MASTER'S THESIS

Master of International Education and Development

MAY 2023

RIVERINE RIGHTS, A COMPARATIVE ANALYSIS OF RIVERS IN NEW ZEALAND AND INDIA

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ACKNOWLEDGEMENT

I am grateful to the Almighty God for granting me the opportunity and strength to pursue this project.

Special thanks to my supervisor, AXEL BORCHGREVINK for his tremendous help and patience he had for me throughout the journey and mostly for his important inputs he made for this thesis to come out as it did.

Thank you also to my friends, Mathias and Ekow for the contributions and suggestions they made towards this paper.

And to end, special acknowledgment to my late mother, SALOMEY AMA YEBOAH, you have always been my pillar and the thought of you is what keeps me going.

ABSTRACT

Human protection of the natural environment by reason of the interdependent relationship has received increased attention in recent decades. From the mid-1800s through the Rio Conference to COP26 in Glasgow, 2021, activists have forged on until the emerging conferment of natural environmental rights. On the conferment and recognition of rights on elements of the natural environment, environmentalists opine that the most efficient approach is by first conferring legal personality on these elements. This study considered principally riverine rights. Adopting the legalist jurisprudence to confer legal personality on rivers, it is proposed that critical institutionalism be adopted in the establishment of a guardian institution for the exercise of the rights of the legal personality of the rivers. Nevertheless, for optimum functionality and realisation of the promises of environmental protection, it is proposed that environmental constitutionalism is the surest foundation with boldest legal force to sustain efforts towards protection of the environment. On this framework, this study adopts a multi-case study approach by documentary analysis of the the Te Awa Tupua (Whanganui River Settlement) Act 2017 of New Zealand and two reported law cases from India - *Mohammed Salim v. State Of Uttarakhand And Others (2016 & 2017 Judgments) and Lalit Miglani v. State Of Uttarakhand And Others (2016 & 2017)*- both of which sources confer legal personality on rivers Whanganui of New Zealand and Rivers Ganges and Yamuna of India respectively. Upon thematic and comparative analyses based on the required elements of critical institutionalism and environmental constitutionalism of the guardian institutions it is concluded that New Zealand by use of prolonged negotiations and statutory reform has a better framework for the recognition and enforcement of the riverine rights as compared to the judicial declaration approach by India. Realising the potential efficiency of the theoretical framework, it is recommended, among others, that states adopt and implement constitutional recognition of riverine rights with strong political will to adopt workable guardian institutions based on critical institutionalism.

LIST OF ABBREVIATIONS

COP26 – 2021 United Nations Climate Change Conference

NGOs – Non-Governmental Organizations

IUCN – International Union for Conservation of Nature and Natural Resources

CBD – Convention on Biodiversity

UNFCCC - UN Framework Convention on Climate Change

UNCSD - UN Commission on Sustainable Development

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION TO THE STUDY

Protection of nature has been a clarion call for over a decade responding to failures attributed to contemporary environmental laws passed for the protection of the ecological settings of planet earth. Global call to protect the environment took centre stage in 1972 when participants at the United Nations Conference on the Environment adopted 26 principles for the sound management of the environment. There was a profound dialogue between the countries from the Global North and developing countries southwards on the correlation between sustainable economic development and environmental pollutions (of air, water and oceans) in relation to wellbeing of people globally (United Nations Conference on the Human, 1972). As noticeable, the now defunct nation of Yugoslavia was first to guarantee legal protection of the environment from a constitution. Article 52 of the 1992 Constitution notes:

> *"(1) Man shall be entitled to a healthy environment and timely information about its condition.*
> *(2) It is everyone's duty to protect the human environment and make use of it in a rational manner.*
> *(3) The state shall be charged with maintaining a healthy human environment and to this end shall prescribe the conditions and manner of the performance of economic and other activities."* (Yugoslavia, 1992).

In modern times, there has been advocacy for more efficient legal framework to protect nature and the environment. One of the early voices was Christopher Stone, he sought for nature to receive a form of protection from the spectrum of the one accorded to man. Stone stated that, it is the nature of man, from the care of oneself only to the compassionate care of inanimate objects (Stone, 1972). This nature of man asserted by Stone has driven indigenous groups, civil society groups and NGOs to move at a fast pace to call and fight for protective laws for the little that is left of nature. Specifically, his writings have influenced advocates of environmental rights to seek the grant of legal personality on elements of the natural environment including rivers, forests, etc. in the quest to provide the best form of legal protection for the environment. This is the phenomenon this study ponders.

This study focuses on two trailblazing countries; New Zealand and India; in environmental protection. These countries have conferred legal personality on rivers in their respective quests to protect the Whanganui River and the Ganges River respectively. It explores a comparative analysis of how these two countries went about it and its implications. The analysis is structured in themes based on the theoretical framework that in order to enjoy the best promises of environmental protection, elements of the natural environment (in this case rivers) ought to be granted legal personalities (Stone, 2010; Shelton, 2015). But for those legal personalities to thrive, there must be legal guardians to act on behalf of and in trust for the rivers (Stone, 2010; Shelton, 2015). The most effective legal guardians are preferably institutions built on the dictates of critical institutionalism as proffered by (Cleaver, 2017) for community based resource management. And finally, for sustainability of this framework, the legal systems of the countries must reflect the elements of environmental constitutionalism by Kotze, (2015). On this framework, this study makes conclusions on whether the two states are on a sustainable path to riverine rights protection and to suggest further modifications where necessary.

1.2 STATEMENT OF THE RESEARCH PROBLEM

Macpherson et al (2021) points out that traditional river protection laws have most for the past decades been ineffective when it comes to its implementation. This has been prevalent in most countries especially those in the Global South, where there have been different forms of regulation to protect the water bodies. These actions of enacting environmental laws without the knack to bite is seen as mere symbolism or formality. (Macpherson et al., 2021) describes these succinctly as 'green washing'; where beautiful environmental provision laws exist but implementation is impeded by the judicial architecture and power-dynamics. For example in the constitution of India, there are provisions for the protection of the environment but no legal personality to assert those rights readily (*Lalit Miglani v. State Of Uttarakhand And Others (2016 & 2017)*. Hence there is an 'implementation gap' which is also coupled with enforcement issues as the two go hand in hand. This implementation gap has led to further environmental pollution because the various policies from the numerous international summits have been helpful only on paper. Polluters persist in their destructive activities while the policies and law remain toothless.

According to Stone, it will take human ingenuity and proactiveness to seize environmental rights without which the need for environmental rights may never be realised (Stone, 1972).

The human allies referred to by Stone includes state and non-state actors like government institutions and structures, non-governmental organisations like civil society groups and all citizenry. This means human ingenuity is needed to solve the implementation gap identified. The solution Stone suggests is first to grant legal personalities to elements of the environment in order to empower these elements to exercise rights for their protection and preservation.

In addition, in the international scene, there is the problem of countries themselves being major polluters. According to Daly and May, most of these countries are developed countries and these pollutions are the knock-on effect of their development which tend to affect developing countries, most especially their water bodies (Daly & May, 2018). Activities such as mineral extraction and oil exploration by these developed nations comes with seductive packages for these developing countries that national environmental laws become irrelevant. This issue also highlights the reluctance of developing countries to abide by international and national environmental laws that have been enacted. These laws they see as imperial impediments to their development guised as sustainability goals. The President of Ghana, Nana Addo Dankwa Akuffo-Addo in his address at the COP26 emphatically reaffirm the stance of most African countries,

> *"The Almighty has blessed our lands with abundant natural resources, and it would be wholly unfair for the world to demand that Africa abandons the exploitation of these same resources needed to finance her development, and help us to cope better with the threat of climate change, at a time when many countries on the continent have only just discovered them."* (graphic.com.gh)

Again, the instructive opinion of Stone are useful here. Where the natural elements are granted the desired standing at law, guardians of these personalities will be able to take legal action against states, multinational corporations and other polluters for the protection, preservation and improvement of the natural environment (Stone, 1972).

Thus, this study essentially is on an assessment of the two leading countries on their quests to address the identified problems of implementation gap and complicity of states in pollution. The study seeks to assess whether the approaches adopted by these states are effective and sustainable for the desired protection of riverine rights so as to set the right pace for other countries in the conferment of riverine rights for the protection of such environmental resources.

1.3 RESEARCH OBJECTIVES

The objectives of this study are stated as follows;

1. To examine how New Zealand and India are exercising legal guardianship over the rivers.
2. To examine how the institutions responsible for the protecting river rights in New Zealand and India are positioned to protect riverine rights.
3. To examine whether the legal systems in New Zealand and India adequately protect and sustain environmental rights?

1.4 RESEARCH QUESTIONS

In tandem with the theoretical framework, this study intends to find answers to the following research questions. It intends to analyse the fundamental differences and implications of choices made in these respects.

1. How are New Zealand and India exercising legal guardianship over the rivers?
2. How are the responsible institutions in New Zealand and India positioned to protect riverine rights?
3. Does the legal systems of New Zealand and India adequately protect and sustain riverine rights?

The resolution of these questions will help test the facts against the theoretical framework of this study that for the most effective legal protection of riverine rights, there ought to be guardians for the legal personality of the rivers. These guardians must be in the form of critical institutions in order to protect riverine rights adequately. Finally, the best form of riverine rights protection is by the incorporation of elements of environmental constitutionalism in the legal system.

1.5 SIGNIFICANCE OF THE STUDY

The existence and sustainability of some of these rivers has been under threat with some nearing extinction. The existing laws and institutions have been a complete failure in their quest to protect our environment. With scientists sounding glaring alarms unabatedly about sustainability of our planet, innovative ways to protect our natural environment seems nevermore urgent. It consequently comes up that giving nature a legal personality or

personhood is a fertile mechanism for protecting nature. Environmental rights may be the way and deserves to be a litmus test for saving the planet.

This study is thus important in assessing existing achievements in this regard, and further analysing same for their strengths and chances for improvement. The study also contributes towards environmental rights by proposing a framework for a more robust and sustainable approach to the entrenchment of environmental or river rights.

1.6 SCOPE OF THE STUDY

This study concentrates on riverine rights especially in the two chosen states – New Zealand and India. It analyses the history, procedure and approaches to granting legal personalities to River Whanganui, River Ganges and River Yamuni and further on how the legal personality is to be exercised and sustained. It also recommends several policies for a more robust and sustainable approach to fulfilling the needs of environmentalism.

Considerations will be made from the perspective of government, stakeholders and persons with primary interest in these rivers including the indigenous communities entirely dependent on these river resources to indicate how these parties have contributed towards the grant of legal personalities in the said rivers.

1.7 RESEARCH LIMITATIONS

Time constraint is a likely and possible obstacle to this study. In addition, restrictions on travelling for field work will affect the study in some way as alternative means of accessing data will have to be use and, inadequate financial resource will trouble this research as it will affect access to data collection sites.

Also, since riverine rights are recent phenomena, it is hard to even guess its impact on stakeholders and the beneficiary communities. With judicial determinations pending in some countries like India, which may go either way, it is almost impossible to tell its impact.

1.8 ORGANIZATION OF THE STUDY

In this study are six chapters.

The first chapter is the introduction.
Chapter Two considers the background, the research problem, objectives and significance among other similar matters.
Chapter Three presents the theoretical framework for the analysis.
Chapter Four delves into the research methodology and would specifically look at the details of the research design, case studies, source and data, ethical consideration.
Chapter Five is an analytical discussion of the individual cases.
Finally, chapter six summarizes the findings and conclusions, then makes appropriate recommendations based on the study.

1.9 SUMMARY OF CHAPTER ONE

This chapter has introduced the study in light of the need for a more effective and robust regime for environmental protection. Specifically, this study is purposed to assess the protection of rivers in New Zealand and India by the grant of legal personality to rivers in these countries. Based primarily on the thoughts of leading advocates of environmental rights like Christopher Stone (2010) and Shelton (2015), this study is set to assess the approach to the grant of riverine rights in New Zealand and India and further conduct a comparative assessment of the two legal regimes to establish the most efficient legal framework for the exercise of riverine rights.

According to the researcher, the most efficient legal framework ought to be one in which legal personality is granted rivers (and other deserving elements in the natural environment) to clothe them with locus standi. And since these legal persons are inanimate, guardians in the forms of critical institutions are needed to act on their behalf (Cleaver, 2017) in a legal system which incorporates the elements of environmental constitutionalism (Kotze, 2015).

The ensuing chapter takes a brief historical tour of International Environmental Law as the academic area in which this study is situated. The background is presented in three distinct eras in International Environmental Law which represent the gradual growth and exploration of that area by several countries to come up with a favourable legal framework and regime for the protection of the environment. The chapter also presents various academic and philosophical thoughts on legal personality to provide a firm foundation for the subsequent chapters on the methodology, theoretical framework and analysis presented in this study. Afterwards, the two cases under study are introduced to provide a glimpse of the subjects considered in this study.

CHAPTER TWO

BACKGROUND OF THE STUDY

This chapter presents the academic and philosophical background of the study to put the study in its right academic perspective. It posits the study in its academic field – International Environmental Law – and presents the historical development of the area in relation to the realisation of environmental and riverine rights. Afterwards, an academic exploration of the theory of legal personhood is done. In that section, the thoughts on the creation of legal persons are presented and a case for the conferment of legal personality on rivers (and certain aspects of the natural environment) is made. Finally, the countries in perspective for the multi-case study analysis are briefly presented to give a holistic picture of the background of this study before the theoretical framework is presented in the next chapter.

2.1 INTERNATIONAL ENVIRONMENTAL LAW

The international environmental law terrain had for periods consisted of loosely unorganised international environment organizations, independent environmental treaties and piecemeal municipal or local practices concerned with the use of the environmental resources, which find coherence in their purpose to protect the environment and ensure natural environmental resources are used sustainably (Koivurova, 2014). The murkiness ascribed to international environmental law scene prompted the need for a kind of centrality and a focal point. But over a few decades now, there has been efforts to bring a form of coherence to the scene. There has been development of important and key principles which have gradually led to the form of coherence been sought (Koivurova, 2014).

The main purpose of contemporary international environmental laws is to control and minimize the damage caused by mankind's anthropocentric tendencies which seems not to be slowing down anytime soon (*ibid*). For a start, destructions caused by natural disasters are out of the scope of international environmental laws as noted earlier it is much more concerned about actions that can be controlled (*ibid)*. In this regard, it is important to have a quick revision of the history of International Environmental Law.

2.1.1 Historical Development of International Environmental Law

International Environmental Law traces its roots to the legal revolutions which started in the mid-1800s although the now prevailing form and structure were developed over five decades ago. A historical account of the development of these principles and legal rules puts same is good context and explanation (Hunter et al., 2015). The current international environmental law has gone through three or four distinct periods or phases depending on how one classifies these periods or phases since its first inception in the global scene. These three or four periods are the traditional era (sometimes divided in two), modern era and post-modern era. The features of these eras are explored in the following paragraphs.

2.1.1.1 Traditional Era

Most of the environmental laws in the traditional era were ironclad in the application of traditional legal analysis which were seen as a much auxiliary invention. Most of these emanated from settled cases of disputes between or among countries that were settled by domestic courts on "classical territorial grounds under the applicable rules of conflict of laws or international administrative law" and arbitration awards when the courts were not used (Sand, 2007). Examples can be found in arbitration cases such as *Pacific Fur Seal* case (*United States v. Great Britain,* 1893: adjudicating on the living resources within the global commons zone); the *Trail Smelter Case* (*United States v. Canada,* 1938-41adjudicating air pollution across national boundaries). There are also litigation cases such as the *River Roya* case (*France v. Italy:* 1939, transboundary water dispute in the Supreme Court of Italy); the *Poro* case (*France v. Germany*: 1957, air pollution trans international boundaries, Germany Court of Appeals).

Also, during the mid-nineteenth century, there were 'sparse instances' of 'green' policies that emphasised the gradual modification in municipal laws to address resource-oriented regulation. One which stands out is Jean-Baptiste Colbert's (1669) *Ordonnance Des Eaux Et Forêts.* This legislation was primarily about conservation of timbers for long-term supplies for French naval construction (Sand, 2007). It was during this period that the United Kingdom was the hegemon when it had to do with naval activities. This legislation is regarded as one of the precursors of the contemporary environmental law. There was a total failure during the pre-war (before the 2nd World War) to set up intergovernmental institutions that had the focus on environmental concerns. Gradual progressive goals in aspects of institutionalising international environmental law were made post 2nd World War by the establishment of the 'para-governmental' institution named International Union for the Protection of Nature in 1948. Gradual progression was

accompanied by necessary name changes in 1956 to International Union for Conservation of Nature and Natural Resources (IUCN) and subsequently to the World Conservation Union. This institution has been instrumental in various treaty initiatives affecting the environment.

2.1.1.2 Modern Era

These developments then led us to the 'Modern Era'. The 5th of June every year is celebrated as World Environment Day. On June 5, 1972, the United Nations' Conference on the Human Environment held in Stockholm, Sweden opened. It came about due to the culmination and the global rise in environmental risks, some of which were eco-disasters and caused by the mistakes or negligence of man. It was initiated by the Nordic countries that were suffering from acid rains as a consequence of industrial activities by the Great Britain and Germany. This is recognised as the foremost international conference to consider national development and the environment as interrelated matters for developing countries in addition to developed countries (Halvorssen, 2012). The United Nation Environment Programme is the 'birth child' of this conference as a global institution "with a decentralised action plan assigning environmental responsibilities to a wide spectrum of existing institutions, and a plethora of new legal instruments ('hard' and 'soft') with a network of functional (risk-oriented) international regimes." (Sand, 2007). This era was also a period of plethora of treaties that related to the environment ranging from bilateral to multilateral. According to Sand, these treaties were designed instead as 'dynamic' and tentative regulatory regimes by supplementary review and negotiation, in addition to intermittent adjustment of technical standards through their annexes (Sand, 2007).

2.1.1.3 Post-Modern Era

We then look at presumably the post-modern era. This was the period that the credibility of international environmental law was called in question. This issue was generally associated with most post-modernity eras where norms and dogmas are questioned literally questioned by observers and critics alike. The scene was just seen as one with proliferation of treaties that had sled to a congestion in the international environmental law space. The 1992 Rio Conference is seen as the benchmark of the post-modernity period. This conference provided a leeway for reflections and reforms to be made to the previous protocols and codifications about the environment. Also known as the United Nations Conference on Environment and Development, the main focus was climate change and biological diversity. Five legal instruments were adopted at the Rio Conference. They are the Convention on Biodiversity (CBD), UN Framework Convention on Climate Change (UNFCCC), Agenda 21, Non-Legally

Binding Principles on Forests, and Rio Declaration on Environment and Development. First two documents are binding; the last three are considered soft law. Furthermore, for efficient monitoring and evaluation of the implementation, there arose the need to establish the UN Commission on Sustainable Development (UNCSD) in December 1992 (Halvorssen, 2012). Agenda 21 is a comprehensive programme for national governments, development agencies, UN organisations and independent private or public sectors in all key areas in the environment-economy relationship (Halvorssen, 2012). There have been several conferences and conventions after Rio with the most recent one being the United Nation Climate Change Conference (COP26), 2021 in Glasgow.

2.1.2 Municipal Implementation of International Environmental Law

It is important to note for the purpose of this research, as requirements for the implementation of International Environment Law, the international law concepts of monism and dualism need to be explained. International environmental laws when enacted does not automatically translate/assimilate into the national laws of its signatories. Sand insists the realisation of innovation in International Environmental Law is attributable to the close interaction with national laws and policies (Sand, 2007).In the considerable opinion of Koivurova, the full implementation of International Environmental Law has the prerequisite of national implementation of these laws and principles because greater legislative and enforcement powers lie with nation-states compared to the efficacy of other actors (Koivurova, 2014).

Under monism, international law is seen as superior to national or domestic law. Where a conflict arises between principles of national law and international law, authority resides in the international law. As such states that apply this form of system easily adapt or assimilates any international treaties, agreements or regulations in their system and it is legally enforceable. This legal theory was formulated by Hans Kelsen, who was of the opinion that it will foster international peace in the global space during his period.

Unlike monism, under dualism there is a separation between international legal obligations recognized by states in their interstate relations, and municipal obligations in their internal relations with citizens. As such, international laws under the dualist system have to be ratified first and be made a domestic law before it can be applicable in the respective state irrespective of the state been a signatory under the particular law. Examples of dualist states include the

United Kingdom, Ghana, New Zealand and mostly states under the common law tradition. Article 75 clause 2 of the Ghanaian Constitution reflecting their dualist stance states:

> *"(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by –*
> *(a) Act of Parliament; or*
> *(b) a resolution of Parliament supported by votes of more than one-half of all members of Parliament." (Ghana, 1992).*

Due to pluralism, strict monism or dualist hardly exists but one may be able to pin down those fundamental features of a legal system: in certain states rules such as found under international treaties are ratified as a process of incorporation into laws binding at the municipal level.
In most civil law countries such as Netherlands, France and some of the countries in the European Union, rule found under international treaties almost automatically operate as municipal law.

2.2 LEGAL PERSONHOOD AND NATURE'S RIGHT

Modern literature on the conception of legal personhood is largely from the perspective of rights. Adriano (2015) highlights the four popular theories of personhood; theory of affection; apparent subject theory proposed by Rudolph Von Ihering; atomic state theory by Lingg; and fiction theory by Friedrich Carl von Savigny and further outlines notable opinions on the rights perspective as summarised in the following:

> Savigny discusses this concept and puts forward the idea that a legal entity should both have rights and free will to exercise those rights failure of either elements denies the entity legal personhood. Hans Kelsen, in response, considers legal persons as the entity that can claim legal rights in the form of legal obligations or subjective rights and records no difference between natural and juridical persons because personhood is "*the unity of a complex of norms*". To Garcia Maynez, legal personhood is the capability to have powers and duties with two broad classifications; natural persons with rights and obligations and juridical persons as associations granted legal personhood. (Adriano, 2015).

Clearly, legal personhood resonates the possession and use of rights and duties by an entity.

More recently, Pietrzykowski (2018) explains legal personhood and its intricacies in very simple words. The author states that legal personhood *"is commonly identified with the capability of holding rights and duties, sometimes also connected with the ability to bear responsibility*". Further, a person in law is defined by the author as "*an entity that can be ascribed certain rights and duties".* However, it is quickly clarified that it is the law that confers the status of legal personhood on designated entities.

2.2.1 Active and Passive Aspects of Legal Personality

A legal person thus consists in two aspects; being the object of legal relations established by other persons (corporations and infants); and the ability of that entity to enter into legal relations as a party. These two aspects resonate in Kurki's (2019) Bundle Theory of legal personhood, derived from Hohfeld and Neil MacCormick's ideas on legal personhood, grouping legal personhood into active and passive.

According to Kurki (2019)'s Bundle Theory of legal personhood, an active legal person bears legal duties or responsibilities and has authority to occasion change in legal statuses by entering contracts and wills or executing other instruments. It includes making autonomous decisions in exercise of legal rights like bringing a legal action. An example is a human being of full age and capacity. Such a person is naturally and legally clothed with capacity to act on her own to enter into binding agreements, to commence and defend and action, and to exercise certain positive and negative rights to which she is entitled.

On the other hand, a passive legal person holds certain legal claims or rights and entitled to their protection and enforcement by the law (*ibid*). Juristic persons are recognised for their passive legal personhood as they are unable on their own accord to legally establish or express their will. Although such entities may bear certain rights and claims protected by law, they are inanimate in the eyes of the law and cannot be proactive in the expression of their negative rights.

2.2.2 Realism and Legalism on the Creation of Legal Persons

Nevertheless, there is the realism/legalism dichotomy reappears in this discourse on legal personhood where Kurki (2019) proffers that realists posit that the inherent features of an entity are indicative of whether they can be recognised as a legal person. This has been the dominant

position throughout history which has denied elements of the environment the necessary legal recognition for their protection. To its adherents, the law in itself cannot create legal persons where such entities are not deserving by reason of their incapability to exercise the bundle of rights associated with legal personality.

On the contrary, the legalists are direct in suggesting that the law can ascribe legal personhood to anything whatsoever to suit the purposes of the lawmaker. Adopting the legalist approach, the omnipotence of the law is emphasized in that the law is able to confer legal personhood on nonhuman and also inanimate entities like corporations, institutions and further to aspects of the environment. For example, the legalist approach reflects in the case of New Zealand and India where by law legal personality is conferred on rivers for their protection.

2.2.3 Conferring Legal Personality on Rivers (The Natural Environment)

As opposed to a "natural person" (a human being), a juristic person, is an entity on whom the law confers a personality. For instance, in the case of *Shiromani Gurdwara Parbandhak Committee vs Som Nath Dass and Others (2000),* the Supreme Court of India stated:

> " *The very words Juristic Person connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such.*"

With this knowledge, non-human entities like gods, animals, rivers, corporations, etc. have at certain times been recognised as juristic persons by some courts. This understanding has been effected in certain senses before.

Under British administration in India deities were conferred juristic personalities. Temples had proprietary rights in vast lands and resources and were held in trust by the *shebait* for the deity. In 1887, the High Court of Bombay held in the *Dakor Temple* case:

> *"Hindu idol is a juridical subject and the pious idea that it embodies is given the status of a legal person."*

Later in 1921, this holding was reinforced in *Vidya Varuthi Thirtha vs Balusami Ayyar*, where it was stated by the Court that

> *"under the Hindu law, the image of a deity (is) a 'juristic entity', vested with the capacity of receiving gifts and holding property"*.

