-depth and easier to read, they are secondary sources of the worst kind. White has clearly manipulated the text of both versions to produce a more story-like text.

2.6. Te Rangihaeata (1780's – 1855) was a leader and warrior of Ngāti Toa. He had affiliations to the Ngāti Kimihia hapū through his mother, Waitohi, who was the elder sister of Te Rauparaha. Through his father, Te Rakaherea, Te Rangihaeata was a junior relative of the senior Ngāti Toa leaders of his generation, namely, Te Pehi Kupe and Te Hiko O Te Rangi of Ngāti Te Maunu. He was also an expert of carving, the recitation of tribal prayers and incantations, and tribal and inter-tribal genealogies.

Te Rangihaeata spent much of his youth involved in the struggle between the people of Kawhia and other Waikato tribes for control of the coastline toward Raglan. By 1819 he was regarded as a great warrior and went on to join Te Rauparaha on many war expeditions. In 1821, he accompanied the first section of the main Ngāti Toa migration, called Te Heke Tahu-tahu-ahi, southwards. Te Rangihaeata was also one of the chiefs who signed the Treaty of Waitangi in 1840. He also had a significant relationship with Sir George Grey and visited Ōtaki to farewell Grey in 1853²⁶.

²⁴ Hoani Nahe (1860). Account of the Emigration of the Maoris from Hawaiki. Held in the Auckland Public Library: Call no. NZ MS 713.

²⁵ John White (1880). 'Legendary History of the Maoris'. AJHR, Vol. II. Wellington: New Zealand Parliament. pp G.-8, 1-27.

²⁶ Ballara, Angela. 'Te Rangihaeata ? - 1855'. Dictionary of New Zealand Biography. <http://www.dnzb.govt.nz/>

2.7. The Death of Kae²⁷

Kātahi anō Tūhuru huri ka puta ki waho. Ka rapu a Tinirau ki te tohunga hei tohi. Ka tikina i a Kae hei tohi mō Tūhuru huri, ka tae mai a Kae ki te kāinga o Tinirau, ka mutu te tohi. Ka karangatia e Tinirau tāna mokamōkai a Tutunui i waho i te moana e haere ana, ka eke mai ki uta, ka tikina atu ka tapahia mai tētahi taha o taua ika nei, ka taona mā te tohunga mā Kae, ka rongo a Kae i te reka, ka mea ki te hoki ki tōna kāinga ki Tihi-o-Manono, ka hoatu he waka hei hokinga mōna. Kāore e haere i runga i te waka, e noho ana kia eke ia i runga i te ika nei i a Tutunui, kua rongo hoki ia i te reka o taua ika nei. Hoatu ana a Tutunui hei waka mōna, ka kī atu a Tinirau ki a ia, e tata koe ki uta, e oioi te ika, e rere ki te taha katau.’

Ka tino rerenga o Kae, ka tata ki uta, ka oioi te ika, noho tonu a Kae kāore hoki i rere ki raro, ka kī ngā pihapiha o te ika rā i te onepū, ka mate. Ka tōia e Kae ki uta hei kai māna, ka tupu te pakanga ki tēnā iwi, ki te aitanga a te poporokewa. Ka taona taua ika nei ki te umu, ka rautaongia ki te koromiko, e mau nā te hinu i te koromiko, koia tōna whakataukī tēnā te kakara o Tutunui.

Ka rongo a Tinirau rāua ko tāna wahine ko Hineiteiwaiwa ki te kakara, kua mate tā rāua tamaiti a Tūhuru huri, kua pau i a Kae. Kātahi ka utaina te waka o Hineiteiwaiwa, rūpeke ake ki runga ki taua waka nei hokorua, ko Hineiteiwaiwa, ko Raukauri, ko Raukatamea, ko Itiiti, ko Rekareka, ko Ruahautangaroa, kāore ētehi i mōhiotia...

Ka hoe rātou, ka tae ki te kāinga o Kae, ka hui tērā iwi ki te mātakitaki, ka ahiahi, ka kā te ahi ki roto ki te whare o Kae, ka hui te tangata ki roto, ka kī, ko tētehi taha i te manuhiri, ko tō Kae moenga, kei te take o te poutokomanawa. Ka whakakitea ngā mahi a Raukauri i reira, te waiata, te pūtōrino, te kōauau, te tōkere, te tī ringaringa, te tī rākau, te pākuru, te papaki, te porotiti, mutu katoa ēnei mea. Kāore a Kae i kata, nā te pīrori kātahi anō a Kae ka kata, ka kitea ngā kikokiko o Tutunui e mau ana i ngā niho, he niho tāpiki hoki tōna niho. Ko tā māua nei whakataukī tēnei e mau nei, ka rongo te tangata ki te kupu a tētehi tangata ka pai, ka kata, ka mea atu tētehi, ka kata Kae.

