

# SOME CUSTOMARY LEGAL CONCEPTS IN TRADITIONAL MĀORI MIGRATION ACCOUNTS

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*Cet article retrace, au travers de trois éléments de la tradition orale Maori, quel a été le phénomène migratoire de cette population qui les a conduit de la Polynésie Centrale jusqu'en Nouvelle-Zélande (Aotearoa).*

*La réflexion et l'analyse portent plus particulièrement sur les sources et les expressions retenues dans ces traditions orales pour pouvoir ensuite dégager les principes du droit coutumier que les narrateurs ont voulu illustrer et intégrer dans ces traditions orales.*

*En guise de conclusion, les auteurs font quelques suggestions sur les enseignements que l'on peut tirer en règle générale, des recherches et des études multiculturelles.*

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## **I INTRODUCTION**

This paper began with an interest in whales – ngā parāoa. We were intrigued by the recurrence in several traditional migration accounts of the finding of stranded whales by the arriving parties in Aotearoa and the consequential disputations 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?

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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.

In this paper we 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 the reader are:

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

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 narratives which are often treated as the principal written record of the stories of the great migrations across the Pacific to the new land of Aotearoa. The researcher's concern was to focus on the original Māori source rather than on Grey's syntheses. The texts in the following section, and the comments on them, are the result of Joeline's researches.

## ***II THREE DISPUTES FROM TRADITIONAL ACCOUNTS***

Most tribes of Aotearoa trace their origins, and their links to one another, to the waka in which their ancestors arrived in the new land. The 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 explicated in traditional forms such as kōrero, waiata, ingoa, whakairo, whakataukī, haka, etc, which were, and continue to be, performed by those with the knowledge to do so appropriately.

Margaret Orbell has described the function of Māori migration traditions in this way:<sup>1</sup>

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1 Orbell, Margaret 'The Religious Significance of Maori Migration Traditions' *Journal of the Polynesian Society*, Vol 84 (1975) 346.

(they) served to explain and justify tribal and sub-tribal origins, to establish and name landmarks within the tribe's territory, and to sustain men and women in their everyday lives by providing precedents for them to follow and ritual chants to ensure their success. A tribe's migration myth must have been at least as important to it as were those other myths which it shared with the rest of the country.

During the mid to late 1800s many of these accounts, songs, etc, were 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 three accounts.

### **III METHODOLOGY**

Before discussing the accounts, the process by which they were chosen must be explained. Simmons 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 of an informant and/or recorder can be judged:<sup>2</sup>

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 kin group, or for use in land court proceedings.

There are several indicators as to the authenticity of a Māori account that should be sought out.<sup>3</sup> A genuine account would appear in a number of different and early sources, it would also be apparent or referred to within Māori songs, chants, and/or other traditional mediums of expression. Another good indication of an account's validity would be if it persisted to current times, as this would point to the acceptance by Māori of the values and principles it carries.<sup>4</sup> Furthermore, whakapapa can provide a relative timeline by which the account may be checked to prove the account's legitimacy or otherwise. However, as McEwen warns, sometimes the whakapapa that Māori informants wrote for or passed on to European writers were deliberately altered by them to protect it from potential abuse.<sup>5</sup>

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2 Simmons, DR *The Great New Zealand Myth* (A H & A W Reed Ltd, Wellington, 1976) 9.

3 Simmons, above n 2, 11-12.

4 Simmons, above n 2, 10.

5 McEwen, JM, *Rangitāne: A Tribal History* (Reed Methuen, Auckland, 1986) vii – ix.

Throughout the research process Simmons' criteria and McEwen's suggestions have been closely followed in order to sort through the various differing versions of each account. However, even Simmons points out:<sup>6</sup>

...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.

Interestingly, some of the elements of two of these stories were found in several different waka traditions, sometimes with the actors having names peculiar to the waka concerned. Although these accounts may have met several of Simmons' criteria, they were left to the side in favour of the account that not only met those criteria but also accorded with our past experience and knowledge in this area.