These holdings which have been sustained even in recent times afford the contention as explored by environmentalists (Stone, 2010; Shelton, 2015; Laszewska-Hellriegel, 2022) that, if legal personality has been conferred on certain non-human entities for various beneficial purposes it is trite that rivers and other elements in the natural environment should be conferred legal personality for the purpose of enabling their protection and preservation.

On the conferment of legal personhood on aspects of our natural environment, Shelton (2015) is necessarily instructive. It is proposed that the grant of legal personhood to aspects of natural environment works ultimately for the beneficial use of humankind by providing certain resources necessary for the sustenance of the human race which is translated into rights to life and safe environment (Stone, 1972). It is an anthropocentric endeavour such that by protecting the environment there is a reflective benefit on the human actors who ironically are being slow to adopt efficient environmental protection policies and laws. This, in effect, places a responsibility on humans to prevent pollution of the environment; a responsibility which according to nature rights proponents will be best executed when nature is granted legal personhood to enable it take action for the protection of its rights and prevention of its destruction (Stone, 1972; Laszewska-Hellriegel, 2022). He explains that every entity has the innate desire for self-preservation which can only be best appreciated by them and this applies equally to aspects of nature which are entitled to legal personhood.

At current standings, the protection offered to all our quintessential natural resources are hopelessly insufficient and in its rescue, the conferment of a legal personality on natural resources presents a bold step towards boosting the protection of natural resources by enabling dedicated representatives take necessary action to protect, preserve and strengthen the protection given to such resources (Laszewska-Hellriegel, 2022). In effect, ecocentrism which recognizes the intrinsic values of all life forms become an ideal policy in our quest to ensure commendable achievements in environmental protection. The result is an intercession between anthropocentrism and ecocentrism such that in ensuring the best protection and preservation of our natural environments by acting as its dutiful guardian, we act to our own beneficial interest in our dependence on the natural environment for sustenance and a plethora of benefits (Laszewska-Hellriegel, 2022).

Broadly, the conferment of legal personality is to facilitate regulation of conduct and interaction with the entity (Smith, 1928). On this, Stone (1972) asserts that when nature or in some cases animals are given legal personalities, it does not change the characteristics or the qualities of that particular entity. This establishes that the conferment of legal personality on rivers is also necessary to regulate the conduct of other person towards rivers. This is evident in the fact that in India, there was reported unprecedented levels of pollution of the River Ganges in the case of *Lalit Miglani v. State Of Uttarakhand And Others (2016 & 2017).* To solve or reduce this, with the conferment of legal personality on the river and the active exercise of its rights by the guardians, polluters can be brought to justice and the river protected from destruction.

2.2.4 The Complementary Role Of Guardians

Although the expected personalities may not come with the full compliments of available rights ascribed to natural persons, the recognition at law of certain aspects of our natural environment empowers these entities to actively assert their rights to self-preservation and protection from destruction. The main shortcoming is the lack of personal initiative of these inanimate entities to take legal action even when endowed with the privilege of legal personhood. It is this challenge that leads Savigny to propose that entities incapable to exercising their freewill to assert their rights cannot be regarded as legal persons. This is the case of the realists. It is the claim that conferment of legal personality on non-human entities will lead to the creation of passive legal personalities incapable of exercising the rights conferred (Kurki, 2019).

In response, Shelton (2015) suggests the public trust approach such that legal persons capable of taking action on behalf of the inanimate entities with legal personality shall be authorized to take action on behalf of the inanimate legal entities. This will be a complementary role by capable legal persons to augment the shortcomings of such a passive legal entity. This will be an implementation of the theory of a passive legal personhood as explained by Hohfeld and Neil MacCormick and an expression of the legalist approach to creation of legal personhood. Supported by strong legal theories, there is more confidence in the words of nature's right advocate Shelton (2015) that *"the creation of nature rights is now a policy decision rather than a biological decision"*. This means our legal systems have organically developed the capacity to adopt and admit the legal personhood of worthy aspects of our natural environment as

proposed in the popularly cited article of Christopher Stone, (2010) "*Should Trees Have Standing?".*

In conclusion, adopting the views of Shelton (2015) is the first step towards a robust and sustainable legal regime for the protection of riverine rights. This is the position adopted in this study. Shelton (2015) proposes that legal personality can be and should be conferred on deserving elements in the environment and to complement their shortcomings, legal guardians should be provided to act on their behalf. It is this phenomenon that this study tests in New Zealand and India so as to examine the approaches adopted therein and how effective they can be. To know what is to be testes, following this section is a brief introduction of the two countries under scrutiny; New Zealand and India; to highlight certain aspects regarding the conferment of legal personality on their rivers.

2.3 THE COUNTRIES IN PERSPECTIVE

2.3.1 New Zealand

In 1840, the 'Treaty of Waitangi' (Te Tiriti o Waitangi), the original formation document of New Zealand as a nation, came into being. It was signed between the Crown represented by William Hopson, a naval captain appointed by the Crown and more that 40 Māori chiefs (Orange, 2021). The agreement was at odds because several chiefs registered reservations on the treaty. The treaty was drafted both in English language and Māori and that was the beginning of the problems between the English Crown and the Māori tribes. The Māori tribes have over the years claimed the version of the treaty in English misrepresented their entitlements under the agreement. They believed they were deceived and betrayed. Agitations, protests and calls on the Crown for parity by the Māori leaders over the centuries fell on deaf years. What was pressing to these Māori leaders over the years was their ownership claims over lands, trees and other possession been recognised by the Crown (Waitangi Tribunal, 1999). The assertion to these claims has been heavily contested. The Māori had their own meaning and interests to the treaty whereas the Crown has others.

There was a healthy compromise in March 2017, when the New Zealand government passed an Act called the Te Awa Tupua (Whanganui River Settlement) Act 2017 (the Act). This brought to a close prolonged negotiations held between the British Crown represented by its representative Government of New Zealand, and the Whanganui Iwi tribe which had lasted

over eight years (O'Donnell & Talbot-Jones, 2018). This new Act gave the Whanganui River covering 290 km of space from central New Zealand's North Island to the Tasman Sea on the North Island's lower west coast a legal personhood within which it was endowed with powers, rights and duties of a legal person and thus created a new governance framework for the river (O'Donnell & Talbot-Jones, 2018).

"Te Awa Tupua" (translated as "the supernatural river") encompasses the spiritual beliefs as well as the innate connection between the indigenes (tangata whenua) and the river including the indivisible tributaries, *"from the mountains to the sea and all its tributaries and ecosystems.*" This was fundamentally based on the cultural sentiments of the Whanganui Iwi people who believed the Whanganui River was a person deserving that recognition at law.
This Act was passed for the well-being of the river. Its guardians known as Te Pou Tupua were appointed to act with *'full capacity'* possessing *"all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act" (*Article 18 of the Act*).* It is manned by two persons; a Maori representative and a state representative (Article 20 of the Act). These guardians have a fiduciary relationship with the river and serve as its trustees (Argyrou, 2019).
Also, there is the establishment of a fund called *Te Korotete* to provide finances exclusively for ensuring the well-being of the Whanganui River (New Zealand Government, 2014). This ensures there is no excuse when the river's legal personality is under such attack and needs dire saving.

2.3.2 India

On March 20, 2017, the High Court of Uttarakhand in India declared:

> *"the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person*" *("Mohd Salim v. State of Uttarakhand & Ors," 2017)*.

The High Court took guidance from precedents by the Supreme Court of India on a declaration that Hindu idols hold legal personalities same as "trusts and corporations", and were capable of suing, being sued and even paying taxes. The High Court relied on the religious significance of these rivers where it was believed *'to wash away sins'* and granted it legal personality just like the Hindu gods *(Cyrus R. Vance Center et al.*, 2020). According to the court, these rivers

were breathing, living and sustaining the communities that depended on it and therefore was imperative to protect it from pollution.

The court also appointed guardians for these rivers by using the legal rule of *'guardian ad litem'* where the rivers were seen as minors before the law and were to be represented by these guardians in any legal or contractual activities. The Director of a local NGO known as NAMAMI Gange, the Chief Secretary of the State of Uttarakhand, and the Advocate General of the State of Uttarakhand were appointed with their duties laid out by the court as

> *"the human face [and] to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries"("Mohd Salim v. State of Uttarakhand & Ors," 2017).*

However, in July 2017, the Supreme Court of India stayed execution on the judgment of this High Court of Uttarakhand on an appeal citing the ambiguity in their role as guardians of the rivers and also jurisdictional issues since the rivers extend beyond their borders to as far as Bangladesh.

As highlighted above, New Zealand has by a legislation created the legal personality of the Whanganui River and established a guardian institution (Te Pou Tupua) to act on behalf of and in trust for the river. India on the other hand has by judicial declaration created the legal personality of River Ganges and River Yamuni. The declaration further established a guardian for the infantile legal personality of the rivers and chose persons to act in that capacity. This is a vivid example of the proposals of Stone (2010) and Shelton (2015) in reality. This is the phenomenon that this study is interested in.

Nevertheless, the researcher takes it further to investigate whether in the fine details the approach adopted is sustainable and the most effective for the desired result. In this quest, this study analyses the approach to the creation of the legal personality, the establishment of the guardian and further assesses the whole of the two legal systems to know whether the legal personality and protection of rivers is entrenched in the fundamental legal order.

2.4 SUMMARY OF CHAPTER TWO

All in all, this chapter has explored the historical development of International Environmental Law as the academic discipline in the background of this study. It has considered the three eras in the development of International Environmental Law over the centuries. Also, this chapter has explored the concept and creation of legal personalities with argument made for the valid creation of legal personality for rivers and other elements in the environment. Furthermore, it

has introduced briefly the two countries under review who have granted legal personality to their rivers. This chapter has put in perspective the whole theory underlying this research.

Going forward, the subsequent chapter is the analytical framework for this study where the various theories proposed by the researcher are explained before they are fine details of New Zealand and India are assessed to ascertain whether their approach to the conferment of legal personality on the rivers are efficient, sustainable and well grounded in law and politics. In that chapter, the theories of legal guardianship, critical institutionalism and environmental constitutionalism are discussed to bring to bear what legal and political framework the researcher posits is most effective for the realisation of the promises of environmental protection.

CHAPTER THREE

THEORETICAL FRAMEWORK

This chapter discusses the theoretical framework underlying the study. Adopting a theoretical framework within which a study is situated is paramount in social science research. It sets out the theoretical grounds for the analysis, conclusions and further suggestions to be made in the study. For this particular work, the framework suggests that for a more sustainable and efficient exercise of legal personality and rights of rivers, governments should appoints guardians for these rivers. The said guardians are preferably critical institutions with extra benefits over individuals. But essentially, governments or states should have a legal system which recognises environmental constitutionalism for upholding environmental and riverine rights at the most fundamental levels at law. Each theory explained in this chapter addresses a respective research question and serves as the thematic foundation for the analysis of the chosen documents.

3.1 GUARDIANSHIP

Guardianship, according to the Black's Law Dictionary, refers to *"the office, duty or authority of a guardian"*. Guardianship is the relationship between a person acting as guardian and the person being guarded as a ward (Black et al., 1999). Black, et al. (1999) further explains that the law empowers the guardian and imposes on him or her a duty to take care of the ward and manage the assets and rights of the ward who is considered, at law, unable to intelligently manage his own affairs. Incapability can be a result of a peculiar status, age, understanding or lack of self-control as grounds for the law to automatically transfer legal authority of the ward to a guardian (Black et al., 1999). The law also places the ward, alternatively referred to as 'the protected person', under the care of a guardian such as to result in a relationship akin to a trust or agency by which the guardian is tasked to act to the benefit of the ward (Black et al., 1999).

Usually, parents have a legal right to decide for their children, whereas adults decide for themselves. That notwithstanding, it is sometimes almost impossible for people to make decisions for themselves due to situations beyond their control. In these circumstances, necessity demands someone steps in to take care of such a person which unvaryingly may be an adult or an infant. A child needs guardianship if no parent is available to take care of the child. For instance, the law requires the use of guardians over an infant's estate where assets like life insurance or cash accounts are inherited. The guardian manages the estate until the infant comes of age.

There are several classifications of guardianship but what is relevant for this study is a *guardian ad litem* (guardian at law). This guardian is appointed by a Court to prosecute (or defend) a civil suit on behalf of an infant (Black et al., 1999). This was the legal concept heavily relied upon by the courts in India and subtly by the legislature of New Zealand even though the courts in India took inspiration from New Zealand. In their respective cases, the law appoints a guardian for the rivers on whom legal personality have been conferred. These guardians are tasked with representing the rivers in legal action among other duties (Article 18 of Te Awa Tupua Act, 2017; *Mohd Salim v. State of Uttarakhand & Ors, (2017)).* These duties are a reflection of the suggestions of environmentalists including Stone (2010), Shelton (2015) and Laszewska-Hellriegel, (2022) that there should be guardians appointed for the passive legal personalities of rivers to act on behalf of and in trust for the rivers with legal personality. Yet, as stated earlier, this study intends to explore the nature of the guardians appointed and their powers to ascertain whether they are adequately equipped and empowered to offer sustainable services in representation and protection of the legal rights of the rivers.

In modern literature, guardianship in itself as a legal concept is deemed as 'obscure' and complex to describe but still maintaining contemporary relevance (Frolik & Barnes, 1990). This warrants a historical exploration of the theory of guardianship to ground its legal force and recognition.

3.1.1 Historical Foundations of Guardianship

To understand the theory of guardianship, it is important to delve into the foundation or the historical context of this theory. The foundation of this theory is the doctrine *parens patriae* (parent of one's nation) or *pater patriae* (father of one's nation). These two are used interchangeable as they imply the same thing. The origin of this doctrine in itself is a bit murky but efforts will be made to clear things up with a bit of history. The advent of this doctrine was the implied power of the state to substitute the authority of natural parents over their children for its authority (Custer, 1978).

There was a form of wardship over idiots and natural fools during the reign of Edward 1 (1272-1307) and was formalized by a passage of a statute called Statute Prerogative Regis in 1324 (Bell, 1953). The treatment of idiots and lunatics were distinguished. With respect to lunatics, the crown was just a 'mere trustee' whereas the crown only had 'beneficial interest' with regards to idiots. Trustees have only fiduciary duties in the interests of their wards and are not

to benefit personally during the managements and distributions of the trusts for their wards. With reference to lunatics, this arrangement was not to be beneficial to the crown. The crown had benefits in respect the wardship of idiots. The idiots receive protection and the crown the benefits of the idiots' estate for the king's services. The crown retains control over the estate during the lifetime of the idiot, and after the passing the heirs were required to present a petition called *ouster le maine* to secure its return (Bell, 1953).

Anthony Fitzherbert in 1553 first indicated in his writings, *Natura Brevium* the king's authority over lunatics may be broader than statutorily prescribed, where he stated:

> "[Tihe King by Law, of Right, is for to defend his Subjects,
> their Goods and Chattels, Lands and Tenements; and therefore
> in the Law every loyal Subject is taken into the King's
> Protection; and if he be put out of the King's Protection for his
> Offence, then every Man may do to him as against the King's
> Enemy, and he hath no Remedy for the same by the King's
> Laws. And because that every Man is within the King's Protection,
> an Idiot, who cannot defend or govern himself, nor order
> his Lands, Tenements, Goods nor Chattels, the King of Right
> ought for to have him in his Custody, and to rule him and his
> Lands and Tenements, Goods and Chattels; and that appeareth
> by the Statute of Praerogativa Regis....
> And therefore when the King is informed, that one who hath
> Lands or Tenements is an Idiot, and is a Natural from his
> Birth, the King may award his Writ to the Escheator of the
> County where such Idiot is, or unto the Sheriff, to inquire
> thereof ..."
> (Fitzherbert, 1793).

The first use of the word 'father' was in the writings of William Staunford, where it is said may have given birth to the name of the doctrine, 'parens patriae'. And was seen as the first reference to the Crown as a 'parent'. Staunford wrote in 1567:

> '[t]he king is the protectour of all hys subiectes and of all
> theire goods, landes and tenements, and therefore of suche as
> cannot goueme them selues nor order their lands and tenements

his grace (as a father) must take vppon him to prouyde
for them, that they them selues and their things may bee preserued.'
(Early Modern English) (Staunford, 1979).

Pater patriae was mentioned again after 25 years, and this time it was used for minors or infants instead of idiots and lunatics. This was seen in the case of *Eyre v. Shaftsbury, 24 Eng. Rep 659 (Ch. 1722),* where the Earl of Shaftsbury had by will appointed Justice Eyre and two others as guardians of his infant child. The infant earl was attended by a governor that was considered not fit for that role. Eyre sought an order for the Countess of Shaftsbury to surrender the custody of her child. The court upheld its jurisdiction, accepting the argument that "the Crown, as parens patriae, was the supreme guardian and superintendent over all infants" (Custer, 1978). It is to be noted that the Crown did not take up these roles out of benevolence but of necessity and in most cases because of the benefits that was derived from these relationships.

Infants or minors were at first not under the groups under the protection of the crown or king and as such there were no precedence for the courts to follow till the *Eyre v Shaftsbury case*, where *Beverly's case* was mentioned as the precedent case for the court to rely on. Relying on precedence by the court is a common law legal tradition used by the British legal tradition and its commonwealth of nations where the court is obliged to follow an earlier ruling or judgment as an authority of cases involving identical facts or legal issues. It is claimed the writer or printer of the *Beverly's case* which was decided on 1603 may have inserted the word 'enfant' instead of 'ideot' in the 1610 edition of the report. This led to the inclusion and stay of infants under the groups covered under parens or pater patriae.

3.1.2 Relevance of Guardianship

In accordance with the *parens patriae* doctrine, the inability or inappropriacy of dependent personalities to act in protection or assertion of their rights casts a duty on the sovereign or actors in the legal system to provide a means for which to realise the benefits of the rights of such persons (Staunford, 1979). This is to say there should be a way for dependent legal persons to assert their rights else the system makes futile their legal personality. In this regard, the use of guardians appointed by law is preferred to agents or attorneys which must be appointed by the incapable and dependent person (Shelton, 2015). This makes the use of guardians in such cases a necessity to prevent dormant legal personalities.

Theoretically, guardians are seen to play a complementary role to the juristic personalities of rivers (Stone, 2010). For the active protection of rights and settling liabilities of juristic personalities. With their proactive abilities, guardians are able to act as trustees for the rights and liabilities of their beneficiaries. With their ingenuity they are able to play a husbandry role over the dependent legal person and ensure that their rights are fully exercised and protected from several breaches. For rivers, such guardians will be able to enforce existing legal provisions for the protection and preservation of rivers and the natural environment as identified by Macpherson et al (2021). Without such guardians, the problem of 'green washing' and the 'implementation gap' will persist without any proper realisation of the prospects of environmental protection.

The role of guardians are also anticipated to result in the regulation of conduct of other persons towards the protected legal personalities. Guardians with their husbandry role may not be able to control the conduct of the dependent person altogether but will be able to protect that person from all forms of abuse and breaches of their rights (Smith, 1928; Stone, 2010). In relation to river, guardians will be able to bring legal actions against polluters, direct environmental protection policies and laws and acts in various ways towards regulating the conduct of other people towards the rivers. For instance, in the Te Awa Tupua Act, 2017 provides in section 19 the functions of the guardian Te Pou Tupua including the duty *"to act and speak for and on behalf of Te Awa Tupua"* and *"to promote and protect the health and well-being of Te Awa Tupua"*

In these considerations, advocates for environmental protection and riverine rights urge sovereigns to acts as or appoint guardians for the protection of the natural environment. This has been realised in the two countries selected for this study where upon conferment of legal personality on the rivers the laws went further to appoint guardians to exercise the rights of the rivers on behalf of and to the benefit of the legally recognised rivers.

The realisation of this theory in the case under study addresses research question 1 on whether the states are exercising legal guardianship over the rivers. This is the first indication of the political will towards the protection of environmental or riverine rights. Where the facts in the cases of New Zealand and India indicate that the states have implemented legal guardianship over the rivers on which legal personality was conferred, then the analysis can progress to

assess the nature and effectiveness of the guardians based on the dictates of critical institutionalism as discussed in the next section.

3.2 INSTITUTIONALISM

Institutions shape individual and collective actions. Institutions are used to build social capital as well as to redress weaknesses in state provisions (Mollinga et al., 2007). Institutions are social arrangements; with rules to regulate and shape behaviour. Being of separate legal personality from the humans who run it, institutions persist by outliving individual lives and intentions (Merrey & Cook, 2012). Subjectivity in interpretation results in different people interpreting and acting upon rules differently. Rules are dynamic with a lifespan. Institutions are established, evolve and fade out over time by constant usage, discussions, breaches and non-use (Merrey & Cook, 2012). They direct the permissible and non-permissible conduct in their target circumstances to give a basis for forecasting and evaluating others' behaviour. Again, the significance of institutions cannot be understated as it is seen as fundamental to good governance and democracy, providing the channels of communicating our expectations, needs and accountability to representatives and service providers (public and private) in our localities to account (Cornwall, 2004). As this study is about preservation of water bodies, it falls under the purview of natural resource management in the form of communal resources.

It is institutions that manage resources for the community or nations at large. There are two broad 'schools' of thought on community-based natural resource management (Cleaver, 2017). These are Mainstream Institutionalism and Critical Institutionalism. These schools of though are explained below.

3.2.1 Mainstream Institutionalism

According to Cleaver, the central theme of the mainstream institutionalism is that

> *"the role of institutions is to provide information and assurance about the behaviour of others, to offer incentives to behave in the collective good, and to monitor and sanction opportunistic behaviour"* (Cleaver, 2017).

Both individual and institutional dynamics have been studied largely because these factors concerning mainstream institutionalism are believed to support decision making by

individuals. With this, the goal is to develop a predictive theory on inclusive action and efficient common property management in a manner which is sustainable (Johnson, 2004).

3.2.2 Critical Institutionalism

Critical institutionalism explores the practical dynamic complexities of organisations in social life. It considers their history and how they are moulded by proactive human actions. It also involves the interaction in the traditional and the modern as well as formal and informal arrangements (Cleaver & de Koning, 2015). This approach emphasizes how people's complex social identities shape rules, limits and processes of institutions. It covers the power imbalance and other political and geographical factors that affect resource management structures and outcomes (Cleaver & de Koning, 2015).

The highly placed emphasis of critical institutionalism is the infusion of the social aspect of life into the whole institutional structure. It is also contended that proponents of critical institutionalism put into issue the logical basis as well as the practicality of Mainstream Institutionalism. Critical institutionalism also provides the conceptual toolkit for illuminating process, power and meaning. Broadly, it considers the dynamics in how certain governance arrangements like laws and institutions emerge; how institutions are set up to benefit particular aspects and how institutions by defining their purpose establish legitimacy and endurance (Cleaver & Whaley, 2018).

It is important to note that, critical institutionalism is multidisciplinary and incorporates its key tenets form disciplines ranging from anthropology, politics, sociology and even history in some cases. Several perspectives of cultural analysis and suggestions for reconceptualising institutions and governance arrangements have emerged from contemporary social relations and belief systems. These critiques emanated from predominantly history and anthropology (Boelens, 2015). Also, another critique stems from the sociological and anthropological school of thoughts. This perspective analyses the process by which institutions gain insights into approaches for balancing social structures and individual agency 5. "Structure" in this context refers to general forms of social resources, institutions, regulations, systems or forces, recognisable in repeated patterns of relevant social institutions and their practices whereas "agency" suggests the actions of individuals by use of their creative forces to achieve stated purposes and meaning (Harrington, 2005). These critiques identify the need for well informed structures for human activity and more practical ideas for the community advancement. Also,

the limitations of collective action are highlighted and insights on how power and meaning affect social relations are discussed (Cleaver & Whaley, 2018).

This study sides with and is based on critical institutionalism. It is on this grounds that the researcher predicts that where the aspects of critical institutionalism are incorporated in the creation of a guardian institution for the protection of riverine rights, there is the greatest probability that such rivers will receive the utmost protection and preservation. The realisation of critical institutionalism in a society or of an institution is seen in the manifestation of the several aspects or elements of the theory. The aspects of critical institutionalism relevant to this study include the origins of institutions, socially informed models of human action, use of negotiation to effect change, and resource governance in polycentric governance landscape. These aspects are outlined in the ensuing paragraphs as basis for the creation of a critical institution which functions as a guardian to a dependent legal person like rivers.

3.2.3 Aspects of Critical Institutionalism

3.2.3.1. Origins of institutions

A key principle of critical institutionalism that is crucial to this study is the look into the origins of institutions. Critical institutionalists often discuss how power and meaning influence the formative processes of institutions and the variable outcomes of certain policy choices (Cleaver & Whaley, 2018). There are opinions that suggest that institutional building is a gradual process of 'try and error', that is we build upon mistakes or on old institutions till they work. According to Cleaver, this process was couched as 'institutional bricolage' by (Bourdieu 1977, Giddens 1984) and it refers to the *"adaptive process by which people imbue configurations of rules, traditions, norms, and relationships with meaning and authority"*. This involves modifying old institutions or inventing new institutions within the permissible limits of acceptable social behaviour as responses to changing socio-legal circumstances (Cleaver, 2017). Building upon old institutions to make them new better institutions sometimes imply resilience to work and endure on the basis of the perceived meaningfulness and legitimacy. Also, these institutions must be socially fit with well synthesized components from different origins and be quickly adaptive to meet related emerging needs.