Te kitenga anō e ngā wāhine rā i ngā kiko o Tutunui e mau ana i te niho o Kae, ka tineia te ahi. Ka tae a Kae ki ngā pāua, ka whakapiria ki ngā kanohi, kia kī atu ai ngā wāhine rā kei te oho ia. Ka rotua te whare ngā wāhine rā, ka whakamoemoea kia moe, kia tupuatia ai a Kae e rātou. Ka warea te whare katoa e te moe, me Kae hoki...

Haere atu ana a Kae i a Hine-i-te-iwaiwa rāua ko Raukauri, ka tae ki tō rāua nei kāinga, ka kawea a Kae, ka whakataria ki te poutokomanawa o te whare o Tinirau kia rite ai ki tōna moenga i te poutokomanawa o tōna whare. Ko tōna whare, he whare kōpae, ko tō Tinirau, he whare paikea. Ka ako atu a Tinirau ki ngā tāngata o te kāinga, e puta au i te ata kia kaha te karanga, ko Tinirau, ko Tinirau. Ka awatea ka puta a Tinirau e haere mai ana, ka pā te karanga, ko Tinirau, ko Tinirau, ka maranga ake a Kae, ka noho a Tinirau ki te roto o te whare, ka oha atu ki a Kae, tēnā koe, ka mea atu anō ia, nāwai koe i homai ki

²⁷ Te Rangihaeata (1852). Genealogies and Legends. Original held in the Auckland Public Library, Call No. GNZ MMSS 46. pp 31-7.

konei. Ka mea atu a Tinirau, tēnā, tirohia te āhua o tēnei whare, ka titiro a Kae, ka mea atu ki a Tinirau, ko tōku whare anō tēnei, ka kī atu a Tinirau, kei whea te matapihi o tōu whare, ka tiroiro a Kae, kua rerekē te āhua o te whare, ka mōhio ia, 'Koia anō nō Tinirau tēnei whare, ka tūohu ia. Ka tōia mai ki waho, ka patua, ka mate a Kae.

*Translation*²⁸

Tūhuru-huru was born and Tinirau searched for a priest to perform the birth ceremony. Kae was fetched to be the priest for Tūhuru-huru's birth ceremony and in due time, he arrived at Tinirau's home and performed the ceremony. Tinirau then called to his pet whale, Tutunui, who was in the sea swimming about, to come ashore. Tinirau proceeded to cut a slice from the whale and cook it for the priest, for Kae. Kae tasted its sweetness and said he wanted to return home to Te Tihi-o-Manono, and so he was given a canoe to return on. But Kae did not board the canoe, he stayed seated so that he might be able to return on the whale, Tutunui, for he now knew the savoury taste of this fish. Tinirau lent Tutunui as a mode of transportation home, but informed him, when you get near the shore, the whale will shake itself, and you must jump off to the right.

Kae travelled a long way and when they came close to the shore and the whale shook itself. But Kae stayed seated and didn't jump off, and the whale's blow-hole filled with sand, and it died. He was then dragged by Kae to the shore to be eaten. This is where the war against Te Aitanga a Poporokewa was bred. This whale was cooked in an oven, wrapped in Koromiko leaves, which hold in the fat. This is their proverbial saying, tēnā te kakara o Tutunui²⁹.

Tinirau and his wife smelt the aroma and realised their child³⁰, Tuhuru-huru had died. He had been consumed by Kae. The canoe of Hine-i-te-iwaiwa was then loaded, and they boarded the canoe along with Hine-i-te-iwaiwa, Raukatauri, Raukatamea, Itiiti, Rekareka, Rua-hau-a-Tangaroa, and others who are not known.

They paddled off and arrived at Kae's village. The tribe gathered to observe the goings on, it became late, and a fire was lit in Kae's house, the people gathered within, and it became full. One side was full with visitors and Kae's bed was positioned at the base of the centre pole. The wonders of Raukatauri were exhibited there, such as waiata, pūtōrino, koauau, tōkere, ti ringaringa, ti rakau, pākuru, papaki, porotiti, until all had been seen. Kae didn't laugh at all, but they then rolled around like balls and all of a sudden he laughed. They then saw the flesh of Tutunui stuck between his teeth, and his

²⁸ Translation by Joeline Seed-Pihama.

²⁹ This proverb is noted in: Grove and Mead (2001:379).

