

'Performance and Maori Customary Legal Process'

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1. Introduction

There are two reasons for our interest in the 'performance' aspect of Maori customary law. The first reason arises from the task which Te Matahauariki Institute has set itself – to explore ways in which the New Zealand legal system might reflect the best of the concepts and values of both our major founding cultures. That objective implies that concepts and values of Maori customary law on the one hand, and of the English common-law system which arrived in Aotearoa/New Zealand with the Treaty of Waitangi in 1840 on the other, have sufficient compatibility and identity to function together or in association, or even to contribute to the evolution of a third and new 'hybrid' system. Alex Frame has used the shorthand expression '1+1=3' to describe that process, and to emphasise that it need involve neither assimilation nor extinction of the founding systems¹. The search for compatibility therefore immediately drives us to inquire into the significance of the fact that the instruments of English law are primarily written statutes, contracts, deeds etc., whereas those of Maori law are performances from a customary repertoire of songs, chants, dances, ceremonial acts of various types, carvings, and so on.

A second reason for our interest flows from our *Te Matapunenga* project, which aims to assemble a compendium of historical references to the institutions and concepts of Maori customary law. We have asked ourselves whether such a project is possible without a very considerable recognition that the divorce from 'performance' and the translation of these institutions and concepts to verbal norms and descriptions runs a great danger of leaving something important and vital behind?

We have found the work of Professor Bernard Hibbitts at the University of Pittsburgh School of Law to be helpful in opening up our thinking to the significance of the 'performance aspect' in so-called 'oral cultures'². Hibbitts writes:

¹ Alex Frame, *Grey and Iwikau: A Journey into Custom – Kerei Raua Ko Iwikau: Te Haerenga me nga Tikanga*, Victoria University Press, Wellington, 2002

² Professor Bernard Hibbitts' major work in this area is perhaps ' "Coming to our Senses" : Communication and Legal Expression in Performance Cultures', *Emory Law Journal*, Vol.41 (1992), p.873. We make use also of Professor Hibbitts' paper delivered in March 1996 to the 'Performance Studies Conference' at Northwestern University.

‘...the performative understanding of law differs profoundly from our own. In a writing culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the aspirational phrase “a government of laws and not of men”. In performance cultures, however, laws and men are virtually coincident. Finding the law generally means finding someone who can perform or remember it.’³

Hibbitt’s analysis of ‘performance cultures’ – a term he prefers to ‘oral cultures’ – begins from the observation that, in the words of Maitland:

‘So long as law is unwritten, it must be dramatised and acted...’⁴

Hibbitts develops a number of characteristics of ‘performed law’.

- It is personal:
‘Without the performer, there is no performance. In this environment, individuals quickly come to associate what is performed with who is performing. Information cannot exist independent of the status or reputation of the human individual presenting it. The objective appreciation of a message is inevitably entangled with a subjective appreciation of its messenger.’
- It is social :
‘Communicative success depends on the live performer actually appearing before a live audience...Individuals in performance-based societies become so accustomed to and dependent upon contact with one another that they tend to conceive of the very idea of “self” in social terms, identifying themselves primarily by their social relationships and the opinion that others have of them. This encourages the development of outwardly orientated “shame cultures” as opposed to inwardly orientated “guilt cultures”.’
- It is dynamic :
‘The dynamism of performance is arguably reflected in the performative inclination to think of law not as things but as acts, not as rules or agreements, but as processes constituting rule or agreement. A performative contract, for instance, is not an object but a routine of words and gestures...Likewise, members of performance cultures tend to think of justice not as something that simply is, but rather as something that is done.’
- It is ephemeral :
‘...the ephemerality of performance encourages members of performance cultures to organise and orchestrate performance to maximise memorability and minimise the likelihood of change. In many performance cultures, these goals are accomplished by a combination of publicization, concretization, and stylization.’

³ Hibbitts, ‘Coming to Our Senses’, at page 956.

⁴ F.W. Maitland, quoted in Harold J. Berman, Law and Revolution (1983).

It is hoped to bring out some of these features in the examples dealt with in the next section of our Paper.

Before Hibbitts, however, Johan Huizinga from his Chair of history at Leyden in the 1930's had noted the importance of the 'play-element' in law. An entire chapter of his illuminating study of 'The Play Element in Culture' is devoted to "Play and Law":

'That an affinity may exist between law and play becomes obvious to us as soon as we realize how much the actual practice of the law , in other words , a lawsuit , properly resembles a contest whatever the ideal foundations of the law may be.'⁵

It is important to guard against the common error of thinking that this connection between law and performance and play in any sense trivialises legal process. On the contrary, Huizinga's study led him to trace the connection to the very roots of civilisation:

'a mental world in which the notion of decision by oracles , by the judgement of God , by ordeal , by sortilege (i.e. by play) and the notion of decision by judicial sentence , fuse in a single complex. Justice is made subservient – and quite sincerely – to the rules of the game.'⁶

We must be prepared to consider, therefore, that the 'play model' in social activity extends as a technique beyond 'mere' amusements to the settling of 'serious' matters such as law suits and the allocation of power in society.⁷

This then is some of the background to the mode of analysis adopted in this Paper. That mode studies 'performances' from the customary repertoire as the instrument of legal transactions, and as analogous to the written documents of legal systems reliant upon the written word. Of course, there is room left to vary and adapt the customary repertoire within certain limits, and no doubt the skill of the 'performer' lies in 'pushing the envelope' so as to maximise the advantage.

