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Law Making Music

“One reason we turn to painting and music and nature is in fact to move, or to try to move, beyond the world of our languages.” – James Boyd White, *The Edge of Meaning*.¹

There is something hopeful in the fact that nature makes sounds and humans make music. Part of the hope lies in the fact that human appreciation of music opens up a way for human appreciation of nature. Another part lies in the fact that the appreciation of sound as music connects human to human in ways that cannot be achieved by words.

When writing at the interdisciplinary intersection of law and music, articulation is everything. To articulate means to join parts together. It works in a way that does not freeze the parts, but frees them. The elbow, for example, articulates the upper and lower arm to enable movement. Articulation also makes a difference between the parts even as it unites them. The elbow, far from eliding the distinction between the parts, is the very thing that makes the distinction between the upper arm and lower arm as elements of the whole. So it is with articulate speech and writing. The clear distinction of one thought from another within an extended speech or text is only possible where distinct phrases are appropriately connected. Many years ago, Marc Stauch, a jurist and composer, said to me that in his view the key to clear expression is the appropriate use of conjunctions – the ‘and’, ‘or’, ‘if’, ‘but’,

¹ James Boyd White, *The Edge of Meaning* (Chicago: Univ of Chicago Press, 2001) 1. I would like to record at the outset my thanks to the careful reviewers of this piece, anonymous and known; including my colleague John Snape for his detailed suggestions. I also acknowledge the support of the Leverhulme Trust through the award of a Major Research Fellowship.

‘because’, ‘therefore’ and so forth. The elegance and clarity of exposition is certainly to be found not only in the clause as a closed part of linguistic expression, but also, and perhaps more so, in the words and phrases by which clauses are joined. When engaging in any interdisciplinary endeavour – including the study of law and music – attention to the joints becomes especially significant. We must attend not only to the law and to the music, but to the “and”. Where an interdisciplinary endeavour crosses cultural contexts – for instance from indigenous to colonial, or ancient to modern – the ligature comes under extreme stress and is at risk of becoming a point of weakness and pain; injury is always threatened. It is, though, important to attend to the elbow if one is going to work the arm. If it matters to work across law and music and across different cultural conceptions of both, it is pivotal to engage with the joint. One way of expressing my concern in this essay is to say that it is concerned with the nature of the ‘fit’. I have approached that same concern in other ways before, for example by attending to the fit between disciplines; and to the fit between strict law and the shape of life that judges achieve through the flexible articulation of equity. The present aim is to attend to the practice of joining as a mode of making. To express that aim in the language of music, it might be said that I am concerned to appreciate the craft of composition with special reference to the art of harmonization.

The etymological connection between “art” and “articulation” is obvious enough, but the connection between “articulation” and “harmonization” is more subtle and just as strong. Derived from the conjectured Proto-Indo-European (PIE) root **ar-* “to fit together”, ἀρμονία (“armonia”) in the Greek indicated “joining, joint, agreement”.² It denoted musical concord and concord between all the arts of the Muses (Euripides writes that “the nine Pierian Muses

² Oxford English Dictionary.

gave birth to fair-haired Harmonia”),³ but also such activities as joining planks to make a ship.⁴ Related to *harmos*, the “fastenings of a door; joint, shoulder”;⁵ the sense in both shoulder and ship is of joining parts for the purpose of producing movement.⁶ Joining is not the end point, but the point from which movement becomes possible. Harmony naturally came to be employed to describe the quality of a society in which all parts live together in civil peace. It is often still so employed to describe the legal ordering of society, although jurists frequently make the mistake of supposing that harmonization (as in the harmonization of laws between different nations) means unification by the removal of differences rather than the quite opposite project of unifying through the accommodation and articulation of differences.⁷ The word “order” is another word cognate with the PIE root **ar-*, and is key to

³ *Medea* in D. Kovacs trans., *Euripides: Cyclops. Alcestis. Medea* Loeb Classical Library 12 (Cambridge, MA: Harvard University Press, 1994), line 830.

⁴ Herodotus *Histories* 2.96.2.

⁵ H. G. Liddell and R. Scott *A Greek-English Lexicon* (Oxford: Clarendon Press, 1940). In relation to the hinge of a door, see, for example, Euripides *Medea* (n.3 above) line 1315.

⁶ The knee is another significant locus of articulation in law. For example, in the feudal ceremony of homage that stood at the heart of feudal property relations in respect of land, the vassal was required to kneel and kiss the hand of his liege lord. For a more ancient example see T. Zartaloudis, “*Hieros anthropos* – an inquiry into the practices of archaic Greek supplication” (2019) 13:1 *Law and Humanities* 52-75.

⁷ I commend to the reader Robert Leckey’s rhapsody on the form and substance of legal harmonization (“‘Rhapsodie Sur La Forme Et Le Fond De L’Harmonisation Juridique’ (2010) 51 *Les Cahiers de Droit* 3–49) as an example to the contrary. It takes seriously the musical sense of harmonization of different parts.

connecting law and music within our present concern for the practice of joining. Making music depends upon the harmony of parts; making laws in parliament depends upon the ordering or articulation of articles within a legislative whole. The etymology of parliament as a place of “speaking” (*parlement*) reminds us that parliament is a workshop of acoustic articulation. Judges also make laws in court through a process of articulation, not only in the sense that articulate speech is essential to adjudication (etymologically “speaking justice”), but also in the sense that judgment involves a fitting of law to the materials of life. In the present essay I will not neglect the courtroom, but my main focus will be on the forum of the legislative chamber.

The word “chamber” suggests isolation and exclusion, but if exclusionary walls are implied then so too are inclusionary doors. Auditory and vocal chambers – whether they are chambers of the human head, chambers of parliament, judges’ and barristers’ chambers, “or” (I do not use “or” to imply that these examples are mutually exclusive) the chambers in which chamber music is played – cannot work without connection between inside and out. The principal actors and the audience must have means of ingress and egress. The door or threshold is an architectural point of articulation; joining the outside to the inside even as it marks the line of separation between them. Even when the door is closed in the doorway, it still stands as a sign of access, and sound still seeps through, however muffled, from one side to another. I am dwelling on the point of connection between inside and out in order to emphasize the part played by public or audience participation in the production of legislative harmony. The argument is that we should see the public as co-producers of the parliamentary music and as joint makers (and joint-makers) of the law. The question of public participation is important, because, however much the voice of the public is distorted within parliament, the House of Commons is ultimately answerable to the public as an echo is answerable to its source. The voting public, not their parliamentary representatives, are the continuous

unifying authority of the law. As Paul W. Kahn puts it: “Individual legislators may disappear from social memory, but the law continues to be our own”.⁸ Musical analogies to this phenomenon readily present themselves. For example, Martin Loughlin (writing in the context of constitutional law) discusses Carl Schmitt’s use of the choral analogy:

The song of a choir, ... [Schmitt] argues analogically, remains that same even “if the people singing or performing change or if the place where they perform changes”, because “unity and order resides in the song and the score, just as the unity and order of the state resides in its constitution”.⁹

This essay proceeds in parts, and this paragraph outlines the scheme for joining them together into what is hopefully a harmonious whole. The first part introduces an exemplary musical event that occurred in the debating chamber of the New Zealand parliament in 2017. To call it a “musical” event can only do it justice if we have an enlarged sense of music in mind.¹⁰ The second part advances a way of approaching musical appreciation as a mental

⁸ P. W. Kahn, *Making the Case: The Art of the Judicial Opinion* (New Haven: Yale University Press, 2016) 56.

⁹ C. Schmitt, *Constitutional Theory* (1928), trans. J. Seitzer (Durham, NC: Duke UP, 2008) 60, quoted in M. Loughlin, *Foundations of Public Law* (Oxford: OUP, 2010) 213. From J. Snape, “Constitution: Handel’s Solomon and the Constitution at Covent Garden” in R. Probert and J. Snape eds., *A Cultural History of Law in the Age of Enlightenment* (London: Bloomsbury, 2019) 40.

¹⁰ The enlarged Greek sense of music (*mousikē*) as the arts of the Muses is considered in Part Three.

activity which, by joining sound to musical meaning not only makes musical sense of sound but can also, in so doing, be said to participate in the process of making music. Crucial to the move from making sense of music to making music, is the notion that music is inherently a metaphorical way of thinking about sound; one in which the music metaphor operates by making sound humanly meaningful. The third part – proceeding from the idea that music operates as metaphor and, like all metaphor, produces meaning by translating abstractions into concrete conceptions – posits music as a bridge (a joint or articulation) between eras, cultures and social strata that might otherwise struggle to find meaningful points of connection and communication. Key to this idea of music as articulation is the expectation that thinking musically and metaphorically is the best way to imagine and realize harmonious relations between distinct and diverse places and people. We might ultimately understand law making music in the sense both of “law making” music and law “making music”.

Part One: Waiata in the New Zealand Parliament

The exemplary event with which I will commence, and to which we will repeatedly return, took place on 14 March 2017 in the debating chamber of the New Zealand parliament on the Third Reading of Te Awa Tupua (Whanganui River Claims Settlement) Bill (referred to hereafter as the “Third Reading”). The Bill received assent and became Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 on 20 March 2017 (hereafter the “2017 Act”).¹¹ Engaging with this legislation, the title of an article in the *Ecology Law Quarterly*

¹¹ NZ Public Act 2017 No 7.

poses this singularly stimulating question “Can You Hear the Rivers Sing”?¹² It is gratifying to read that the authors believe with me that we can answer “yes” if we allow metaphoric imagination to open our ears.