'There rises the savoury smell of Tutunui.'... The lesson is that one should not covet someone else's goods or enjoy another person's property.'

³⁰ Translators Note: This is purely figurative, meaning they felt like Tuhuru-huru was a member of their family.

teeth were crooked. As a result of this we still have this proverb, when a person listens to someone telling a great story and laughs, we say, ka kata Kae³¹.

As soon as the women saw the flesh of Tutunui stuck in Kae's teeth they extinguished the fire. But, Kae (suspecting something) put pāua over his eyes so that the women would say that he was awake. The women then performed a spell to put everyone to sleep, so they could kidnap Kae. Finally, everyone in the house including Kae fell asleep...

Kae was carried off by Hine-i-te-iwaiwa and Raukatauri, and when they arrived home, they carried Kae to the centre-pole of Tinirau's house so that his bed was in the same position, next to the centre-pole as in his own home. However, his house was a round house, and Tinirau's was a long house. Tinirau advised his people, that when he made his appearance in the morning, they should all loudly call out, here comes Tinirau, here comes Tinirau. Now, the next morning, when Tinirau's people saw him coming, they shouted, here comes Tinirau, here comes Tinirau, and Kae woke up. Tinirau sat down at the front end of the house, and startled Kae by saying, greetings, and then he asked him, who brought you here? Tinirau then said, now, look at the appearance of this house, so; Kae looked and said to Tinirau, this is my house. Tinirau then asked him, where is the window placed in your house? Kae looked slowly, saw that the appearance of the house was different and realised, this house belongs to Tinirau, and so bowed his head. Kae was then dragged outside, and killed.

2.8. Discussion of Sources

This version was dictated by Te Rangihaeata and written by Matene Te Whiwhi in 1852. Grey later rewrote this version and added in some extra information in Māori in one of his manuscripts³² which he then published in Nga Mahinga a nga Tupuna Maori³³. This is another example of the liberty Grey took with some of these informants' knowledge and accounts. There is also another version of this account given by Hami Hone Ropiha³⁴ before 1854, however this version seems to be a summary of the events and as such is too brief for our purposes. I also could not find enough information on the informant to satisfy reliability.

³¹ This proverb is noted in: Grove and Mead (2001:161).

‘Kae laughs.’... used when a gloomy person is at last induced to smile... One learns also from this that guilt may be inadvertently revealed by the guilty one.’

³² Sir George Grey (before 1854). Mythology and Traditions of the New Zealanders. Originals are held in the Auckland Public Library: Call No. GNZ MMSS 29, Vol. I. pp51-9.

³³ Sir George Grey (1854:36-8)

³⁴ Hami Hone Ropiha (before 1854). He pukapuka whakamatau kia mohiotia ai nga tupuna o nga tangata maori kia kitea ngahautanga o te tangata maori ana karakia me ana waiata me nga haka ano. Originals held in the Auckland Public Library: Call No. GNZ MMSS 10.

For this account, I discarded Grey's translation and penned my own³⁵. This was decided, because, as I have already pointed out, Grey often inserted his own words into original texts and he did the same with his translations. In his translation of this account specifically³⁶, he has written it as though for an audience of children, even though the original is not written in that register.

3. Customary Law Elements suggested by the accounts

3.1. The finding of the Whale

The substantive principle presupposed by this account is the significance of temporal priority in creating rights – 'first in best served'. The earliest assertion of rights takes precedence over, or 'trumps', a subsequent claim.

A second principle, however, is that the earliest assertion of rights must have taken an active or physical form capable of demonstration by the claimants.

The conduct of the contenders for the rights to the whales shows acceptance of these twin substantive and procedural norms. Furthermore, the supposed manipulation of the evidence by the 'improvement' of the facts shows that, as with modern law suits, the adversarial aspect of a legal dispute permits skilful, and even artificial, use of the interaction between 'rules' and 'facts' to secure victory. Not only is the honoured place of the 'trickster' in Polynesian thought recognised, but a more general calculation is asserted. That the price of having 'rules' is that they may be capable of manipulation and may not always produce 'justice' in an abstract sense. Of course, if rules are so open to abuse as to produce consistent abuse and injustice they will lose legitimacy and fall into abandonment. But we can tolerate quite a lot of 'slippage'. We sigh resignedly when we read of the acquittal of an accused person 'on a technicality'. We wince when we hear of successful tax avoidance by artificial device. We do not, however, abandon the system. We seem to recognise that the alternative to 'rules' is so ominous and so incompatible with social life that the 'slippage' is a price worth paying.