Some other proponents disagree with the building upon old institutions to build new institutions. They are of the view that why do you build on the old institutions if it did not work in the first place. And with their argument, they also talk about the need for resilience of an

institution and if the old institution did not have the resilience to withstand the test of time, this will affect what is built upon. They call for a wholly new institution with nothing to do with the old institution that was problematic. With a fresh start they are confident the new institution is capable of avoiding the shortfalls of the old with which it has no relation.

This aspect of critical institutionalism is necessary to this study in that it will help to assess the guardians established for the protection of the legal rights of the rivers in New Zealand and India. In the documentary analysis of the creation of legal rights of the rivers and their accompanying guardians, this theme of origins of institutions is considered to assess whether institutional bricolage was used or a new institution was established for the fulfilment of the guardian role.

3.2.3.2. Socially informed models of human action

The need for more socially informed models of human action in critical institutionalism is tenable as a considerable acknowledgement of the various points of relevance of diversity and inclusion in human institutions (Cleaver & Whaley, 2018). Public institutions are set up to protect public interests and require membership reflective of the represented classes. The need for socially informed institutions becomes clear upon realising the essential need for diversification of views and the power implications of adequate representation on such bodies. Critical institutionalism thus advocates a good consideration of diversified membership of institutions for insightful information, power balance and collective action.

In relation to this study, socially informed models of human action will be considered as a theme in the documentary analysis to assess the membership of the guardians on demographics. The membership will be assessed to consider factors of adequate inclusiveness and representation in order to establish the adherence of the guardian to critical institutionalism. Where adequate representation and inclusiveness is provided in the guardian, this requirement of critical institutionalism will be deemed satisfied.

3.2.3.3 Use of negotiation to effect change

Another aspect of critical institutionalism relevant to this study is the use of negotiation to effect changes. Strands of thinking have been developed to emphasize diversity and dependence on human made arrangements, decentralisation of power that has effect through discourses, forms of governments, and the use of negotiation to cause change, and in everyday routines (Agrawal & Bauer, 2005). Broad stakeholder consultations are key to management of

resources as there is the need for inputs from all those that matters when it has to deal with those particular natural resources.

The relevance of this aspect is in the consideration of the extent of consultations and negotiations used in the formulation of policy and law for the appointment of the guardian. The documentary analysis considers this as a theme across the selected documents to ascertain whether this aspect of critical institutionalism is adopted by New Zealand and India in the establishment of the guardian for the newly created legal personality of rivers.

3.2.3.4 Resource governance in polycentric governance landscape

Critical institutionalism also endeavours to appreciate how law and policy for resource management are promulgated in politically polycentric societies. Again, it explains the dynamics of change in institutional, legal, and policy plurality bringing about imbalanced outcomes for resource management (Hall et al., 2014). This aspect in practice considers the effects of shared power or decentralised power in the creation of institutions. It covers aspects of recognition of political and judicial power and other authorities during the creation or operation of certain institutions which function in the public interest.

In relation to this study, resource governance in polycentric governance landscape is considered as a theme in the documentary analysis to ascertain the use of political and judicial power and power relations among the actors considering the grant and recognition of riverine rights and the creation and functioning of their guardians. This is to draw conclusions on appropriate approaches for appointment of guardians for the protection of riverine rights.

Concluding the discussion on critical institutionalism, this theory is relevant to this study by fitting in the theoretical framework developed by the researcher for the most effective legal framework for the protection of riverine rights. It presents knowledge and suggestions on the best approach for creating a guardian institution for the protection of riverine rights which are seen as from the perspective of communal rights and the communal protection of natural resources. By the use of critical institutionalism, a state will be able to establish a workable and durable institution for the effective protection of riverine rights when granted. Such an institution will fully complement the shortcomings of the legal personality of the river and function appropriately to protect and preserve the rights and health of such rivers. It is directed towards resolving the discussion on research question two on how the responsible institution in New Zealand and India are positioned to protect riverine rights.

But this study does not end there. It is the case for the researcher that such an institution will thrive best where the legal system is such as inculcates the elements of environmental constitutionalism. These elements are purposed to entrench legal provisions for environmental protection in the most fundamental legal norms of the state in other for to bolster their prominence. These thoughts are explored in the next section.

3.3 ENVIRONMENTAL CONSTITUTIONALISM

Environmental constitutionalism is a new theory under international environmental law. Constitutionalism is concerned with studying legal norms and institutional arrangements for political and legal decision making (Bosselmann, 2015). Constitutions have thus become the means of assessing the structure, content and legitimacy of constitutionalism (Catá Backer, 2008). It is almost impossible to pinpoint to a universal definition of environmental constitutionalism as various experts/scholars have opined in their own views what they think of the subject.

For the purpose of this research, the description of Louis J. Kotzé (2015) stands out. He described it as included in a larger constitutional set up, as a growing academic discipline for critique as well as a transformation project in social, political and legal economies (Kotze, 2015).

Environmental constitutionalism also acts as a procedure for entrenching environmental protection laws in constitutions for more enduring and higher normative protection. Its transformative edge is evident in the reliance on constitutions for an environmental governance architecture which in effect improves environmental protection using various features of modern constitutionalism. It advocates the application of constitutional principles like fundamental rights, separation of powers, and rule of law in achieving aspirational goals of environmental protection (Kotze, 2015).

The United Nation Commission on Human Rights, (Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment) concluded on how far reaching the dangers of environmental damage extends to:

> *"Environmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living, to sufficient food, to housing, to education, to work, to culture, to non-discrimination, to dignity and the*

harmonious development of one's personality, to security of person and family, to development, to peace, etc" (Ksentini, 1994).

It is clear from the conclusion of the report the overarching impact, the dangers of environmental damage has/will be having on the other intangible rights of man.

Environmental constitutionalism as a theory does not imply that there have never been laws whether national environmental laws or international environmental laws to protect the environmental from man's anthropocentric urges or tendencies but rather complements existing legal regimes to help advance a global environmental agenda which is more locally grounded. The need for both international and local involvement corporation is to ensure uniformity in promulgated environmental protection rules, responses and implementation (May & Daly, 2015). There is sometimes the need for international environmental protection to play a supplementary role. Except sometimes its enforcement is a bit lacklustre. Available literature on environmental constitutionalism predominantly evaluates the expectations of using constitutions to enforce better environmental protection.

3.3.1 Skeptics and Advocates of Environmental Constitutionalism

There are two camps within the literature of environmental constitutionalism, the 'skeptics' and the 'advocates' (Weis, 2018). Despite their differences, there is a common understanding between the two camps on the central function of the judiciary in enforcing environmental constitutionalism. The judiciary is responsible for interpreting the extents and content of required fundamental values and principles; and enforcing those principles by judicial review of state actions and other judicial processes to seek compliance with the norms (Weis, 2018). The skeptics are of the view that constitutionally entrenching environmental values has yet to corresponded to changes in constitutional law due mainly to Courts hesitating to fully enforce environmental provisions. Skeptics suggest that courts rarely interpret and enforce fundamental environmental values and their required legal norms (Weis, 2018). According to skeptics, the concept of environmental constitutionalism is a mere façade or symbolism and lacks the significance as constitutional law breakthrough for the environment. The advocates on the other hand, are firmly committed that environmental constitutionalism can be the way forward in the quest for the advancement of environmental protection. The advocates have two core arguments to cement their position:

1. First, some environmental values are "fundamental," and ground the validity of ordinary legal norms.
2. Second, fundamental environmental values can supersede other social values in certain circumstances (Weis, 2018).

The advocates are of the view that there may not be overwhelming cases of courts enforcing environmental constitutional rights but there are instances where these rights have been enforced and affirmed (Kotze, 2015). They are optimistic that these cases of instances can kickstart a trend or wave in the terrain of environmental rights which have been seen in liberal 'activist' courts in South East Asian countries and Latin America. It is in view of this that the researcher proposes that the best legal regime for the protection of riverine rights is one that inculcates the elements of environmental constitutionalism. The reason is simple; and already stated. It puts legal principles and rules for the protection of the environment at the pinnacle of legal norms and enhances their legal force. Such elements of environmental constitutionalism are explained in the ensuing paragraphs.

3.3.2 Elements of Environmental Constitutionalism

As opined by skeptics, enforcement or implementation of environmental constitutionalism remains the bane of this theory. Louis J. Kotzé, an 'advocate' of environmental constitutionalism came up with six constitutional elements that are vital to the implementation of environmental constitutionalism and it is worth a look for the purpose of this study. If these six constitutional elements are observed in tune with environmental governance in domestic legal orders for environmental protection, it will be more probable the goals of environmental protection will be achieved. These six elements are the *rule of law in advancing an environmental constitutional state*; *separation of environmental governance powers; imperative roles of independent and impartial court; constitutional supremacy; environmental democracy and issues of rights* (Kotzé, 2018). It is imperative this study takes a detailed look at what these six constitutional elements are all about.

3.3.2.1 Rule of law in advancing an environmental constitutional state

First, we look at environmental rule of law. The term or concept of rule of law is universally clear and agreed. It is known as rule of law in commonwealth countries and countries affiliated to the Anglo-American political-legal tradition. It is called *Rechsstaat* in Germany, *regsstaat* in South Africa, *état de droit* in France, and *estado de derecho* in Latin American

countries. All these suggestions imply one key idea; that limitations of people reflect in the governments they create for themselves and thus require a substantial limitation of their freedom to decide by general rules created adopted by and applied to them under all circumstances (Kotzé, 2018). This concept is based on the notion of *"rule of law is better than rule of men"* which was coined by Aristotle, where no man is above the law and the law applies to everyone equally.

Applying rule of law in the environmental sense, Magraw suggested that environmental law should be being overly available; enforceable and enforced; applicable to anyone and with sufficient authority for compliance (Magraw, 2014). Most importantly, achieving the environmental protection objectives with the means of environmental constitutionalism comes with the need a for legal systems with comprehensive environmental laws in the constitution which are enforced in accordance with the principles stated above. It further requires the guarantees of a separate environmental regulatory authority, a vibrant judiciary with judicial review as well as other private or public law enforcement powers, and the indiscriminate application of the laws (Kotzé, 2018).

These ideas are used as themes in the document analysis to consider whether the legal systems of New Zealand and India apply environmental constitutionalism in the form of environmental rule of law. It is to ascertain whether the legal system in general gives to environmental protection the relevance prominence in the legal norms of the state by applying the policies and rules of environmental protection of all persons equally. Where this is proven, it is concluded that there is environmental rule of law in the legal system suggesting the presence of environmental rule of law.

3.3.2.2 Separation of environmental governance powers

Secondly, we explore the separation of environmental governance powers. It is imperative to operationally define separation of powers before relating it to the environment. The classic definition of separation of powers is a fundamental idea that the three distinct functions of government – executive, legislative, and judicial – ought to be performed by three organs of government – the Legislature, the Executive (or government), and the Judiciary (or the courts) which are separate and distinct (Fombad, 2005). The idea of separation of powers implies that these institutions or organs do not overlap or interfere in the duties of the other organ or institution theoretically. The idea is for the establishment of checks and balances among these organs to prevent the abuse of power. The idea of separation of powers is for these organs to be accountable to each other. The legislature is in charge in the making of laws, the executive

is charged with the running of the government or country and the judiciary is charged with the adjudication of laws. But in practice, there is no country in the world that strictly practices separation of powers as there are instances that, the functions of some of these organs intertwin with each other.

The degree of separation that this doctrine seeks to achieve is not absolute: "the legislative, executive, and judicial branches play distinct but potentially complementary roles in performing basic government functions, and it is the very separation (with overlap) of these institutions that often produces salutary effects for governance" (Peabody & Nugent, 2003). Separation of powers can be applied to environmental policies to regulate the three stated functions on the environment. More specifically, separation of powers benefits environmental protection and environmental constitutionalism by delineating, regulating and enforcing environmental protection laws and their governance authority including provisions for checks and balances within the environmental governance architecture (Kotzé, 2018).

The available documents under study will be considered to ascertain the theme of separation of environmental governance powers and the degree of separation. This is expected to prove whether there are checks and balances in the exercise of legal and judicial powers towards environmental protection.

3.3.2.3 Imperative roles of independent and impartial courts

The third element is an independent, impartial judiciary and its review functions. The judiciary is important because they interpret laws and see to its enforcement. It is necessary for this organ of government to be independent of the other organs of government as seen in the earlier element of separation of powers. According to Rosenn, judicial independence was "the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from the coercion, blandishments, interference, or threats of governmental authorities or private citizens." (Rosenn, 1987).

Since the government regulates the anthropocentric use of the environment and the judiciary is an arm of the government, it is vital for the judiciary to be independent so as not to erode the faith the public has in that organ of government. Paying attention to the broad public interest nature of environmental conflicts issues on access and redress are pertinent (Kotzé, 2018). A constitutional order with an independent and impartial judiciary to enforce the constitution's environmental guarantees, and as the final arbiter in environmental law

conflicts, including avenues to increase access to the courts to have environmental disputes heard, will most likely enhance the implementation of environmental constitutionalism.
These aspects are considered under the thematic element of environmental constitutionalism in the analysis. These aspects will help ascertain whether the legal systems of New Zealand and India incorporate the independent and impartial courts in the adjudication of environmental law conflicts. If these factors are present, it is concluded that the legal system to an extent supports environmental constitutionalism.

3.3.2.4. Constitutional Supremacy

The fourth element is constitutional supremacy. Constitutional supremacy holds that no judicial norm is higher than the constitution of the state. It legitimizes the authority of the organs of the state. Any law or regulation that contravenes or contradicts with the constitution is void. Constitutional supremacy safeguards the political stability of the basis of a government's authority and protects fundamental values of constitutionalism from eternal influences (Kotzé, 2018). Environmental laws entrenched in the constitutions therefore means, any laws that contradicts the safety of the environment will be null and void. Constitutional supremacy is advantageous to environmental protection when it comes to implementation because it establishes a hierarchy of norms with the environment as a fundamental and one of the highest juridical and constitutional norms (Kotzé, 2018).
The two legal systems under study will be assessed in relation to environmental laws on whether the environmental laws are included in their constitutions in order to establish their supremacy and guarantee that any law or act contrary to them shall be rendered unconstitutional and void. The presence of these factors in their constitutions will lead to the conclusion that environmental constitutionalism is respected in these legal systems.

3.3.2.5. Environmental Democracy

We then take a view at the fifth element which is environmental democracy. Abraham Lincoln, the former American president (16th President) described democracy as 'government of the people, by the people and for the people'. Governance legitimacy is important for the implementation of environmental constitutionalism because only a democratically elected government that has been legitimately constituted and sanctioned by the majority to govern environmental matters will have the currency to enforce its decisions and to be obeyed by the people that have created it. Democracy is broader than just majority rule. It also requires elected representatives to adhere to fundamental dictates usually effected in a constitution (Limbach, 2001). Also, where a constitutional state is established by democracy, the government is kept

in check by other constitutional provisions which support the tenets of democracy (Limbach, 2001).

It is argued that the greater or solid the foundation of democracy are entrenched in countries, the better it is for environmental laws to survive the test of time unlike autocratic or authoritarian states where everything is at the whims and caprices of the despot leader. Also environmental hazards as well as the costs associated with it are more equally distributed; political and environmental government officials operate in accountability; the public included in environmental decisions; environmental information is more readily accessible; nongovernmental organizations are tolerated; civil enforcement is readily available; and there is more participation in global society all aimed at promoting democracy and justice in environmental protection (Kotzé, 2018).

The aspects of environmental democracy as listed above will be considered in light of the features of the legal systems of New Zealand and India to ascertain whether these factors are reflected in the legal systems. This is an attempt to establish whether the legal systems uphold environmental constitutionalism in the form of environmental democracy.

3.3.2.6. Issues of Rights

To end with the last element of an environmental constitutionalism is the issues of rights. Rights seems to be fundamental of all the elements in which some are inalienable and imprescriptible for the subjects of the polity or the state. Grounded in natural law theories, rights are recognised as legal statuses necessary for freedom, liberty, well-being, dignity, and fulfilment. Rights epitomize a core impetus of constitutionalism itself, i.e., and shield individuals from abuse of power and the full realization of being human (Kotzé, 2018). The progression of natural law theories through religion, morality and/or ethics all establish the idea of rights as apex norms and by its very nature, environmental protection can be entrenched as a fundamental constitutional right.

As it is the central theme of this research, in devising rights for rivers, rights are seen as a mechanism or medium by which protections are enforced when they are enshrined in the constitution (as pointed out in the section of the supremacy of the constitution). When these environmental rights are entrenched, it is what empowers the courts to adjudicate environmental cases as most of the environment as accorded with rights have *locus standi* in legal matters which therefore becomes in some cases as of right.

The analysis will consider the availability of environmental rights in the legal systems of New Zealand and India. It will also consider whether these rights are entrenched, exercisable and

justiciable in the legal systems. These factors will suggest whether the issue of rights as part of environmental constitutionalism is adhered to in the two legal systems.

In concluding this section on the theory of environmental constitutionalism, it is conceded that environmental constitutional will not magically fix the anomalies that the environment is facing but helps fix a fundamental issue by serving as a supplement to the environmental laws that have been deemed ineffective or 'lacked the teeth to bite'. For example, Laszewska-Hellriegel (2022) identifies a key duty in guaranteeing the actual realisation of environmental protection laws even in Ecuador and Bolivia where although nature's rights are recognised at the constitutional level they are seldom implemented.

Nevertheless, environmental constitutionalism is the underlying theoretical basis for research question three on whether the legal systems adequately protect and sustain environmental rights. The discussion and resolution of this research question will be based on a logical thematic analysis of the elements of environmental constitutionalism as manifested in each legal system to compare the legal economies of the New Zealand and India for a sustainable environmental protection regime.

3.4 SUMMARY OF THEORETICAL FRAMEWORK

This study is based on the framework that for the best riverine rights protection regime, rivers must first be conferred legal personalities. However, knowing the inanimate nature of rivers, the legal personality is certainly a passive legal personality. For that reason, the state ought to appoint legal guardians for the rivers in order for these guardians to exercise the rights of the rivers on behalf of and in trust for the rivers. These guardians are proposed to be institutions established by consideration of the aspects of critical institutionalism as explained above. Such institutions are believed to have the dexterity and permanence required for the sustainable exercise of the rights of the rivers and to perform the duties of a guardian. But all these notwithstanding, the strongest guarantee for a sustainable environmental or riverine rights protection regime is one in which the legal system has incorporated the elements of environmental constitutionalism. These elements are expected to ingrain the policies and rules for environmental protection in the most fundamental legal norms and create for environmental law a working legal system which supports the roles of the guardians and the personality of the legal system. This framework is what the research intends to test by analysing relevant documents from New Zealand and India which speak on environmental protection and the grant

of legal personality to major rivers in these countries. The details of the research method follow in the next chapter.

CHAPTER FOUR

METHODOLOGY

This chapter will discuss the research method that will be used in this study. This covers the research approach, research design, sources and method of data collection, sampling technique employed in the study and the ethical considerations that will be followed in the study. It states that a qualitative research method will be used in this study. The design of the qualitative research is a multi-case study by documentary analysis of certain relevant document which address the central theme of the study. The documentary analysis is a theoretical thematic analysis by considering the elements of guardianship, critical institutionalism and environmental constitutionalism as major themes in the documents. The outcomes will be put in a comparative analysis to ascertain the manifestation of these themes in the two legal systems under review. Relevant ethical considerations and document sources are also presented in this chapter.

4.1 QUALITATIVE RESEARCH METHOD

Two main approaches to conducting social science research exist namely qualitative and quantitative methods with quantitative research method dominating social science research between the periods of the late 19th -20th century. (Creswell J. W., 2014) however, proposes a third approach called mixed methods which together with qualitative research method emerged in the late twentieth century. (Creswell J. W., 2014) admonished social science researchers to not consider the two main methods as mutually exclusive but one that fades into each other and argued that “a study tends to be more qualitative than quantitative or vice versa”.

Some of the methods of inquiry employed in conducting qualitative studies include conversation analysis, content analysis, grounded theory, ethnography, discourse analysis, narratives phenomenological studies (Wilkinson, 1998). However, (Creswell J. W., 2009) identifies and recommends five strategies to be followed by qualitative researchers in carrying out qualitative studies namely narrative, phenomenology, ethnography, case study and grounded theory.

This research will be solely based on qualitative research methods using the case study analytical method. A comparative study and document analysis technique will be used in analysing facts of the case study. In the document analysis, a thematic analysis by deductive

logic will be applied on the relevant documents to assess the manifestation of the theoretical framework in the legal systems under study. Further evaluation of the conclusions will be considered for a more elaborate analysis as well as to warrant making good recommendations.

4.2 CASE STUDIES

According to (Gerring, 2006) a case is a phenomenon delimited in a particular space (a unit) and observed at a single point in time or over a period. The phenomenon is explained by an inference. For instance, a study considering specific elements of nation-states, nation-states are used as illustrative cases (a typical example is our study); in a study considering individual behaviour in certain circumstances, individuals are used as illustrative cases, and so forth. From each case, a single or multiple (within-case) observations can be made (Gerring, 2006). In case study approach to research, a case may emerge from any phenomenon provided there are identifiable boundaries and elements of the basic objects of an inference. Cases have boundaries with the spatial ones being more apparent than the temporal ones. It is easy to identify where a country begins and end. The temporal boundaries of cases are at best assumed. There are assumptions when cases consist of historic events such as promulgation of legislation (one of the main tenets of this study), seminal judgments, revolutions, or crises.

Stemming from these, a case study is widely considered an in-depth analysis of a single unit (case) in order to generalize inferences across larger sets of cases. Case studies rely on covariational evidence in its analysis (Gerring, 2006). The case that is under inquiry will enable the theory under consideration to be illuminated, analysed, and explicated. Realising the indivisible interdependence social affairs has made case study approach one of the most popular and result oriented research designs available to researchers (Thomas, 2019). The units in a case study does not have to be perfectly representative, but have to be an example of only one phenomenon (Hay, 2000). Also, it is important to identify the ‘class’ or ‘subclass’ of events, under which a the selected case can be analysed (George & Bennett, 2005). Instead of seeking practice direction from theorised general knowledge, case studies give a variety of logical inferences based on exemplary knowledge. Such exemplary knowledge become bases for connections between experiences and establishing links and insights (Thomas, 2019).

As stated above, cases in a case study need to have boundaries to avoid a real messy situation. In the instance of this study, analytical boundary will have to be drawn. This is done in

correlation with the development of a research problem, which will stipulate which specific features of the case the study will be on and how it fits in a social theory (Silverman, 2013). The research topic of this study was chosen due to inquisition about this subject and due to its novelty. I gradually trimmed down the topic, until the research was specifically narrowed to riverine rights in New Zealand and India. To create the boundaries for the research, I decided to delve into the processes that leads to the making of the riverine rights in these two countries.

Using the multi-case study variant of this approach in this research will help in the comparative analysis of the two cases, that are, New Zealand and India, on the collected documents in light of the theoretical framework. Mainly, focus will be on analysing and comparing;

a. the processes leading to the legal personhood of rivers in these two countries; and
b. the mechanisms or framework needed/established to assist in the enforcement of these laws.

These objectives are detailed in the three specific research questions for this study as noted in Chapter One.

4.2.1 Document Analysis

Bowen (2009) defined document analysis as *"a systematic procedure for reviewing or evaluating documents"*. It is a qualitative analytical method which involves the use of secondary data like policy or legal documents as basis for the analysis or evaluation of a concept under study. In document analysis, a theory in considered in light of how it manifests in the case of the document under study. The advantage of document analysis is that the subject document has not been recorded with the directions or intervention of the researcher and the subject document also offers certainty in the form of a specific text. The main disadvantage is identifying and gaining access to standard texts backed by incontrovertible authority to form the basis of the analysis. Nevertheless, this approach is used broadly in academic research in legal and other social science discourses.

In this study, the principal document to be evaluated in the Te Awa Tupua (Whanganui River Settlement) Act 2017. This is the statute of the Parliament of the New Zealand in which River Whanganui is granted a legal personality and placed under the guardianship of certain institutions established under the Act for the exercise of legal rights to protection of the River.In

its analysis, reference shall be made to other scholarly works on the same subject and preparatory documents forming the background to this Act for proper context and insights.

Aside from the Act, other documents to be evaluated include certain reported case law of the High Court of India. The two principal reports analysed are *Mohammed. Salim v. State of Uttarakhand and Others* and *'Lalit Miglani v. State of Uttarakhand and Others.* There are the judicial declarations to the effect of conferring legal personhood on Rivers Ganges and Yamuna as well as several other connected water bodies. Being of strong legal effect in the common law legal tradition, reported judgments are credible sources of secondary data for qualitative analysis of this nature.