#### ***IV FIRST EXAMPLE: TE ARAWA CANOE AND THE KURA OF MAHINA***

The following is our chosen version of this account:

Māori text <sup>7</sup>	English text <sup>10</sup>
<p>Ka tata mai ki uta, kite rawa mai ki te pohutukawa o te tahatika e ura atu ana, ehara tau ana te tututupo ki te wai. Ka tahi tetahi o ngarangatira o te wakara ka karanga ake, e! kua nui ake te kura o tenei kainga i te kura o Hawaiki, ka panga a hau i aku kura ki te wai, ehara, panga atu aua kura ki te wai, ko te ingoa te tangata ko Tauninihi, nana i panga atu a Taiwhakaea. Urawa mai ra ki uta, eha kua paatu nga ringa ki aua pohutukawa, ana horo noa iho, ka tahi ratou ka mahara he puawai rakau enei mea,</p> <p>Ka raruraru nga rangatira o runga ia te Arawa mo te maumau ranga o a ratou Kura i panga ai ki te wai...<sup>8</sup></p> <p>[Also, in order to further elaborate upon this</p>	<p>As they drew near to land, they saw some Pōhutukawa trees on the sea-coast, glowing with red flowers, and the still water reflected back the redness of the trees. Then one of the chiefs of the canoe called out, "Hey! the <i>kura</i><sup>11</sup> are much more plentiful in this country than in Hawaiki, I'm going to throw my <i>kura</i> in the water"; and, so saying, he threw them into the sea. The name of that man was Tauninihi; and the name of the kura he threw into the sea was Taiwhakaea. The moment they got on shore they went to touch the Pōhutukawa, but no sooner did they touch them than they fell to pieces; and they realised that these <i>kura</i> were nothing but tree blossoms. The chiefs on board the Arawa were troubled that they should have been so foolish as to throw</p>

6 Simmons, above n 2, 10.

7 Te Rangikaheke, *Tūpuna*, 1849. Originals held in the Auckland Public Library: Grey Collection, Māori Manuscripts, GNZMMSS 44, 926.

8 The handwritten Māori texts have been reproduced as they appear in the records, although crossings-out and other markings have been omitted.

<p>event the following has been provided:]</p> <p>Māori text<sup>9</sup></p> <p>'...a kitea ana nga Kura a Tauninihi ki te one o Mahiti na Mahina i kite. Koia tenei pepeha, mo te mea kite, e ka kitea te taonga makere, kaore e ho atu e a hau tate mea ko te parekura [sic] kite a Mahina...</p> <p>...rongo rawa ake kua kitea, tae rawa atu ki te tiki kihai i riro mai a mau tonu nei hei whakatauki ki mamatou e takoto mai nei ano aua kura kiia te Whanau apanui, a tae noa mai ki tenei ra,....'</p>	<p>their kura into the sea...</p> <p>English Text<sup>12</sup></p> <p>'...and the <i>kura</i> of Tauninihi were found by Mahina on the beach of Mahiti. Hence the proverb for anything found, that has been treasured and lost by another person, "I will not give it up, it is the <i>kura</i> which Mahina found...<sup>13</sup></p> <p>...As soon as Tauninihi heard they had been found, he went to retrieve them, but they were not given back to him, and, this story has been preserved for us in a proverb. The <i>kura</i> are still with the Whānau a Apanui people nowadays....'</p>
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## V 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 Maori*<sup>14</sup> which was then republished in *Nga Mahinga a nga*

9 Te Rangikaheke, *Maori Religious Beliefs and Observances; Genealogy; Accounts of the Ancestors; Waiata and Whakatauki* 1849. Originals held in Auckland Public Library, Grey Collection, Maori Manuscripts, GNZMMSS 81, p 61.

10 Based on the translation by Grey, Sir George, *Polynesian Mythology, and Ancient Traditional History of the New Zealand Race, as furnished by their Priests and Chiefs* (John Murray, London, 1855) 142-3, with some modifications by Joeliee Seed-Pihama, who acknowledges the assistance of Dr Richard Benton with all three translations in this paper while absolving him of all responsibility for any errors.