⁵ Johan Huizinga , Homo Ludens, first published 1933 and in English 1949 , Temple Smith , London , 1970 , p.97.

⁶ Homo Ludens , page 100

⁷ The French sociologist Roger Caillois, in his work Man, Play, and Games (transl. Meyer Barash, Free Press of Glencoe, 1961) has discerned four different kinds of 'play', regarding these as applicable to both the amusing and serious forms of activity. Caillois' four categories were *Agon* (games involving competition and contest), *Alea* (games involving chance), *Mimicry* (games involving fantasy and role-play), and *Ilinx* (games involving the deliberate creation of altered mental states) .The range of these categories across both 'amusing' and 'serious' social activity is demonstrated by a few examples of each. *Agon* (rugby, the old 'trial by battle', the modern 'adversarial legal contest'). *Alea* (game of dice, the selection of a modern jury, deciding a Member of Parliament where the votes are tied). *Mimicry* (a child's make-believe game, 'forcing' the Speaker of Parliament to take the Chair after his election, the Judge in full dress). *Ilinx* (a child's game of spinning to induce vertigo, the taking of the oath by a witness).

When Sir Henry Maine came to analyse the origins and development of the legal system centred at Westminster, he noted the central importance of the ‘forms of action’ – the limited repertoire of procedural ‘moves’ in which a complaint could be presented to the King’s courts - and made the famous observation that :

‘... substantive law has at first the look of being gradually secreted in the interstices of procedure.’⁸

For us, therefore, the question becomes that suggested by Hibbitts: what legal information is conveyed by a particular performance? More particularly, what rights and obligations are created and discharged? How are relations changed and how is status established? What statements of legal relations are being made? What legal remedy is being exercised?

A further and important question will be: who is socially authorised to give a particular performance? It can by no means be assumed that anyone can perform anything. Status, in its various manifestations becomes significant.

The dictum of Sir Henry Maine at the end of Chapter V of Ancient Law, first published in 1861, and said by Sir Carlton Allen to be ‘among the most famous in the whole English juristic literature’, was that:

‘We may say that the movement of the progressive societies has hitherto been a movement from status to contract.’

A favourite examination question in “jurisprudence” courses covering Maine’s work asks to what extent the statement was true of nineteenth century English law, and where this ‘movement’ is going in modern times when so many rights depend on our being ‘employees’, or ‘consumers’, or ‘Members of Parliament’, or of a certain age. If contractual freedom has diminished, and ‘status’ is making a comeback, are we to think that modern western societies are no longer ‘progressive’, or should we rather be confirmed in our scepticism as to the usefulness of the kind of analysis which bases itself on a supposed scale of ‘primitivity’?

As is stressed in the draft *Introduction to Te Matapunenga*, we reject the idea that “performed” customary law is to be regarded as “primitive” in comparison to the “advanced” or “sophisticated” development of “written” law:

‘The idea that social norms found in traditional, performance cultures were either not law at all, or at best only ‘primitive law’, has been a persistent one in European jurisprudence. It is often found coupled with analyses which propose an ‘evolutionary scale’ for law in which fully-fledged law only emerges as societies struggle into the blinding light of written law, administered in a centralised way,

⁸ Sir Henry Maine , Early Law and Custom , p.389

by specialist courts, whose decisions are recorded in leather-bound annual tomes.’⁹

The draft *Introduction* discusses the ‘levels of evolution’ model, linked to social and economic organisation, favoured by Sir Henry Maine and others, including the New Zealand legal scholar R.C. Maclaurin writing a century ago, and concludes that:

‘We need not be Marxists to agree that Maclaurin was surely right to relate the concepts and institutions of any legal order to the circumstances in which it serves. However, it would not seem to be either a necessary or a desirable step to derive from such analysis any classificatory or definitional ‘scale’ of law as more or less ‘primitive’. Concepts, institutions, and procedures may be judged to work, or not work, in a particular social context, but that does not seem to provide a basis for describing law as ‘primitive’ or ‘advanced’, any more than a particular language could intelligibly be characterised in that way.’

Use of the expression ‘primitive’ is misleading in the further sense that it chooses a particular set of criteria by which to measure “sophistication”. Other criteria could be proposed which might produce different orderings. For example, if social cohesion were taken as the measure, or economic cost, then legal systems might be placed at different positions on the scale. Systems in which law consisted of technical signals administered by expensive specialist elite groups of lawyers and policemen might be seen as ‘primitive’ when compared to ‘sophisticated’ systems capable of functioning without either.

It may simply be better to avoid ranking legal systems in this way. This does not mean that we deny ourselves the right and duty of assessing the efficacy of legal systems in their context – on the contrary, it makes it easier to do so free of the assumption that the system familiar to the observer is at the apex of human development.

A second point requiring consideration concerns the feasibility of expressing the norms and procedures of one legal system in terms of another. Warnings abound as to the dangers, but we again resort to the comparison with language. Translation is both possible and useful so long as it is recognised that some terms will have no exact equivalents and that in many cases only approximation can be achieved.

2. Applying the Method to Examples from Maori Customary Law

In this section of our Paper we attempt to illustrate the method of analysis proposed. Each example is followed by an attempt to identify the ‘legal information’ carried by the performance described.