4.2.2 Thematic Analysis

On the documents listed above, a thematic analysis will be done. In the view of Nowell (2017) "thematic analysis is a qualitative research method that can be widely used across a range of epistemologies and research question. It is a method for identifying, analyzing, organizing, describing, and reporting themes found within a data set". In thematic analysis the researcher after gathering the relevant data sets out to identify themes corresponding to the research questions for description and evaluation. This approach is flexible to fit several research concepts; its form of analysis is more accessible and easily grasped with few prescriptions and procedures for both early and experienced researchers (Braun and Clarke, 2006). These advantages are relevant to the document analysis approach adopted in this study. It allows the researcher to check the theories adopted in the theoretical framework as reflected in the documents under study.

In this study, a top-down or theoretical thematic analysis is adopted. As described by Braun and Clarke (2006), the theoretical thematic analysis works along the themes of specific research question. It allows deductions to be made from data under study. The data for this research as identified is documentary – the Te Awa Tupua Act of New Zealand and the two judgements of the High Court of India. In the analysis, these documents will be considered in light of the themes underlying the research questions; legal guardianship, critical institutionalism and environmental constitutionalism. The elements of these theories are considered for deductions on how they are realized in New Zealand and India. Logical connections and reflections are made to highlight the framework for environmental or riverine rights in these states.

4.2.3 Comparative Studies

According to Coccia and Benati (2018) comparative studies involve investigations to analyse phenomena or facts among different areas, subjects or objects to delineate points of convergence and points of divergence. Comparative studies are mostly done with qualitative data but can be made with quantitative data as well. The emphasis is on identifying similarities and differences among the data from two different sources to show how a phenomenon under study is expressed under different circumstances. It is the observation of a theory under different practice situations to show the dynamics in the manifestation of the central idea of the theory.

The analytical approach in this study is comparative in that the expression of the subject concept is considered from two culturally and legal different States – New Zealand and India. Although certain similarities may be established in the course of the analysis, the main perspective is to highlight certain disparities and consequent effects of the highlighted conditions and choices in order to illustrate the desired approaches from others. It is in this light that is hoped to illustrate the approaches to the creation of the legal personalities of the said rivers and to point out certain improvements necessary for a sustainable implementation of riverine rights.

4.3 SOURCE AND METHOD DATA

With the research questions of this study at the back of our mind, it is imperative that we set out to collect data that is relevant to the answering the research questions posed. Two main sources of data exist; primary and secondary. Primary data source is when the data for the research is gathered by the researcher himself through means such as interview, observation etc. Secondary data source, on the other hand, implies the use of data collected by a different person either than the researcher him for the purpose of the study or the research.

(Hox & Boeije, 2005) argued that “the data collection strategy can be tailored to the research question, which ensures that the study is coherent and that the information collected is indeed helpful to resolve the problem”.

Let us zoom in at the research questions and find the methods that best first or helps in finding answers for the research questions:

1. How are New Zealand and India exercising legal guardianship over the rivers?

2. How are the responsible institutions in New Zealand and India positioned to protect riverine rights?
3. Does the legal systems of New Zealand and India adequately protect and sustain riverine rights?

To find out how these issues reflect in the two legal systems in view, the relevant documents are the legal texts which have direct bearing on the subject areas. The researcher has identified the Te Awa Tupua (Whanganui River Settlement) Act 2017 of New Zealand and two law judgment reports namely *Mohammed Salm v State of Uttarakhand and Others (2016 & 2017)* and *Lalit Miglani v State of Uttarakhand and Others (2016 & 2017)* made in India. It is in these documents that legal personality is conferred on rivers in the respective countries and directions given on the exercise of riverine rights as conferred. These documents also reveal the frameworks for environmental protection in these states and contain ripe contents sufficient for the thematic analysis intended in this study. They will be analysed in light of the theoretical framework for this study to ascertain whether the legal protection offered to the rivers live up to the standards required by the theoretical framework formulated in this study.

4.4 ETHICAL CONSIDERATIONS

Modern researchers consider ethics an essential aspect of research methodology. Ethical concerns about study help to limit the possible adverse effects of research methodology on humanity as well as the environment. Certain elements of ethics include anonymity, confidentiality, informed consent, voluntary participation, potential for harm and the requirement of publication of research findings (Berg and Lune, 2017). Conflict of interest in also included in ethical concerns as it bears on the objectivity of the research in his approach and analysis. Satisfaction of the requirements of these elements puts a research work on an acceptable pedestal for replication.

The document analysis method adopted by this study fortunately brings up only a few ethical concerns. Without the use of human or animal participants, ethical concerns like confidentiality, anonymity and risk of harm become non-starters. The reason is that the documents to be assessed in this research are public documents published on the internet to be made available to all interested persons. This reason also minimizes the need for informed consent because documents wilfully placed in the public domain may not need informed consent to be assessed for its correspondence with the theoretical framework.

All that notwithstanding, the research in light of ethics is required to and is willing to publish and share the results of this study with all interested parties. Perhaps, the most salient ethical consideration for this study is the issue of conflict of interest which in effect is the requirement of objectiveness in the analysis (Berg and Lune, 2017). It is assured that there is no conflict of interest on the part of the researcher who does not identify with either of the states under scrutiny; neither is this research sponsored by any donors connected with these states. Furthermore, in the personal leanings of the researcher, no factors require his allegiance, loyalty or strict alignment with either of the states under scrutiny. The absence of all these factors suggest the objectiveness with which the researcher intends to approach this study in satisfaction of the ethical requirements. It is for the sake of emphasis that the researcher declares that his paramount interest in this study is academic.

4.5 CONCLUSION ON METHODOLOGY

In all, this study seeks to make deductions from the documents under study in light of the theories explained in the theoretical framework. The document analysis is done by a thematic analysis of the legal provisions in the main and supporting documents which are presented in the subsequent chapter. The researcher will consider each of the three topics by serially expounding their elements in light of the provisions of the legal documents and further evaluate how the elements are reflected in the two legal systems. This approach helps to assess the approaches to the conferment and recognition of riverine rights in New Zealand and India against the standards proposed in the theoretical framework. It further points out the merits and demerits and suggest political and legal directions for a more effective riverine rights protection regime.

The next chapter presents the cases under study. It gives a detailed account of the legal systems under review in this study in preparation for the ensuing analysis as indicated in this chapter. It gives the facts for the case by considering the legal systems of New Zealand and India in relation to the grant of legal personality for the rivers and the regime for the protection and exercise of these rights. The facts stated in that chapter are used in the analysis of this study.

CHAPTER FIVE

PRESENTATION OF CASES

This chapter presents the cases under consideration in this study. It presents New Zealand and India in light of the research area – riverine rights – to delineate their political and judicial journeys towards granting and recognition of riverine rights in these countries. As noted in the methodology that this study employs a document analysis and comparative analysis approaches to case studies, this chapter highlights the political and judicial economies of these states in preparation for further analysis in the subsequent chapter.

First, the case of New Zealand is narrated from the pre-independence era to post independence era in light of their most salient treaties and events concerning their political sovereingty, recognition and expression of rights in the River Whanganui. The historical information on New Zealand is retrieved from Archives New Zealand a website by the Governement of New Zealand with detailed narration of the history of the country. Other sources are cited for complemetary and confirmatory functions. Subsequently, India is discussed with highlights on judicial pronouncements leading to the recent conferment or recognition of riverine rights in rivers Ganges and Yamuni. The facts presented herein present the cases to be analysed in the subsequent chapter.

5.1 THE CASE OF NEW ZEALAND

According to Elaine C. Hsiao (2012), one of the most pervasive reasons for Western imperialism and colonisation was to civilise people and lands world over. The mission to civilise non-European or non-Western populations and lands by imposing western orders of political, sociocultural, economic and legal structures was driving force for European imperialism and have in contemporary post-independence times been converted into missions in modernisation, globalisation and international aid. The old order was characterised by the establishment of colonial administration systems leading to the disruption of traditional forms of governance, development of virgin lands for agricultural and other uses (Hsiao, 2012).

Hsiao (2012) continues that most of the laws, livelihood and the structure of institutions of these people in the ‘wildernesses’ were either abruptly ended or changed over time by these imperialists. These impositions led to the Europeans becoming the dominant force and the natives under their submission. The natives then had to learn the languages of their masters and

used them as their official languages, throw away their customs and traditions and take up those of the imperialists. These changes and assimilations led most of these natives into entering unfavourable and unfair agreements and treaties with these Western Europeans with the natives having little or no understanding in what they had entered to. The intentions and implications of these agreements are sometimes skewed when explaining to these natives and they tend to have lasting and burdensome impacts on these natives. It was one of these treaties that set the theme for our study into the Whanganui River and its tributaries and the processes that led to its ultimate protection which is at the centre of our study. It all began with the He Whakaputanga and the Treaty of Waitangi.

5.1.1. The Declaration Of Independence Of The United Tribes Of New Zealand *(He Whakaputanga O Te Rangatiratanga O Nu Tireni)*

Archives New Zealand (2022) shows that in the political history of New Zealand, this document is most at times overlooked because of the high prominence given to the Treaty of Waitangi. But it is the first recognised document that propelled the Aotearoa into modern nationhood. In 1831, thirteen Māori chiefs (Ngāpuhi) petitioned King William IV of the United Kingdom, in a hope to align with the British for protection from the other imperial powers on the island. There had been an avalanche of other Europeans coming to their island and they sort help how to deal with them. Eventually in October 1835, James Busby who was a British resident on the Island conferred with some chiefs at a meeting (hui) he called at Waitangi. The meeting closed with 34 chiefs (rangatira) signing the He Whakaputanga O Te Rangatiranga O Nu Tireni (the Declaration of the Independence of the United Tribe of New Zealand). Busby took that direction partly based on the fear of losing the island to the French. This was after the French nobleman, Charles Phillipe de Thierry announced plans to declare the island an independent state in Hokianga. Busby referred to this document as the ‘Magna Carta of New Zealand Independence’. By July1839, the declaration has been signed by 18 additional chiefs, totalling the number to 54 rangatira.

The declaration was written in both English and Māori and had four articles. Below are the literal English translation of the Māori version and the original English version respectively:

5.1.1.1. Māori Version (Literal English Translation By Dr. Mānuka Hēnare)

The Maori version of this treaty as attached in appendix A contains the following provisions.

In Article 1, the leaders declared their absolute leadership and sovereignty under the title of The sacred Confederation of Tribes of New Zealand (Te Wakaminenga o ngā Hapū o Nu Tireni).

In Article 2, the leaders emphasized their sovereignty, legislative and governmental powers in the Confederation with no unauthorised person allowed to exercise any such authority therein.

In Article 3, the leaders agreed to confer annually in Waitangi to pass laws for justice for justice, peace and trade. The southern tribes were also called upon to set aside their animosities in light of the Confederation.

In Article 4, it was agreed for a copy of this declaration to be sent to the King of England as gratitude for his approval of their flag, and to act as protector for their "inexperienced statehood, lest our [their] authority and leadership be ended"

In the Codicil to this declaration, the Rangatira fully acceded to the declaration despite their absence due to widespread flooding of their lands.

5.1.1.2. Original English Version

The original English version of the treaty, attached as appendix B, contains the following provisions.

1. The hereditary chiefs and heads of the tribes of the Northern parts of New Zealand declared their independence under The United Tribes of New Zealand in article 1.
2. All sovereign, legislative and governmental power and authority within the territories resided in the chiefs and no other person was allowed to exercise same without their authorisation (Article 2).
3. The chiefs agreed to meet annually at Waitangi to frame laws for justice, peace and regulation of trade. The Southern tribes were invited to set aside animosities and promote the safety and welfare of their common country by joining the Confederation (Article 3).
4. The chiefs agreed to send a copy of their declaration to the King of England to appreciate him acknowledging their flag, and to reciprocate his friendship and protection to his subjects living within their territories. They also requested England to be their Protector from all attempts upon their independence (Article 4).

It was unanimously agreed to and signed by thirty-five chiefs and heads of tribes. Four Englishmen namely Henry Williams; George Clarke; James C Clendon; and Giblert Mair witnessed the signatures (Archives New Zealand, 2022).

The declaration is clear that the chiefs did not transfer sovereign power and authority (mana) to the Crown as the power to make laws and review old laws were only in the domains of the chiefs (Rangatira). This declaration was a bold and independent depiction of indigenous powers and had been one of the documents relied upon by the Waitangi Tribunal Reports.

5.1.2. The Treaty Of Waitangi *(Te Tiriti O Waitangi*)

Archives New Zealand (2022) further shows that the Declaration of Independence was in force and its legal rights enforced until the Treaty of Waitangi was signed. In modern-day New Zealand, this treaty is widely recognised as the constitutional document establishing and guiding the relationship between the Crown (represented by the Government) and the Māori people represented by over 500 Maori chiefs (rangatira) in May 1840 (Ministry of Justice, 2020). The agreement was overseen by Lieutenant-General William Hobson. Prior to the 1830s, New Zealand or Aotearoa was entirely under the control of the Māori and merely a frontier outpost for the colony of New South Wales as business boomed between the indigenes and the Europeans which was merely based on good accord between the two parties.

There were at times that violence erupted. British law did not operate on these territories and hence some British subjects or residents acted out of control or unruly. There were continuous pleas for the British government to step in to ensure order but the request met some hesitation (Orange, 2012). The British government finally took action on New Zealand in 1839 with the appointment of William Hobson, a naval captain, as consul and lieutenant-general to any part of the island where the Māori were willing to cede or consent to become British. Hobson then took advise from by George Gipps, then governor of New South Wales to draft a treaty with the Māori.

Hobson with the aid of his secretary, James Freeman drafted the treaty. The treaty was tidied up by James Busby. Henry Williams and his son Edward Williams translated the treaty into Māori. Hobson later presented this treaty in Māori language to a meeting with around 500 Māori chiefs at Waitangi on February 5, 1840. The contents of the treaty were discussed at length especially on any possible effect of the content on their autonomy, land, chiefly authority, and trade. It resulted in a deadlock and no agreement was concluded. Throughout the negotiations, Henry Williams was instrumental in explaining the content to the Māori chiefs during the debate.

The treaty was executed on 6th February 1840 with little contention with the agreement of more than 40 chiefs who signed the treaty. French Catholic Bishop Jean Baptiste François Pompallier petitioned on the need for plurality of religion and Hobson sided with that request. Hobson quickly reported to the Crown about the success of his mission. He further indicated he reached an agreement for British sovereignty over the island, even from a number of chiefs who were previously parties to the Declaration of Independence in 1835. Te Tiriti o Waitangi was signed by over 500 chiefs including some women in Māori-language except an English copy executed by 39 chiefs at Manukau Harbour and the Waikato Heads. The European witnesses also executed copies of the treaties (Orange, 2012).

5.1.2.1 The Treaty

The treaty had both English and Māori versions and as stated above, majority of the Māori chiefs signed the Māori version with a few signing the English version. The treaty has three articles. The two versions of the treaty have been an issue of contention between the Crown and the Māori till date due the discrepancies in the wordings of these two versions and likewise their interpretations. The Māori version (as translated in English literally by Professor Hugh Kawharu in 1975) is attached in Appendix C and English version attached in Appendix D respectively. Nevertheless, the salient points of disagreements in interpretation of the two versions are stated below.

5.1.2.2. The Disparity Between the two Versions

Considering the texts in Appendices C and D, it is evident that the Treaty has two different texts, the Māori version and the English version. The variations between these two texts have been contested for more than a century. Some writer consider two treaties were signed; 'Te Tiriti', the Māori version; and the Treaty, the English version (Ministry for Culture and Heritage, 2021).

Preamble: Looking at the preamble of the two versions of the treaty, it is stipulated in the Māori version that the Queen's key promises to the Māori were to establish a government and to secure the already established chieftainship (that is its autonomy and authority (mana) over their own areas exclusive of the government). The lands owned by the Māori were secured if they intend to retain them. The English version expressed British intentions to protect Māori interests, provide for British settlers, and establish a government to maintain peace and order.

Article 1: The English text maintains that the Māori absolutely secedes their sovereignty to the Queen but the Māori text makes mention of ‘kawanatanga’, that is the right of government of which the Queen receives.

One main challenge in translating the treaty from English to Maori was the non existence of a direct Maori equivalent for 'sovereignty'. Rangatira (chiefs) exerted full and absolute powers (‘mana’) over the land and resources of their territories as a community trust. The term 'kawanatanga', was transliterated from 'governance', which was contemporary to them. Māori understanding of this word was from similar use in the New Testament of the Bible with reference to the likes of Pontius Pilate. The term was also used in comparison to the functions of the Governor of New South Wales whom they addressed as 'Kawana'. (Waitangi Tribunal, 2016).

Article 2: The English text stated that Māori were assured and guaranteed “exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties”. However, it also provided for the Crown's exclusive right to purchase portions of the land; a provision which was later interpreted by some Māori (and British) as a first option instead of an exclusive right to buy.

The Māori text stated that the Māori were guaranteed *'te tino rangatiratanga'* i.e. the unqualified chieftainship over their lands, villages, and all their property and treasures. It also included the right of the Crown to buy their land where the Maori wished to sell it which was found uncertain on the issue of exclusive Crown purchase or first option (Ministry for Culture and Heritage, 2021). The motive of this provision was for sale to be effected through the Crown (Waitangi Tribunal, 2016).

Article 3: Article 3 in both texts promised equal rights and citizenship and hence there was no disputable claim.

5.1.3. Aftermath Of The Treaty

The British officials in Aotearoa after signing the Treaty with the Māori chiefs placed much emphasis on the Te Tiriti o Waitangi based on the English version which sought to take authority (mana) away from the chiefs. There was a conflict of authority from the onset between the Crown and the Māori chiefs. After then signage, the British pushed all the Māori chiefs under the Queen’s authority, even those that were not signatories to the treaty. There were earlier signs of problems attributed to the treaty when violence erupted between British settlers

in New Zealand and indigenous Māori at Wairau in 1843 and war broke out in Northland in 1845. Most at times the government ignored the proposed effect of the treaty altogether (Orange, 2012).

From the 1800s to the 1900s, the Māori felt the treaty was been dishonored and that that brought about the creation of the Māori King Movement (Kingitanga) in the late-1850s. This is perhaps among the longest-standing political institutions in the political history of New Zealand. The Māori was a proliferation of different chiefdoms without a centralized ruler. After signing the treaty, the Māori faced increasing number of British settlers, marginalization of the indigenes and the increased demands from the Crown to purchase Maori lands (Rahui Papa & Paul Meredith, 2012). In 1856, the Waikato chief, Pōtatau Te Wherowhero was the first unifier king of the Māori, even though the British refused to recognized his authority and this led to ensuing war between the two factions. Waikato was defeated and their lands confiscated by the British and the Māori King movement was tagged as a dissident group throughout the 19th century.

It became evident to the Māori that the treaty guarantees will not be yielded to by the British. Court decisions were blatantly decided against the Māori who sought resort through the established native courts. There were shady land dealings and legislations that were enacted to put the Māori at disadvantaged positions. Typical instances were the Public Works Acts of 1864 and 1876 that led to compulsory acquisition of Māori lands for roads, railways and other public works. Article Two of the treaty promised “exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties”, but these were not observed by settler British developments in the form of foreshore reclamation, timber floatage (transporting timber downstream through flooding), and drainage schemes all of which affected indigenous communal economic rights in the rivers and lands. Another major source of irritation was the refusal to discuss and fully explain local body works to the Maori (Orange, 2012).

The Māori considered closely the treaty and its guarantees and decided to find ways to mitigate some of the problems emanating from the British settlement and Maori land loss. In the 1870s, they had several discussions to debate political power and authority (mana), as well as how to mitigate their land loss and the destruction of their water reserves. Waitangi became the key place where these deliberations among the rangatiratanga of the various groups (Orange, 2012).

At these deliberations, strategies were developed to address power imbalances among the Crown and the Māori and activities to reclaim control of their political and economic affairs. Decisions were made to send petitions to the Crown in a bid to address their grievances. Hundreds of petitions were sent to Britain but they yielded no results. In 1882, 1884, 1914 and 1924 respectively, Māori delegations were sent to England to seek redress from the Crown and the British government based on the Treaty. Every one of these visits sought that the treaty rights and guarantees has to be adhered. At various instances, they were all returned to the New Zealand parliament, that kept insisting that the various promises and guarantees in the Treaty were being met and were not being breached.

The idea of the Māori using the Parliament of the New Zealand government, was a response to the inactivity of the Crown towards their grievances. Frederick Nene Russell, Mete Kingi Te Rangi Paetahi, Tāreha Te Moananui and John Patterson were the first Māori Members of Parliament who joined the House in 1868. The MPs were unable to occasion change in Parliament because of the majority white settler British politicians. Over that period of time, Māori MPs kept introducing strings of bills to enforce the Treaty and in effect empower the Māori but were all rejected by the votes of other MPs (Orange, 2012).

In the 1920s came some government attention to Māori grievances. Ngāi Tahu's land-claim grievances were upheld by a Native Land Claims Commission in 1921. In 1928 the grievances of the iwi who had their lands confiscated after the wars were upheld by the Sim Commission. Modest compensation was made later in the 1940s for these grievances (Orange, 2012).

The continuous blockade for bills meant for the implementation of Māori rights based on the Treaty by the New Zealand Parliament led to the springing up of political movements in the 20th century. The most influential was the Rātana Political Movement. The Rātana Church which initially began as a prophetic movement morphed into a political movement. The Church entered politics in the 1920s with the utmost goal of securing the Treaty rights and its ratification, that is the legal recognition by the New Zealand government. Until ratification was completed, this group claimed the Treaty could not be recognized and enforced. The Rātana political movement aligned with the Labour Party in the UK winning all four Māori seats in the 1943 general elections. For the ensuing 30 years Rātana MPs sustained their mission of gaining recognition for the treaty in law (Orange, 2012).

There was a bit of recognition for the Treaty in 1940, a century after executing the original Treaty. The government sought to demonstrate an act of good faith by organizing centennial celebration where they encouraged the populace to demonstrate national pride and unity for the Treaty. The Māori were not motivated because they perceived the government's actions as a mere 'showmanship', given the past unwillingness of the government to give heed to the promises and guarantees of the Treaty. Around that period, Apirana Ngata, a Māori MP and also the Father of the House (the longest serving member) used the centennial celebrations to project the governments' delivery on treaty promises, and petitioned the government for settlement of the people's grievances under the treaty promises (Orange, 2012).

5.1.3.1. Waitangi Tribunal (Treaty Of Waitangi Act 1975)

In the 1970s, there had been a rapid increase in Māori protests in relation to their grievances about the promises and guarantees from the Treaty that were not been adhered to by the government. Some of these protests led to actions that were outside the framework of the law. This forced the government to establish the Waitangi Tribunal as the legal process to address Māori Treaty claims.

Composition of the Tribunal: The Waitangi Tribunal was established by the Treaty of Waitangi Act, 1975 (Amendment Act, 1985). Section 4 subsection 2 of the Act details the composition of this Tribunal was repealed in 1985 by the Treaty of Waitangi Amendment Act 1985. Section 2 of the Amended Act 1985 details the new composition of the Tribunal and is made up of the Chief Judge of the Māori Land Court. This Judge was not only a member but also Chairperson of the Tribunal. In total, the Tribunal consisted six persons; at least four shall be Maod appointed by the Governor-General on the recommendation of the Minister of Maod Affairs in consultation with the Minister of Justice (New Zealand Acts As Enacted, 1985) but now it consists of up to 20 members experts from varied backgrounds appointed by the Governor-General on the recommendation of the Minister for Māori Development. The Māori and Pākehā (non-Māori) that is, with regards to the 1975 Act (New Zealand Legislation, 1975) make up the two halves of the members. The Chairperson holds a term limit not exceeding 5 years and the members not exceeding 3 years as specified by the Governor-General that appoints them (New Zealand Legislation, 1975). Inquiries are made by three member or seven member panels appointed for the purpose. At least one Māori member must be part of each panel. Also, there is provision for judges of the Māori Land Court to preside a Tribunal while although they are not members of the Waitangi Tribunal.

Functions of the Tribunal: The functions of the Tribunal are set out in Section 5 of the Treaty of Waitangi Act, 1975 to mainly "inquire into and make recommendations upon, in accordance with the Act, and any claims within the jurisdiction of this Tribunal". Also, the Tribunal examines and reports on bills referred to it by the legislature or a Minister of the Crown. Again, this Tribunal makes recommendations and determinations on certain Crown Forest lands, railways land, state-owned enterprise land, and land transferred to educational institutions (New Zealand Legislation, 1975). The Tribunal also has a function of educating, that is, "explaining a Māori world to a predominantly western society".