11 'Kura' is defined by Williams HW *Dictionary of the Maori Language* (first published 1844, reprinted 2005, Legislation Direct, Wellington)157-8, variously as:

Red, glowing; Ornamented with flowers; Precious; Redden, paint red; Red feathers; Treasure, valued possession, darling.

12 Translation by Joeliee Seed-Pihama.

13 Neil Grove and Hirini Moko Mead *Ngā Pēpeha a ngā Tūpuna* (Victoria University Press, Wellington, 2001) 91,105,174, 276, 281, 292, and 375. The 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. It is also used in response to someone trying to regain possession of an object previously abandoned.

14 Grey, Sir George *Ko nga Moteatea me nga Hakirara o nga Maori* Robert Stokes, Wellington, 1853, p 1xii.

*Tupuna Maori*<sup>15</sup> and the translated version in *Polynesian Mythology, and Ancient Traditional History of the New Zealand Race, as furnished by their priests and chiefs*.<sup>16</sup>

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 Rangitīhi. 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 material as part of his work with Grey, in total he produced 21 manuscripts, and contributed to 17 more, all of which he wrote before 1854.<sup>17</sup>

Other sources of this account include one recorded by Edward Shortland in 1843, from an elderly Te Arawa priest, named Tatahau.<sup>18</sup> 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 reliability.<sup>19</sup> In addition, Tatahau refers to Rātā trees in his account, not Pōhutukawa trees which raises another reliability issue.<sup>20</sup> Another account of note was written by Eruera Te Uremutu.<sup>21</sup> Simmons<sup>22</sup> gives the date it was written as 1846; however the names given in the whakapapa indicate sometime between 1860 and 1880<sup>23</sup> 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. Jones<sup>24</sup> briefly refers to the 'kura' incident, claiming Tai-ninihi, Maa-ihiihi and Haa-popo as the actors. He also includes Tai-ninihi as a member of the Tainui canoe.<sup>25</sup> However, it is not clear who

15 Grey, Sir George *Ko Nga Mahinga a Nga Tupuna Maori* George Willis, London, 1854, 74.

16 Grey, 1855, above n 10, 142-3.

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

18 Shortland, Edward *Traditions and Superstitions of the New Zealanders* (Longman, Brown, Green, Longmans & Roberts, London, 1856) 11.

19 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.

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

21 Te Uremutu, Eruera, 1860-1880 *Some Arawa Legends* Alexander Turnbull Library, Wellington, MS-Papers-1187-191.

22 Simmons, above n 2, 160.

23 See the provenance notes on the record page of this manuscript.

24 Jones, Pei Te Hurinui *Nga Iwi o Tainui* (Auckland University Press, Auckland, 1995) 36.

25 Jones, Pei Te Hurinui, 29.

his source was for this information and further investigation would be needed to determine the authenticity of this version.

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

## ***VI CUSTOMARY PRINCIPLES ILLUSTRATED BY THE STORY OF MAHINA'S ACQUISITION OF THE KURA***

In a phrase – 'finders keepers, losers weepers'. As Anne Salmond's careful account of the transactions between Captain Cook and his men and their Polynesian hosts on their visits to Tahiti and the Society Islands in the 1760's and 70's reveals, the 'ura, or 'red feathers', were considered the most prized personal possessions and a kind of currency with which substantial items could be purchased.<sup>26</sup>

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. Māori customary law is full of indications that, to be fully effective, a theoretical right (take, or root) must be accompanied by continuous occupation. The requirement is captured in the well-known concept of ahi kā – the burning fires of occupation.

The Ngāti Porou lament 'He Tangi Mo Taneuarangi' contains a reference to 'Te Kura a Mahina', and Sir Apirana Ngata's collection 'Nga Moteatea'<sup>27</sup> explains the allusion, outlining one way in which rights to taonga could be lost and gained in this way.