(a) Waiata Kakahu : A Protective Song

⁹ The draft *Introduction* may be found on the Te Matahauariki website – www.lianz.waikato.ac.nz .

In 1849-50 Governor Grey travelled with the Ngati Tuwharetoa chief, Iwikau Te Heu Heu, to Ngati Tuwharetoa lands to attend important ceremonies following the death of Iwikau's brother, Mananui in a landslide. As the Governor's party prepared to leave for home, Iwikau sang the following song for Grey:

Takoto te marino, horahia i waho,
Tarenga haki mai, nāu, e Kāwana
Tae rawa te uira, te tihi ki Tongariro,
Maunga rāhiri nāu, e Kerei

Nunumi kino ana, te pikinga i Kaiwhare rā,
Aha tō te kanohi? Te hoki mai whaka-muri, e,
A ringa atu, e waikamo i roto rā, e,
Pāheke nui ana, ko te ia, e huri i Taupō rā, e.
Ko te rite i au, e, nāku nei, whakaupa
He whakaūtanga rau; te iri noa atu,
Te tūwai haere, nōu nā, e te Kupa.

Hei kawē ki tāwiti, noho ana i te rae
Horotiu rā, kia tomokia atu, te whare, i a Mata,
Kia whakaata mai, ki te kahu rīnena,
Kia tāraro au, te remu o te hīraka.

*Serene are the waters , 'tis a widespread calm
Sourced to your flag ; this enduring peace , yours ,Governor.
Lightning strikes the summit of Tongariro ,
Acknowledging your prestige and authority , Grey.*

*You ascend Kaiwhare and disappear from view ,
Naught remains for my eyes , but to return here
To be wiped , for tears well up from within
And gush forth in a current that encircles Lake Taupo.
My task is complete , and I am satisfied.
The treasure chest shall be hung aloft
To swing gently to and fro , a salute to you Cooper.*

*Our memories shall be carried afar , to the very headlands
At Horotiu , to enter the house at Mata
Where they will be fondly appreciated , adorned with fine carving
And ornamented with chiefly white bird plumes.*

This 'waiata kakahu', literally 'cloak-song', sung for Sir George Grey by Iwikau Te Heu Heu on 7 January 1850, illustrates the role of performance in creating rights and obligations and might usefully be regarded as akin to the modern 'non-molestation order'

– it cloaked the Governor in the protection of Iwikau, and placed would-be trouble-makers on notice that consequences would follow for any who might infringe.¹⁰

(b) Hinana ki Uta Hinana ki Tai: A ‘Constitutional’ Performance

In the course of the same visit, Governor Grey presented Iwikau with a flag similar to the one presented to the North Auckland tribes, prior to 1840, by King William IV. Iwikau’s response was this song:

Tenei ka noho ki te take o te Kara ;
Whakatu rawa iho taku noho ki raro ra ;
Whakamau te titiro te ao , ka riaki ,
Na runga ana mai te hiwi ki Takapuna ,
I raro ra Kawana , e aroha mai nei i au , e –
Toro mai to ringa kia hari-ruia ,
Ka tikamauru te aroha i au , e –¹¹

Sir John Grace gives this translation :

*Today I pay allegiance to the crown ,
And by this flagstaff I take my seat.
O people everywhere lift up your eyes ,
Behold the colours fluttering o’erhead !
From the hill at Takapuna , O Governor ,
Came your greetings and your friendship.
So , extend your hand , my friend , that I may take it ,
For great indeed is my love for you.*

The Governor’s flag was subsequently to fly at the great 1856 hui to open the pataka named *Hinana ki uta hinana ki tai* (literally, ‘look inland – look seawards’). The gathering also had the important political purpose of discussing the setting up and selection of the Maori King. The flag given by Grey flew at the masthead. From a spar beneath it fluttered two further flags, one white and the other red. Sir John Grace reports Iwikau’s explanation:

‘You see the flags on each arm flying side by side . The white is the Pakeha and the red is the Maori.’¹²

¹⁰ The circumstances of the performance, and the text, together with Chris Winitana’s valuable translation of his ancestor’s waiata, are presented in Alex Frame, Grey and Iwikau: A Journey into Custom, Victoria University Press, Wellington, 2002, see especially pages 58-59

¹¹ Sir John Grace , Tuwharetoa , Reed Books, 1959, p.438-439.

¹² Tuwharetoa , p.447. Sir John Grace is specific that the flag flown in 1856 was the one given by the Governor in 1850 , attributing the confirmation to ‘notes by L.M. Grace in 1882 taken at the dictation of Ruingarangi’ (Tuwharetoa , p.439).