3.2. Customary law relating to whales continued to evolve after the Treaty of Waitangi. In 1910, the Chief Justice of New Zealand, Sir Robert Stout, a Shetland Islander and knowledgeable in fishing matters, decided the case of *Baldick v. Jackson*³⁷. Jackson and his crew had killed and secured a whale in an apparently safe place. It later sank and was carried out into Cook Strait. Although Jackson continued to search, it was found by Baldick and towed to land whereupon he claimed it.

Which of the parties had the superior right to the whale? Both principal issues identified by the Chief Justice are of interest to students of customary law in New Zealand. First, did an English statute from the time of Edward II appearing to claim whales as 'Royal

³⁵ I hold a Postgraduate Diploma in Translation and Interpretation.

³⁶ Grey (1855:90-8)

³⁷ Baldick and Others v. Jackson Vol. 30 NZLR, p.343

Fish' apply in New Zealand? Secondly, should Jackson's loss of control of his whale be treated as 'abandonment' of his rights?

As to the first issue, Stout C.J. declared that the old English statute was 'never applicable to the circumstances of the Colony' – the test which at the time determined whether English law applied in New Zealand. Whaling had been intensively practiced here both before and after the Treaty of Waitangi in 1840, and neither the Crown nor the Government of New Zealand had ever asserted the 'royal prerogative' in relation to whales. The prerogative:

'is one not only that has never been claimed, but one that it would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with...' ³⁸

On the second issue – abandonment – the Chief Justice recognised that customary practice could vary among societies. In Greenland, it seemed that any loss of control of a fish made that fish a 'lost fish', whether alive or dead. However, the evidence adduced by Jackson demonstrated that the New Zealand practice was otherwise:

'if a fish is killed and put in what is believed a secure position, even though no boat belonging to the whaler who killed the whale is attached to the fish, still, that the fish having been killed by a whaler, it is deemed to be his property.' ³⁹

Here is law being made by the customs of the people. But how to discover the customs? and how to deal with these logically-armed Maori claimants and their customs?

3.3. The Kura of Mahina

In a phrase – 'finder keepers, loser weepers'. The story is both a moral warning to those who would discard the ancient traditions and values in favour of new and superficially attractive things, and the articulation of the customary legal principle that rights can be lost by abandonment or neglect. Maori law is full of indication that, to be fully effective, a theoretical right (take, or root) must be accompanied by continuous occupation. The requirement is captured in the well-know concept of ahi kā – burning fires of occupation.

3.4. Kae and the Whale Tutunui

The whale had been given for the purpose of transport home. The killing and eating of the whale was both a failure to reciprocate the gift and a breach of a principle that the beneficiary of a gift made for one purpose is not free to use the gift for other purposes not contemplated by the giver.

³⁸ Baldick v. Jackson , at page 344-345

³⁹ At p.345

The terrible consequences visited upon the miscreant in this story are regarded as justified by the breach.

4. Some Conclusions and some Observations on Cross-Cultural Study

4.1. The normative and procedural elements identified in this account are, of course, an arbitrary selection. Other traditional stories concerning settlement and exploration, and indeed other traditional recitations of all kinds, might well allow extrapolation of further elements. Nevertheless, even the limited selection generated here does suggest two conclusions.

4.2. First, that the elements have an ongoing historical significance and it should not come as a surprise that they are so embedded in the Māori world-view that, in modern times as in earlier, actions which ignore or contradict elements experienced as central to identity are difficult or impossible for Māori to accept. Although this is not the place to elaborate the connections, all the elements sketched in this Paper can be given a modern application. The ‘priority principle’ has an obvious and general relevance to relations between first settlers and subsequent arrivals; the ‘finders keepers, losers weepers’ doctrine tells us that rights can be lost by neglect or abandonment, thus establishing the dynamic potential of rights; the wrong exemplified by Kae’s ingratitude might be thought relevant to situations in which land or other resources have been made available for a particular purpose but have been appropriated to another.

4.3. A second conclusion connects the analysis of the traditional accounts selected in this Paper with Te Matahauariki Institute’s ‘mission statement’ **“to explore ways in which the best of the values and concepts of the founding cultures of Aotearoa/New Zealand might be reflected in its legal system”**. These apparently tentative words are, on closer inspection, significant in relation to two major debates in modern anthropology.

First, in its assumption that different cultures have ‘values and concepts’ with sufficient formal identity to be harnessed together, or to generate coherent and sufficiently faithful hybrid derivatives, the mission statement places itself in the debate about the viability and sustainability of cross-cultural interaction.