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26 Anne Salmond *The Trial of the Cannibal Dog* (Allen Lane, The Penguin Press, London, 2003). The 'ura were associated with the God Oro, whose temple was Taputapuata. The Tahitian chief Tu asked the departing Cook in 1777 to tell the King of England to send another ship with red feathers, axes, muskets and horses' (365).

27 Sir Apirana Ngata *Nga Moteatea*.... Part I, published for the Polynesian Society by AH and AW Reed, 1928, reprinted 1974, 115. We are grateful to our friend and colleague Paul Meredith for drawing our attention to this reference.

## VII SECOND EXAMPLE: DISCOVERY OF A STRANDED WHALE

The following is our chosen version of this story:

Māori text <sup>28</sup>	English text <sup>29</sup>
<p>'Ka korero ki a taraia he waka, ko te Arawa to mua, muri iho. ko Tainui, ko Kurahaupo, ko Takitimu, ko Aotearoa, ko nga waka enei i hoe mai ai nga tupuna, ka tuia a Tainui, ka mate te tamaiti a Manaia, ka tanumia ki nga marama 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 ruahine, kaore he nukarau na Tamatekapua, ka tangohia a Ngatoroirangi ki runga i a te Arawa, ko Tainui ke tona waka, ka hoe mai a te Arawa, no muri ko Tainui...</p> <p>...Ka u a te Arawa ki Whangaparaoa ka kitea te ika moana e pae ana i uta, ka u mai hoki a Tainui ki reira ano, ka tautohetohe ki ta raua ika, ka mea a Tainui nana te ika, ka mea a te Arawa nana te ika, katahi ka titiro ki nga toko o te tuaahu, ko ta Arawa he maha, nga toko o tana tuaahu, ko ta Tainui i tunua ki te ahi, kia hohoro ai te maroke, ka herea te taura ki te kauae o te ika, no reira i riro ai i a Tainui ta raua ika....'</p>	<p>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 <i>tapu</i> o Te Arawa, they also called out to Kearoa to come and remove the <i>tapu</i>.<sup>30</sup> 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...</p> <p>...The Arawa arrived at Whangaparaoa and a sea fish was seen lying on the shore. The Tainui arrived there too and they disputed over 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....</p>

## VIII DISCUSSION OF SOURCES FOR THE 'WHALE DISPUTE' STORY

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

28 Te Rangihaeata *Genealogy and an account of the migration to, and early movement in New Zealand* 1851. Originals held in the Auckland Public Library: Grey Collection, Māori Manuscripts, GNZMMSS 77, 10-11.

29 This translation is based on Simmons, above n 2, 169, however some significant changes have been made to make the translation suit a more contemporary audience.

30 Translator's Note: 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.



Rangihaeata and written by Matene Te Whiwhi in April, 1851. Grey published part of this version in *Nga Mahinga a nga Tupuna Maori*<sup>31</sup> 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 chiefs*.<sup>32</sup>

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 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 recognise that these accounts are significant within their respective tribes. Whether they 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 treated with respect.

Another version of this account has been written by Hoani Nahe,<sup>33</sup> and published by John White along with a version of Grey's 'The voyage to New Zealand' in the records of Parliament.<sup>34</sup> Although these versions may seem more in-depth and easier to read, they are secondary sources of the worst kind. White has clearly manipulated both versions to produce a more story-like text.

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.

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31 Sir George Grey, above n 15, 75.

32 Sir George Grey, above n 10, 143.

33 Hoani Nahe *Account of the Emigration of the Maoris from Hawaiki* 1860. Held in the Auckland Public Library, NZ MS 713.