The “subject” of the Act, and we can now use that word in the official sense of a legal subject having legal personhood,¹³ is The Whanganui river in New Zealand. It is the third longest of New Zealand’s rivers, and, most pertinent in terms of its relationship to humans, it is New Zealand’s longest navigable river. It is therefore fitting that the 2017 Act settled the longest-running litigation in New Zealand history.¹⁴ The “Te Awa Tupua” in the title of the Act might be translated “Ancestral River”, and the connections run deep between the river and the lore, law and song of its human community (the Whanganui iwi).

[Te Awa Tupua] is the Māori way of viewing the river as a whole, an integrated entity from the mountains to the sea. According to Māori customs, the river consists of the water, the riverbed, the tributaries, the banks, the flats, and the catchment area. The spiritual and physical connection of the Whanganui iwi to the river can be encompassed by the tribal proverb: “Ko au te awa. Ko te awa ko au,” which means “I

¹² C. Clark, N. Emmanouil, J. Page and A. Pelizzon, “Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance” (2018) 45 *Ecology Law Quarterly* 787-844.

¹³ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 14(1): “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person”.

¹⁴ Press Release, Christopher Finlayson, “Whanganui River Settlement Passes Third Reading” (15 March 2017). The litigation spanned in various forms over 150 years, mostly in response to the physical exploitation of the River.

am the river, the river is me”. The concept behind Te Awa Tupua is that it is not a geographical location, but rather a recognition of the river system as a whole with specific interests and intrinsic values of its own.

The river iwi perceive their own health and wellbeing as intrinsically interconnected with the health and wellbeing of the Whanganui River. “The inseparability of the people and the Whanganui River underpins the responsibility of the Whanganui iwi to care for, protect, manage, and use the Whanganui River” (Wanganui District Council).¹⁵

“Te Awa Tupua” seems to this outsider to be a great expression, a prodigious articulation, that joins all parts human and natural into a harmonious expression of life. When the power of that expression encountered the opposing flow of the crown and the common law’s notion of private property, prolonged conflict ensued. In the end, Te Awa Tupua prevailed, but the peace treaty between Te Awa Tupua and the common law, which required the common law to recognize the river as a legal personality, came at the inevitable cost of Te Awa Tupua being recognised as a legal subject. That cost has at least two dimensions. First, the significant spiritual, sentimental and symbolic cost of subjecting Te Awa Tupua to human sovereignty to the extent inherent in the very act of legal recognition by the crown and common law. Second, the fact that a legal subject capable of bearing rights must also be capable of bearing responsibilities, which in the case of Te Awa Tupua are borne vicariously by its human representatives.

¹⁵ <https://sites.google.com/site/whanganuiriverrights/the-river-as-a-legal-entity>.

In a helpful summary of the legal position, as seen from the common law perspective, Christopher Rodgers of Newcastle University, UK, notes that:

The settlement, and the 2017 Act which implements it, confers legal personality on the river system, giving it a unique legal status that recognises not only the need to protect the ecosystem it represents, but also to provide a legal forum in which to implement Maori cultural and spiritual attitudes to the relationship of land and people. It can be argued this marks a new and innovative approach to protecting the environment, focusing at the ecosystem level and incorporating spiritual values in a manner unknown in environmental law in most Western legal systems.¹⁶

I entirely agree, and with that “new and innovative approach” comes a new hope for the future performance and reform of UK law. Rodgers goes on to explain that

The Act establishes the office of Te Pou Tupua. This will carry out functions analogous to those of a trustee, with an overriding duty to uphold the Te awa Tupua status, to promote and protect the health and wellbeing of Te awa Tupua, to carry out landowner functions on land held by the Te awa Tupua, and to carry out various ancillary functions of a trusteeship nature. One trustee will be nominated by the iwi with interests in the Whanganui river, and one will be nominated on behalf of the

¹⁶ C. Rodgers, “A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017” (2017) 19(4) *Environmental Law Review* 266–279. <https://doi.org/10.1177/1461452917744909> (This summary is taken from the abstract to the article).

crown. A distinctive facet of the trusteeship role of the Te Pou Tupua is their obligation to uphold the Tupua te Kawa. This is a broad concept that encompasses both the physical and spiritual aspects of the environment provided by the Whanganui river system (the ‘intrinsic values that represent the essence of Te awa Tupua’) [footnotes omitted].¹⁷

Making the point that the rights of Te Awa Tupua exercised by Te Pou Tupua bring corresponding responsibilities, Rodgers notes that “the trustees will be potentially liable in private law suits brought...for example, in private nuisance as regards the use of land”, and “[a]s a public body, their decisions will also be potentially open to judicial review”.¹⁸

What Rodgers does not mention is that the legislative Act of the New Zealand parliament was not the only performative act of making that took place in the parliamentary debating chamber on the climactic occasion of the Third Reading. The authors of “Can You Hear the Rivers Sing”? highlight the fact that members of the Whanganui iwi “sang a *waiata* in the parliamentary chamber in celebration”.¹⁹ In celebration certainly, but also, it might be said, by way of endorsement or sealing of the performance and accordingly by way of making the law complete. The music and the movement of the *waiata* can be understood to express, through the mouths and bodies of the Whanganui iwi, something like the river’s own

¹⁷ Rodgers, *ibid.*, 270. In November 2017, Dame Tariana Turia and Whanganui iwi Poukōrero (tribal historian) Turama Hawira were the first people to appointed to the office of Te Pou Tupua.

¹⁸ Rodgers, *ibid.*, 274.

¹⁹ Clark, “Rivers Sing”, at 800. Another *waiata* was sung at the First Reading of the Bill and can be accessed at www.parliament.nz/en/watch-parliament/video.

assent to being made a legal person. The waiata was delivered from the public gallery, which comprises raked rows of seating located in a balcony running along the sides of the chamber so that members of the public can look down on the legislative business taking place on the floor below. The equivalent space in the Chamber of the House of Commons in the Palace of Westminster in the United Kingdom is subtly but significantly different, for the section dedicated to the general public is located only at one end of the chamber, immediately above the main entrance. This makes clear the threshold presence of the general public as being in, but not wholly within, the chamber; an impression confirmed by the addition in 2004 of a glass screen separating that section from the rest of the debating chamber. The location of the public gallery at one end of the chamber gives the impression that the public are in a sort of minstrels' gallery, but one in which they are required to be silent. The silence of the minstrels above in contrast to the cacophony of the ministers below strikes a melancholy note in a minor key,²⁰ and one that is an affront to its musical potential.

The authors of "Can You Hear the Rivers Sing"? explain that waiata "is a traditional Māori song, sung at ceremonial or commemorative occasions, or as songs of love, lament, or mourning".²¹ Watching the video recording, one needs no translation of the words to understand that the waiata of March 2017 expresses both joyfulness and mournfulness; and

²⁰ Peter Goodrich explores the small but significant connection between ministers of state and the minstrel's art in his article "How Strange the Change from Major to Minor" (2017) 21 *Law Text Culture* 30-53, at 31 (<http://ro.uow.edu.au/ltc/vol21/iss1/3>).

²¹ Clark, "Rivers Sing", at 800. For more detail on waiata, the reader might consult *Te Ara: The Encyclopedia of New Zealand* (teara.govt.nz) and the books of Mervyn McLean, including *Maori Music* (Auckland: Auckland University Press, 1996), ch.3: "Sung Song and Dance Styles".

why should it not mourn, given the fact that in order to acquire legal personhood and the protection of legal rights it is necessary for Te Awa Tupua to become a subject of law? The authors of “Can You Hear the Rivers Sing”? attach significance to the role of metaphor in the language of the waiata, quoting from Te Ara (Encyclopaedia of New Zealand), which states that “[t]he emotionally charged circumstances under which waiata [are] composed are reflected in their highly poetic language, . . . rich with allusion, metaphor and imagery”. They emphasize the narrative nature of the waiata, noting that:

The Whanganui Claims Settlement Act is a legal instrument that sings a powerful narrative, a song strangely at one with both the Māori waiata, and the common law’s occasional turn to narrative.²²

Their emphasis on narrative as a point of commonality between the waiata and the common law is a sensible attempt to bridge the gap between the Whanganui iwi and the crown at the shortest possible point of crossing. This does not imply that our attention should be focused solely upon narrative in the form of words. The message is also to be found in the music, the movement, and in all aspects of the “mise en scène” appreciated as an integrated ceremonial whole. A lesson I am still learning after years of approaching one scholarly community (say that of music) whilst carrying the baggage of another community (say that of law or literature) is that one’s baggage always contains in its folds the fleas of the former place, and the former place inevitably has its own peculiar infections and inflections. With that caution in mind, the reader might join me in approaching the recording of the performance of the waiata on the occasion of the Third Reading. It can be accessed via YouTube and through the

²² Clark, “Rivers Sing”, at 801.