Jurisdiction Of The Tribunal: At the onset, the jurisdiction of the Tribunal covered only claims and/or acts done on or after the commencement of the Act, that is on/after 1975. This jurisdiction was later expanded to include all claims from Māori (person or group) on/after February 6, 1840, that is, the day the Treaty was signed that were affected adversely by ordinance, Act, regulations, order, proclamation, notice, other statutory instrument made, policy, or practice (Section 3 of the Treaty of Waitangi Amendment Act, 1985). Also, where any of the instruments listed above was inconsistent with the principles of the Treaty, claims could be made for trial by the Tribunal. The Tribunal could also order the return of land conveyed under the State-Owned Enterprises Act even where it has been sold to a third party [Treaty of Waitangi (State Enterprises) Act, 1988], certain education land (Education Amendment Act, 1990), Crown Forest lands (Crown Forests Assets Act, 1989) and assets of New Zealand Railways Corporation (New Zealand Railways Corporation Restructuring Act, 1990). The findings and opinions of the Tribunal were of great persuasive authorities to the court recognized as yielding strong evidential weight by the Courts but their recommendations ought to be accepted by a Court to have the force of law. This difference was highlighted by Robin Cooke, President of the New Zealand Court of Appeal (the Highest Court of the land as at that time) in the case of *Te Rūnanga o Muriwhenua v. Attorney-General (1990)*, where he described the Tribunal findings as noted below:

> 'The crucial point is that the Waitangi Tribunal is not a Court
> and has no jurisdiction to determine issues of law or fact conclusively.
> Under s 6 of the 1975 [Treaty of Waitangi] Act it may
> make findings and recommendations on claims, but these findings
> and recommendations are not binding on the Crown of
> their own force. They may have the effect of contributing to
> the working out of the content of customary or Treaty rights;

but if and when such rights are recognised by the law it is not because of the principles relating to the finality of litigation. Thus a Waitangi Tribunal finding might well be accepted by a Court as strong evidence of the extent of customary title; but unless accepted and acted on by a Court it has no effect in law. If accepted and acted on by the Court, it takes effect because the Court is determining the extent of legal rights in applying, for instance, the legal doctrine of customary title. The Court's decision will operate as judicata, but not the finding of the Tribunal.' (Te Puni Kokiri, 2001)

5.1.4. Whanganui River Deed Of Settlement *(Ruruku Whakatupua)*

5.1.4.1. Historical Background of the Whanganui River Claims of Whanganui Iwi

As at 1840, the iwi and hāpu (tribe) of Whanganui (Whanganui Iwi) were in possession of the Whanganui River. They enjoyed rights and performed duties towards the Whanganui River. Enjoying or exercising these rights were based on their customary and cultural rights and responsibilities (tikanga). The river and its tributaries have always been the home of the Whanganui Iwi. Fourteen rangatira belonging to the Whanganui Iwi were identified signatories to the Treaty of Waitangi in May, 1840.

In 1848 the Crown acquired 86,200 acres of land at Whanganui. The acquisition ran through the lower reaches of the Whanganui River. The Crown sought to assert rights over portions of the River which intersected their land. At the same time, the Whanganui Iwi also insisted on their use and exercise rights over the entire River including the intersecting portions. The Crown used legislation in the late 1850s to authorize the local administration to construct on and administer structures on the River without the consultation or involvement of the Whanganui Iwi.

In 1885 the Crown conferred with Whanganui Māori on improving river rapids to provide steamer services. But the excesses in these activities led the Whanganui Māori in 1887 to protest the large excessive extents and effects of the river works. Petitions were made to the Parliament on the destruction of eel weirs and fisheries in the river by the river works and most dams were destroyed by 1891.

In 1891, Wanganui River Trust Act was promulgated for conservation of natural scenery and for the protection of the navigability of the River. No Māori membership was included on the board. The Act guaranteed protection of the rights of Natives conferred by the Treaty of

Waitangi. Petitions were made again to Parliament on the Trust's activities which obstructs river works. Instead, Parliament expanded the powers of the Trust between 1893 and the 1920s to include mining rights in the River. The Whanganui Iwi continued their demands for compensation for gravel extraction.

More protests erupted in 1903 when the Coal-mines (Amendment) Act sought to vest all navigable riverbeds in the British Crown with no consultation with the Whanganui Iwi. In the early twentieth century, the Whanganui Iwi sustained their interests in the River which is the longest in New Zealand. In 1927 they petitioned for compensation for river rights, gravels, land preservation, and profits from the steamer company. The Native Land Court made inquiries into the petition. Nevertheless, after a decade, inquiries were incomplete so the Whanganui Iwi applied to the Native Land Court to investigate claims of the indigenes to customary rights over of the River. The claims of the indigenes to the river bed persisted in the Courts until 1962. The Courts held that Whanganui Iwi held customary rights in the river bed as at 1840 but the Supreme Court in 1949 held that the riverbed was vested in the Crown by the Coal-mines Act Amendment Act 1903. Nevertheless, a Royal Commission in 1950 held that save for that Act, Whanganui Iwi would remain the customary owners of the riverbed. The Commission went ahead to recommend compensation for gravel extraction. Subsequently the Court of Appeal ruled similarly in1962 that Maori customary ownership of the riverbed were extinguished by the granting of Crown titles to riparian blocks.

In 1958, as part of construction of Tongariro Power Scheme (TPS), a Crown Order in Council sought to authorize diverting water from the River and others into the dam. The Crown unilaterally decided to start in 1971. Whanganui Iwi consistently opposed the TPS on grounds that the diversions caused reduced water flows damaging the health and wellbeing of the Whanganui River and poorly affecting Whanganui Iwi cultural and spiritual values.

In 1988, the government established the Whanganui River Māori Trust Board to address all such outstanding Whanganui Iwi claims. So finally in 1990, claims were filled by the Trust Board with the Tribunal on behalf of all Whanganui Iwi affiliates. The Whanganui River Māori Trust Board has been instrumental to claiming the legal status of the Whanganui River. This board was established by the Whanganui River Trust Board Act, 1988. According to the Act, this board was purposefully constituted for the descendants of the Hinengākau of the Upper River, Tama Ūpoko of the Midle, and Tūpoho of the lower Whanganui. These are the three children of ancestor Tamakehu, the founder of the Whanganui Iwi Tribe [Section 4(2) of the Whanganui River Trust Board Act, 1988]. In addition to the functions of Māori Trust Boards, the Whanganui River Trust Board occasionally discusses settlement of claims with the

Government, and other stakeholders. It includes rights in the riverbed, minerals, water, and fish (Section 6 of the Whanganui River Trust Board Act, 1988).

5.1.4.2. The Whanganui River Deed of Settlement Document

The Whanganui River Deed of Settlement (Ruruku Whakatupua), guaranteed full and final settlement of Treaty of Waitangi claims. It covers all such claims made by the Whanganui Iwi in relation to the River before 21st September 1992.

The Deed of Settlement has two parts and is comprised of two documents:

- Ruruku Whakatupua – Te Mana o Te Awa Tupua
- Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui

Ruruku Whakatupua – Te Mana O Te Awa Tupua

This document contains the agreed terms of a new legal framework between the Whanganui Iwi and the Crown for Te Awa Tupua which upholds the mana of the Whanganui River and recognizes the intrinsic values or ties which binds the Whanganui River to the People and vice versa.

Te Pā Auroa Nā Te Awa Tupua

According to this deed, a new framework is provided for the Whanganui River centered on the Te Awa Tupua. It is on this framework that anyone with a claim or anybody making a determination is obliged to rely. Te Pā Auroa Nā Te Awa Tupua is fundamentally made up of seven principles enacted into seven articles in this legal document. These are stated above.

I. **"Te Awa Tupua and its legal recognition:** Te Awa Tupua is indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements. With Te Awa Tupua as a legal person, it gets to be enshrined with the rights, duties and liabilities of a legal person. Also, these rights, powers and duties of Te Awa Tupua must be exercised and performed on behalf of, and in the name of Te Awa Tupua by Te Pou Tupua (human face of the River) and in accordance with this document.

II. **Tupua Te Kawa (Te Awa Tupua values):** Under this deed, relevance is given to the intrinsic values of Te Awa Tupua and it must be recognized and established. The values comprise of:

   a. **Ko te Awa te matapuna o te ora:** This value implies that the River is the source of spiritual and physical sustenance, that is, it is a spiritual and physical entity that supports

and sustains both the life and natural resources within the Whanganui River and the health and wellbeing of the iwi, hāpu and other communities of the River.

b. **E rere kau mai te Awa nui mai i te Kahui Maunga ki Tangaroa:** This means the great River flows from the mountains to the sea. It asserts the River been indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and its all physical and metaphysical elements.

c. **Ko au te Awa, ko te Awa ko au:** This value is in reference of the inseparability of the River and the Whanganui people. The iwi and hāpu of the Whanganui River have an inalienable interconnection with, and responsibility to, Te Awa Tupua and its health and wellbeing.

d. **Nga manga iti, nga manga nui e honohono kau ana, ka tupu hei Awa Tupua:** This means the small and large streams that flow into one another and form one River. Te Awa Tupua is a singular entity comprised of many elements and communities working collaboratively to the common purpose of the health and wellbeing of Te Awa Tupua.

III. **Te Pou Tupua (the Human Face of Te Awa Tupua):** This is to be the human face of the River and must act in the name of Te Awa Tupua. In the exercise of its functions, Te Topou Tupua must act in the interests of Te Awa Tupua and these actions must be consistent with Tupu ate Kawa (the intrinsic values).

The functions of the Te Pou Tupua are to act and speak on behalf of the Te Awa Tupua and also to uphold its status and intrinsic values. Also, it is to promote and protect the health and wellbeing of Te Awa Tupua. Again, it is to serve as landowner in relation to any land that is vested in Te Awa Tupua and to keep its register. Te Pou Tupua must take any action reasonably necessary to achieve its purpose and exercise its functions including heading to court and litigating.

Te Pou Tupua is to receive support and advise from Te Karewao (an advisory group) in the exercise of its functions. Te Pou Tupua is also to receive $200,000 from the Crown each year for a period of 20 years from the date of commencement of this deed as a contribution to the costs associated with the exercise of the Te Pou Tupua functions.

IV. **Te Heke Ngahuru Ki Te Awa Tupua (Te Awa Tupua Strategy):** The name for this strategy is a symbolism for the potential of the Te Awa Tupua to provide for all if cared for and protected as a living spiritual and physical resource. The purpose is to bring together persons with interests in the Whanganui River (iwi and hāpu) in a collaborative effort to address and advance the environmental, social, cultural and economic health and wellbeing of Te Awa Tupua.

This strategy has to identify issues relating to the environmental, social, cultural and economic health and wellbeing of Te Awa Tupua, provide the necessary strategy to address those issues, and provide recommended actions to address those issues.

V. **Te Kōpuka Nā Te Awa Tupua (Te Awa Tupua Strategy Group):** This is a strategy group comprising representatives of persons and organizations with interests in the Whanganui River, including iwi, local and central government, commercial and recreational users and environmental groups. The purpose of this group is to act collaboratively to advance the environmental, social, cultural and economic health and wellbeing of Te Awa Tupua.

The main function of the Te Kōpuka is to develop and approve Te Heke Ngahuru (the strategy discussed above). Additional functions include:

a. monitor the implementation of the strategy;
b. review the strategy;
c. provide a forum for discussion of issues relating to the health and wellbeing of Te Awa Tupua;
d. exercise function that may be delegated to it by a local authority.

The members of Te Kopuka will not be personally liable in their capacity as a member of Te Kopuka, provided they have acted lawfully, in accordance with their statutory mandate and in good faith. The Crown will provide a one-off contribution of $430,000 to the cost of establishing Te Kōpuka and the development of Te Heke Ngahuru.

VI. **Kia Matara Rawa (the vesting of the Crown-owned parts of the bed of the Whanganui River in Te Awa Tupua):** The motive of this principle seeks to address the actions of the past and begins the reunification of the river. The fee simple estate in the Crown-owned parts of the bed of the Whanganui River will vest in the Te Awa Tupua. This vesting does not include legal roads, existing structures (private and public) and any part of the Whanganui River located in the marine and coastal area.

With the issue of future interests, when any parts of the bed of the Whanganui River become Crown-owned or otherwise comes to the ownership of the Crown, the Crown must engage with Te Topou Tupua to explore the potential for such lands to be vested in Te Awa Tupua.

VII. **Te Korotete O Te Awa Tupua (Te Awa Tupua Fund):** A $30 million fund, Te Korotete o Te Awa Tupua, will be established to support the health and wellbeing of Te Awa Tupua. Te Korotete will be held in the name of Te Awa Tupua and administered by Te Pou Tupua. Applications will be open on a contestable basis to any

person or group wishing to advance an initiative related to the health and wellbeing of Te Awa Tupua."

Ruruku Whakatupua – Te Mana O Te Iwi O Whanganui

This document is the assured commitment of the British Crown (the government) to consider grievances of Whanganui Iwi in relation to the Whanganui River. In effect, it upholds the mana of Whanganui Iwi and their relationship with Te Awa Tupua.

5.1.5 Te Awa Tupua (Whanganui River Settlement) Act 2017

In March 2017, the principles stated above as found in the Deed of Settlement were adopted and legislated into statute of the Parliament of New Zealand referred to as the Te Awa Tupua (Whanganui River Settlement) Act 2017. Other features of the Act were the consolidation of representative trusts of the various peoples with interests in the Whanganui River, legal jurisdiction and procedure for claims and the various functions and roles of the several accessory persons and institutions.

5.1.5.1. The Claims Settlement Process

It is important to outline the claims settlement process for the purpose of this research. The Honorable Christopher Finlayson, a former Member of Parliament of New Zealand in his article *'A River Is Born: New Zealand Confers Legal Personhood on the Whanganui River to Protect It and Its Native People'* made admission on the numerous changes this process had to through since the 1990s but careful outline and explained the current process below:

a. *Deed of Mandate*: This is the stage the party representing and negotiating on behalf of the iwi people demonstrates his authority for that role.

b. *Terms of negotiation*: The objectives for the negotiation is made known by the parties to each other. The procedure and other rules are clearly stated at this stage.

c. *Agreement in principle*: The parties negotiate and agree to the vital elements of the settlement and sign a non-binding agreement in principle or heads of agreement. It can be skeletal or detailed as agreed for the drafting.

d. *Initialing a deed of settlement*: An initialed deed of settlement maps out the historical claims and redress agreed between the Crown and the mandated in purely technical terms. This process in a way assists the Crown for the purpose of accountability.

e. *Ratification*: The claimant community votes on the final offer and decide how to manage the settlement; usually by a trust.

f. *Signing a deed of settlement*: This stage involves triparty, the mandated body, the entity appointed by the claimant community for the post settlement duties and the Crown. These parties sign the final deed of settlement once the Crown is satisfied that the listed above have been seen through by the claimant community without any opposition, thus to conclude all their historical claims.

g. *Legislation:* The Parliamentary Counsel Office drafts the settlement bill for introduction to Parliament. This legislation must be agreed to by the negotiating groups involved in the whole process. This stage gives the whole process the legal backing needed and also authorizes settlement redress to transfer to the ratified post settlement governance entity.

The crux of the Whanganui River claim is that the people of Aithaunui-a-Paparangi possessed and controlled the Whanganui River and its tributaries. This has been their basis for negotiating for riverine rights over the Whanganui River until recent success in the Deed of Settlement agreement and subsequent promulgation into law.

An analytical scrutiny of this history through these documents will reveal the process of negotiations towards the conferment of the legal personality of the Whanganui River and the establishment of the guardian Te Pou Topua institution for the exercise of the legal rights of the river. The facts provided in this historical documentary narration will be the basis for the assessment of the legal system of New Zealand on riverine rights in light of the theoretical framework that the there ought to be institutions created along the dictates of critical institutionalism for a more effective protection of riverine rights in a legal system with entrenched values of environmental constitutionalism. With the thematic analysis in light of the elements of the various theories it is hoped to establish whether these legal systems provide the requisite protection for riverine rights according to the standards of the theoretical framework.

5.2 THE CASE OF INDIA

River Ganges (Ganga in Hindi, term may be used interchangeably in this study) is an important waterbody in India where hundreds of millions of Indians rely on it for their source of livelihood and spiritual gratification as it is one of the main pillars, that is, the holy river of the Hindi religion. River Ganges originates from the Gaumukh Glacier in the Himalayas and pass through one-fourth of India across several federal states into the Bay of Bengal. It shares a delta

in the Bengal area with the Brahmaputra River, which lies mostly in Bangladesh. The length of River Ganges is 2,510 kilometers.

The Yamuna River, also known as Jumna, is the name of a major river in India and a tributary of the Ganges River. The source of the Yamuna River can be traced to the Yamnotri Glacier also in the Himalayas. The Yamuna River flows solely through India across 3 states, Uttarakhand, Uttar Pradesh and Haryana. The Yamuna River is also considered as a goddess (Goddess Yamuna) in the Hindu religion with its shrine sited in the State of Uttarakhand. Although this river is not navigable, it has a high economic importance in the states it flows through mostly for irrigation purpose because of its countless tributaries. The Yamuna River is 1376 kilometers long and it is considered among the worst polluted rivers in India.

In 2017, India granted legal rights to Ganges and Yamuna Rivers in the judgments in these two legal cases; *'Mohd. Salim v. State of Uttarakhand and Others'* and *'Lalit Miglani v. State of Uttarakhand and Others'*. It is important to note that Article 21 of the Indian Constitution enjoins to all persons the right to a healthy environment. Article 51A(g) of that same constitution, specifically mandates citizens to protect the healthy environment. This was what Mohammed Salim relied on as a private individual to bring a public interest action against the State of Uttarakhand. It is imperative for this study that we delve into these two cases.

5.2.1. Mohd. Salim V. State Of Uttarakhand And Others (2016 & 2017 Judgments)

The plaintiff commenced a public interest litigation in the High Court of Uttarakhand against the illegal constructions on the banks of Ganges River. It also included encroachments as well as the government's delay in setting up the Ganga Management Board as required under Uttar Pradesh Reorganisation Act, 2000. It was averred that the respondents as private persons had acquired public lands from the government and develop same. They sought an injunction which was refused.

There had been an earlier litigation between the State of Uttar Pradesh and the State of Uttarakhand in respect of a property after Uttarakhand seceded from the State of Uttar Pradesh 14 years earlier before this current petition. As such, these private respondents took advantage of the stalemate in the litigation between the two states and continued to occupy the lands owned by the government with claims that the property belongs to the State of Uttar Pradesh with the boundaries yet to be delineated. About the deadlock between these two states, the Supreme Court of India had earlier directed the Central Government to give directives to these

two sates to settle the matter amicably between themselves and these two states were to act swiftly. According to a filing by the State of Uttar Pradesh, they had come to a resolution with the State of Uttarakhand and it was the Central Government that had failed to establish a Ganga Management Board.

5.2.1.1 The 2016 Ruling

In the 2016 ruling, the High Court of Uttarakhand had ordered the eviction of the respondents from the said government land by the Ganges River and had banned the respondents from mining in the riverbed of the Ganges which was the highest flood plain area. The High Court had also ordered the central government to take a final decision in settling issues between the State of Uttar Pradesh and the State of Uttarakhand and also establish the Ganga Management Board, under Section 80 of the Uttar Pradesh Reorganisation Act, 2000.

5.2.1.2 The 2016 Ruling

In the 2017 judgment, the State of Uttar Pradesh and the State of Uttarakhand drew the irate of the court for their inactions on the orders of the court. The court referenced that action as a 'sign of non-governance'. Consequently, the High Court further directed the Chief Secretaries of the State of Uttar Pradesh and Uttarakhand respectively to cooperate with the Central Government to find a resolute means for the constitution of the Ganga Management Board by appointing members failing which the Central Government could constitute the board without the input from these states.

The High Court took notice of the dire state that both rivers, the Ganges and Yamuna were in. The court called it an 'extraordinary situation' and hence moved to provide an extraordinary measure to preserve and conserve the rivers. The court accordingly in the exercise of its *parens patriae* jurisdiction, declared the Rivers Ganges and Yamuna together with all their tributaries, and connected water bodies as juristic/legal persons/living entities possessing legal personality for the preservation and conservation of the water resources.

For the purpose of this research, it is important to look at the reasons that influenced the decision by the court.

5.2.1.3. The Religious Perspective

The first reason the court relied on was from a religious perspective. India as a country is predominantly a country that follows the Hindu religion. The court tied the attachment between

the country and its people to these two rivers as one of a god-subject relationship. Rivers Ganges and Yamuna are gods or idols worshipped by people of the Hindu faith and are revered for being sacrilegious. The Hindus believe in a deep spiritual connection with both rivers. For example, it is believed that sins can be washed away by a dip in River Ganges. The court further relied on the holdings by the Supreme Court in the case of ***Yogendra Nath Naskar v. Commission of Income Tax, Calcutta, 1969 (1) SCC 555*** which recognized a Hindu idol as a juristic which can hold property and be taxed through the Shebaits (persons who serve the deity) entrusted as legal guardians and representatives of the properties of the Hindu idols. The Court stated in paragraph 6 of the said judgment, their Lordships held:

> "That the consecrated idol in a Hindu temple is a juridical person has been expressly laid down in Manohar Ganesh's case, I.L.R. 12 Bom. 247 which Mr. Prannath Saraswati, the author of the 'Tagore Lectures on Endowments' rightly enough speaks of as one ranking as the leading case on the subject, and in which West J., discusses the whole matter with much erudition. And in more than one case, the decision of the Judicial Committee proceeds on precisely the same footing *(Maharanee Shibessourec Dehia v. Mothocrapath Acharjo 13 M.I.A. 270* and *Prosanna Kumari Debya v. Golab Chand Baboo L.R. 2 IndAp145* Such ascription of legal personality to an idol must however be incomplete unless it be linked of human guardians for them variously designated in *Debya v. Golab Chand Baboo L.R. 2 IndAp145 the* Judicial Committee observed thus : 'It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as shebait or manager. It would seem to follow that the person so entrusted must be necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir'-words which seem to be almost on echo of what was said in relation to a church in a judgment of the days of Edward I: 'A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age' (Pollock and Maitland's 'History of English Law', Volume I, 483."

5.2.1.4 The Doctrine of Juristic Person

The court was also of the view that their determination was born out of necessity considering the state both rivers were in. Both rivers were facing existential threat and the court sought the

need to overreach in a bid to save the rivers. The court then cited in support the Supreme Court case of ***'Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & Others AIR 2000 SC 1421'*** that necessity requires the adoption of the concept of a 'juristic person' for the law to help sustain the continuous phase of human development. The Supreme Court further elaborated in paragraphs 11, 13 and 14 the meaning of a juristic person and the concept of legal personality below:

> *"11. The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "Person" in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a "Slave" was not a person.*
>
> *He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.*
>
> *13. With the development of society, 'where an individual's interaction fell short, to upsurge social development, co-operation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very Constitution of State, municipal corporation, company etc. are all creations of the law and these "Juristic Persons" arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.*

Corpus Juris Secundum, Vol. LXV, page 40 says:

> *"Natural person. A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition 'Person' it is stated that the word "person," in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons."*

Corpus Juris Secundum, Vol. VI, page 778 says:

> *"Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."*

Salmond on Jurisprudence, 12th Edn., 305 says:

> *"A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human being is one of the most noteworthy feats of the legal imagination.... Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. ... If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention...*
>
> *1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members....*
>
> *2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself....*
>
> *3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses - a charitable fund, for example or a trust estate...*

Jurisprudence by Paton, 3rd Edn. page 349 and 350 says*:*

> *"It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units - all entities*

recognised by the law as capable of being parties to legal relationship. Salmond said: 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties...

...Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract: and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities."

Analytical and Historical Jurisprudence, 3rd Edn. At page 357 describes "person";

"We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.
14. Thus, it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol, was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is

akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an Idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such."

5.2.1.5. Doctrine of Parens Patrie

On the strength of these legal authorities, the High Court in their bid to adjudicate exercised a function based on the *'doctrine of parens patrie'*, where they decided to act with their paternal and protective jurisdiction and compulsorily appoint guardians on behalf of the two rivers, that are, Rivers Ganges and Yamuna. The court appointed the Director of NAMANI Gange (A Ganges pollution eradication programme by the Central Government), the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as *'persons in loco parentis'*, that is, the human face to protect, conserve and preserve Rivers Ganges and Yamuna and their tributaries. These officers and their offices were legally bound to uphold the judgment of the court to protect the status of the rivers as a legal person and promote the health and wellbeing of the rivers. The Advocate General of the State was also to represent the rivers in any legal proceedings to protect their inter interests.

By this reasoning the High Court declared that the River Ganges and Yamuna River are legal persons capable of suing and being sued. The Court further appointed for the infantile legal personality of the rivers a guardian authority to exercise the rights of the rivers. This is a clear manifestation of the proposals of Shelton (2015) and Stone (2010) as discussed earlier.

5.2.2. Lalit Miglani V. State Of Uttarakhand And Others (2016 & 2017)

This is another public interest litigation action commenced by an advocate of the court. This case was in two folds, the original petition that was decided upon in 2016 and its follow-up mandamus case in 2017 and this created a stark difference in the respective judgments.

5.2.2.1. The 2016 judgment

The study will first take a look at the 2016 judgment. The petitioner was perturbed about the unprecedented pollution levels in the river Ganga which was hazardous to the existence of the river and to the people that make use of the river for their daily use. The petitioner averred that a study by the Uttarakhand Environment Protection and Pollution Control Board revealed that the river Ganga has four main uses: (i) for drinking, (ii) for bathing, (iii) for agriculture and, (iv) for excessive pollution. Scientifically, water safe for drinking should contain coliform levels of below 50 mpn/100 ml; water conducive for bathing should have less than 500 mpn/100 ml coliform and below 5000 mpn/100 ml if the water is to be used for agriculture. The levels of coliform recorded in river Ganga at the time of the action was 5500 mpn/100 ml caused mainly by the unregulated disposal of human faeces, urine and sewage by directly dumping into the river from its source in Gaumukh throughout until the water reaches Haridwar. The court was notified that 89 million litres of sewage were dumped in the river Ganga per day which was a startling revelation.