The skill of Iwikau in reconciling the promise to his friend the Governor with a leading role in the creation of the Kingitanga is revealed in James Cowan's description of the proceedings. The tribes assembled at Pukawa around Iwikau's mast – representing Tongariro mountain. Long ropes of plaited flax hung from lower points to the ground. Cowan reports that Iwikau called upon each tribe in turn to affix a flax strand to the ground:

'Each of the ropes representing these sacred mountains of the tribes was hauled taut and staked down, leaving Tongariro mountain in the middle, supported and stayed by all these tribal cords, and above floated the flag. Thus was the union of the tribes demonstrated.'¹³

Both the 1850 and 1856 events illustrate the way in which obligations are created and evidenced in performance cultures. The 'legal information' carried by the performance in 1856 concerns the availability and acceptability to the tribes of a constitutional method for discussing and determining a position among the tribes on issues requiring a common policy. Observers of Maori politics will note that this institution remains active to the present time.¹⁴

(c) Performed Wills - Ohaki

In the days leading up to his death in 1894, Tawhiao, the second Maori King¹⁵, made known his successor with these words:

Papa te whitiri, ka puta Uenuku, ka puta Matariki.
Ko Mahuta te kingi!.

*The thunder crashes, Uenuku appears, Matariki appear.
Mahuta is the king!*

Margaret Orbell explains that Tawhiao figuratively associated the kingship of his eldest son Mahuta, with the mana and tapu of thunder, the rainbow god Uenuku, and the constellation of Matariki (Pleiades) which traditionally heralds the start of the Maori New Year.¹⁶ Tawhiao's words, were celebrated by his people and incorporated into a composition for Mahuta:

Ko Mahuta Te Kingi

Ko Mahuta te kingi, hei kingi hou,

¹³ 'Notes by James Cowan on Great Hui at Pukawa in 1856', Journal of the Polynesian Society, Vol.29 (1920), p.160-161.

¹⁴ Perhaps the most notable recent example being the hui at Hirangi marae, near Turangi, on 29 January 1995, called by Sir Hepi Te Heuheu and attended by over 1000 leaders and representatives, to reject Government's proposal to place a financial limit on the settlement of historic Treaty claims.

¹⁵ The first Maori King was the great Waikato leader, Potatau Te Wherowhero, elected in 1858.

¹⁶ Waiata: Maori Songs in History, first published 1991, Reed Books, Auckland. See also Cowan, J. The Maoris of New Zealand, Christchurch (1910) pp. 342-343.

Hei kingi tuatoru mo te ao katoa.

Ko Te Paki o Matariki hei anahera,
Hei omaoma i waenganui i te iwi nui.

Ma matou koe e hari atu. Haere,
E Mahuta, haere ki te ao katoa.

Mahuta is the King

*Mahuta is the king, a new king,
A third king for all the world.*

*Te Paki o Matariki are his angels,
To speed amongst our people.*

*We will carry you forth. Go,
Mahuta, go out to all the world!*

This ‘ohaki’ or dying declaration of Tawhiao performs the function of the written will for the purpose of transferring political leadership . Tawhiao announces his testamentary wishes to individuals gathered around in a public performance. The public nature of the performance ensures that there are sufficient witnesses to attest to the wishes as well as inviting tribal support.¹⁷ Mahuta’s kingship is subsequently confirmed by the people with the song, among other performances. It becomes part of the tribal narrative and its ongoing recital represents their continuing support. The song also establishes the place of the King’s advisors – Te Paki o Matariki - they are figuratively seen here as angels, intermediaries who will act on his behalf.

Ohaki also had functions in respect of land, property and even the values to be held by the successors. For example, on January 26 1843, a dying Taikiamana of the Te Uri-o-Hau, Ngati Whatua and Kaipara made the following pronouncement:

‘E hoa, e Te Hemara Tauhia, kia atawhai ki o tuakana ki o tuahine i muri nei. No te mea ko te tukunga atu tenei o te mana o te whenua kia koe, ara kia koutou ko tuakana. Ia au ano e ora ana kia au te mana o te whenua kia he rano tooku tinana katahi ka oti kia koutou te mana o te whenua...’

¹⁷ On occasions ohaki have been challenged for having insufficient public character. For example the Native Appellate Court in 1895 held that words used by Renata Kawepo on his deathbed did not constitute an ‘ohaki’ in favour of Mr James Carroll and another. They stated: ‘Mr Carroll... was the only one present who heard the important words, and the words themselves are not, we think, of clear and deliberate character as to form a proper foundation for the “ohaki” set up.’ The Court stressed the words were not clearly expressed in the presence of the near relatives. Refer Judge Rawson’s ‘Treatise on Native Land Law’, National Archives MA 16/3 at p. 9.

*'Friend, Te Hemara Tauhia, look after your brothers and sisters in the future. This is the bequeathing of the mana of the land to you, that is to you and your brothers. While I was alive and well I had the mana of the land but with death upon me I give you the mana of the land...'*¹⁸

(d) He Waiata Whakautu Taunu – Remedy for an Insult

The great epics of the performative past of Maori were sung and chanted. Such compositions represent 'case law' where precedent may be found. They can mark the beginning and/or end of a legal procedure, from formally laying an accusation to publicly acknowledging a settlement reached. At the marriage feast of Potatau te Wherowhero and Ngawaero (c.1815), Waata Kukutai, a visiting chief, commented disparagingly on the absence of preserved birds from the fare. Learning of these comments, and overcome with embarrassment, Ngawaero sought to remedy this insult. She requested the assistance of her Raukawa and Maniapoto relatives to carve an elaborate vessel named Hao-whenua. She then arranged for it to be filled with preserved birds and carried by eight men in presentation at a subsequent feast. Wearing a prized heirloom¹⁹, Ngawaero led her people in the presentation of the kumete, 'Hao-whenua' and the performance of the following patere, intended both as a kinaki or relish and as a retort to Kukutai:

E noho ana ano i te papatahi a taku koro
Whakarongo rua aku taringa
Ki te hiha tangi mai a Kukutai
Me aha koe i te awa, whakawhiti ki Punui,
Te Pikitia i te pinakitanga ki Turata
Ko Te Arawi!
E kore au, e Kahu, e aro iho he kaitata;
Waiho tonu i te huanui

*I am sitting on the marae of my spouse
Mine ears hearing
The sneers of Kukutai
Regardless of the river I cross to Punui,
Do not climb the slopes to Turata
To Te Arawai!
I will not turn aside, there is plenty of food;*

¹⁸ This appeared in a note to Elsdon Best, George Graham who was well versed in the history and traditions of the Waikato and Northern peoples relates. He describes it as a "good sample of the old verbal 'ohaki'". 'Correspondence and notes for papers' in [Polynesian Society : Further records \(80-115\)](#), Alexander Turnbull Library, Wellington, ca 1924-1929.

¹⁹ This heirloom was a tiki of greenstone named 'Te Ngako' and was a prized possession of the notable Te Rangituamatotoru family of the Ngati Tuwharetoa tribe. For a more dramatic account of this story see Pei Te Hurinui Jones' King Potatau: An Account of the Life of Potatau Te Wherowhero, the First Maori King. Auckland : Polynesian Society, (1959) Chapter 10.

*Left by the roadside!*²⁰

This patere, still sung today by the Waikato-Maniapoto people, illustrates the adversarial use of food and taonga, and the dramatic expression of music and song, in the formal “shaming” of the named individual. The overall performance provided Ngawaero with a legal remedy for the slur on her reputation.

(e) Hakari : Talk Feasts

One obvious category of performance-based customary legal transactions is the often-reported hakari. These were far from being mere food demonstrations, being the occasion for resolution of all kinds of grievances and disputes. They were occasions for exhaustive discussion also ranging over legal matters. The 1838 House of Lords Select Committee was set up to inquire into New Zealand affairs. A Surgeon, Mr J. Watkins, who had spent some time in New Zealand, gave the following evidence before the House of Lords Select Committee in 1838 when questioned whether Maori had any persons to expound the Law:

‘... they appear to have Councils or annual Meetings of Feasts there. Chiefs of various Tribes meet together and speak at great length... They reason very acutely indeed; and they have their Assistants to sit with them as Reporters to assist them to remember the speech. In case they would forget something they would refer to their friends.’²¹

Disputes are literally talked out. A traveller, William Bambridge, described such an occasion at Kerikeri in March 1843, in which the parties joined together for a ‘korero’ (*talk*). Grievances were brought forward, rectified, and resolutions made around a ‘hakari (feast). Bambridge gave a detailed description of the structure that was erected and noted some of the performative aspects surrounding the ‘talk feast’:

‘The scene was now one of great animation... At the time of my arrival, the party giving the feast was commencing their dancing, whilst the other party were stationed on the opposite hill in some degree of regularity with guns, spears & other various weapons ready to rush down to the stage as soon as the other party concluded their ceremony ...’²²

Such animation made the event memorable and signified the seriousness of a claim, relationship, or transaction. Structures such as the stage added to the dramatic atmosphere of the experience. The partaking in the feast and acceptance of gifts provided a public statement that the recipients had accepted the outcome and any

²⁰ He Patere na Ngawaero’ in Nga Moteatea Vol. IV, song 319.

²¹ Report from the Select Committee of the House of Lords appointed to Inquire into the Present State of the Islands of New Zealand...with Minutes of Evidence.’ Ordered to be printed, 8 August 1838, p.29.

²² William Bambridge Diaries, March 1843, Alexander Turnbull Library, Wellington, ref. MS-0129-0132, p. 21.

settlements arrived at .

(f) Ka Tika to Mate: Symbolic Violence

Where a wrong has been done, the wrongdoer and his group are regarded as being in a sense at the disposal of the wronged party and his group. John White reports Governor Wynyard's conference with several chiefs of Waikato over the killing of a Native by a European. The Governor went there to ensure that no further outbreak of violence would occur. After a meeting with the chiefs, the Governor was referred to the father of the victim who declared:

‘E Kawana ka tika to mate. Nau i haere mai ka tika taka kia patua koe. I patua a Te Wherowhero, ko koe e Kawana te tuarua o nga tupapaku. Ka mutu te patu, ka oti nei te hohou te rongu. Nau i haere mai ki te whare, no reira koe i mate ai. Ehara i au i karangatia ai koe; nau i haere mai ki au, no reira koe i mate ai. I mea koe ka tika to haerenga mai.’

‘Governor, your death is just; (alluding to the spear thrust into the earth, as figurative of a retributory victim for the murdered native) you came to me; it is right for me to kill you. Te Wherowhero was killed, and you O Governor are the second offering. Will you cease to kill, now that peace is made? You have come into the house hence your being killed. I did not call you; you came, so I will kill you.’²³

This encounter is clarified by John White in a footnote:

‘According to Maori usage the aggrieved should make concession, and propose peace; and should the aggressor have the hardihood to visit the injured party, his own life would be the penalty; hence the allusion, “you are mine” simply means, you are at my mercy, your life is at my disposal.’