NZ parliament’s official website.²³ It made a great impression on me. I cannot translate the words into English any more than I can translate the sounds of the river itself, but that might be a significant part of what made the waiata for me, in a resolutely unromantic way, a meaningful and moving event. In a forum accustomed to formal speech and formal movement all framed by formal architecture, the music and movement of the waiata seems to flood over the legislative benches. Private property has traditionally enclosed the natural world within artificial bounds, in something like the way that built banks regulate and conduct the waters of a canal. Here, in the waiata, the waters push back and break the banks. The music of the river refuses to be conducted by the common law. No doubt every person coming to the performance of the waiata as it is reproduced in the YouTube clip will make something new of it. What is particularly exciting is its potential to make something new of us and of our law – whoever the “us” and “our” might be. For lawyers working in the traditions of Anglo-Saxon-based common law and Roman-based civil law, such a renewal will not entail fresh invention so much as the re-creation of ligatures that once articulated law to the wider life of the community, and to the whole life of the person; even to the emotional life associated with the forensically forbidden domain of feelings. The notion that law can and should operate in a logical vacuum insulated from human emotions and passions – so well expressed in the lawyer Jaggars’ outburst “Get out of this office. I’ll have no feelings here”²⁴ – is as false and dangerous as the idea of a law made entirely of feelings at the

²³www.parliament.nz/en/pb/hansarddebates/rhr/combined/HansDeb_20170314_20170315_1 2 (the entire video archive is accessible at www.parliament.nz/en/watch-parliament/video).

²⁴ Charles Dickens, *Great Expectations* (first published serially in *All the Year Round*, 1860-61) ch. 51.

expense of logic. What is required is to articulate the forensic to the feeling, or – in the words of another literary quote – to “connect the prose and the passion”.²⁵

In this spirit, Margaret Werry writes that the performance of waiata “conducts and amplifies powerful affects”, adding that “Sensitivity to these affects... is a way of registering the *appearance* of the non-human through the performance of the human”.²⁶ She refers to a speech delivered by MP Marama Fox at the Third Reading, in which she invoked elders of the Whanganui iwi who had died during the lengthy litigation leading to the Settlement of the river’s personhood:

Their waiata and whakataukī, and their karanga and karakia provide other means to understand te mana o te awa [the mana of the river]. They help describe the heart and soul from which to interpret te mana o te iwi... They told us: “Kauaka e kōrero mō Te Awa ēngari, kōrero ki Te Awa!” [*Do not talk about the River but speak to it!*] So, we too went to the River. (New Zealand Legislation 2017a, 9–10)²⁷

²⁵ E. M. Forster, *Howards End* (London: Edward Arnold, 1910), ch.22. We will return to this quote later when we discuss its relevance in the context of the novel.

²⁶ M. Werry, “What’s Left of Rights? Arendt And Political Ontology In The Anthropocene” (2019) 5.1 *Performance Philosophy* 1–17, 13 (doi.org/10.21476/PP.2019.51275). Citing Charles Te Ahukaramū Royal, “Te Whare Tapere: Towards a New Model for Māori Performing Arts.” PhD diss. (Victoria University of Wellington, 1998).

²⁷ Werry, *ibid.*, 13-14. Translations taken from <https://maoridictionary.co.nz> are as follows: whakataukī (proverbs); karanga (ceremonial call of welcome); karakia (ritual chant) mana (prestige, authority, control, power, influence, status, spiritual power, charisma - *mana* is a supernatural force in a person, place or object).

Werry senses that

The tears of the *kaumātua* and *kuia* (elders) in the gallery and the MPs on the floor as these *waiata*, *karanga*, and *karakia* were performed, the power and fullness of their performance, were not a wholly human affair; they were a very complex form of spokespersonship, a speaking to and for, a listening and interpreting, a presencing and co-presencing, a braiding of human and non-human, by which the Whanganui made an appearance...And so, a river ran through parliament.²⁸

Werry's word "braiding" depicts, better even than "articulation", the intimacy of the making process by which differences are joined together into an integrated whole through the *waiata*. Thinking in similar metaphoric terms, Mervyn McLean chose *Weavers of Song* for the title to his 1995 monograph on Polynesian music and dance.²⁹ Approaching the recording of the *waiata* as an outsider (and conscious as I am that I am talking about the River and not speaking to it), I am struck by the sense of order and authority it conveys. No doubt that sense is prompted in part by the fact that the singing is choral and the accompanying hand gestures are coordinated. The sense of order is also prompted by the presence of a leader of the Whanganui *iwi* who, holding a ceremonial walking stick (*Tokotoko*), leads and to some extent conducts the proceedings. Edmund Leach might have been correct in his generalisation that in "ordinary culturally defined ritual performance":

²⁸ Werry, *ibid.*, 14.

²⁹ M. McLean, *Weavers of Song: Polynesian Music and Dance* (Honolulu: University of Hawai'i Press, 1995).

The proceedings follow an ordered pattern which has been established by tradition – “this is our custom”. There is usually a “conductor”, a master of ceremonies, a chief priest, a central protagonist, whose actions provide the temporal markers for everyone else. But there is no separate audience of listeners. The performers and the listeners are the same people.³⁰

“Conduct” is a concept that connects powerfully the lives of law and music and rivers. The ducal nature of legal authority meets the musical conductor meets the duct or conduit by which to greater or lesser degree most human civilisations throughout history have sought to contain, control and divert the life of rivers. How accurate it is to think of the holder of the Tokotoko as a conductor of the waiata it is hard to say, but Leach’s observation purports to have general application to culturally defined ritual performance whatever the context. It might, for instance, apply as well to the culturally defined ritual performances of the United Kingdom parliament as to that of any Māori iwi. There, Her Majesty The Queen might be considered to be, in ceremonial terms so far as law-making is concerned, the “conductor” and “central protagonist” of all business conducted in Parliament; she is even, as the titular Head of the Church of England, the nation’s “chief priest”. It just happens that Her Majesty, being seldom present in Parliament in her bodily person, is instead represented there through the physical medium of her ministers. In the chambers of the House of Commons and House of Lords, Her Majesty’s authority is also represented materially through the presence of The Mace, one for each chamber. The Mace is ceremonially brought into the chamber whenever it

³⁰ E. Leach, *Culture and Communication: The Logic by Which Symbols are Connected* (Cambridge: Cambridge University Press, 1976), 45.

is to sit in legislative session, and if The Mace is not present in the chamber, the House has no power to make laws. The representative nature of The Mace is most obvious during the State Opening of Parliament, for on that occasion the Monarch is present in person with the Imperial State Crown and the Mace is not present because it is not needed when the Monarch is bodily present. However much The Mace resembles the Māori Tokotoko as a material representation of the conductor's authority, as Leach terms it, one key distinction is that The Mace represents Her Majesty's authority substitutionally, whereas the Tokotoko, held in the leader's hand, does so conjunctively.

Joanne Kowhai Hayes, of the Ngāti Porou (a Māori iwi) is a Member of Parliament for the New Zealand National Party. On the occasion of the Third Reading, she invited the members of Parliament to approach the river:

I just say for the people in this House here, our members of Parliament, if ever you get a chance to be able to cross the Whanganui River, at any point of its journey from Hinengakau all the way down through to Tūpoho, and if you sit and you stop and you listen, I am sure that you will hear the voices of our tūpuna as they are singing that wonderful waiata that I have fallen in love with. The words are: [*she sings*] *e rere Te Awa Tupua* [*“flow the Ancestral River”*]. And, with that, Mr Speaker, I commend the bill to the House. Congratulations. Kia ora.³¹

To cross the river in a canoe (waka) and stop at the midpoint where it is deepest and listen there to the voices of the ancestors (tūpuna) joins the iwi to the river and the river to song. There is even a sense in which the river is a sort of law of life, for “While the river iwi do not view their relationship with the river in terms of ownership, they believe that the Whanganui

³¹ https://www.youtube.com/watch?v=pqT69Sk-t_g.

River owns them, obligating them to care for the river and protect its intrinsic interests”.³² Te Awa Tupua is understood therefore to be not only a physical river, but a people, a song, a lore, and even a law. In long, a whole articulation of life.

Part Two: Making Music

Appreciating music in this way not only makes musical sense of sound but in so doing also constitutes performer and perceiver as co-producers in the process of making music.

Jerome Frank is one of a number of scholars who have written about the role of judge and jury in interpreting and thereby fulfilling the legislative intentions of parliament in something like the way that conductors and instrumentalists interpret and fulfil the musical work of a composer. Important as that insight is, in this article I will endeavour to limit my attention to activity within the legislative forum itself. Furthermore, whereas I agree with Frank that:

the conscientious, intelligent judge will consider government a sort of orchestra, in which, in symphonies authorized by the people, the courts and the legislature each play their parts.³³

And with Daniel J. Kornstein, who said that “Judges and lawyers are performers of legal music” (he was referring to “the continuing fundamental debate in constitutional law over original intent versus a living document”),³⁴ the hope is that we can go further than this in

³² <https://sites.google.com/site/whanganuiriverrights/the-river-as-a-legal-entity>.

³³ J. Frank, “Words and Music: Some Remarks on Statutory Interpretation” (1947) 47(8) *Columbia Law Review* 1259, 1272.

³⁴ D. J. Kornstein, “Introductory Remarks: Panel on Politics” (1999) 20 *Cardozo L Rev*

imagining the public as performers and co-producers of the legislative music when they are neither professional lawyers nor people who have been co-opted to legal officialdom through jury service. What I have in mind is the influence at the legislative or compositional stage that comes from the wider constituency of people implicated in and affected by law-making. There is a great deal of truth in the observation made by J M Balkin and Sanford Levinson, that:

Like other performing arts, legal performance is more than the interpretation of a text by a performer: it involves a triangle of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances.³⁵

It is nevertheless important that the influence of the audience be not postponed or relegated to the post-production stage of the law-making process. It is all too easy to suppose that the official legislature and legal profession have a monopoly over law-making. If one defines law narrowly enough it is clear that such agencies will by definition have a monopoly, but the narrow definitions that produce such an outcome are the work of the jurists' profession in all its practising and academic branches and as such are somewhat self-serving and self-defining. Crucially, Balkin and Levinson go on to state that members of the audience are not merely passive, but also:

1331, 1332.