Secondly, the monosyllabic word ‘best’ in the mission statement plunges us into the debate about ‘universalism’ and ‘relativism’. It assumes that some standard is both discoverable and workably applicable for assessing which ‘concepts and values’ of each culture are ‘best’, and which should be allowed to fall by the wayside.

4.4. We will defend the positions inescapably adopted by the mission statement in these debates, and we observe that, for our Institute in our country in our age, this is not some philosophical finger-exercise in which elegant theories and demonstrations can be rehearsed and balanced in a ‘let-the-chips-lie-where-they-fall’ vacuum. For us it is a work of necessity on which the viability of our country in something like the form proposed and hoped for by our founders and ancestors may depend. Failure is not an option.

Therefore, although we look to theory and models to light our way, where these fail or seem to block the path we must find new theory and new models.

4.5. Both the ‘pluralism’ and ‘relativism’ debates have been thoughtfully, and wittily, addressed by the anthropologist Clifford Geertz in a recent series of late-career essays⁴⁰.

A thumbnail sketch of ‘the relativism debate’ looks something like this. Some observers of cultures think that arrangements and values found there can only be understood and assessed in a manner ‘relative’ to and in the context of that society – they doubt that ‘universal’ values and standard can be found against which cultures can meaningfully be judged. Their critics retort that this approach paralyses the moral judgement of the observer, who is left in a moral and cognitive desert devoid of standards, in which all seems permitted. The critics assert that meaningful ‘universal’ standards are both possible and necessary to avoid what is seen as the nihilism of the ‘relativist’ posture.

Geertz’ approach to this ‘relativism’ debate is ingenious. In an essay titled “Anti Anti-Relativism’ he points to the role of anthropology in modern times:

‘We have been the first to insist on a number of things: that the world does not divide into the pious and superstitious; that there are sculptures in jungles and paintings in deserts; that political order is possible without centralised power and principled justice without codified rules; that the norms of reason were not fixed in Greece, the evolution of morality not consummated in England. Most important, we were the first to insist that we see the lives of others through lenses of our own grinding and that they look back on ours through ones of their own... The objection to anti-relativism is not that it rejects an it’s-all-how-you-look-at-it approach to knowledge or a when-in-Rome approach to morality, but that it imagines that they can only be defeated by placing morality beyond culture and knowledge beyond both. This, speaking of things which must needs be so, is no longer possible. If we wanted home truths, we should have stayed at home.’⁴¹

4.6. Geertz introduces a second essay, called “The Uses of Diversity”, with an interesting account of Claude Levi-Strauss’ speech to UNESCO in 1971 when, to the organisation’s dismay, he expressed views more sympathetic to pre-occupation with one’s own culture - ‘ethnocentrism’ - than he had done twenty years earlier in a work commissioned by the United Nations to combat ‘racism’:

‘If...human societies exhibit a certain optimal diversity...we must recognize that, to a large extent, this diversity results from the desire of each culture to resist the cultures surrounding it, to distinguish itself from them – in short to be itself. Cultures are not unaware of one another, they even borrow from one another on

⁴⁰ Clifford Geertz, Available Light: Anthropological Reflections on Philosophical Topics, Princeton University Press, 2000.

⁴¹ In “Anti Anti-Relativism”, Available Light, above, at page 65.

occasion; but, in order not to perish, they must in other connections remain somewhat impermeable toward one another.’⁴²

Geertz describes Levi-Strauss’ metaphor for the opportunities of cross-cultural observation and comprehension:

‘We are, says Levi-Strauss, passengers in the trains which are our cultures, each moving on its own track, at its own speed, and in its own direction. The trains rolling alongside, going in similar directions and at speeds not too different from our own are at least reasonably visible to us as we look out from our compartments. But trains on an oblique or parallel track which are going in an opposite direction are not. “[We] perceive only a vague, fleeting, barely identifiable image, usually just a momentary blur in our visual field, supplying no information about itself and merely irritating us because it interrupts our placid contemplation of the landscape which serves as a backdrop to our daydreaming”’⁴³

4.7. Geertz himself is a more alert and optimistic train spotter, defending both the possibility and the utility of cross-cultural observation. In a still earlier essay he had explained his own method:

‘The study of other peoples’ cultures... involves discovering who they think they are, what they think they are doing, and to what end they think they are doing it... It involved learning how, as a being from elsewhere with a world of one’s own, to live with them.’⁴⁴

⁴² Levi-Strauss, in The View from Afar, trans. J. Neugroschel and P. Hoss, Basic Books, New York, 1985, quoted in Geertz, above, at page 71.

⁴³ Geertz, Available Light, above, p.70-71

⁴⁴ Available Light, above, p.16