The account underlines the role of symbolic violence as a substitute for actual violence after a wrong. It represents a form of remedy as a public acknowledgment of the wrong and a restoration of mana.

Symbolic violence is a dramatic performance. It is not something one party does to another, but a cooperative act in which both sides must play their parts. An example is provided by the following account from the Native Agent for the Thames:

‘I refer to a makutu, or witchcraft. Some four years ago an elderly Native named Te Pukeroa was accused of causing the death of the great Ngatitamatera chief Te Moananui ; in fact the man (who is really a harmless monomaniac) confessed that he had exercised the black art, the result of which confession was a threat by Te

²³ The Maori Messenger: Te Karere Maori Vol. 1, No. 3, March 1855; the account first appeared in The New Zealander, February 1854.

Moananui's people to take his life ; and to show that their rage was genuine, several of them surrounded his house one morning at daylight, and poured a volley into it. I do not think, however, they really meant murder, as they took the precaution the day before to send word to the Thames about their proposed expedition, so that the opportunity was taken to have the old man removed from his house to a place of safety.'

The subsequent resolution was arrived at in notable Maori fashion:

'The result of which was they forgave the old man (but cautioned him not to do the like again), averted the threatened tribal quarrel, and, metaphorically speaking, a general hand-shaking took place - not on the quiet, or in secret, but in grand style, according to most approved Maori custom. The meeting was held at Ohinemuri, and the Natives from the Thames (with whom was the wizard) were conveyed thither in two war canoes, one steamer, and numerous boats, all the men being armed ; the whole, when they landed and joined with the Ohinemuri people in their war dances, &c., making quite an imposing spectacle. The speeches that were made were very few, being merely expressive of forgiveness on the part of the late Te Moananui's relatives and of peace-making on the part of the others ; an exchange of muskets took place to show that the wrong inflicted was forgiven, and the peace made a genuine one ; after which the meeting ended and the Natives returned to their different homes apparently satisfied that, if a long and bloody war had not been brought to an end by their action, at least a threatened catastrophe had been averted.'

(g) Tapatapa Whenua: Claiming Land by Personal Naming

Te Rangi Hiroa (Sir Peter Buck), in his classic 1949 account *The Coming of the Maori*, has given a characteristically clear explanation of the custom by which land is reserved by persons of sufficient authority by naming it after parts of the namer's body :

'Te Arawa [the canoe], commanded by Tamatekapua worked along the coast westward to Maketu where she paddled in towards the mouth of the Ngapuna River. As they came in , the chiefs indulged in tapatapawhenua or taunaha which is the custom of pre-empting land by naming it after the parts of their body. This Tamatekapua pointed to the point now known as Maketu Heads and called out. "I name that place Te Kuraetanga o te ihu o Tamatekapua" (the projection of the nose of Tamatekapua). Tia identified the place now known as Rangiuru with the abdomen (takapu) of his son Tapuika, and Hei named Otawa the abdomen of Waitahanui a Hei. This ceremony effectively reserved the land indicated for those whose anatomical parts had been publicly announced, for no one would subsequently dare to cultivate on Tamatekapua's nose or build a house on someone else's abdomen.'²⁴

²⁴ Te Rangi Hiroa , The Coming of the Maori, first published 1949, Whitcombe and Tombs, Christchurch , 1970, pp.55-56.

(h) Te Kawanga: House Opening and removal of Tapu

On 23 August 1922, the newly built Maori Affairs Committee Room of Parliament was formally opened with a mixture of Maori kawa and European protocol. Those in attendance included Maori politicians of the time such as Sir James Carroll, Apirana Ngata and Tau Henare, the Prime Minister, several Ministers, other Members of Parliament, Members of the Judiciary, Heads of Departments and other distinguished Wellington figures. The kawanga ceremony was performed by Mita Taupopoki of the Tuhourangi tribe and other Te Arawa principals. Te Arawa, under the leadership of Te Kiwi Amohau, had been charged with the task of completing the carvings for the room.

‘Na nga kaumatua o te Arawa i wewete nga tapu o ona whakairo, i karakia te karakia o te waere, te kawa, te toki, te takapou. No muri ka whakatuwheratia e te Minita Maori te taha pakeha, na ka hoatu e Te Kiwi te ki o te ruuma ki te wahine a te Minita, a na taua wahine i takahi te paepae o te ruma, i tomo hoki, i whakanoa.’

‘The elders of Te Arawa removed the tapu from their carvings, recited the incantations of the waere (addressed to the building as a whole, and to lift the tapu off the same), of the kawa (an incantation addressed to the building and calling on the powers to ‘ruruku’, or bind together, the uprights and rafters), the toki (An incantation addressed to the tree in the forest whence, with the aid of the toki, or axe, the material for the carving, was obtained) and the takapou (lifting the tapu to enable the entry of women to the house and spreading the mat of occupation and use). Following this, the European ceremonies were performed by the Minister of Native Affairs and Te Kiwi presented the key to the wife of the Minister of Native Affairs. It was that women who crossed the bar of the room, entered it and thus rendered it free from restrictions.’²⁵

The Te Kawanga ceremony had the effect of averting the dangerous effects of tapu and of making the house usable for the ordinary purposes for which it was intended. The occasion and the banquet afterwards provided an opportunity for speeches by the major figures, who offered comment on the state of relations between the races.