³⁵ J. M. Balkin and S. Levinson, "Interpreting Law and Music: Performance Notes on the Banjo Serenader and the Lying Crowd of Jews" (1999) 20 *Cardozo L Rev* 1513 -1572, 1519.

play an important although often unacknowledged role in creating the conditions for authentic or faithful performance. Performances exist in traditions and institutions of performance that set standards for what kinds of performances are judged faithful or authentic. Judgments about faithfulness and authenticity, in turn, occur against the backdrop of the many different communities that help shape the tradition, including the audience of fellow performers and laypersons. Standards of faithful or authentic performance are social and evolve over time. They result from negotiation and struggle between performers and these various audiences. This is no less true in law than in music and drama.³⁶

Claude Lévi-Strauss said something along these lines, in his inimitably grand and quotable style, when he opined that “myth and musical work are like conductors of an orchestra, whose listeners are silent performers”.³⁷ The point is that audiences in the triangular relation outlined by Balkin and Levinson influence the performance of others and constitute the performance of others as authoritative, so that the audience is in a sense a co-producer of the law constituted by the performance. Public approval, even if it merely takes the form of applause, is in a constitutive sense a part of the action. To put it in terms of legal performance, the applause seals the deed and is therefore an active part of the execution of the deed – hence the word “exécutants” employed by Lévi-Strauss is perfectly apposite. The public audience is integral to the law-making process at least to the extent that its approval is

³⁶ Balkin and Levinson, “Interpreting”, 1519-20.

³⁷ “Le mythe et l’œuvre musicale apparaissent ainsi comme des chefs d’orchestre dont les auditeurs sont les silencieux exécutants” (my translation) (Lévi-Strauss, *Mythologiques*, volume. I: *Le Cru et le Cuit* (Paris: Plon, 1964), 25.

appealed to, or is (through political mandate) retroactively woven back into, the stages of parliamentary law making. Furthermore, and beyond this minimal version of the public's participation, there are occasions in which a wider public or communal presence fractures the usual formalities and shows itself in the forum itself. The waiata of the Whanganui iwi, performed on the occasion of the Third Reading, was a paradigmatic occasion. Critical and creative interventions of a very different sort have even been witnessed in the Chamber of the House of Commons of the Palace of Westminster. In the public gallery there have been orchestrated protests, including, recently, protests by women campaigning against raises to the age at which women become eligible for a state pension and semi-naked protests by climate change activists. On the floor of the chamber itself, MPs have performed interventions ranging from the more reverent (for example, the singing of hymns and political anthems)³⁸ to the decidedly irreverent (for example, Dennis Skinner MP's habitual heckling of the parliamentary official known as "Black Rod").³⁹ Those examples were more or less mischievous, and certainly unauthorised, interventions by opposition MPs performed during an active parliamentary session. A very different contribution, also instigated by an Opposition MP, came when the House was not in session in the form of chamber music performed in the Chamber of the House of Commons by the string quartet "The Statutory Instruments".⁴⁰ That performance was authorised by The Speaker of the House of Commons. Even this author once had the privilege of performing in the Palace of Westminster; not in the Chamber of the House of Commons, but in Westminster Hall. The choral society to which I

³⁸ "'Scuffles' in the Commons as Parliament is prorogued for five weeks" (*Metro* 10 September 2019).

³⁹ "Labour MP Dennis Skinner heckles Black Rod" (*The Guardian*, 14 Oct 2019).

⁴⁰ www.bristolpost.co.uk/news/bristol-news/bristol-mp-explains-new-music-3141935.

belong had been invited to sing alongside the Parliament Choir.⁴¹ It was the first public concert ever held in Westminster Hall, and as a jurist I felt privileged to perform alongside members of the legislature in the very place that for seven hundred years had been home to the nation's central courts of judicature. I experienced the occasion as an outsider, albeit for a moment from the inside of the legally sacred space. It is, one suspects, the sort of space in which one is always an outsider, even on the inside.

It is as outsiders that we, being members of the general public, are aware of performance in the chambers of the United Kingdom and New Zealand parliaments. Our experience is mediated – bridged and articulated – by means of social and mainstream media. These media create an (if it isn't tautologous to say so) immediacy between orator and the public audience that has scarcely been achieved since the days of open-air oratory in the Roman forum. Kamila Wysłucha makes the point that in classical Rome “the most significant moment for a musician or an orator was a public presentation of their art”.⁴² Emphasising the constitutive power of public participation, she adds that in a passage of *De oratore* (II.83), Cicero stresses that neither music nor oratory could exist without a public performance.⁴³ What Cicero had in mind is performance *to* the public and approval by the audience. Where (as in the waiata on the occasion of the Third Reading) public performance entails performance *by* the audience, not merely in the form of performed approval but also by virtue of new invention and new creation, its constitutive power as part of the law-making process is even more potent.

⁴¹ See www.parliamentchoir.org.uk.

⁴² K. Wysłucha, “Motif of comparison : oratory and music in rhetorical works of Cicero and Quintilian” (2010) 15.2 *Graeco-Latina Brunensia* 171-180, 175.

⁴³ *Ibid.*, 177.

I commenced this essay with the observation that music is a way of appreciating sound. The *opera* or work done in any musical appreciation of sound is done in part by the instigator of the sound and in part by the person who hears and responds. (The same individual can of course play both roles). Music is, I would suggest, in essence a metaphor for a peculiarly human way of appreciating sound, in the sense that the arts of music (performative and interpretative) translate sounds into forms that can be appreciated as being organised according to a certain system of ordering. If it is the case that the sense we attribute to sounds when we call them music is a sense of order and rhythmic regulation, the interpretative appreciation of sound that leads to the assessment “this is music” can be considered to be a mode of law-making. The individual hearer performs a sort of legislative listening, a “law making music”, every time they attribute musical meaning to acoustic events.

Bret Rappaport writes that: “The neurological mechanisms that operate to perceive and be influenced by music are the same ones (or many of the same ones) that operate in the brain for language-first spoken and then written”.⁴⁴ This is not quoted in order to suggest that words, still less written text, can (or should be enabled to) capture musical sense, but only to show that cognitive processes of ascribing abstract meaning to concrete stimuli are essentially metaphoric whether the language in which they work is musical, literary or legal. Metaphor, which typically operates poetically to connect an abstract concept to a concrete sense (Robert Burns’ phrase “my Luve’s like a red, red rose” exemplifies the point) is a two-way bridge or ferry (the old-fashioned “chain ferry” may be the ideal metaphor for metaphor,

⁴⁴ B. Rappaport, “Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing” (2010) 16 *Legal Writing: J Legal Writing Inst.* 65-116, 68.

for it moves even as it connects both sides) that simultaneously connects the tenor concept (for example, “love”) with the concrete vehicle (for example, “red, red rose”). In the poetical works of Robert Burns, the bridge or ferry is wrought out of words, but metaphor can operate with equal meaning and emotive effect in the form of music or dance. Bret Rappaport cites a 2004 article by Michael Vincent entitled “The Language of Music, the Music of Language, More Than a Metaphor”, which, to judge by its title, suggests that Vincent employs too limited a conception of metaphor.⁴⁵ Properly understood, metaphor is not merely descriptive of a deeper reality, but is the very means by which our conception of reality is constructed. To have a full conception of the work of metaphor in words and sounds, one does not need “more than metaphor”; one needs only to understand metaphor more. Henry Peacham regarded music as a form of rhetoric, saying that “no rhetoric more persuadeth or hath greater power over the mind”.⁴⁶ Music’s rhetorical attributes are to be found in the use of such formal figures as gradation, amplification, antithesis, repetition, chiasmus, metonymy, ellipsis, parallelism and so forth. There is though, overarching such particulars, a general sense that music is rhetorical because it moves forms and translates modes of life in the way that metaphor does; and music, like metaphor, is deemed to be successful in its performance when it pleases the hearer. We too often think of metaphor in relation to the particular simile. This is to think of metaphor as “a” metaphor. What we need to do is to think about what metaphor, in general, does. This is to think of metaphor as a dynamic activity; a way of working and of making meaning. The author of *Wordless Rhetoric* puts it well in a section on

⁴⁵ It would be inappropriate to reach a final judgment, given that I have been unable to locate the text of Vincent’s article.

⁴⁶ Henry Peacham, *The Compleat Gentleman* (1622), V. B. Heltzel ed., (Ithaca, New York: Cornell University Press, 1962), 115-16.

“Musical Form and Metaphor”, when he writes that, when considering the relationship between rhetoric, music and languages, “[r]ather than limit ourselves to examining what ‘literal’ meanings metaphors express, we should broaden our inquiry to include what conceptions a metaphor implies”.⁴⁷ Thought of in this way, we discover a dynamic idea that goes to the very root of what music and rhetoric both aim at, which is “movement”. Music is able to move because it is formed, in its essential materials and structures, from movements of parts within a whole. Metaphor by the same token translates or moves from one formal state to another, the word “translatio” – meaning “across-carry” – being the direct Latin equivalent of the Greek “metaphora” (think “meta-ferry”).

There is an old and ongoing debate in musicology between those who favour a pure form of musical appreciation in which attention is restricted to music as music, and those who allow that music may be appreciated by ascribing non-musical or extra-musical meanings to what is heard. As we consider this distinction it will be helpful to think of it as being also a way of distinguishing approaches to law: on one side the extreme positivist attitude that regards law as a formal system of rules that is as legally proper as it is internally consistent, and, on the other side, critical appreciation of law according to its moral, ethical, cultural, social and personal implications. The latter sorts of approach depend upon imaginative articulation between law and life and therefore open the way to appreciate that the waiata performed on the occasion of the Third Reading played a part in the productive or output stage of the law-making process.