5.2.2.2. Constitutional Provisions for Environmental Protection

The court in this case was of the view that water was a basic element of life and man, animals and aquatic life could not survive without water. The court interpreted Article 21 of the Indian Constitution that protected the right to life and personal liberty and inferred that water is a necessary means to achieve the right to life. The Parliament had enacted the Water (Prevention and Control of Pollution) Act, 1974 since the problem of pollution of water resources had gained noticeable urgency in recent years as a consequence of increased industrialisation and tendencies of urbanization. The Act then highlighted the adverse impacts that these forms of pollution had on the economy of the country. Under section 24 of this Act, waste disposal that pollute streams or rivers were strongly prohibited but this provision was not been adhered to. The Act further creates pollution boards at the central as well as state government levels. In relation to this, the court stated that the onus lies on these bodies to ensure maintenance of the standards and parameters for quality water as the extreme the court can go was taking judicial notice of the events.

Their Lordships of the Honourable Supreme Court in *'Virender Gaur & others v. State of Haryana and others' (1995) 2 SCC Page 577*, had held that Articles 21, 47, 48-A and 51-A(g) of the Constitution of India, gave the citizenry the right to hygienic environmental protection. The government as well as municipalities have duties to maintain and protect both the manmade and natural environment. In paragraph 7 of the reported judgment, it was held as under: -

> *"Article 48A in part IV (Directive Principles) brought by the Constitution 42nd Amendment Act, 1976, enjoins that "the state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51A imposes "a fundamental duty" on every citizen of India to protect and improve the natural "environment" including forests lakes, rivers and wild life and to have compassion for living creatures". The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with humane dignity without a human and healthy environment. Environmental protection, therefore has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safe- guard proper environment but also ah imperative duty to take adequate measures to promote, protect and improve the environment man-made and the natural environment."*

5.2.2.3. Practical benefits of Water Protection to Humans

Again, the court made known the undisputable importance of the river which had 10 percent of the world population as dependants of the river. The excessive pollution of the river has slowed down or stagnated most of the flowing parts of the river. These stagnations had led to a deadly health problem where mosquitoes now thrive in these areas and cause malaria. Plasmodium falciparum, the most brutal form of malaria, was increased in India following a prediction that the worst is yet to come.

The court relied on the Supreme Court's case of *M.C. Mehta v. Union of India & others (1987) 4 SCC 463,* another similar public litigation action filed against Ganga Water. In this case, their Lordships found the effects of the pollution on life, health and ecology. They then pointed out the sacred duty of all dependents or users of the river to ensure the purity and prevent pollution of the river. Their Lordships, in paragraph No. 2 held as follows:

> *"Water is the most important of the elements of the nature. River valleys are the cradles of civilization from the beginning of the world. Aryan civilization grew around the towns and villages on the banks of the river Ganga. Varanasi which is one of the cities on the banks of the river Ganga is considered to be one of the oldest human settlements in the world. It is the popular belief that the river Ganga is the purifier of all but we are now led to the situation that action has to be taken to prevent the pollution of the water of the river Ganga since we have reached a stage that any further pollution of the river water is likely to lead to a catastrophe. There are today large towns inhabited by millions of people on the banks of the river Ganga. There are also large industries on its banks. Sewage of the towns and cities on the banks of the river and the trade effluents of the factories and other industries are continuously being discharged into the river. It is the complaint of the petitioner that neither the Government nor the people are giving adequate attention to stop the pollution of the river Ganga. Steps have, therefore, to be taken for the purpose of protecting the cleanliness of the stream in the river Ganga, which is in fact the life sustainer of a large part of the northern India."*

5.2.2.4. Responsibilities of environmental regulatory bodies

The court continued by highlighting the responsibilities of the regulatory bodies in ensuring that the laws been enacted to protect and sustained river bodies. The court relied on another Supreme Court case of *M.C. Mehta (II) v. Union of India reported in (1988) SCC page 471,* where the Supreme Court re-stated that laws have been enacted casting duties on both central

and states boards constituted under the Water (Prevention and Control of Pollution) Act. The Court clearly stated in paragraph 7 this idea.

> *". It is unfortunate that although Parliament and the State Legislature have enacted the aforesaid laws imposing duties on the Central and State Board and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto."*

Again, in another Supreme Court judgment on which the High Court relied, (*Indian Council for Enviro-Legal Action v. Union of India and others (1996) 5 SCC 281*), the Supreme Court highlighted the expected role of the High Courts in shouldering some responsibilities in their respective states in local issues over which it can exert considerable direct influence and have close awareness of ecological conditions. This approach was intended to ensure compliance with court orders. There was also caution about the tolerance of infringement as it was considered worse than not enacting the law at all. To continually tolerate such blatant violation of law renders the law nugatory and such tolerance emboldens violators unto lawlessness and unacceptable conduct in civilised society.

To sum up the judgment in 2016, the court did not overreach or deliver any direction or order out of the ordinary but solely relied on the Constitution of India, statutes and regulations and demanded statutory bodies do their best to help prevent and reduce the pollution and help maintain the river's purity.

5.2.2.5. The 2017 judgment

The 2017 case took an entirely different direction in relation to the judgment pronounced by the Court. This case was filed as a miscellaneous application by the same petitioner for a declaration that the Himalayas, glaciers, streams, and other water bodies are juristic persons as good as the pious rivers Ganga and Yamuna (already declared as legal persons in the Salim Mohd case). According to the court, this case would have been permitted by the court after an earlier decision had been made but encouraged further on the principle of 'continuous mandamus' and to require compliance with earlier judgments. It was noted by the Court that it was in the best interest of the public that this case is heard and to avoid further ligation on the same issue. Mandamus was explained by the Court as a judicial remedy whereby the court orders an inferior court, government agency, corporation or public authority to properly fulfil their legal or official duties or correct any abuse of their discretion.

5.2.2.6. The relevance of public interest litigation

The Court was worried the main petition had not been disposed off expeditiously and brought to light the relevance of public interest litigation as against traditional dispute resolution mechanism which was mainly about adjudication and determination of individual rights. Also, public interest litigation has proceedings that cut across or transcend traditional forms or inhibitions in the legal system and comes with compulsion that is a constitutional promise. According to the court, public interest litigation are, therefore, for the purposes of vindicating the rights and effectuating the individual and collective rights which are rarely pursued due to poverty, ignorance, social and economic disadvantages or unawareness. The court also emphasized the need to lower the locus standi thresholds when it comes to public interest litigation:

> *'In order that these public causes are brought before the courts, the procedural techniques judicially innovated specially for the public interest action recognises the concomitant need to lower the locus standi thresholds so as to enable public-minded citizens or social action groups to act as conduits between these classes of persons of inherence and the forum for the assertion and enforcement of their rights.'*

To reach these conclusions, the court relied on the Supreme Court case of *Sheela Barse v. Union of India & others (1988) 4 SCC*, where it was held that "in a public litigation, unlike traditional dispute mechanism, there is no determination of adjudication of individual rights." In the same judgment, it was noted that the kind of reliefs sought under these kinds of litigation need not be derived necessarily logically from the rights asserted as the court is not a merely a passive, disinterested umpire but has a more dynamic and involving role with the responsibility of organising proceedings, moulding of the relief and also seeing to it that that it is implemented. It was held in paragraph 12 as follows:

> *"Again, the relief to be granted looks to the future and is, generally, corrective rather than compensatory which, sometimes, it also is. The pattern of relief need not necessarily be derived logically from the rights asserted or found. More importantly, the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of the relief and -- this is important – also supervising the implementation thereof. The court is entitled to, and often does, seek the assistance of expert panels, Commissioners, Advisory Committee, amici etc. This wide range of the*

responsibilities necessarily implies correspondingly higher measure of control over the parties, the subject-matter and the procedure. Indeed, as the relief is positive and implies affirmative action the decisions are not "one-shot" determinations but have ongoing implications. Remedy is both imposed, negotiated or quasi-negotiated."

5.2.2.7 The urgency of nature rights

The court was quick to highlight the alarming rate at which the Glaciers, both Gangotri and Yamunotri, the sources of rivers Ganga and Yamuna respectively. These Glaciers were receding extremely as a result of pollution in addition to climate change of which pollution is also a factor. Instant remedial steps were sought to ensure and prevent the further recession of these glaciers and to put a stop to it as glacial ice reserves the largest volumes of fresh water on earth. Using an article written by two Indian writers, Vikram Soni and Sanjay Parikh, titled "Nature has Rights too" where the rights of nature were explained in clear language as:

"Human rights commissions are obligatory vigilantes in all democracies. Human rights are about inequities between one set of human beings and another. These range from usurping the sovereign rights of one nation by another more powerful one, to more local violations. They arise when the rich and powerful exploit the poor and disenfranchised. They reveal themselves in violence against women, violence against members of lower caste and creeds and other such instances. They are horrible acts and are often portrayed graphically. Violations against nature can be equally appalling despite being viewed through the filter of 'environmental damage'. The Stockholm Declaration accepts the environment as part of basic human rights-the right to life itself."

Whereas human rights enjoy the necessary attention when it comes the needs of mankind, the loss of natural resources which inextricably threatens human survival itself should be treated with the urgency it demands.

5.2.2.8. The Doctrine of Parens Patriae

The court then headed to the legal theory of parens patriae. With the help of the case of *Fontain v. Ravenel, 17 How. 369, 58 U. S. 384*, where Justice McLean opined that:

"When this country achieved its independence, the prerogatives of the Crown devolved upon the people of the states. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is

made known to us by legislative enactment. The state, as a sovereign, is the parens patriae."

And also, the concept of parens patriae was simplified in the US Supreme Court case of *Sanpp & Son, Inc v. Puerto Rico ex rel. 458 U.S. 592 (1982)* as:

"Parens patriae means literally "parent of the country." The parens patriae action has its roots in the common law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property."

This court went a step further to inherently assume the role of a parens patriae in the determination of this case. As a beneficial function of this role, the judges saw it as prudent to exercise it for the interests of humanity, and to help safeguard those who can't protect themselves of which the natural resources at the helm of contention are part. In the well-founded knowledge of the court, jurisdiction was not an issue in their determination of the case though, the objects to be affects by the decision passes through several states or even another country. They were of the view that parens patriae triumphs original jurisdiction of the courts. The court cited the case of *Missouri v. Illinois, 180 U.S. 208,* where it was perceived by that court that the absence of pecuniary interest in a matter for the states does not extinguish the original jurisdiction of the Court especially functioning as *parens patriae,* trustee, guardian, representative, etc of the citizenry. Also, the pollution of a river extending beyond states and threatening health and comfort of the citizenry amounted to a justiciable cause of action under the Constitution. Hence issue of jurisdiction was in effect a non-starter for the High Court of Uttarakhand.

5.2.2.9 Moral duty for the protection of the environment

The Court lastly went of way of legal norms and delved into morality pronouncing on the moral duty of the court for the protection of the environment and its ecology. The court attempted to equate morality with law by quoting an article written by Peter Cane in the *Cambridge Law Journal* (March, 2012), Vol.71, 2012 C.L.J. titled 'Morality, Law and Conflicting Reasons for Action' as follows:

"Law and morality are both concerned with practical reasoning- that is, with reasoning about what to do, what goals to aim for and what sort of person to be. In this sense, both law and morality are about right and wrong, good and bad, virtue and vice. These

contrasts are "normative", that is, they express value judgments. Sometimes the terms "moral" and "morality" are used in contrast to "immoral" and "immorality" to distinguish normatively between right and wrong, good and bad, virtue and vice. In the similar way, what is "legal" may be contrasted with what is "illegal", "legality" with "illegality". On the other hand, the terms "morality" and "law" may also be used to distinguish between different aspects of social life and different domains of practical reasoning. Thus, morality may be contrasted with tradition or etiquette or custom and, of course, with law. We may, that is, use the words descriptively, contrasting the moral not with the immoral but with the non-moral."

Finally, it was the holding of the court that the Himalayan Mountain Ranges, Glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs are legal entities/legal persons/juristic persons/ juridical persons/moral persons/artificial persons for their survival, safety, sustenance and resurgence. Furthermore, any person causing any injury and harm, to these juristic persons incurs liability under the common law, penal laws, environmental laws and other statutory enactments governing the field.
The Court acknowledged the need of the people's input in their judgment or declaration as they highlighted "however, we would hasten to observe that the local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes must have their voice too."
But unfortunately, the people's inputs were isolated and not even sought.

Based on these reasonings the High Court of Uttarakhand has declared that Rivers Ganges and Yamuna are legal personalities and the exercise of the rights associated with legal personality, there is appointed guardians in the persons of the Advocate General for the State, the Secretary of State of the State and the Director of NAMANI Gange. This study thus considers the strengths of this legal personality, its guardian institution (in light of critical institutionalism) and the place of environmental protection in the legal system of India (in light of environmental constitutionalism). This is done by a documentary analysis of the legal instruments by which the legal personality and the guardians were established and a further consideration of the constitutional set up of India to assess if it incorporates the elements of environmental constitutionalism. The outcome is compared to corresponding outcomes from New Zealand in draw further conclusions and make recommendations in that regard.

CHAPTER SIX

DOCUMENT ANALYSIS AND COMPARATIVE ANALYSIS OF CASES

The underlying theoretical approach to this analysis, as discussed earlier, still remains that there is a myriad of necessities for rivers to be accorded legal personality. Foremost is the theory of guardianship which can be realised, in this circumstance where a river is a non-human but natural entity, through the creation of a critical institution in a legal system which recognises and practices environmental constitutionalism. This is what the researcher proposes as the most effective legal framework for the protection of riverine rights in modern democratic states.

In accordance with the chosen methodology, this analysis navigates this idea through the facts of the two cases as presented. In both the cases of the legal recognition of rivers in the New Zealand and in India the facts are tested as against the theory and principles of this theoretical framework to evaluate the procedures adopted, the possible effects of these approaches and to assess whether environmental democratic values are upheld in these cases.

First, in resolving research question 1, the approaches to the theory of guardianship adopted in both cases are analysed. Being a comparative study, similarities and differences are highlighted and discussed. Afterwards, in resolving research question 2, the features of appointed guardians are considered in light of the elements of critical institutions taken as themes for the thematic analysis. Being a top-down or theoretical thematic analysis, the manifestation of the themes as underlying reasons in the documents are identified and analysed. Subsequently, the manifestation of environmental constitutionalism in these two cases is also put in issue to resolve research question 3. In this aspect, the elements of environmental constitutionalism are sought in the two legal systems to ascertain whether environmental constitutionalism is incorporated in the legal systems of New Zealand and India. Finally, the general critical impression from the assessment of both cases are highlighted after the analysis.

6.1. Research question 1:

How have New Zealand and India created legal guardianship over the rivers?

This research question is analysed in light of the theory of guardianship. A guardian is identified as a person with lawfully invested power and duty to take care of and manage the property and rights of the incapable person (Black et al. 1999). From this understanding, guardianship is defined as “the office, duty or authority of a guardian” i.e. the office, duty or authority of a person on whom a duty is imposed to take care of another person. In effect, when considered in light of the law, guardianship as relates to this research is the recognition of the

state of its duty to protect and administer persons indisposed to manage their own affairs by acting on its own or by appointing a another legal person. It is mostly attributed to the *parens patriae* doctrine which ascribes to the State (or other capable persons) a duty to protect the vulnerable persons under its jurisdiction (Custer, 1978).

In the two cases presented – the cases of New Zealand and India on the recognition of legal personality of rivers – guardianship as a theory is applied. Nevertheless there are some differences in the implementation of the theory. These similarities and differences are discussed in this comparative analysis.

6.1.1. Similarities in application of Guardianship

On convergence, similarities in the application of the theory of guardianship are found in the purpose of the guardianship as well in their institutional approach to guardianship.

6.1.1.1. Purpose of the guardianship

As noted earlier, guardianship does not exist in vacuum; it is appointed for a stated purpose. The purpose may be political, economic, social etc which guides the functions and roles of the guardian. In this analysis, two purposes are identified; the wellbeing of the rivers and the welfare of the people. These purposes manifested in both cases as the assumption of guardianship of the rivers was propelled by the duty to ensure the welfare of the rivers as well as the people.

a. Wellbeing of the Rivers

In the case of New Zealand, guardianship is assumed for the purpose of maintaining "*health and wellbeing"* of the Whanganui River by protecting the river's rights and interests against the rights and interests of other legal persons which already exist or will be subsequently acquired. This is stated in the Whanganui River Deed of Settlement and the Te Awa Tupua Act. In section 19(1)(c) of the Act, the functions of the Te Pou Tupua (the human face of the river; to wit the guardian) is

"to promote and protect the health and well-being of Te Awa Tupua (the River);".

This stated purpose is directly based on the quest to ensure the welfare of the river as proffered by the welfarism jurisprudence which compels the law through its human agency to act in the interest of the welfare of the rivers which are non-human entities and lack agency. Due to the lack of personal initiative and agency of the rivers which is reflective of the power imbalance

between human agents of pollution and the rivers, the law assumes guardianship of the rivers and appoints human agents to act in the welfare of the rivers.

In the case of India, the law assumed guardianship of the rivers by recognising its duty to *"protect the environment and its ecology"*. This was stated by the court in the 2017 judgment in the *Lalit Miglani case* by relying on the Supreme Court case of *M.C. Mehta v. Union of India & others (1987) 4 SCC 463* where the Court reasoned that steps should be taken

> "*for the purpose of protecting the cleanliness of the stream in the river Ganga, which is in fact the life sustainer of a large part of the northern India."*

The Court also relied on the dictum in *'Virender Gaur & others v. State of Haryana and others' (1995) 2 SCC Page 577* which states that

> *"Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safe- guard proper environment but also an imperative duty to take adequate measures to promote, protect and improve the environment man-made and the natural environment."*

In both instances, the purpose for assuming legal guardianship of the rivers is to act to the benefit of the rivers. Whereas in New Zealand it was stated as to ensure the welfare of the river, in Inda it was stated as a constitutional imperative for the collective action towards promoting, protecting and improving the environment. These are indications of the law in the two countries assuming legal guardianship by recognising the collective duty for the welfare of the rivers.

b. Welfare of the people

On another pedestal, guardianship is necessitated by recognition of the importance of rivers to the people dependent thereon. The law recognises the need to appoint guardians of the rivers on grounds that the rivers are inextricably linked to human existence, health and sustenance. In this direction, the law looks to the welfare of the human dependents on the river in recognition of the interdependence between the rivers and the people. This is recognised by Laszewska-Hellriegel, (2022) where he lists reasons humans ought to protect the environment.

In New Zealand, guardianship for the welfare of human dependents is evident in the recognition of the religious (spiritual), and health links existing between the Whanganui iwi, hapu and other communities on the one part and the Whanganui River of the other part. In the Te Awa Tupua

values incorporated in the Whanganui River Deed of Settlement and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, it is enacted that

> *"Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River."* (section 13(a) of the Act).

This is an indication of the reliance and interdependence between the people and the river and delineates the central role of the legal personality created in holding this inter-reliance together. Another value enacted therein is that

> "*The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being."* (section 13(c) of the Act).

This value, a stronger manifestation of the welfarism jurisprudence, makes it the duty of the people to ensure the well-being of the River due to the inseparable connection between the people and the river. The sustenance of the people therefore depends on the river and vice-versa. As a matter of emphasis of the fundamentality attached to these values, they are repeated in section 69 and 71 of the Act as the acknowledgements of the Crown of these values.

India uses a different approach but arrives at the same conclusion. In India, the judges acknowledged this form of welfarism by an analysis of the human rights approach. In the case of *Lalit Miglani,* the court held that article 21 of the Indian Constitution protected the right to life and inferred that water is a means of a right to life. The Court recognised the quintessence of water to human life and sustenance from across history as a reason to assume guardianship of the river. In the words of the Court in *M.C. Mehta v. Union of India & others (1987) 4 SCC 463* as relied on in the *Lalit Miglani* case,

> *"Water is the most important of the elements of the nature. River valleys are the cradles of civilization from the beginning of the world. Aryan civilization grew around the towns and villages on the banks of the river Ganga. Varanasi which is one of the cities on the banks of the river Ganga is considered to be one of the oldest human settlements in the world. It is the popular belief that the river Ganga is the purifier of all but we are now led to the situation that action has to be taken to prevent the pollution of the water of the river Ganga since we have reached a stage that any further pollution of the river water is likely to lead to a catastrophe. There are today large towns inhabited*

by millions of people on the banks of the river Ganga. There are also large industries on its banks

By recognising the dependence of the people on the river, the Court deemed it imperative to act in protection of the river to the ultimate benefit of the people.

In plainer words, the Court also stated that;

> *"All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and wellbeing. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. ... They support and assist both the life and natural resources and health and well-being of the entire community…"*

The Court further relied on articles 47, 48-A and 51-A(g) of the Indian Constitution which gives the citizenry the right to hygienic environmental protection to assume guardianship. The Court reasoned that

"*hygienic environment is an integral facet of right to healthy life and it would be impossible to live with humane dignity without a human and healthy environment".*

It consequently assumed guardianship in order to ensure the welfare of the people dependent on the rivers.

In this sense, the purpose of the guardianship assumed by the law is demonstrated to be based on the welfarism jurisprudence both for the welfare interest of the rivers which are granted legal personality and for the welfare of the people who benefit from the resources of these rivers. On this matter, there is a convergence in the purpose of the guardianship in both cases; New Zealand and India.

6.1.1.2. Institutional Approach to Guardianship

Second is the approach to guardianship. The law is replete with the trustee approach of guardianship where the guardian whether the state or a private person is appointed trustee over the rights and property of the beneficiary. In fact, it is the main approach used with the inception of the doctrine of *parens patriae.*

That notwithstanding, there are modern approaches with the use of institutions as trustee for beneficiary (usually non-human) entities. Using institutions instead of natural persons is to leverage on the sustainability of the institutions by virtue of their perpetual succession in addition to increase capitalisation for the institution through availability of multiple human

resource and funding. For instance, in the case of an infant represented at law by a next friend or *guardian ad litem* where the guardian becomes indisposed to continue further representation, a whole new procedure for the appointment of another qualified person ought to be adopted. But in the case of an institution as a guardian, there is a guarantee of perpetual succession and the indisposition of a person does not stultify proceedings. This approach is another point of convergence in the two cases under study.

In New Zealand, the Te Awa Tupua, the river with a legal personality, does not act by itself. The Te Pou Tupua (the human face of the Te Awa Tupua) is appointed in accordance with the law to represent the Te Awa Tupua. Section 18 of the Act provides as follows;

> *"(1) The office of Te Pou Tupua is established.*
>
> *(2) The purpose of Te Pou Tupua is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua.*
>
> *(3) Te Pou Tupua has full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act."*

This provision establishes the office of the Te Pou Tupua, makes it the human face of the Te Awa Tupua and grants it *"full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act.*" It is a two member office (institution) each member representing one party to the Deed of Settlement which acts in accordance with the stated values and strategy in the Act.

Additionally, the law sets up trustees *Ngā Tāngata Tiaki o Whanganui* in section 101 which is a consolidated trust replacing the now dissolved Maori Trust Board, Te Whiringa Muka Trust and the Pakaitore Trust. It has extensive powers as a public authority to supplement and supervise the Te Pou Tupua which regulates activities on the rivers, to make submissions and be heard on matters concerning the Whanganui river as well as some regulatory powers over activities concerning the Whanganui river.

By the use of institutions instead of human beings as trustees, the law is able to provide a sustainable solution to animating the rights and interests of the rivers through the representative institutions.

In India as well an institutional trustee approach to guardianship is used. First, the existing law provided for the establishment of a board to cater for the protection and regulation of

environmental resources in India but the central and municipal governments have not been able to execute that. Judicial intervention arrived as a matter of necessity by appointing the Secretary of State of the State of Uttarakhand, the Advocate General of the State of Uttarakhand as well as the Director of NAMANI as guardians of River Ganges and Yamami River. In the words of the Court they are to act as

> *"the human face [and] to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries"("Mohd Salim v. State of Uttarakhand & Ors," 2017)*

It must be pointed out clearly that at law, these appointments are made to the offices (or institutions) stated and not necessarily only the persons occupying those offices at that point in time. The effect of the Court directive is to make the current and all subsequent occupants of the offices stated to be accorded this appointment and incur all the duties and rights associated therewith. Consequently, the High Court of the State of Uttarakhand has appointed three strong institutions guardians of the rivers instead of three strong individuals. This goes to accord the rivers all the benefits of institutional trusteeship as guardians in clear advantage of the traditional appointment of individuals as guardians or trustees.

6.1.2. Differences in approach to Guardianship

The two cases in study in their manifestations of the theory of guardianship have several differences. This illustrates the difference in thoughts and approaches by the legal actors in implementing the guardian role of the law over the rivers. The main point of difference is in the source of legality of the law conferring legal personality on the rivers and establishing their guardians. Whereas in New Zealand legislative approach was used, the judicial approach was used in India. This has ramifications on the politics of recognition and implementation that will also be considered but it must be highlighted once again that from the legalist approach in creating legal persons, the law can create legal persons by whatever approach available and on whatever entity it desires (Kurki, 2019).