34 John White "Legendary History of the Maoris" (1880) AJHR, Vol III, G-8.

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 around 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 had a significant relationship with Sir George Grey and visited Ōtaki to farewell Grey in 1853.<sup>35</sup>

Further interesting information on the whale tradition was given during a wānanga with our colleague, Dr Tui Adams.<sup>36</sup> In 1990, Dr Adams travelled with the Māori Queen, Dame Te Arikinui Te Atairangikaahu to the Kauae Tangohia Marae in Whangaparaoa to meet up with Pene Ruruku, who had built a waka and along with some others was sailing from Nelson to Whangaparaoa as part of the 150<sup>th</sup> anniversary of the Treaty of Waitangi celebrations. Tui Adams describes his visit as follows:

...The name of the whareniui there was 'kauae tangohia' and I believe it had something to do with the fish that was stranded on the beach... I believe it was a tohorā because the fish that is depicted on the wall of the whareniui 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....

This clearly proves the persistence of this account through to present times, it also provides us with information from a reputable elder who has seen the area concerned and who had heard this account first-hand, orally – which is the traditional Māori way of passing on knowledge.

## ***IX CUSTOMARY PRINCIPLES ILLUSTRATED BY THE DISPUTE ABOUT 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.

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35 Ballara, Angela. 'Te Rangihaeata - 1855', *Dictionary of New Zealand Biography* <http://www.dnz.govt.nz/>.

36 Dr Tui Adams (15<sup>th</sup> July, 2004). *Pū Wānanga Seminar* Te Awamutu, at Te Wānanga o Aotearoa, Head Office. Attended by Joeliee Seed-Pihama and Robert Joseph. Recording held by Te Mātāhauariki Institute at the University of Waikato.

The conduct of the contenders for the rights to the stranded whale 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 legal advantage. Not only is the honoured place of the 'trickster' in Polynesian thought recognised, but a more general calculation is asserted. The price of having 'rules' is that they may be capable of exploitation and may not always produce 'justice' in an abstract sense.

Of course, if rules are so open to manipulation 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 perilous and so incompatible with social life that the openness of rules to manipulation and deviation from abstract justice is a price worth paying.

Customary law relating to whales continued to evolve in New Zealand 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*.<sup>37</sup> 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 for the whale carcass, 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 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 CJ 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:<sup>38</sup>

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...

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37 *Baldick and Others v Jackson* (1910) 30 NZLR 343.

38 *Baldick v Jackson*, above n 37, 344-345.

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:<sup>39</sup>

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.

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 Māori claimants and their customs? The recognition of Māori customary rights in respect of stranded whales continues in modern times, as may be seen in various agreements and protocols entered into between tribes and the Department of Conservation to ensure co-operation in dealing with stranded whales, and to recognise the priority of the tribal claim to whale-bone and teeth for carving and ornamental purposes.<sup>40</sup>

**X     *THIRD EXAMPLE: THE DEATH OF KAE IN RETRIBUTION FOR EATING TINIRAU'S WHALE***

Although this third story does not directly concern the migration of Māori to Aotearoa, it is found in recognisable variations in several Polynesian centers, demonstrating that it was part of the Polynesian stock of traditions pre-dating the Māori migrations. For example, Handy gives an account by 'Haapuani of Hivaoa' in the Marquesas Islands, collected in 1920-21, in which Kae travels on the great whale 'Tunua-nui' but fails to follow instructions and leaves the whale stranded and dead, to be cut up by people there.

In a sequel, however, Kae's son travels on a baby whale, 'Tunua-iti', which feigns stranding and destroys those who attempting to cut it up – whale's revenge!<sup>41</sup>

Māori text <sup>42</sup>	English Text <sup>43</sup>
Katahi ano Tuhuruhuru ka puta ki waho ka rapu	Tuhuruhuru was born and Tinirau searched for

39 *Baldick v Jackson*, above n 37, 345.

40 See for example the 'Protocol for the Management of Marine Mammal Strandings in Ngatiwai Rohe', signed on 29 July 1998, and the related permit issued under the Marine Mammals Protection Act 1978 for the Ngatiwai Trust Board to 'Remove the bone and teeth from dead marine mammals stranded in Ngatiwai rohe'.