⁴⁷ M. E. Bonds, *Wordless Rhetoric: Musical Form and the Metaphor of the Oration* (Cambridge, MA: Harvard University Press, 1991), “Introduction” pp.7-8.

Peter Kivy exemplifies the distinction between types of musical appreciation with the assistance a passage that opens Chapter 5 of E. M. Forster's novel *Howards End*, and which provides the epigraph and theme for Kivy's book:

It will be generally admitted that Beethoven's Fifth Symphony is the most sublime noise that has ever penetrated into the ear of man. All sorts and conditions are satisfied by it. Whether you are like Mrs. Munt, and tap surreptitiously when the tunes come – of course, not so as to disturb the others – or like Helen, who can see heroes and shipwrecks in the music's flood; or like Margaret, who can only see the music; or like Tibby, who is profoundly versed in counterpoint, and holds the full score open on his knee; or like their cousin, Fraulein Mosebach, who remembers all the time that Beethoven is "echt Deutsch" ... the passion of your life becomes more vivid, and you are bound to admit that such a noise is cheap at two shillings.⁴⁸

Kivy seizes in particular upon the contrast between Helen Schlegel who, as she listens, "can see heroes and shipwrecks in the music's flood", and her brother Tibby Schlegel, who "is profoundly versed in counterpoint, and holds the full score open on his knee".⁴⁹ Kivy argues that Tibby savours "tönend bewegte Formen", a German phrase that might be translated "tonally moving forms" or "sounding mobile forms". The phrase is taken from Eduard

⁴⁸ E.M.Forster, *Howards End* (London: Edward Arnold, 1910), ch. 5.

⁴⁹ P. Kivy, *Music Alone: Philosophical Reflections on the Purely Musical Experience* (Ithaca: Cornell University Press, 1990).

Hanslick's assertion that the beauty of music resides in "tönend bewegte Formen".⁵⁰ In their article "Impurely Musical Make-Believe", Eran Guter and Inbal Guter write that:

For Kivy, an eminent advocate of formalism, this sharp contrast between Helen-type listening and Tibby-type listening ultimately means that Helen cannot really be a pure listener "of the work".⁵¹

The Guters rebut Kivy's analysis (or rebut Kivy's presumption that pure listening is a virtue), arguing that:

In contradistinction to formalism and to persona-theory narrativism, the ultimate point of impurely musical make-believe may be to enable us to appreciate how music meshes with our lives.⁵²

I would agree with that rebuttal, and so too might Margaret Schlegel. Forster appears to locate her somewhere between the formalism of her brother Tibby and the romanticism of her sister Helen. On the formalist side, Forster tells us that Margaret "can only see the music", whereas on the romantic side, it is to Margaret that Forster gives the novel's central message:

⁵⁰ *Vom Musikalisch-Schönen: Ein Beitrag zur Revision der Ästhetik der Tonkunst* (1854).

⁵¹ E. Guter and I. Guter, "Impurely Musical Make-Believe" in Bareis and Nordrum eds.

How to Make Believe: The Fictional Truths of the Representational Arts (Berlin/Boston: De Gruyter Berlin/Boston, 2015) 283-307, 284.

⁵² *Ibid.*, 304:

Only connect! That was the whole of her sermon. Only connect the prose and the passion, and both will be exalted, and human love will be seen at its height. Live in fragments no longer.⁵³

Christian Morar gives an account of Margaret's "sermon" that expresses very well the sense of articulation that I have been urging, namely a joining of parts that does not dissolve their distinctiveness as parts but enhances and expresses it more completely through the very act of composing the whole. He writes that:

Margaret's "Live in fragments no longer" injunction recognizes the fragment with all that it implies and thus points to a form of sociality – rather than a firm social synthesis – in which fragments, individuals, and cultural models link up and support one another mindful of each other's incompleteness and distinctiveness.⁵⁴

We know from manuscript notes that Forster's choice of the name Schlegel was expressly made with an unnamed "critic" – possibly Friedrich Schlegel – in mind.⁵⁵ The choice seems

⁵³ Forster, *Howards End*, ch. 22.

⁵⁴ C. Morar, "The Forster Connection or, Cosmopolitanism Redux: Zadie Smith's *On Beauty*, *Howards End*, and the Schlegels." *The Comparatist* 35 (May 2011): 133-147.

⁵⁵ J. Hillis Miller points out that the choice of Schlegel is not accidental, citing an early manuscript version of the novel in which appears the phrase: "Their father, a distant relation of the critic" ("Just Reading *Howards End*" in *Howards End*. A. M. Duckworth (ed) (Boston: Bedford Books, 1997) 467-82, 474). See, further, L. White, "Vital Disconnection in *Howards End*" (2005) 51(1) *Twentieth Century Literature* 43-63.

to allude to Schlegel's notion of the free-standing (that is word-independent) nature of the musical idea. As Schlegel writes: "Must not purely instrumental music create its own text?".⁵⁶ Mark Evan Bonds informs us that the German jurist Wackenroder also stressed "the self-referential quality of instrumental music in chiding those who would provide a program for every untexted composition".⁵⁷ Wackenroder had asked "Do they strive to measure the richer language by means of the weaker and solve with words that which disdains words?".⁵⁸ Bonds also refers to the music criticism of the jurist E. T. A. Hoffmann, noting that "One of the basic premises of Hoffmann's music criticism is his distinction between the rational and irrational elements of music, which he associates with the qualities of *Besonnenheit* ("awareness / prudence") and *Genie* ("genius"), respectively".⁵⁹

Besonnenheit emphasizes the objective side of art, the process by which the creator distances himself from his creation and exercises criticism upon it. For Hoffmann, the perspective of this objective process is that of the composer's intended audience.⁶⁰

⁵⁶ F. Schlegel, "Athenäums-Fragment 444" in Hans Eichner (ed), *Kritische Friedrich-Schlegel-Ausgabe*, vol. 2 (Munich: Ferdinand Schöningh, 1967), 254.

⁵⁷ *Wordless Rhetoric*, n.40 above, 176: "Rhetoric and the Autonomy of Instrumental Music".

⁵⁸ W. H. Wackenroder, "Das eigentümliche innere Wesen der Tonkunst und die Seelenlehre der heutigen Instrumentalmusik" (orig. pub. 1799), in G. Heinrich (ed) *Wilhelm Heinrich Wackenroder: Werke und Briefe* (Munich: Carl Hanser, 1984), 326.

⁵⁹ *Wordless Rhetoric*, n.40 above, 177.

⁶⁰ *Ibid.*, 178.

Whilst I echo the Guters' preference for musical appreciation that imaginatively and linguistically meshes sounds to lived context, I would argue that the Tibby and the Margaret and the Helen modes of ascribing meaning to music – ranging from the purest form of ascribing meaning to the music qua music to the ascription of musical meaning by relating the music to a wider context – can all be considered in various ways to be participatory modes of making music by producing a musical sense of the sound. On this view, the Guters' idea of “musical make-believe” is not limited to the contextualization process by which sound is imaginatively synthesized to its linguistic, scenic and cultural context, but includes any cognitive process by which the listener participates in the process of attributing sense to sound. Music must certainly be appreciated as music without deference to accompanying or interpretative words, but to seek to isolate music from its wider cultural and cognitive connections does not enhance the status of music as music but seriously diminishes it. After all, the very name of music denotes its imagined place in a mythological scheme. The challenge is to appreciate the music as music *and* in context. Lawyers will be familiar with this challenge as one that resembles the equitable endeavour to respect a general rule of law whilst adapting it to the materials of life as the context of a case presents them. In contrast to the equitable law maker, whether judicial or legislative, is the legal stickler who supposes that their interpretation must adhere unwaveringly to an invariable authorial intention. It is with this legal stickler and their musical equivalent in mind, that Jerome Frank write approvingly of the composer and musicologist Ernst Křenek (1900-1991) who:

criticizes those musical “purists” who insist on what they call “work-fidelity”. The performer of a musical piece – an individual pianist, violinist, or an orchestra-leader-

should, say the purists, engage in “authentic interpretation” which eliminates the interpreter altogether.⁶¹

Frank also mentions that another composer and author, Charles Darnton (1905-1981), wrote that it “makes nonsense of the music to play it as if the truth, the whole truth and nothing but the truth reside in the notes and [the composer’s] directions”, for the performance should vary “with the musical insight and interpretative skill of the interpreter”.⁶² Important for present purposes is that fact that it is not merely at the judicial stage that the challenge of contextual (“equitable”) appreciation and adaptation presents itself, for it is also present at the compositional or legislative stage. At that prior stage, it is incumbent upon the composer in the very act of drafting to have past and future interpretative possibilities always in mind. In something like this manner, Hoffmann’s idea of *Besonnenheit* (mentioned earlier) supposes that the primary performer notionally stands back from their own invention to imagine its critical reception in the mind of a disinterested listener. This process of imaginative distancing entails a highly pragmatic mental exercise, but it is also an ethical exercise that demonstrates the composer’s humility in admitting the imagined audience as co-producer of the musical output.

⁶¹ “Words and Music: Some Remarks on Statutory Interpretation” (1947) 47(8) *Columbia Law Review* 1259, 1260. Referring to Křenek’s book *Music Here and Now* (New York : Norton, 1939) and “The Composer and the Interpreter” The composer and the interpreter, an address given at Black Mountain College, 4 September 1944 (3 Black Mountain College Bulletin 1944).