6.1.2.1. Creation of Guardians by Legislation

The creation of the guardian and riverine rights in New Zealand was through legislation. From a rough history of struggle for the legal guardianship of the River Whanganui, it finally became a reality in the promulgation of the Te Awa Tupua Act, 2017. It specifically establishes the legal personality of the river and its guardian by statutory authority.

In section 1of the Act, the legal personality of the river is created in the following words;

"*(1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.*

(2) The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and in Ruruku Whakatupua—Te Mana o Te Awa Tupua."

These clear words establish the legal personality and legal rights of the river by legislative force.

In section 18 it is provided as follows;

"(1) The office of Te Pou Tupua is established.

(2) The purpose of Te Pou Tupua is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua.

(3) Te Pou Tupua has full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act."

By the effect of section 18(2) and (3) the office of Te Pou Tupua is legally recognised as the guardian of the River Whanganui. This is the backed by the force of legislation. As a legal principle, the declarations in an enactment are binding law and can only be rendered nugatory by another enactment or in some constitutional set ups, by the Courts on stated grounds. Statutes are used where there is strong political will for the purposes of that law. By use of an enactment, the legal personality and guardian of the Whanganui River is grounded in law and superseded only by the Constitution or by subsequent legislation on the same matter. The adoption of this approach thus entrenches the legal personality of River Whanganui in the legal system of New Zealand with astounding confidence and recognition.

6.1.2.2. Creation of a guardian by judicial declaration

The creation of riverine rights in India was through judicial declarations. Judicial declaration have the force of law in common law traditions like India and New Zealand. As such, the declarations of a judge can become law.

In the *Mohd. Salim v State of Uttarakhand and others* case, the legal personality of Rivers Ganga and Yamuna were established by judicial declaration in paragraph 19 that,

"Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal

persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna."

Thereafter, the guardians for the legal personality of the rivers were established also by judicial declaration in the same paragraph 19 that,

"The Director of NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and wellbeing of these rivers."

The Court exercised its *parens patriae* jurisdiction and declared that the rivers named are juristic entities having the status of a legal person to preserve and conserve the river. Furthermore, it compulsorily appointed the Director of NAMANI Gange, the Chief Secretary of the State of Uttarakhand, and the Advocate General of the State of Uttarakhand as persons in *loco parentis* to the river pursuant to its *parens patriae* powers.

In another 2017 ruling in the case of *Lalit Miglani v State of Uttarakhand and Others,* the Court declared that the Himalayas, glaciers, streams, water bodies are juristic persons similar to the pious rivers Ganga and Yamuna. The Court declared as follows;

"We, by invoking our parens patriae jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridicial person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights."

The Court appointed legal guardians by declaring as follows;

"The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court, are hereby declared the persons in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri &

Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand. These Officers are bound to uphold the status of these bodies and also to promote their health and well being."

By these judicial declarations, legal personality or rivers and riverine rights are conferred in India as a matter of law on the basis of the guardianship of the law of these rivers risking destruction by human activities. Legal guardians for the infantile legal personalities of the rivers are also appointed as a matter of law by judicial declaration.

6.1.2.3. Evaluation of the approaches

Nevertheless, not the same as done in New Zealand. Being a decision of the Court, especially a High Court, there is a tendency that on appeal to the Supreme Court of India, the outcome may unfavourably affect the efficacy of this principle. An example is the stay of execution granted by the Supreme Court of India. This weakens the force of law, recognition and compulsion behind the declaration. Second, legislation can change the course of development of this principle of law considering the already existing lack of political will as exhibited. Third, it can be argued that, the decision of this High Court binds only persons within the territorial jurisdiction of this Court – the State of Uttarakhand. These considerations tend to weaken the force of law behind these judicial pronouncements compared to legislation.

All these notwithstanding, the main advantage of judicial decisions is time. Compared to the time it takes for an enactment to be passed (in this case from the legislative arm of the central government of India and ratified by the states), judicial pronouncements like these are the more efficient routes. Judicial declarations work as a backdoor into the legal space where the main door of legislation is inaccessible to an advocate. Accepting that the pronouncements were based on sound legal reasoning, these holding are likely to be upheld in the Supreme Court of India and the legislature is cannot set it aside by enactment knowing that these principles are contemplated by the Constitution of India.

This approach is workable also because of the lack of political will by the Indian government towards riverine rights. The politics in recognition and implementation of Court orders on riverine rights in India is a sour reality as observed by the High Court when it laments on the refusal of the central and municipal governments to constitute a statutory mandated board for the protection of environmental resources in India. Risking contempt of court orders, the

governments' refusal had to be remedied by the Court with the compulsory appointed of trustees and a 'human face' to administer the legal personality of the rivers.

This point of difference taking into consideration their advantages and shortfalls have ultimately worked to eventually lead the respective countries into conferring legal personality on rivers and the recognition of riverine rights. It may be argued that the Indian approach by the use of the courts may be a less efficient approach considering its incidents but from another perspective it can be observed as giving credence to the whole theory of riverine rights by using two different recognisable law creation procedures.

6.1.3. Conclusion

In all, this document analysis has established that, in both New Zealand and India the theory of guardianship has been applied in the grant of riverine rights. First, on similarities, both countries adopted guardianship for the purpose of ensuring the wellbeing of the rivers as well to for the welfare benefits to the humans dependent on the rivers. Second, on differences, it is established that whereas in New Zealand a legislative approach was used to the effect of a greater force of law, in India a judicial declaration approach was used to the effect of speedy realisation of the legal recognition of riverine rights and guardianship.

For these, it is concluded on research question 1 that New Zealand has created guardians for River Whanganui by use of legislation and India has created same by use of judicial declaration. Both approaches with their effects are valid in light of legalist jurisprudence to creation of legal persons (Kurki, 2019).

6.2 Research Question 2

How are the responsible institutions in New Zealand and India positioned to protect river rights?

This research question is analysed in light of the theory of critical institutionalism.

It is proposed that where the law assumed guardianship of rivers or other environmental entities which are of themselves incapable of initiative, in order to realise the purpose of conferring legal personality on the entity there should be a means through which the incapable entity will act. Mostly, this duty of initiative is imposed on trustees who in public interest matters tend mostly to be institutions which of themselves are non-natural juristic persons but act through humans on its board. Critical Institutionalism comes in to direct the formation of appropriate

institutions as *loco parentis* to carry out the representative or regulatory duties associated with the newly created juristic personality (Cleaver & de Koning, 2015; Cleaver, 2017); .

As highlighted earlier under '6.1.1.2. Institutional Approach to Guardianship', trust boards have been used in both case studies. In this analysis we consider the nature, features and composition of the institutions which act as guardians of the river personalities.

The analysis is carried out in themes from the aspects of critical institutionalism namely; origins of institutions, socially informed models of human action, use of negotiation and resources governance or management in polycentric governance landscape. In each of these themes, the top-down or theoretical thematic analysis will compare the facts to the requirements of the theory in an attempt to assess whether the guardian institution is established according to the teaching of critical institutionalism.

6.2.1. Origins of Institutions

Critical institutionalism proposed by Cleaver (2017) entails an analysis of the origin of institutions formed to implement the desired functions to achieve the desired goals. Origin of institutions come to play in two broad ideas. The main matter of consideration is whether to consider completely new institutions or to modify and equip existing institutions to achieve goals they have hitherto failed at. The dynamics involved in origins of institutions as well as the role of power and meaning in shaping these institutions in both cases are considered. The purpose of these institutions which give credence to their legitimacy are also considered. These factors are checked in the facts available.

The facts available on the creation of the critical institution for the exercise of the legal personality, rights and interests of the Whanganui River in New Zealand shows that the was no pre-existing institution acting as the guardian of the River. Several trusts existed on behalf of the people who had interests in the river (the Te Whiringa Muka Trust; the Pakaitore Trust; and the Whanganui River Maori Trust Board). The promulgation of the Act has come with a new institution to act on behalf of the river itself. This is a case of the adoption of new institutions with no prior existence in hopes of charting a new path.

Nevertheless, with the trusts on behalf of the interested iwi, there is a consolidated trust named the Ngā Tāngata Tiaki o Whanganui Trust created under sections 93 to 101 of the Act. That may be considered an example of institutional bricolage.

Power balance is also efficiently achieved in this approach considering the constitution of the Te Pou Tupua. It is balanced by two members each representing one party to the Deed of Settlement. The Crown represented by a government official and the people represented by a nominee of the people. In section 20 of the Act, it is provided as follows;

> **"20 Appointments to Te Pou Tupua**
>
> *Nominations*
>
> (1) The office of Te Pou Tupua comprises 2 persons appointed by nominators as set out in subsections (2), (3), and (4).
>
> (2) One person must be nominated by the iwi with interests in the Whanganui River and one person must be nominated on behalf of the Crown as provided for in subsections (3) and (4).

By equal representation on the guardian institution, power balance seems assured. It also illustrates the empowerment of the people directly affected in the institutional guardianship of the river considering the significant relevance of the Whanganui River as their dependable and inalienable source of spiritual and physical sustenance.

On legitimacy, technical legitimacy is found in the recognition and force of the statutory law approach used as well as the purpose to ensure the wellbeing of the rivers. This purpose legitimises the guardian institution of the Whanganui river. Section 19 of the Act on the purpose of the Te Pou Tupua provides as follows;

> ***"19 Functions of Te Pou Tupua***
>
> *(1) The functions of Te Pou Tupua are—*
>
> *(a) to act and speak for and on behalf of Te Awa Tupua; and*
>
> *(b) to uphold—*
>
> *(i) the Te Awa Tupua status; and*
>
> *(ii) Tupua te Kawa; and*
>
> *(c) to promote and protect the health and well-being of Te Awa Tupua; and*
>
> *(d) to perform, for and on behalf of Te Awa Tupua, landowner functions for—*
>
> *(i) the land vested in Te Awa Tupua by section 41(1) or under section 53(3), except to the extent that section 42(2) is applicable; and*
>
> *(ii) any land transferred to, or vested in, Te Awa Tupua under section 48; and*
>
> *(e) to administer Te Korotete; and*
>
> *(f) to maintain the Te Awa Tupua register; and*
>
> *(g) for the purposes of section 60, to authorise the use of the name Te Awa Tupua; and*

(h) to enter into the relationship documents described in clauses 3.36 to 3.42 of Ruruku Whakatupua—Te Mana o Te Awa Tupua; and

(i) to take any other action reasonably necessary to achieve its purpose and perform its functions."

These functions are desirable outcomes in themselves for the people and in effect legitimizes the guardian institution in accordance with origins of the institutions as required.

The case of India is the same. The origin of the institution established by the Court as guardians of the rivers is not a refurbishment of an existing institution. It is unfortunate to highlight that although the existing laws mandated the establishment of a board to cater for environmental claims and protection the central and municipal government were, until the delivery of the judgment, not in consensus on creating the institution *(ibid)*. Thus, there was no existing institution to refurbish; no ancestor to inherit from.

Legitimacy of the guardian institution is not in issue. There is sufficient legal recognition and force of law behind judicial declarations by a court of competent jurisdiction to legitimise the institution (ibid). Yet again, for the plausible purpose of ensuring the welfare and protection of the rivers, the institution is assured further legitimacy. These two points are encapsulated in the dictum that,

> *"The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court, are hereby declared the persons in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand. These Officers are bound to uphold the status of these bodies and also to promote their health and well being."*

The advantage in this approach is the exercise of an exuberant fresh energy for the purpose and goals of the organisation. Such organisations operate from a clean slate with their reputations intact and a high level of hopeful drive which propels them into action. They are free from accusations of past failures and are equipped with new ideas for the execution of tasks.

The inability of the government to establish the board mandated by the existing legislation is an indication of power and meaning in that although the central government and municipal governments had power to establish that board it did not mean to them as a matter of necessity and the lack of this conviction led to the abandonment of negotiations for the execution of that task. To the Court however, there was a demonstrable urgent need of guardianship over the rivers founded in its duty to enforce the right to life which is inseparably linked to healthy environment in the form of clean and healthy rivers. In this approach, power and meaning converged in commensurable degrees and compelled the Court to establish guardianship for the rivers. An original institution was created to execute the task of guardianship over the rivers.

6.2.2. Socially Informed Models of Human Action

This is the requirement of diversification and inclusion in the members of institutions which act in the public interest or the public benefit. It is the very essence of democracy that institutions set up for public service be representative of the beneficiary class. This helps for easy identification of the needs of the beneficiaries and the easy connection and communication with the beneficiary class.

In creating the institution responsible for the administration and exercise of the legal personality of the Whanganui River in New Zealand the Te Awa Tupua Act in sections 18 and 19 sets up the office of Te Pou Tupua (the human face of the River) which is consists of two persons; one representing the Crown and the other representing the Whanganui iwi. This membership reflects adequately an equal representation for both parties to the Deed of Settlement. This approach addresses a long-held grievance of the Whanganui iwi on the lack of representation or consultation on matters concerning the river when such decisions and laws are passed. Contrary to the Whanganui River Trust Act in 1891 which entertained no whanganui iwi representation, this Act grants equal representation. In section 19(2)(b) of the Act, the Te Pou Tupua aside from its core mandate is also required to develop a system to report to the people represented as a gesture of accountability to the beneficiary Whanganui iwi. It reads

> *" 19 (2)Without limiting subsection (1), Te Pou Tupua, in performing its functions,—*
>
> *(b) must develop appropriate mechanisms for engaging with, and reporting to, the iwi and hapū with interests in the Whanganui River on matters*

relating to Te Awa Tupua, as a means of recognising the inalienable connection of those iwi and hapū with Te Awa Tupua"

Another commendable implementation of social representation in this Act is found in sections 29 and 30 with the establishment of the Te Kopuka which comprises representative of person and organisations with recognisable interests in the Whanganui River. It includes the iwi, relevant local authorities, departments of State, commercial and recreational users, and environmental groups tasked to act collaboratively towards advancing the health and wellbeing of Te Awa Tupua and the River. Mainly it is to be a forum for discussion but it also functions to monitor and review the implementation of Te Heke Ngahuru and perform other delegated functions. This is the political empowerment of the social people and all stakeholders to contribute in the institutional roles of the Te Pou Tupua and a commendable satisfaction of the requirements of social inclusion in critical institutionalism relevant for the implementation of riverine rights. In section 29 of the Act, it is provided as follows;

"29 Nature and purpose of Te Kōpuka

(1) Te Kōpuka is established to be a strategy group for Te Awa Tupua.

(2) Te Kōpuka comprises representatives of persons and organisations with interests in the Whanganui River, including iwi, relevant local authorities, departments of State, commercial and recreational users, and environmental groups.

(3) The purpose of Te Kōpuka is to act collaboratively to advance the health and well-being of Te Awa Tupua.

(4) Further provisions relating to Te Kōpuka are set out in Part 1 of Schedule 4."

The inclusion of all relevant persons on this board is a good demonstration of social inclusion and representation in the formation of the critical institution.

The case of India varies. The approach adopted by the Court in instituting a human face of the legal personality of the rivers is representative only in the political sense but not in the social sense. The Court in the *Mohd Salim* case compulsorily appointed as *loco parentis* the Director of NAMANI Gange (an environmentalist advocate group), the Chief Secretary of the State of Uttarakhand (a top political administrative official of the State) and the Advocate General of the State of Uttarakhand (the official legal representative of the State) as guardians of the river.

This institution seeks the involvement of the executive branch in ensuring the welfare of the rivers but does not include representatives of the people even though the court hinted on the relevance of the input of the occupying lands next to the banks of the rivers and relying on the rivers as a spiritual, health and economic resource.

The appointment of a secretary of state and advocate general can be considered as a means to address the lack of political will towards environmental law but it fails to comprehensively address the issues when it omits an inclusion of the representatives of the people directly affected by the astronomic levels of pollution of the rivers. Perhaps the omission can be explained by the absence of a recognisable representative body of the people party to the suit over which the court could exercise direct jurisdiction. This approach is similar to former state of affairs in New Zealand where the political class consisting mainly of Crown representatives were solely at the helm of affairs of the river and their decisions were deficient of social inclusion.

The idea of socially informed models of human institutions is defeated by the approach adopted in India and requires attention to redress. The institution set up as guardians of the rivers ought to be both politically and socially representative of all stakeholders in the affairs of the rivers.

6.2.3. Use of Negotiation

Human made arrangements are viewed by the law as sacred covenants created by the parties out of their innate ingenuity assuming obligations out of their freewill and conforming to obligations or requirements by reason of necessity, reciprocity or associated potential benefits. Contrary to the obligations naturally assumed, human made arrangements are prescriptive obligations created to achieve goals necessary for the advancement of human civilisation (*Shiromani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass & Others AIR 2000SC 1421*). From the state governance mechanism, many arrangements have been negotiated to create the rights and responsibilities in our modern legal systems.

The history and procedure of creation of legal personality for the Whanganumi River in New Zealand is a vivid demonstration of human ingenuity in the use of negotiations in our legal systems. The Whanganui iwi have for over a century advocated the safety and wellbeing of the river as an inextricable link to the safety and wellbeing of the people. In the final crowning moments, the negotiations resulted in the Whanganui River Deed of Settlement (Ruruku

Whakatupua) an agreed settlement between the British Crown represented by the Government of New Zealand and the Whanganui iwi and peoples of New Zealand. The deed embodies all the traditional values and aspirations of the people towards the legal recognition of the river and welfare of both the river and the people.
Further negotiations were made towards finally enacting the Deed into law in 2017, the arrangements also include the set up of a trust and the human face of the river by which the managerial duties and legal representation duties will be carried out respectively. The provisions are summarised in Chapter 5.1.4.2. above. The salient provision therein is the recognition of the legal personality of the River Whanganui and the establishment of its guardian Te Pou Topua as well as the incorporation of the values of the Whanganui people regarding the River. In this it is realised that ingenuity resulted in the inclusion of the representation of Whanganui people in the guardian institution for the river.

The history and procedure of creation of legal personality of River Ganges and Yamuna River in India does not clearly demonstrate human ingenuity in the use of negotiations in our legal systems. Contrary to the case of New Zealand where constant political struggles and negotiations were used, in India, the facts point to a failure in the use of negotiation despite continuous advocacy by environmentalists. Human ingenuity can rather be seen in judicial advocacy to use the Courts which function with judicial power through orders and directives as a means to promulgate legal conferment of riverine legal personality, rights, interests as well guardians. Negotiation force was successfully channelled through legal arguments in the Court to achieve the desire results because the political class indicated their lack of will to execute same.

6.2.4. Resource Governance or Management in Polycentric Governance Landscape

Different states have different models for resource governance or management depending on their economic policies and goals. In the institutionalisation of guardianship over resources, considerations of resource governance models and policies become paramount in light of varying power and governance structures. Proper resource governance thrives in states with well defined political power structures and roles for the exercise of protection and regulatory functions over the available resources. In relation to riverine rights, the political power structure and the authority of environmental institutions over water resources and management are considered.

Considering New Zealand, the state is a colony of the British Crown with a government representing interests of the British Crown and the people granted representation in the legislature and several offices in the executive branches. It must be stated that until recent times political power was imbalanced in favour of the Crown which is sovereign over the tribes and people of the New Zealand. It has been the exercise of the sovereign's prerogative to control the natural resources of New Zealand including the rivers as evident in the Coal-mines Act of 1903 and the Whanganui River Maori Trust Board Act 1988 which worked in favour of the Crown to the detriment and constant protest of the Whanganui iwi.

The people hold considerable degree of political power in recent years considering their representation in high levels of political office and maturity to use political power. For example, the Deed of Settlement and the Te Awa Topua Act as an expression of political will has established the Te Pou Topua as the guardian of the river with powers including in section

"19(1) (d) to perform, for and on behalf of Te Awa Tupua, landowner functions for—

(i) the land vested in Te Awa Tupua by section 41(1) or under section 53(3), except to the extent that section 42(2) is applicable; and

(ii) any land transferred to, or vested in, Te Awa Tupua under section 48;"

This empowers the guardian to act by exercising the rights of a landowner in accordance with the values of the Te Awa Tupua.

Also, section 72 has treated the trustees as iwi authority and a public authority with a statutorily guaranteed right to make submissions on matters concerning the Whanganui river and a further right to be heard on such matters, a right stemming from their greater interest in the Te Awa Tupua compared to the general public interest. Section 72 of the Act provides that;

"72 Recognition of interests of trustees for purposes of Resource Management Act 1991

For the purposes of the Resource Management Act 1991, the trustees—

(a) are to be treated as—

(i) an iwi authority; and

(ii) a public authority; and

(b) are entitled to lodge submissions on a matter relating to or affecting the Whanganui River, if there is a process for lodging submissions in relation to that matter; and

(c) are entitled to be heard on a matter relating to or affecting the Whanganui River, if a hearing, proceeding, or inquiry is to be held in relation to that matter; and

(d) are recognised as having an interest in Te Awa Tupua greater than, and separate from, any interest in common with the public generally."

This has equipped the trustee with power to regulate matters relating to or concerning interests of the river and with legal capacity to be heard in all such matters separate from and more legally recognisable than the interest of the general public vested in the Te Pou Tupua. In relation to other matters aside from resource management, section 73 has made the trustees interested parties entitled to make submissions as well as to be heard on matters in relation to or concerning the Whanganui River. Clearly, the greater legal interest of the trustees in such matters is as well recognised. Chapter 73 of the Act provides;

*"**73Application of other Acts to trustees***

(1) For the purposes of Acts other than the Resource Management Act 1991, in relation to matters relating to or affecting the Whanganui River, the trustees—

(a) are to be treated as interested persons or a party; and

(b) are entitled to lodge submissions on those matters, if there is a process for lodging submissions in relation to that matter; and

(c) are entitled to be heard on those matters, if a hearing, proceeding, or inquiry is to be held in relation to that matter; and

(d) are recognised as having an interest in Te Awa Tupua greater than, and separate from, any interest in common with the public generally."

In a polycentric regime as the New Zealand, the trustees of the River are given extensive authorities and recognition to administer resource governance and management. This fortifies the idea of the superior effective in the comprehensive legislative approach of the New Zealand towards riverine rights. The painstakingly broad consultation involved in the production of the legislation reflects in its comprehensiveness in addressing several issues on riverine rights initially affecting the state.

In India, political governance structure differs. India is a federal republic with constitutional rule. The Indian Constitution, with all its democratic values and principles, is the fundamental source of law and legitimacy of political power. There are claims of power imbalance and some evidence is found in the reluctance of the government of the State of Uttarakhand to enforce the directives of the Court to institute the trust board for the guardianship of the rivers. The guardian institution established by the Court, out of urgency and necessity, consists of two

highly powerful political figures who are capable to execute these functions optimally. Nevertheless, with previous indications of lack of political will to act towards the execution of similar tasks one considers their role with some scepticism.

Technically, the trustee guardians are equipped with adequate political power to execute the task but what ought to be attended to is whether they are willing to exercise political powers to that effect in light of previous reluctance and present claims of being already drained in several other constitutional duties. Being optimistic, if this trustee guardians are to exercise the requisite political will, the institution will be a commendable force in river resource management and administration in India. While the secretary of state provide the executive force for the tasks, the Director of NAMANI advocates social attention and inclusion for the tasks and the Advocate General assists with the legal framework as well as litigation force to ensure the welfare of the rivers in India. In the ruling of the Court is declared that

> *"The Advocate General shall represent at all legal proceedings to protect the interest of Rivers Ganges and Yamuna."* (Mohd. Salim v State of Uttarakhand, 2017; paragraph 20).

Where this directive is abided by, this approach will assist in speedy statutory recognition of riverine rights in India, the possible use of executive instruments in the protection of riverine rights and further judicial intervention in the grant and recognition of riverine rights. Eventually, the guardian institution is able to exercise authoritative powers in protection of river resources in India.

Political powerplay in this case arises in the habitual disobedience of the government of such Court holdings and directives in light of the previous poor experiences of administrative inaction by the government towards Court orders on the same matter. It is the ripple effect of this powerplay politics and lack of political will of the government toward environmental law that denied the public interest advocates a chance at negotiation with the government for the acknowledgement of riverine rights to reach and agreement which is subsequently adopted into law. It took the Court a further step to start the institution which ought ideally to be instituted by the government as an interim redress of the deplorable situation of water resources in India.

6.2.5. Conclusion

Summing it all up on research question 2, it is sound to conclude that several aspects of critical institutionalism are reflected in the creation and operation of the guardian institutions established for the protection of riverine rights in New Zealand and India. On origins of institutions, both India and New Zealand used new institutions as their guardian institutions. On socially informed models of human institutions, it was found that whereas New Zealand had an equally representative and inclusive institution, India had an institution which is politically well represented by leaves out representation of the people directly affected by the pollution. On use of negotiation, it is found that in New Zealand, negotiations heightened political will and resulted in the use of legislation to create change. In India, the lack of political will resulted in a makeshift approach by using litigation for judicial declarations yielding the same results. Finally on resource governance in a polycentric governance landscape, it was realised that aspect features prominently in New Zealand whereas in India there are traces of political powerplay seen in the reluctance of the political wing to abide by such Court directives in the past. In all, it can fairly be stated that the guardian institution in New Zealand is more critically positioned and established to protect riverine rights compared to its equivalent in India.

6.3. Research Question 3

Does the legal system adequately protect and sustain environmental rights?

In analysing this research question, the elements of environmental constitutionalism will be assessed within the facts provided.