41 ES Craighill Handy 'Marquesan Legends' (Bernice P Bishop Museum, Bulletin 69, Hawaii, 1930) 60.

42 Te Rangihaeata *Genealogies and Traditions* 1852. Original held in the Auckland Public Library, GNZ MMSS 46, 31-7.

43 Translation by Joeliee Seed-Pihama.

<p>a Tinirau ki te tohunga hei tohi, ka tikina i a Kae hei tohi mo Tuhuruhuru, ka tae mai a Kae, ki te kainga o Tinirau, ka mutu te tohi, ka karangatia e Tinirau tana mokamokai a Tutunui, i waho i te moana e haere ana, ka eke mai ki uta, ka tikina atu ka tapahia mai tetahi taha o taua ika nei, ka taona ma te tohunga ma Kae, ka rongo a Kae i te reka, ka mea ki te hoki ki tona kainga ki Tihi o Manono, ka hoatu he waka hei hokinga mona, kaore 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 mona, ka ki atu a Tinirau ki a ia, e tata koe ki uta, e oiioi te ika, e rere ki te taha katau, na tino rerenga o Kae, ka tata ki uta, ka oiioi te ika, noho tonu a Kae kaore hoki i rere ki raro, ka ki nga pihapiha o te ika i te one pu i te [sic] ka mate, ka toia e Kae ki uta hei kai mana, ka tupu te pakanga ki tena iwi, ki te aitanga a te poporokewa, ka taona taua ika nei ki te umu, ka rautaongia ki te koromiko, e mau na te hinu i te koromiko, koia tona whakatauki tena te kakara o Tutunui, a ka tatari a Ka rongo a Tinirau raua ko tana wahine ko Hineiteiwaiwa, kua mate te mokai a ta raua tamaiti a Tuhuruhuru, kua pau i a Kae, katahi ka utaina te waka o Hineiteiwaiwa, rupeke ake ki runga ki taua waka nei hokoru,</p> <p>Ko Hineiteiwaiwa, Ko Raukatauri Ko Raukatamea</p>	<p>a priest to perform the birth ceremony. Kae was fetched to be the priest for Tuhuruhuru's birth ceremony, in due time he arrived at Tinirau's home and performed the ceremony. Tinirau then called to his pet, Tutunui, who was in the sea swimming about, to come ashore. Tinirau proceeded to cut a slice from the whale and cooked it for the priest, Kae. Kae tasted its sweetness and said he wanted to go 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 fish, Tutunui, for he now knew the savoury taste of this fish. Tinirau lent Tutunui to Kae as a mode of transportation, but informed him, when you get near the shore, the whale will shake itself, and you must jump off to the right.</p> <p>Kae travelled a long way and when they came close to the shore the fish shook itself, but Kae stayed seated, he didn't get off, consequently the fish's gills filled with sand, and it died. He was then dragged by Kae to the shore to be eaten, and so the war with the people of Te Aitanga a Poporokewa began. The fish was cooked in an oven, wrapped in Koromiko leaves which hold in the fat. This is their proverbial saying, 'tēnā te kakara o Tutunui'.<sup>44</sup></p> <p>It was not long before Tinirau and his wife, Hineiteiwaiwa learnt of the death of their child's pet. He had been eaten by Kae. The canoe of</p>
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44 This proverb is noted in Grove and Mead, above n 13, 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.'