⁶² *Ibid.*, at 1261. (The quotations are from C. Darnton, *You and Music* (Harmondsworth: Pelican, 1945) 161-62, 40.

The imaginative exercise in legislative activity, through which strict law is extrapolated out into a wider range of expressive possibilities, resembles in some respects Heinrich Schenker's notion of *Auskomponierung* ("Composing Out") as an aspect of *Der freie Satz* ("Free Composition"). Wayne Alpern writes that:

Composing out is the paradigmatic act of synthesis (*Synthese*) between order and freedom in music. It subsumes all of the connective devices such as arpeggiation, passing tone progressions, neighbor note motions, voice exchanges, motions to and from and inner voice, superposition, register transfer, and octave coupling—all of which "bind together" (*Verbindung*) the intervening tension spans between the periodic points of organizational stability just like the "composing out" of the triad into the fundamental line. The objective of composing out is to arbitrate a compositional compromise between unbridled artistic freedom and the constraints of musical structure, both of which are essential. ...⁶³

This talk of connective devices binding elements together into a synthetic whole would seem to support my argument that musical composition operates in the same articulating, metaphorical and equitable mode in which laws are made. Where the statute falls short in its imagination, the task of free composition passes to the judges. Their role is to fill the gaps, not only by way of joining together (harmonizing) the "fragmentary" statute,⁶⁴ but also by

⁶³ "Music Theory as a Mode of Law: The Case of Heinrich Schenker, Esq." (1999) 20 *Cardozo L Rev* 1459-1512, 1491.

⁶⁴ B. N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 16.

joining the statute to society. Justice Cardozo put it this way, in terms which (whilst expressly mindful of the French juristic notion of “*libre recherche scientifique*”) will for us be reminiscent of the musical notion of free composition:

The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision.⁶⁵

Part Three: Music as Articulation

Proceeding from the idea that music operates as metaphor and, like all metaphor, produces meaning by translating abstractions into concrete conceptions, this part posits music as a bridge – a joint or articulation – between eras, cultures and social strata that might otherwise struggle to find meaningful points of contact and communication. Key to this idea of music as articulation is the expectation that thinking musically and metaphorically is the best way to imagine and realise harmonious relations between distinct and diverse places and people. The work of making music is in that respect akin to the work of making law. John Snape cites Isaiah Berlin for the view that:

Legislation is not the making of laws (that would be more properly called “legisfaction”). *Legislation* is the *translation* into legal terms of something which is to be found in nature: ends, purposes.⁶⁶

⁶⁵ Ibid.

⁶⁶ I. Berlin, *Freedom and its Betrayal: Six Enemies of Human Liberty* H Hardy (ed) (London: Chatto and Windus, 2002), 15. (Cited in J. Snape, “David Hume: Philosophical Historian of

I do not agree with the stark distinction that Berlin draws between “making” and “translation”. The process of translation is a highly creative way of producing something new from existing materials; the legislature is certainly a law-making body. Nevertheless, what Berlin very helpfully alerts us to is the possibility that the legislature makes law in a metaphoric or translatory mode; forming a bridge as it were between human nature and human law. Berlin emphasizes in italics the “lation” that connects legislation and translation, and it is worthwhile pausing on that choice. The root “latus” is employed in Latin to denote carrying, but how it came into existence, given the dominance of the verb “ferre” (“to bear”), is something of an etymological mystery. The best estimate is Calvert Watkins’ suggestion that it derives from the Proto-Indo-European root **telā-* “to bear”.⁶⁷ We can speculate, therefore, that “latus” was itself, at some point in its history, a metaphoric translation; an imaginative leap from one line to another in something like the way that the English “went” (from “to wend”) became the past participle of the otherwise unrelated verb “to go”. This is mentioned because, without an inherent sense of translation, the element “latus” does not serve the point that Berlin is making. What Berlin is really concerned with is not the “lation”, but the “trans”. It is the crossing over from nature to law that really makes his point of comparison between legislation and translation, and (subject to the etymological quibble) it is an excellent point to make. It offers a very helpful way to think about the metaphoric activity

Tax Law” in P. Harris and D. De Cogan eds., *Studies in the History of Tax Law* 7 (Oxford: Hart Publishing, 2015) 421-464, 460).

⁶⁷ C. Watkins ed., *The American Heritage Dictionary of Indo-European Roots*, 2nd edn., (Boston: Houghton Mifflin Harcourt, 2000).

through which law-making and music-making express the raw material of natural life in terms of an integrated regulatory order.

Bearing in mind this idea of translation-as-making and making-as-translation, the way is open to explore the imaginative and metaphoric making processes that operate in music and law; and to consider what they might promise in terms of positive relations between, in our example, a river and a people. Here I have an echo in my memory of James Boyd White's *Justice as Translation*, where he writes that for him "the fundamental image of life is...composition: people seeking to make texts that will establish meanings and relations with others".⁶⁸ Let us therefore dwell a while upon the process of composition. I will do this in two stages. First, I will consider the process by which the very idea or code or law of music is created out of found sound, that is out of sound that is naturally occurring. Second, I will consider the process of composition by which parts are combined into a particular piece of music to produce a whole that is harmonious. Both stages involve processes of joining or articulation. Music is frequently considered holistically in terms of its "texture", and "text" is the subject of composition in the preceding quote from White. To express the two stages of making in terms of the material production of textile, we might say that the first stage involves the process of forming a yarn from natural fibres (spinning is one way), and that the second stage involves the integration of yarns into a textile (weaving is one way). What I hope will emerge as we think through these two stages of making, is a new way of appreciating music, law, and the lore of the River. We will find that the law-making process, even in a parliamentary place of speaking, is a creative process that starts with found elements of natural, social and cultural life and fabricates them into forms that maintain a

⁶⁸ J. B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) 20.

constant expressive connection – a constantly moving articulation – between public source and parliamentary mouth.

For the first stage of making, I will begin by turning to Dorothy L Sayers. Her monograph *The Mind of the Maker*,⁶⁹ commences with a chapter on “The ‘Laws’ of Nature and Opinion” in which she proposes a fundamental distinction between law as a “generalised statement of observed fact” (in which she includes most of the so called “laws of nature”), and, on the other hand, law as:

an arbitrary regulation made by human consent in particular circumstances for a particular purpose, and capable of being promulgated, enforced, suspended, altered or rescinded without interference with the general scheme of the universe.⁷⁰

Expressing this distinction in terms of the sport of cricket, she posits as an example of the former type of law, the fact that the ball struck into the air must come back to earth; and, as an example of the latter, the rules (they are actually known as “Laws”) of the sport as promulgated and maintained by the sport’s legislative body, the MCC (Marylebone Cricket Club). What does Sayers’ distinction between the immutable-natural and the arbitrary-artificial look like when we turn to music? At first sight it fits nicely. We might say that there is a natural or found law in the resonant sound of wind blowing on fibre or wood, and that artificial and arbitrary law is present in the articulation by humans of a musical order by arranging the natural sound spectrum into tonal and temporal elements – say by measuring a natural fibre to a certain length and regulating it into resonant intervals by means of fingers or

⁶⁹ D. L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941).

⁷⁰ *Ibid.*, 2.

frets and then strumming it rhythmically. Yet, on further reflection, we find that natural sound is not so immutable as it might at first appear, and neither is musical regulation so arbitrary. The natural sound of wind on wood is not as pure a law as Sayers' example of the law of gravity. If I jump off a high building, I will fall no matter what I make of it. There is no imaginative translation or metaphoric engagement that will keep me suspended in the air. The stage of finding sound in nature is not independent of human perception. When nature produces soundwaves, they are perfectly silent vibrations in the air. They only become sound at the point of perception by a sentient receiver. Defining sound in that way provides this answer to an old philosophical riddle: when a tree falls in a forest devoid of sentient life, it does not make a sound. The production of sound is the work of an audience. An acoustic stimulus can be misinterpreted or creatively interpreted at a point on its journey from ear to brain and the interpretation will produce a new thing. If I jump from a high building, gravity produces the same thing no matter how I interpret it. Any creative interpretation I might add to the physically inevitable outcomes will be merely that – an interpretation of an event – it will not fundamentally change the nature of the event in the way that reception and interpretation of sound does. This is so because in the case of sound stimuli there is no audible outcome at all in the absence of a receiver capable of perceiving it and (if only in a basic – perhaps instinctual – way) of interpreting it.

At the second stage, which is the artificial imposition of musical order, we find that the process of making musical rules is not as arbitrary as the process of making rules for sport. It is perhaps for this reason that Sayers does not dwell on the example of music. The rules of cricket can be changed in any particular respect, provided that they work together with sufficient integrity and practicality. Humans have power to change the laws of the game at will, provided only (and Sayers makes this point) that the rules do not require what is naturally impossible – for example that the ball should be struck into the air and remain there.