(i) Taonga as Contracts

A gathering in respect of the memory of Sir Donald McLean was held at Waihirere Pa, Wairoa, on Monday, the 29th January. Three hundred of the principal Natives of the district were present. Mr. Locke had been asked to be present on the part of the Government, along with other European guests. Several speeches were recorded including that of Tamihana Huata. Having noted past troubles and declaring his

²⁵ The report quoted is from ‘He Kawanga Whare’ in *He Toa Takitini*, October 1, 1922 pp. 7-8. A full report of the proceedings, with the text of the Karakia and the speeches of the principal leaders, both Maori and Pakeha, is found at App. J.H.R. 1922, 1-3B, where the date of the occasion appears to be incorrectly stated as 23 October.

continued loyalty to the Government, Tamihana concluded with the presentation of a gift to Locke in honour of the memory of Mclean:

‘Heoi, ka tango au i taku ritenga Maori ka hoatu ki a koe te kaitaka me te pounamu hei whakanui i te ingoa o tera kua mate nei—he ritenga tenei e kiia ana he Tapaetoto.’

‘Now to conclude, in honor of the memory of him who has gone, I adopt my Maori custom and present you with a mat (a kaitaka) and a greenstone—this is called a Tapae toto.’²⁶

Dr Paki Harrison has also referred to the custom of ‘tapae toto’. The Hauraki chief, Paora Te Putu had transferred certain lands around Kennedy Bay to Ngati Porou. Following his death a mere known as Whaita and a cloak were presented to these Ngati Porou as a tapae toto which along with intermarriages served to confirm their tenure. The presentation of these taonga rendered it a permanent grant:

‘It cements the authority by presenting the mere and the intermarriages that occurred at the time of the presentation, and looking back on it now it seems to me to be a very sensible thing to do, because it gave us the descendants, the right to argue the permanence of our tenure, not only in terms of the tāpae toto but in the preceding whakapapa that linked us through to Ngati Maru from Ahuahu right through Ngati Maru and all coastal people...’²⁷

The presentation, and the taonga itself, thus become evidence of the relationships and rights confirmed and granted. This is evident too in the presentations of taonga to Grey at the end of his first, and generally successful, term as Governor in 1853.

At Otaki in September of that year, the Ngati Raukawa , Te Atiawa , and Ngati Toa tribes said their farewells to Governor Grey in the form of an address subscribed to by 272 signatures , in which expressions of admiration and affection were prominent.²⁸ A song followed lamenting the departure, and the greenstone pendant Kaitangata was presented to Grey in this way:

‘Rangiuiira , the wife of Rangihaeata , was led forward by several people , one of whom having cut the string by which a green jasper ear-ring (a very old heirloom of the Ngatitōa tribe) was attached to her ear , handed it first to Rangihaeata . The old chief then proceeded after the ancient Maori custom of “hongī” to press the greenstone to his nose , and pass it over his face in token of farewell , having finally parted with the precious heirloom of the tribe ...’

²⁶ ‘Hui Maori i Te Wairoa’ in *Te Waka Maori O Niu Tirani*. Vol. 13b, No. 3, 6 February 1877 p. 49

²⁷ Extract from transcript of Te Matahauriki Pu Wananga (Seminar) with Dr Paki Harrison, James Henare Centre, University of Auckland, 28 April 2000.

²⁸ The details of the Otaki ceremonies are reported in attachments to Grey’s despatch (No.118) to the Duke of Newcastle of 26 September 1853 , B.P.P., Vol. 9 , p.284-287, see Enclosures 1 - 4.

(j) Lifting Rahui - An Argument About Capacity

Not anyone can perform certain acts. Many performances require status and capacity. The Tuwharetoa chief, Tureiti Te Heuheu gave the following account of the destruction of a 'rahui' in his evidence to the Native Land Court in 1888. The rahui was put in place because it was a recent burial place and therefore tapu. Te Heuheu recorded that:

'When we reached Te Pukeroa a "rahui" was standing there belonging to Ngati Maniapoto. I took off the garments that were on it and burned them. My companion was alarmed and ran away; my companion was Te Naihi. When we got to Waihora, Tokowhitu was crying at my having burnt the clothes, but Te Kirikau, the mother of Te Kahui endorsed my action...(Hikaka) had heard of my destroying the rahui, and declared I was right as I owned that land and said that I was the bridge of his nose...'²⁹

In performance cultures, legal disputes arise. Not everyone recognised Te Heuheu's legal right to perform such an act, he being regarded as a 'teina' or junior to the deceased. Te Paehua Matekau, asserted that:

'It would not be according to Maori custom for a younger relative to take off the tapu from what belonged to an older people.'

She claimed, rather that it was Hauauru who took the tapu off by 'killing pigs', another example of an act in removing rahui. Hauauru himself maintained he took the tapu off:

'...I took it off myself... Tureiti is not an ariki of mine, that he could take it off.'

Nevertheless Tureiti Te Heuheu responded by insisting:

'I did not know at the time I was a "teina" of those "Tupapaku". I consider that if the teina possesses the necessary mana he would be able to take the tapu off. I know it is a Maori custom that it would not be proper for a teina of low degree to take the tapu off.'