45 This proverb is noted in Grove and Mead, above n 13, 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.'

<p>Ko Itiiti.</p> <p>Ko Rekareka.</p> <p>Ko Ruahauatangaroa,</p> <p>Kaore etehi i mohiotia, Ka ki atu tona tuahine ki a Tinirau – He aha te [?], ka ki atu ia he niho [?] na Ka hoe ratou, ka tae ki te kainga o Kae, ka hui tera iwi ki te matakitaki, ka ahiahi, ka ka te ahi ki te whare o Kae, ka hui te tangata ki roto, ka ki, ko teteahi taha i te manuhiri, ko to Kae moenga kei te take o te poutokomanawa, ka whakakitea nga mahi a Raukatauri i reira, te haka, te waiata, te putorino, te koauau, te tokere, te ti ringaringa, te ti rakau, te pakuru, te papaki, te porotiti, mutu katoa enei mea kaore a Kae i kata, na te pirori katahi ano a Kae ka kata, ka kitea nga kikokiko o Tutunui e mau ana i nga niho, he niho tapiki hoki tona niho, ko ta maua nei whakatauki tenei e mau nei, ka rongu te tangata ki te kupu a teteahi tangata ka pai, ka kata, ka mea atu teteahi ka kata Kae.</p> <p>te kitenga ano e nga wahine ra i nga kiko o Tutunui e mau ana i te niho o Kae, ka tineia te ahi, ka tae a Kae ki nga paua, ka whakapiria ki nga kanohi, kia ki atu ai nga wahine ra kei te oho ia. Ka rotua te whare e nga wahine ra, ka whakamoemoea, kia tupuatia ai a Kae e ratou, ka warea te whare katoa e te moe, me Kae hoki...</p> <p>...haere atu ana a Kae ia Hineiteiwaiwa raua ko Raukatauri, ka tae ki to raua nei kainga, ka kawea a Kae ka whakataria ki te poutokomanawa o tona whare Ko tona whare he whare ko pae, ko to Tinirau he whare paikea, ka ako atu a Tinirau ki nga tangata o te kainga, 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 pa te karanga, ko Tinirau, ko Tinirau, ka maranga ake a Kae, ka noho a</p>	<p>Hineiteiwaiwa was then loaded, and boarded by Hineiteiwaiwa, Raukatauri, Raukatamea, Itiiti, Rekareka, Rua-hau-a-Tangaroa, and others who are not known.</p> <p>Tinirau's sister asked him, what is the [?], to which he replied, it is teeth [?]. They paddled off and soon 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, filling one side with visitors. 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. However, Kae did not laugh, and so they rolled around like balls until all of a sudden he laughed. They then saw the flesh of Tutunui stuck between his teeth, and that his teeth were crooked. This is our proverb, when a person listens to someone telling a great story and laughs, we say, ka kata Kae.<sup>45</sup></p> <p>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...</p> <p>Kae was carried off by Hineiteiwaiwa 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 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</p>
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Tinirau ki te roro o te whare Ka oha atu ki a Kae, tena koe, ka mea atu ano ia, na wai hoki koe i ho mai ki konei, Ka mea atu a Tinirau, tena tirohia te ahua o tenei whare, ka titiro a Kae, ka mea atu kia Tinirau, ko toku whare ano tenei, ka ki atu a Tinirau, kei whea te matapihi o tou whare, ka tiro tiro a Kae, kua rereke te ahua o te whare, ka mohio ia koia ano no Tinirau tenei whare, ka tuohu ia, Ka toia mai ki waho ka patua ka mate a Kae.

loudly call, here comes Tinirau, here comes Tinirau. The next morning, when Tinirau's people saw him coming, they called, here comes Tinirau, here comes Tinirau, and Kae woke up. Tinirau sat down at the front end of the house, and said to Kae, hello, and then asked, 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 replied, where is the window placed in your house? Kae looked around, saw that the appearance of the house was different and realised that the house belonged to Tinirau, and so bowed his head. Kae was then dragged outside, and killed.

## ***XI DISCUSSION OF SOURCES FOR THE KAE STORY***

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 manuscripts<sup>46</sup> which he then published in *Nga Mahinga a nga Tupuna Maori*.<sup>47</sup> 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 Ropiha<sup>48</sup> 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.

For this account, Grey's translation was discarded and we penned our own<sup>49</sup>. 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 specifically<sup>50</sup>, he has written it as though for an audience of children, even though the original is not written in that register.

46 Grey, Sir George, *Mythology and Traditions of the New Zealanders* before 1854. Originals are held in the Auckland Public Library, GNZ MMSS 29, Vol I. pp 51-9.

47 Grey, Sir George, above n 15, 36-8.

48 Hami Hone Ropiha, *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*, before 1854. Originals held in the Auckland Public Library, GNZ MMSS, 10.