The potentially endless proliferation and variety of sports is evidence of the fact that given certain starting materials – nothing more perhaps than a stone and a stick – the human will to devise different rules for dealing with the basic elemental materials is theoretically endless. Is it the same with music? It may only be different in a matter of degree, but it is certainly not the same. Music, or that which the performing and audient community agrees to call music, must be more than found sound. The sound of a waterfall can be very pleasing (it can in other circumstances be terrifying), but the sound does not become music until the audience has regulated it – usually by at least perceiving a pattern of pitch and rhythm in it. Music is mused – it is always ultimately inspired by and connected to something beyond the human will – but it is human will that creates and produces music out of the seed of a sound. In Plato’s *Laws* we read that:

Now, whereas all other creatures are devoid of any perception of the various kinds of order and disorder in movement (which we term rhythm and harmony), to men the very gods...have granted the pleasurable perception of rhythm and harmony, whereby they cause us to move and lead our choirs, linking us one with another by means of songs and dances; and to the choir they have given its name from the “cheer” [chara] implanted therein.⁷¹

Music is formed as such in the human senses, but its formation is subject to the physical conditions of the natural world. No arbitrary power of human will can free us from the physical fact that the resonant frequency of a string fixed at both ends and held in constant

⁷¹ Plato, *Laws* R. G. Bury trans. Loeb Classical Library 192 [Plato vol. XI] (Cambridge, MA: Harvard University Press, 1926) vol II, Books 7-12, 653d–654a.

tension is heightened by a certain ratio when the length of the string is halved. When we agree that something is or is not music (leaving aside any personal judgment as to its being “good” or “bad” music) we make our assessment not out of unencumbered free will, but within the parameters of the physical world to which the human sense of hearing has become attuned. The determination that a sound is musical is accordingly not a wholly arbitrary matter of taste, but a matter of taste exercised within the parameters of physical and biological tolerances. A postmodern musicologist might dispute this and say that found sound in the form of arrhythmic and unpitched noise can be music if the hearer thinks it so. So be it, there is no way of disputing such an opinion, but such theorists cannot escape three things. First, that their own interpretative imagination has to work very hard to make music out of sound when it offers none of the standard incidents of musical form. If this sort of articulation were an elbow, it would be overworked and very painful. Such a human relation to natural sound might create a certain dissonant and difficult form of harmony, but it would lack euphony – which is the important biological and social quality of being pleasing to the ear. Second, whereas sound that doesn’t positively please is one thing, sound that is inaudible or painful to the human ear can only be called music if we strip from music all sense of human engagement with the phenomenon. We might as well apply the name of “food” to any edible substance no matter how unpalatable and lacking in nutritional value. Third, human communities will generally disagree with an unconstrained postmodern notion of music as anything we choose to make of any sound. Pure random found sound – noise – that lacks the qualities of musical order will therefore lack the very aspect that make music such an important part of human life, namely its capacity to unite us within a civil and cultural sense of lives lived in harmony with each other and with the natural world.

Any suggestion that music is entirely and nothing more than that which humans choose to make of sound would, in any case, be anthropocentric and lacking in humility. It

would ignore the fact that the biological make-up of the human ear and brain as a system of hearing is itself produced by, and is an integral part of, the very sound-producing world that an extreme postmodern theory might suppose can become a dispassionately disconnected object of human critique. Writing with something like this in mind, Sayers contrasts the “human maker” who “tortures his material” so that “the stone looks unhappy when he has wrought it into a pattern alien to its own nature...his writing is an abuse of language, his music a succession of unmeaning intervals”, to the maker who “respects and interprets the integrity of his material” and who “works with plants, with animals or with men” so that “the co-operative will of the material takes part in the work”. She prefers the latter, but says that the ideal is ultimately unattainable, because the human artist is “part of his own material”.⁷²

With all this talk, we might be forgetting the experience of witnessing the waiata performed on the occasion of the Third Reading in the New Zealand parliament. Recalling that outsiders were invited to approach the river and to cross it and to pause to listen for its song, let us consider what the metaphorical appreciation of music as a bridge – or a chain ferry or a canoe (*waka*) - might mean for our understanding of law as a bridge between human society and the natural world.⁷³ As we do so, we should bear constantly in mind the

⁷² Sayers, *Mind*, 114-5.

⁷³ With the canoe in mind, I commend to the reader James Tully’s *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995). The cover image of the book is a detail from the wonderful sculpture *The Spirit of Haida Gwaii*, by Bill Reid, a master carver of the indigenous Haida people of Canada’s west coast. The sculpture depicts. Tully praises it for its “dialogical capacity for diversity awareness” and in particular for the lessons that can be learned from the fact that the inhabitants of the canoe

two stages by which music is made – the first being the ordering of sound into a system in response to, and in responsible relation to, naturally occurring impulses; the second being the harmonious synthesis of a particular musical composition out of diverse musical elements. Harmony between humans, and between humans and nature, is the hope. My argument is that metaphoric imagination is the way to achieve this, and that musical thinking is especially helpful to this imaginative process because music is itself made of metaphor. Crucially, so too is the law. We could be drawn here into the old debate between positivist and natural law jurisprudence, but that should perhaps wait for another time and place. As a preliminary provocation I would suggest only this – that law has in common with music the fact that neither is wholly natural nor wholly arbitrary; and that both operate by maintaining a connection between the found systems of nature (including the eco-system and human nature in all its socialised and acculturated shapes), and a more or less arbitrary and abstract system of rules.⁷⁴ Most of the fundamentals of law – agreements, property and wrongs – have their source in innate features of human society and psychology. Law making, including the positing of rules, does not occur in a vacuum, but describes the processes of making a complex ordered system out of those basic naturally (including socially) occurring features of human life. If we can get a feel for the metaphorical workings that make music out of sound, and which articulate humanity to the rest of the natural world, we might also have the means to produce harmony between different cultural, spiritual and systemic conceptions of law.

“make up an association more akin to the irregular arrangement of an ancient, custom-based constitution than to a modern, uniform constitutional association” (p. 26).

⁷⁴ This is similar to the point made by Isaiah Berlin in the quotation cited at n.63 above.

It will be illuminating at this point to turn to Hanne Petersen’s rich article “Peripheral Perspectives on Musical Orders”.⁷⁵ After a survey of nations in which indigenous law and culture is entwined with music, Petersen throws down a musically inspired challenge to law:

I believe that we need a concept and an understanding of order that moves far beyond both legal positivism and legal pluralism. We need an understanding that is much more sensitive to the complexities, diversities, and differences of the elements of order; an approach or approaches that link economic, social, psychic, emotional, spiritual, and musical orders and not only social and economic order; an approach that links order and rhythm and not just order and rules.⁷⁶

Kieran Dolin poses a similar challenge when, inspired by the example of first nation cultures in Australia and elsewhere, and bearing in mind Robert Cover’s famous assertion that “the formal institutions of law, and the conventions of the social order are ... but a small part of the normative universe that ought to claim our attention”,⁷⁷ he asks: “Can music be paired with *nomos* in the same way as narrative, among the cultural materials that give shape and meaning to the law in the cultures of the West?”⁷⁸ My own answer to that question is

⁷⁵ (1999) 20 *Cardozo L Rev* 1683 -1694.

⁷⁶ *Ibid.*, 1694.

⁷⁷ R. Cover, “The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative” (1983-4) 97(4) *Harv Law Rev* 4-68, 4. See, generally, J. Etxabe, “The Legal Universe After Robert Cover” (2010) 4(1) *Law and Humanities* 115–147.

⁷⁸ K. Dolin, “From Orpheus to Yothu Yindi: Music and Legal Cultures” (2016) 12(1) *Law, Culture and the Humanities* 29–38, 38.

“yes”, with the qualification that to do so will require us to acknowledge and exercise the metaphorical mode by which law and music work. Dolin notes that:

In London, Sydney and probably elsewhere, the opening of the law year is marked by an ecumenical religious service. At one such service in Sydney in 2006, settings of the Psalms by George Palmer, a lawyer, judge and composer, were sung, including Psalm 118, “Lord I Love Your Commands.”⁷⁹

One can find similar ceremonial seepages of music and spirituality into the United Kingdom legislature, most clearly when the Queen’s Speech opens a new parliament. Occasions such as the opening of parliament and the opening of the law year are significant because they are liminal performances at the threshold between the business of state and the broader cultural and spiritual life of the nation, but they are also highly official occasions. Music and song have no inherent license to spill out spontaneously or to be heard within the chamber, still less any official right to be aired.

The situation is rather different if we go back far enough along the timeline of Western democracy. In ancient Greece, for example, we find that music was far more integrated into the fabric of political life than it is now. The same culture that originally expounded our idea of “harmony” in terms of all elements of human and natural life joined together in proper and fitting (“*artia*”) way, did not isolate music from the serious business of State in the way that is generally done today. Neither was music isolated from the other expressive arts. Song, dance, and word were seamlessly combined in the notion of *mousikē*,

⁷⁹ Ibid., p.33.

which denoted the arts inspired by the Muses. The authors of *Music and the Muses*,⁸⁰ depart from the general practice of examining the various components of *mousikē* in isolation and instead consider its significance as an integrated expression of the social, religious, and educational practices of the *polis*. In a similar vein, M. Paola Mittica gives an account of the “art of mousiké as political activity”. In her article “When the world was mousiké”, she informs us that

the political ideal of the identity between mousiké and lawgiving persists throughout the Archaic age, occurring both in the shape of a lawgiver, who must be skilled at making the principles of a higher law “resonate” through sweet and persuasive speech, and in that of a professional musician called upon to sustain the politics and education of citizenship. This ideal becomes concrete in historical reality with Solon, who embodies both lawgiver and poet.⁸¹

Mittica concludes that in this “we see a lesson which is still valid today: that we must reflect on the foundations of the principles that regulate our life in common”.⁸² Adding, which is apposite to our present concern, that

⁸⁰ P. Murray and P. Wilson, *Music and the Muses: The Culture of Mousike in the Classical Athenian City* (Oxford: Oxford University Press, 2010).