(k) Rongo-a-Marae: Women as Emissaries

As we have already commented, in many cases, if not all, an appreciation of the performer is necessary to understand the performance and the message being communicated. Traditionally, 'women' conveyed overtures of peace as the following example illustrates. In 1874, the Resident Magistrate in Raglan, Mr. Bush, reported the attendance of Tawhiao's sister, wife and daughter to open the house Tokanga-nui-a-noho. The house was built by Hone Te One. The party of women was sent by Tawhiao himself with messengers sent on ahead prepare their arrival. Hone Te One had supported the

²⁹ Te Heuheu Tukino - Claim to have his children's names inserted in the Rohe Potae list, Alexander Turnbull Library, Wellington, MS-Papers-4760-5, p. 4 .

Government during its conflict with Tawhiao during the 1860s and there had been some animosity between the two since:

‘On the 21st of November Hone te One's carved whare at Aotea was opened by Tiria, Tawhiao's sister, who was accompanied by Parehauraki, one of his wives, and his infant daughter. It was stated that these women had been especially deputed by him to perform this ceremony. The mere fact of a party of women being detailed for this work was looked upon as a good omen, auguring peace, by the friendly chiefs, it being a custom amongst their ancestors generally to send women to negotiate a truce, who sometimes were given to the hostile tribe as a surety of good faith, and whose wives in many instances they became, thus connecting the two tribes previously at enmity with each other.’³⁰

Furthermore, in performance cultures we should always be alert to what might be going on 'behind the scenes'. Sometimes the ‘performer’ is merely a mouthpiece. During the speeches of welcome, Bush observed that though Tawhiao’s sister, Tiria, did not speak, nevertheless the spokesmen consulted with her before replying to the speeches.

3. Some Conclusions

We come to two points with which to conclude our Paper:

First, that the approach sketched in this Paper will cause us to look carefully at the place of the performance elements in Maori and Polynesian customary law. A celebrated hui two hundred years ago may have been the origin of constitutional consequences which persist today, and are recorded, taught, and ‘proved’ in a song by an influential chief on the occasion. The presentation of an important taonga, recorded in action and song, may state and record the ‘contractual’ relations between the parties. The carving on a meeting house may provide conclusive evidence as to relationships and customary rights. In each of these cases, it will be seen that, as Hibbitts suggests, ‘performance’ provides opportunity for social participation, for consolidation and verification of both facts and norms, and for explication and legitimation of relationships. We will understand George Steiner, who in his introduction to Huizinga’s book observes of hakari-like institutions in many cultures involving ceremonial presentations of food and gifts:

‘Even spectacular waste when encapsulated in a social ritual, in a framework of agreed, and reciprocally binding rules, can prove to be a civilising agency.’³¹

Secondly, if our hypothesis that Maori customary law is embedded in performance is correct, then that is a factor which must be taken account of in our Institute’s stated objective of exploring ways in which the legal system of Aotearoa/New Zealand might better reflect the values and institutions of both our major component cultures. A

³⁰ Report of G. T. Wilkinson, Native Agent, Thames, to the Under Secretary, Native Department, 28 May 1881. AJHR 1881, G-8, p.8.

³¹ Homo Ludens, page 11.

particular implication might be that participation by performance in our legal system is likely to accord better with traditional Maori methods than the reduction of law to technical verbal signals.

On this view, it ceases to be obvious that the removal of the dramatic elements and symbolism of legal process – much advanced in New Zealand and elsewhere on grounds of supposed ‘rationality’ – represents undiluted progress. Hibbitts has noted the role in Western law of the formal court trial as a performance, describing it as ‘a unique opportunity for recalling, popularizing, approving and democratising the law’.³²

Nor, from this perspective is it self-evident that the modern fashion of legislative drafting – away from customary and poetic style and towards supposedly ‘plain English’- will inevitably produce the most social cohesion. The proliferation of complex legislation comprehensible to only a few specialists and administered by bureaucratic process might not be the best manner of enlisting Maori participation.

Finally, a question is raised whether the bureaucratisation of legal process may starve the performance tradition of the ‘charismatic’ and tribal element on which it relies. The foregoing discussion pinpoints the diverging perspectives. The modern fashion assumes comprehensibility and demystification to be the primary requirements whereas the customary systems of both our major component cultures relied upon performance and inspiration – what Maori might call *ihi* and *wehi* - to a considerable extent. Weber uses the terms ‘rational’ and ‘charismatic’ to contrast the two kinds of system. To take an example, when the enlightened decision was made early in the 20th century to recognise in New Zealand law the Maori custom as to adoption, it was provided that the traditional customary requirement that the process take place on the marae, before the tribe, be replaced by a registration system. After all, it was reasoned, a public register would provide the notification previously achieved on the marae:

‘The publication to the tribe, laid down as one of the essentials of adoption, is fully satisfied by the registration and gazetting of the notice of adoption under section 50.’³³

On the sort of analysis suggested here, it may be that the replacement of the ‘performance’ element by formal registration is not just a ‘technical’ change, but rather one going to the very essence of the institution. Similarly, the understandable bureaucratic aspiration to develop dispute resolution processes which can be ‘mass-produced’ by training courses and manuals may be frustrated by the inability of such processes to take account of the ‘charismatic’ requirements of ‘performance cultures’.

³² Bernard Hibbitts, ‘De-scribing Law : Performance in the Constitution of Legality’

³³ App. J.H.R. (1908), Vol.II, G-5