49 Translation by Joeliee Seed-Pihama who holds a Postgraduate Diploma in Translation and Interpretation.

50 Grey, Sir George, above n 10, 90-8.

## ***XII SOME CONCLUSIONS AND SOME OBSERVATIONS ON CROSS-CULTURAL STUDY***

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.

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 principles 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 'finders keepers, losers weepers' doctrine tells us that rights can be lost by neglect or abandonment, thus establishing the dynamic potential of rights. The 'priority principle' has an obvious and general relevance to relations between first settlers and subsequent arrivals. The wrong exemplified by Kae's ingratitude and breach of trust 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 without the consent of the giver.

A second conclusion connects the analysis of the traditional accounts selected in this Paper with Te Mātāhauariki 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 '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.

We will defend the positions inescapably adopted by the mission statement in these debates, and we observe that, for our Institute, this is not some philosophical 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, hoped for, and indeed contracted, by our founders and ancestors may depend. 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 theories and new models.



Both the 'pluralism' and 'relativism' debates have been thoughtfully, and wittily, addressed by the anthropologist Clifford Geertz in a recent series of late-career essays.<sup>51</sup>

A thumbnail sketch of 'the relativism debate' looks something like this. Some observers – the 'relativists'- think that arrangements and values found in cultures can only be understood and assessed in a manner 'relative' to, and in the context of, the particular society. They doubt that 'universal' values and standards can be proposed against which cultures could meaningfully be judged. Their critics – the 'anti-relativists'- retort that this approach paralyses the judgment of the observer, who is left in a moral and cognitive vacuum devoid of standards, in which all seems permitted and nothing may be denounced. They assert that '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:<sup>52</sup>

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.

Geertz introduces a second essay, called "The Uses of Diversity", with an interesting account of Claude Lévi-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'.<sup>53</sup>

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

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51 Clifford Geertz *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton University Press, 2000).

52 In "Anti Anti-Relativism" *Available Light* above n 51, 65.

53 Lévi-Strauss, in *The View from Afar*, trans J Neugroschel and P Hoss (Basic Books, New York, 1985) quoted in Geertz, above n 51, 71.

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

Geertz describes Lévi-Strauss' metaphor for the possibilities of cross-cultural observation and comprehension:<sup>54</sup>

We are, says Lévi-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".<sup>55</sup>

Geertz himself is an 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.

There, perhaps, lies the meeting ground between cultural perspectives. Cross-cultural judgments are not eliminated, indeed they are inevitable, but they require a careful and rigorous preparation by the judge.

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54 Geertz, *Available Light*, above n 51, 70-71.

55 *Available Light*, above n 51, 16.

**GLOSSARY**

Ahi kā (roa)	Title to land by occupation
Aotearoa	Māori name for New Zealand
Haka	Dance
Hapū	Pregnant
Ingoa	Name
Kauae Tangohia	This is the name of a tribal village
Kawhia	Place name
Kōrero	Story, narrative, discussion
Kura	Treasure, valued possession
Māori	Native race of New Zealand
Marae	Meeting area of whānau or iwi
Ngā	Plural of 'The'
Ngāti Kereru	Tribal name
Ngāti Kimihia	Tribal name
Ngāti Rangitihi	Tribal name
Ngāti Rangiwehewehi	Tribal name
Ngāti Te Maunu	Tribal name
Ngāti Toa	Tribal name
Ōtaki	Place name
Parāoa	Sperm whale
Pōhutukawa	A tree with red blossoms
Rātā	A forest tree with red blossoms
Rotorua	Place name
Tainui	Name of canoe and its associated tribes
Take	Root, base, cause, basis for claim
Tapu	Under restriction, sacred
Te Arawa	Name of canoe and its associated tribes
Te Moana nui a Kiwa	Pacific Ocean
Tohorā	Whale (general) or southern right whale
Waiata	Song
Waikato	Place name
Waka	Canoe
Wānanga	Seminar
Whakairo	Carving
Whakapapa	Genealogy
Whakataukī	Proverb
Whangaparaoa	Place name
Whareniui	Meeting house