⁸¹ M. P. Mittica, “When the world was mousiké: on the origins of the relationship between law and music”. (2015) 9.1 *Law and Humanities* 29-54, 53.

⁸² *Ibid.*, 54.

Now, as then, we believe that wisdom can come from a special poetic sensitivity, which permits us to grasp this idea of proportion and to use it in human affairs to bring about peaceful coexistence. The aim is to approach harmony according to its original meaning, namely “harmonizing differences”, without the temptation to establish a harmonious architecture once and for all, but with an awareness that the only constant in life lies in its growing multiformity.⁸³

Attention to the role of metaphor in expressing harmony is, for me, key to the “special poetic sensitivity” which Mittica rightly identifies as essential to a living sense of harmony in human affairs. I am mindful of Desmond Manderson’s suggestion that harmony is a value neutral concept with the result that the quality of the whole is only as good as the quality of the parts.⁸⁴ I don’t wholly agree with that, for harmony surely imports a sense of diversity, and diversity is inherently more positive than uniformity in music, law and life. As Marc-Antoine Charpentier opined in his treatise *Les Règles de Composition*:⁸⁵

Diversity alone produces perfection, whereas uniformity produces displeasure and dullness. Variations in movement and Form, done well, contribute marvellously to this diversity that music demands. [...] Music that is composed only of Consonances

⁸³ Ibid.

⁸⁴ D. Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley and Los Angeles: University of California Press 2000), 702.

⁸⁵ C. Cessac (ed), *Les manuscrits autographes de Marc-Antoine Charpentier* (Wavre: Éditions Mardaga, 2007) 201-221.

would be bland; and too full of Dissonances would be hard, because these two extremes offend against Diversity.⁸⁶

I do, however, agree with Manderson that bad parts make a bad whole, as bad voices make a bad choir and rotten planks a bad ship. Yet, even then, is it not likely that the worthy endeavour of producing a harmonious whole is the very practice that is most likely to reveal the fault in a part? The sense in which, and the extent to which, the crown and the common law were at fault in their dealings with the Whanganui river and its people were not apparent to the crown and common law on their own terms of property rights and crown prerogative. It was only through the practice of attempting harmony by attending to the song of the river – the articulation of Te Awa Tupua – that the crown and common law was enabled to see its own faulty part in the story.⁸⁷ I hope, in any case, that Manderson’s entirely proper demand that “[a]ny specific proposal for or theory of harmonization...be supported or justified by...reasons or normative values” over and above the mere activity of combining distinct parts, will be met in the mode of joining or articulation advanced here: one that involves the participants in imagining a way to hear more fully all the voices that together produce the song.

There is an echo of this sentiment in a challenge that James Boyd White’s lays down in *Justice as Translation*:

⁸⁶ Cessac, *ibid.*, at 211. (My translation).

⁸⁷ I commend to the reader Richard Dawson’s *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Abingdon, Routledge, 2013), which offers great insight into the practice of listening across cultural differences, including between Maori and Common law understandings of the world.

Listen to the voices: my voices and your own, as you hear yourself respond in different ways to what I say. There, in the music the voices make, whether beautiful and harmonious or raw and ugly, is where the meaning lies; it is to that music that our attention and judgment should above all be directed.⁸⁸

White is here writing about a practical method of listening, but he is also using the language of music and voice metaphorically to criticise the common assumption that our utterances satisfactorily express our inner thoughts. In fact, our expressions do not end with utterance, but begin there. It is only when the expression is outer, that it can attain complete performance. This is at least partly because it is only at the point of being uttered that the speaker can attend with a dispassionately critical ear to their own expression in the manner imagined by Hoffmann's idea of *Besonnenheit* discussed earlier. One can try to hear one's own inner voice, but the exercise is impractical until the idea has been expressed so as to be "out there" in some uttered form. To make the point by returning to the terminology with which this essay began, we can say that the solo part cannot fulfil its identity as part of the whole work unless it is harmoniously articulated. W. H. Breare wrote a guide to elocution that employs similar terminological distinctions and theoretical considerations in service of the practical art of speaking well.⁸⁹ Having clarified some vernacular of vocal training (he writes of "pronunciation" of vowel sounds and "enunciation" of consonants combining to produce "articulation"),⁹⁰ he advises that:

⁸⁸ White, *Translation*, 231.

⁸⁹ W. H. Breare, *Elocution: Its First Principles* (New York and London: G. P. Putnam's Sons, 1905).

⁹⁰ *Ibid.*, 26.

great care must be taken that the various elements of a single vowel should evolve in those true proportions which realise perfect pronunciation AS IT REACHES THE AUDIENCE. A student cannot distinguish perfectly the results of his own vocal work, therefore he must be guided by his teacher or some one with an equally sensitive ear and discriminating mind.⁹¹

Utterance is also important because this will bring home to the speaker the humbling realization that their own expression cannot be truly complete until it is heard by others, and heard alongside the utterances that others contribute to the choral whole. Leach writes in this vein about musical performance:

the audience of an orchestra are interested in what all the instrumentalists and the conductor do in combination. The meaning of the music is not to be found in the “tunes” uttered by individual instruments but in the combination of such tunes, in their mutual relations, and in the way particular patterns of sound are transformed into different but related shapes.⁹²

When E. Leach writes in the same place that “the relations of harmony, which allow for the transposition of a melodic phrase from one instrument to another, are those of

⁹¹ Ibid., 34-5. (The capitalised phrase is as it appears in the original.)

⁹² E. Leach, *Culture and Communication: The Logic by Which Symbols are Connected* (Cambridge: Cambridge University Press, 1976), 33. 34

metaphor”,⁹³ he is pointing to a distinction between melody as a musical line notated from side-to-side in the score and harmony as a collection of instrumental lines represented in the vertical axis. I have represented metaphor as a bridge or ferry moving from one side to another in the horizontal axis, but Leach is right to point out that there is also a sense in which metaphor works in the vertical axis. It connects higher abstract concepts to more earth-bound concrete instances (whereas “love” is in the air, the “red, red, rose” is down in the soil and inhabits the earthy sensual world of colour, scent, touch). Metaphor in its harmonious mode can therefore be regarded as a bridge that makes its connections vertically. We might imagine it as something like the mythological Bifröst – the bridge in Norse myth that is said to connect the lower human world to the higher world of the gods. Hierarchical mythologies and societies frequently tend to think of harmony in this way. One such society was Rome; another was medieval and Tudor England with its pervasive notion of the “chain of being” connecting all beings and things from God at the top to the dust and mineral matter of the soil below; yet another was England during the Enlightenment, with its belief in (or hope for) harmonious constitutional relations between monarch and people.⁹⁴ It was when thinking along the vertical axis that Cicero, in his *De Re Publica*, gave his Scipio the metaphor of musical harmony to account for civil harmony between different strata of society:

For just as in the music of harps and flutes or in the voices of singers a certain harmony of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and

⁹³ Ibid., 33. 34

⁹⁴ J. Snape, n.10 above.

reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony in song is concord in a State, the strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice.⁹⁵

Shakespeare has the same tradition, and perhaps the exact passage from Cicero, in mind when in *Henry V* he has Exeter say that:

...government, though high and low and lower
Put into parts, doth keep in one concert,
Congreeing in a full and natural close
Like music. (1.2.180-3)⁹⁶

Our musical sense of harmony is innate in us because it is naturally occurring. The pitch of wind blowing through reeds, of water dropping into pools, the rhythm of heartbeats, steps and days, all combine in us to turn sound into music.⁹⁷ We are the conductors. We are the audience of the natural world and co-producers with it of the music it makes. Some lawyers

⁹⁵ Cicero, *De Re Publica (On the Republic)* C.W. Keyes trans. Loeb Classical Library 213 (Cambridge, MA: Harvard University Press, 1928) II. XVII. 180-181.

⁹⁶ T. W. Craik (ed), *King Henry V*, The Arden Shakespeare, third series (London: Bloomsbury, 1995).

⁹⁷ On the natural source of musical order, a good starting place is the work of Gioseffo Zarlino, including *Le istituzioni harmoniche*, 1558. A. Carapetyan notes that “Zarlino refers the four elements to the four voices” (“The Concept of ‘Imitazione della natura’ in the Sixteenth Century (1946) 1.1. *Journal of Renaissance and Baroque Music* 47-67, 60).

reading this essay, even if they allow that we have stumbled upon answers, might doubt that the questions I have raised were ever ones that lawyers should ask. “What is the point of it?”, they might demand. If one has to ask that question, one should also ask “what is the point of a river?” and “what is the point of music?”. The answer is always the same. It is hard for lawyers and the literary-minded “to move, or to try to move, beyond the world of our languages”.⁹⁸ We tend to write our laws down, and to read and write wordy texts like this one, and to think of the law as an exclusively written or spoken thing. We are always searching for just the right word. If we can avoid the Scylla of being seduced by words, we might fall into the Charybdis of supposing that moving beyond words must entail forward progress, a pushing into new territories; but that impulse to colonize is just crown-thinking. Movement can entail a new way of joining old things, and variations on old tunes. It can entail a remembering rather than a pushing forward. We can remember the waiata that occurred on the occasion of the Third Reading in the New Zealand parliament. We can remember the forsaken art of *mousikē*. We can remember Shakespeare’s wonderful word “congreeing”, which he coined from Latin to express the joining and articulation of parts into a pleasing whole. It was his new word for the old idea of “harmony”. Until we lawyers can learn to listen to the music, let us at least begin to think in other words.

⁹⁸ J. B. White, *The Edge of Meaning* (Chicago, Univ of Chicago Press, 2001) 1.