Kotze, (2018) proffers that advocates of environmental constitutionalism propose a legal system with fundamental norms and institutional arrangements acknowledging the elementary relevance of environmental protection laws and policy. In the greater constitutional set up of the state, advocates of Environmental Constitutionalism propose the entrenchment of environmental protection laws at the highest normative levels and fairly represented in all aspects of democratic constitutionalism. Six main elements of environmental constitutionalism by Kotze are explored in light of the two cases considered in this study.

6.3.1. Rule Of Law in Advancing Environmental Constitutional State

Magraw (2014) suggests as an element of environmental constitutionalism the adoption of certain guarantees in the legal system including making environmental law overly available,

easily enforceable and enforced, applicable to all legal persons equally and backed by sufficient authority to command habitual compliance.

The legal system in New Zealand has certain features which reflect rule of law advancing environmental law. First, on accessibility of environmental law, the use of an Act of Parliament is illustrative of the popularisation of the these laws. The gazetting or publication of Acts promulgated by Parliament upon receiving royal assent is a constitutional requirement in every legal system which applies the rule of law. In the case of the Te Awa Tupua Act, the contents of the law is made accessible online via the website of the Parliamentary Counsel Office of the New Zealand on Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 No 7 (as at 30 November 2022), Public Act – New Zealand Legislation for all persons around the world. Other laws on the protection of the environment and rivers of the New Zealand are made available online and in hardcopy for all citizenry to access.

On easy enforceability of these laws, the political aura of the Te Awa Tupua Act stemming from a history of continuous legal and political struggle for recognition of the rights of the river makes it a popular matter for the Courts to enforce. In the Act, access to the Maori Land Court and other Courts are guaranteed for redress of claims in relation to the Act. For example, it is provided in section 49 that;

"49Bed of River on Māori freehold land

(1) If part of the Whanganui River is located on Māori freehold land, the Māori Land Court may, on application by a person referred to in subsection (2), make a vesting order to vest in Te Awa Tupua the part of any Māori freehold land on which the bed of the Whanganui River is located."

This is one of the jurisdictions to enforce rights in the River.

Enforceability of the law is also realised in the exercise of the authorities of the Te Pou Tupua and the Ngā Tāngata Tiaki o Whanganui in protecting and regulating use of river resources.

On applicability of the laws to all persons, what is ordinarily known as equality before the law, there is the guarantee of the enforcement of this law to all persons including the Crown. Section 5 provides that *"This Act binds the Crown.";* a provision reflecting rule of law.

The legislative force of these provisions also boosts its rule of law requirements.

In light of these features of the Te Awa Tupua Act passed in New Zealand, requirements of rule of law in advancing environmental constitutionalism is satisfied.

In India, it is undeniable the availability of law which propose a structure and mechanism for environmental protection by the State. The Court in the *Lalit Miglani* case, the court relied on the dictum of *M.C. Melta (II) v Union of India (1988) SCC 471* that constitutional and other legal provisions enacted by parliament and state legislature exist imposing duties on the Central and municipal governments to constitute boards under the Water (Prevention and Control of Pollution) Act in order to protect water resources including rivers. Unfortunately, those provisions have not been pursued into real experiences. The laws were available and accessible for all but implementation was not. The Court registered its displeasure in paragraph 7 that,

> *". It is unfortunate that although Parliament and the State Legislature have enacted the aforesaid laws imposing duties on the Central and State Board and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto."*

Easy enforceability of these laws is realised in the plethora of litigation on environmental laws including all the cases cited as several others. For example in the case of *Indian Council for Enviro-Legal Action v Union of India and Others (1996) 5 SCC 281,* the role of the High Courts in enforcing environmental laws due to their proximity affording them easier monitoring functions was emphasized. In the *Lalit* case, the Court lowered requirements for public interest litigation in order to accept jurisdiction in the case. The Court relied on the dictum *of 'Sheela Barse v. Union of India & others* (1988) 4 SCC 226 paragraph 11 which stated that;

> *"In order that these public causes are brought before the courts, the procedural techniques judicially innovated specially for the public interest action recognises the concomitant need to lower the locus standi thresholds so as to enable public-minded citizens or social action groups to act as conduits between these classes of persons of inherence and the forum for the assertion and enforcement of their rights."*

These illustrate that there has not been trouble accessing courts for adjudication of environmental disputes but the bottleneck has been in the executive implementation of court rulings and directives.

Equality in application of environmental laws happens in India as well with few exceptional situations where the executive arm of government has refused to carry out judicial directives directed at them. In principle, rulings of these courts bind all manner of persons in India but the issue has been in execution of the rulings. This is because judge-made-law in India is an authoritative source of law and habitually obeyed by all persons in India. Political interests

often cloud the willingness of the political branches in execution of court directives but there is legal recognition of the force of law backing judicial declarations in India. The High Court of Uttarakhand exhibited this power in passing a directive to the executive and legislative institutions as well as appointing their heads as guardians of the rivers.
In all, rule of law promoting environmental protection is a reality in India.

6.3.2. Separation Of Environmental Governance Powers

The requirement of separation of environmental governance powers concerns regulation and enforcement of environmental governance authority including implementation of measures for accountability among the political authorities in the state. It requires, among others, the establishment of regulatory bodies for the enforcement of environmental laws and certain measures which help in placing checks and balances on the other arms of government in implementing environmental laws.

In New Zealand, the Te Pou Tupua is clothed with regulatory functions including licensing the use of the surface of the river water. Further in the regulatory architecture is Ngā Tāngata Tiaki o Whanganui trust established to oversee the Te Pou Tupua in addition to performing several contributory and representational roles in enforcing the rights and interests of the Te Awa Tupua. On accountability in the form of checks and balances, the various functions and roles of these regulatory machinery are unequivocally listed in the Act to avoid any ambiguity. Section 19 (ibid) is clear on this matter. Included in these roles are measure for periodic reporting to the Whanganui iwi who are the ultimate beneficiaries of the functions of the Te Pou Tupua. It is provided in section 19 that

> *" 19 (2)Without limiting subsection (1), Te Pou Tupua, in performing its functions,—*
>
> *(b) must develop appropriate mechanisms for engaging with, and reporting to, the iwi and hapū with interests in the Whanganui River on matters relating to Te Awa Tupua, as a means of recognising the inalienable connection of those iwi and hapū with Te Awa Tupua"*

This regulatory architecture symbolises the inclusion of separation of environmental governance powers from mainstream governance powers.

India has its constitutional and statutory environmental protection provisions still unrealised from the statute books. Upon judicial recognition of riverine rights, the Court appointed guardians made up of persons who are already overwhelmed with other constitutional and political functions. Ideally, it would have been more appropriate for the court to establish an independent body to perform guardianship over the river instead of already burdened offices. The institution is made up of three officers two out of which are executive officers.

However, formal measures for ensuring checks and balance in this guardianship committee is not clearly defined. Independence of this guardian institution from the political arms of government is hopelessly not guaranteed reasoning from a perspective that in includes two powerful political appointees and a private person. The personnel on this regulatory body are also questionable knowing the other constitutional and political duties already imposed on them by law.

In all, it cannot be a sound conclusion that there is separation of environmental governance power law in India. Further arrangements however be made to complement the existing institution.

6.3.3. Imperative Roles of Independent and Impartial Courts

In the institution of environmental constitutionalism, the role of the judiciary cannot be underestimated. There is the need for independent and impartial courts with final judicial powers to protect the established constitutional order. Practically, there must be competent specialised courts with jurisdiction in the resolution of environmental disputes which are accessible and guarantee the realisation of the promises of environmental laws.

In the ideal sense, there is the need for specialised environmental law courts fortified to adjudicate matters of environmental law in the state. Nevertheless, In New Zealand the Te Awa Tupua Act equips the Maori Land Courts with jurisdiction in matters emanating from the Act (Section 49 of the Act). This court is accessible to all persons with grievances in the implementation of the Act. The grant of access to this Court which promises impartiality and judicial competence is a commendable step towards the incorporation of elements of environmental constitutionalism because it is expected to operate from a point of experience from past judicial interventions.

In India, the situation is the same. Although the Courts have granted and recognised the legal personality of rivers, there is no specialised court for environmental protection matters as required as elements of environmental constitutionalism. Traditional courts assume jurisdiction in matters of environmental protection occasioning gross discomforts due to delay, and some lack of expertise in environmental protection matters. On accessibility, traditional courts are open to all persons with locus standi and has been bold in adjudicating disputes brought before them. Traditional courts have been efficient even in granting legal personality of the rivers and their tributaries, himalayas, etc. In the *Lalit* case it was declared in holding 2 that

> *"We, by invoking our parens patriae jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridicial person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights"*

The High Court of Uttarakhand which has delivered the two salient judgment under consideration is nevertheless competent to adjudicate conflicts in environmental law considering its proven tract record. This satisfies the requirement of independent and impartial courts to enforce environmental constitutionalism.

6.3.4. Constitutional Supremacy

Where environmental laws are entrenched in constitutions there is a greater guarantee of the observance of environmental laws. This is an incident of the principles of constitutionalism where other laws and acts contrary to any provision of the constitution is rendered null and void. The entrenchment of environmental law thus raises environmental protection to the highest juridical norm in the legal system.

New Zealand has laws on environmental protection but these laws are not incorporated into the national constitution. The available laws on environmental protection do not enjoy the privilege of constitutional entrenchment which raises environmental protection to the highest norms. Despite the endurance of long struggles to achieve a comprehensive Act for the recognition and implementation of riverine rights, the position of this law on the hierarchy of laws suggests that a subsequent law can easily amend the provisions and where any of its provisions stands

contrary to or in excess of rights granted or guaranteed by the constitution, all such provisions can be declared null and void. Regardless that it binds the Crown, the government and the people all together, without entrenchment in the Constitution of the state the guarantee of implementation is not absolute.
On this New Zealand is found to have adopted a weaker constitutional supremacy mechanism for granting legal protection to the environment.

India has several constitutional and statutory provisions on environmental protection as held in the case of *M.C. Mehta (II) v Union of India (1988) SCC 471.* In 2016 the High Court of Uttarakhand held in the *Lalit Miglani case* that articles 21, 47, 48-A and 51-A(g) of the Constitution gave the citizenry the right to hygienic environmental protection and obliged governments to observe same. For example, article 21 confers the right to a healthy environment whereas article 51A(g) mandated all persons to takes steps in protection and improvement of the health of the environment. The Court stated as follows;

> *"Article 48A in part IV (Directive Principles) brought by the Constitution 42nd Amendment Act, 1976, enjoins that "the state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51A imposes "a fundamental duty" on every citizen of India to protect and improve the natural "environment" including forests lakes, rivers and wild life and to have compassion for living creatures". The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment."*

The Court upheld these rights because a healthy environment is an integral facet of our right to healthy life and dignity. This is the judicial recognition of environmental protection laws at the pinnacle of legal norms. The Constitution includes provisions on environmental protection and the Courts recognise these provisions as fundamental constitutional provisions which cast a burden on the central and municipal governments to act towards the realisation of these positive rights. This is a clear indication of constitutional entrenchment of environmental protection provisions making environmental protection a fundamental legal issue in India.

6.3.5. Environmental Democracy

In environmental constitutionalism, environmental democracy suggests that the greater the entrenchment of foundations of democracy the greater the chances of survival of environmental laws. In entails respect for dominant of opinions, accountability of environmental government officials, access to relevant environmental information, private advocacy by NGOs, a collective aim to promote environmental protection, among others. The realisation of these principles highlights the operation of environmental democracy in the legal system.

Throughout the advocacy for riverine rights in New Zealand, certain principles of environmental democracy are exhibited. First, there is the important role of vibrant NGOs in advocating riverine rights for the Whanganui iwi involve youth, women and chiefs of the Whanganui iwi. The Te Whiringa Muka Trust; the Pakaitore Trust; and the Whanganui River Maori Trust Board are examples of such groups in modern times.

With the passage of time, the dominant views on the matter of recognising riverine rights in New Zealand swayed to favouring riverine rights and Whanganui iwi rights and benefits associated therewith leading to the terms of the Deed of Settlement and the Act which recognise the values of the people concerning the Te Awa Topua in section 13 of the Act.

Under the Act there is guaranteed easy access to environmental information as one of the functions of the Te Pou Tupua and requirement of periodic reporting to Whanganui iwi as a measure of accountability. The Act provides in section 19(2)(b) that

> *"Without limiting subsection (1), Te Pou Tupua, in performing its functions,—*
> *(b) must develop appropriate mechanisms for engaging with, and reporting to, the iwi and hapū with interests in the Whanganui River on matters relating to Te Awa Tupua, as a means of recognising the inalienable connection of those iwi and hapū with Te Awa Tupua"*

Further on accountability, the Ngā Tāngata Tiaki o Whanganui trust oversees the activities of the Te Pou Tupua ensuring the adherence to the values and strategies entrenched in the law. All these are clear manifestations of environmental democracy as required in environmental constitutionalism.

In India environmental democracy is realised in certain aspects of advocacy for riverine rights. First is the critical role of NGOs which take initiative in conducting research and commencing legal actions in the public interest to seek judicial intervention in protecting rivers. In the *Lalit*

Miglani case, public interest litigation was commenced for order ultimately geared towards preventing or reducing unprecedented pollution of the river Ganges. In the *Mohd. Salim case,* public interest litigation was commenced against illegal construction and encroachment along the Ganges Rivers and the failure or inability of the government of India to establish a management board for Ganges River. Eventually, the Director of NAMANI Gange an NGO responsible for commencing the action was appointed by the Court as one of the guardians of the river.

Respect for dominant opinions led the Courts to recognise the rivers as legal persons as many advocates have pressed such ideas on the powers that be through several literature one of which was cited by the Court ('Nature has Rights too' by Vikram Soni and Sanjay Parikh cited by the Court in the *Lalit Miglani case).* The Court cited with approval the following passage.

> *"Human rights commissions are obligatory vigilantes in all democracies. Human rights are about inequities between one set of human beings and another. These range from usurping the sovereign rights of one nation by another more powerful one, to more local violations. They arise when the rich and powerful exploit the poor and disenfranchised. They reveal themselves in violence against women, violence against members of lower caste and creeds and other such instances. They are horrible acts and are often portrayed graphically. Violations against nature can be equally appalling despite being viewed through the filter of 'environmental damage'*

Environmental information was also accessible as indicated by the ability of the NGO to calculate the astronomic rates of pollution of the rivers by human activities. It was averred to the Court that laboratory research revealed the level of coliform in the rivers reached 5500 mpn/100ml; a situation of exceptional pollution.

There is however the challenge of lack of political will among the political class towards achieving environmental protection goals shown in the lackadaisical approach towards enforcing judicial orders for environmental protection. But in all these indicators, Indian legal system has observed sufficient levels of environmental democracy as required by advocates of environmental constitutionalism.

6.3.6. Issues of Rights

Kotze recognises the issue of rights as perhaps the most fundamental of all the elements. In this setting, rights are seen as a mechanism for enforcing protection and allowing expression when enshrined in a constitution. The entrenchment of environmental rights permits easy

adjudication of environmental disputes these legal right mainly being incidents of legal personalities. The grant or recognition of legal personality thus enables the entity to exercise and protect its incidental rights in and out of court. Environmental constitutionalism requires issuance of rights to deserving environmental entities for protection of environmental rights.

New Zealand through the Te Awa Tupua Act has granted and the Whanganui River its legal personality recognising the river as unified body with all its tributaries and other resources. In the Act it provided that

> *"14 (1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person."*

As a legal personality, the river can now commence and defend legal actions affecting its rights and interests having a non-debatable *locus standi*. The nature of legal personality granted the river is a dependent personality and has been supported by the establishment of the Te Pou Tupua to act as the human face and guardian at law of the river. The Act enshrines this by providing that

> *"14(2) The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and in Ruruku Whakatupua—Te Mana o Te Awa Tupua"*

The Act spells out the rights exercisable in the protection of the wellbeing of the river as well as the persons and procedure to exercise these rights. The only shortfall is the lack of constitutional backing but realising an enthusiastic recognition of the Crown of these rights, there is great confidence in potential of recognition among high ranking political powers.

Using the judicial declaration approach, the High Court of the State of Uttarakhand has declared, upheld and extended legal personality to River Ganges and Yamuna River in the *Mohd. Salim* case and *Lalit Miglani* cases respectively. In the *Mohd. Salim* case, the court spelt out the reasons and the features of the legal personality of rivers recognised. These reasonings are highlighted in chapter five above.

Legal personality was conferred on rivers on juridical basis considering a god-subject relationship between affected rivers and people of India relying on a previous holding by the Supreme Court of India in *Yogendra Nath Naskar v Commission of Income Tax, Calcutta, 1969 (1) SC 555* where the Court held that Hindu idols are juristic entities.

Another reason for the conferment of legal personality on rivers in India is on grounds of necessity considering the deplorable state of both rivers. On this the court relied on a Supreme Court exposition of the law in *Shiromani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass & Others AIR 2000SC 1421* where the Court stated juristic person is a person born out of necessities in the continuous phase of human development.

Finally, the most popular doctrine of *parens patriae* was applied for the Court to act with its paternal and protective jurisdiction to compulsorily appoint guardians for the rivers. It was communicated in the following words

> *"Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna."*

In *Lalit Miglani* case, human rights jurisprudence was the justification for granting legal personality on the other water resources linked to the rivers. It was reasoned that realising constitutionally guaranteed fundamental human rights to life, health and hygienic environment was interrelated to environmental rights and protection being an integral facet in realising these rights. A constitutional imperative is thus cast on the State to ensure the protection of the environment in its quest to guarantee and protect fundamental human rights as held in *Virender Gaur & Others v State of Haryana and Others (1995) WSCC 577*. It was stated in that case that;

> *" The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with humane dignity without a human and healthy environment.*

Environmental protection, therefore has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safe- guard proper environment but also ah imperative duty to take adequate measures to promote, protect and improve the environment man-made and the natural environment." (ibid).

In all these jurisprudential approaches to conferring legal personality on rivers, the Courts have exhibited unchallengeable competence in recognising riverine rights; a step quintessential to promoting environmental protection because this legal personality gives legal and natural powers and rights to pursue other rights incidental to legal personhood. There is a satisfactory exhibition of issuance of rights in this context.

6.3.7. Conclusion

The analyses reveal general adherence to the elements of environmental constitutionalism as proffered by Kotze. Most essentially, the issue of rights which gives access to all other elements is now recognised under the laws of both New Zealand and India. Other elements including environmental democracy, rule of law, separation of environmental governance powers, as well as independent and impartial courts are sufficiently applied in both legal systems. Nevertheless, on constitutional supremacy, New Zealand falls short of realising this potential considering the lack of constitutional backing for environmental protection laws. India on the other hand has constitutional, statutory and judicial recognition and backing of the fundamentality of environmental protection laws. Altogether, these cases and analyses demonstrate the possibility of environmental constitutionalism by highlighting practical realisation of the elements of the theory.

There it will be a sound conclusion on research question three that although not in the ideal sense, the legal systems of New Zealand and India reflect a majority of the elements of environmental constitutionalism. This indicates more confidence in the sustainability of their legal frameworks for the protection of riverine rights.

6.4. CONCLUSION

In this chapter, a documentary analysis of the Te Awa Tupua Act and two judgments of the High Court of Uttarakhand in India have been analysed. Through a theoretical thematic analysis approach, the two cases of New Zealand and India are analysed to test their legal framework for the protection of riverine rights against the theoretical framework developed for this study. The thematic analysis was organised by considering the elements of the various theories adopted; legal guardianship, critical institutionalism and environmental constitutionalism. The analysis revealed certain features of the two legal systems which are common and other distinguishing factors.

In analysing research question one, the theory of guardianship was considered. It was established that similarities exist in the purposes of the guardianship. Also, the approach to guardianship (institutional guardianship) was the same in both cases. However, whereas New Zealand used a legislative approach to the creation of the legal personality and guardian institution, the judicial declaration approach was used in India.

In analysing research question two, the relevant aspects of critical institutionalism were assessed across the legal systems through the documents. The origins of the guardian institutions were found in both cases to be the use of new institutions without institutional bricolage. On socially informed models, it was found that New Zealand has robust measures for inclusion and representation but in India the membership of the institution is titled towards political instead of social representation. On the use of negotiation, whereas New Zealand negotiated until legislation was passed, India negotiated through advocacy in the Courts. Finally political powerplay causes considerable challenges in India because of the use of judicial declarations but in New Zealand the institution is made up of equal representation and inclusion. It was thus concluded that the guardian institution in New Zealand is better positioned for its purpose compared to the institution created in India.

In analysing research question three, the facts were assessed in light of the elements of environmental constitutionalism. The analysis revealed that the elements of environmental constitutionalism reflect in the legal frameworks for environmental protection set up in these countries. Nevertheless shortcomings were realised in both countries on certain elements.

In all, it is agreed that the preferrable approach to the grant of riverine rights is the legislative approach which establishes the legal personality and legal guardian in a legal system which respects environmental constitutionalism. New Zealand is closer to achieving this framework than India.

CHAPTER SEVEN

SUMMARY, CONCLUSION AND RECOMMENDATIONS

7.1. SUMMARY OF THE FINDINGS

This aspect presents the findings of the analysis in brief conceptual presentations to highlight the salient outcomes of the research and analyses. In a structure similar to the analysis, the findings are presented based on the research questions and analytical theories adopted. Research question one is presented in light of the theory of guardianship. Research question two is presented in light of the theory of critical institutionalism; and finally, research question three is presented in light of environmental constitutionalism as presented in the theoretical framework for this study.

7.1.1. Research question 1

How are New Zealand and India exercising legal guardianship over the rivers?

From the analysis of the facts of the two cases theoretical framework for this study, several findings were made most of which are presented briefly below.

First, both states – New Zealand and India - recognised the necessity to assume duty of guardianship of the rivers influenced greatly by the doctrine of *parens patriae* and other human rights and constitutional considerations. This has led the law, as was applied in *Eyre v. Shaftsbury, 24 Eng. Rep 659 (Ch. 1722* (Custer, 1978) to confer legal personality on the rivers to enable them assert their right to protection and welfare through their guardians (Stone, 2010).

In so doing, there were similarities in the implementation of guardianship. First, in both instances, the purpose of the guardianship was rooted in welfarism jurisprudence such as to function to ensure the welfare of rivers and considering the interdependence of human existence and environmental wellbeing. This confirms the thoughts of Stone, (2010) and Laszewska-Hellriegel, (2022) that environmental protection has a reflexive necessity by combining anthropocentric and ecocentric desires.

Another point of similarity was the approach in ensuring guardianship. Having in mind the various approaches to guardianship, both cases in point made a commendable choice of adopting an institutional guardianship approach where institutions, instead of individuals, are appointed to act as guardians to non-human legal personalities because of their relative permance (Merrey & Cook, 2012). The institutions function like trusts with fiduciary and

statutory duties to perform on behalf of and to the benefit of the rivers and the dependent people (Argyrou, 2019).

Not all matters were agreed. The main point of difference was found in the sources of law for the realisation of riverine rights in these two states. Whereas in New Zealand a statutory law approach based on positive law theories was used to promulgate a well documented comprehensive statute for the protection of the Whangaui River, in India it took judicial intervention based on natural law theories in the form of judicial declaration to confer on rivers their legal personality, guardians and the needed protection. The implications of these approaches were that, being of statutory force the New Zealand approach seems in technical sense more durable and readily realisable by enforcement compared to the possible frustrations to be faced by the declarations of the High Court of the State of Uttarakhand. Nevertheless both sources are deemed valid by Kruska (2019) as supported by the legalist approach to creating legal personalities.

7.1.2. Research question 2

How are the responsible institutions in New Zealand and India positioned to protect riverine rights?

Upon adopting guardian institutions for the juridical personalities of rivers, there were considerations of the implementation of critical institutionalism as proposed by Cleaver (2017). Such institutions, according to the theoretical framework adopted, are capable of enforcing environmental protection policies and laws in the states. Upon close consideration of elements of critical institutionalism in light of the facts prevalent in the two cases, the findings included the following;

On the origins of institutions, both New Zealand and India adopted new institutions as their guardian institution. However, in New Zealand, traces of institutional bricolage were found in merging the old trusts into one new trust. It is the form of institutional bricolage advocated by Bourdieu (1977) and Giddens (1984). On legitimacy, however, both states have the purpose and establishment of their guardian institutions well grounded in law as explained initially and satisfies the import of this aspect of critical institutionalism described by Cleaver & Whaley, (2018).

On socially informed models of institutions, it was realised that diversity and inclusion were highly respected in New Zealand with the establishment of Te Pou Tupua with two main

representatives one for each party to the negotiations. This was also backed up with Ngā Tāngata Tiaki o Whanganui trust with wide representation as well as legal rights to be heard in all matters affecting the river. It reflects the requirement of infusion of the social aspects into the whole institutional infrastructure (Cleaver & de Koning, 2015). In India, the judicial pronouncement stated only three persons perhaps in expectation of respecting suggestions by other affected persons. Although the court hinted at the inclusion of the affected peoples, no pronouncement to that effect was made. It can thus be said that the institution convened in India was not sufficiently representative and inclusive.

Paying attention to the use of negotiations, New Zealand persisted in negotiations with the Crown for over a century to arrive at a comprehensive and robust solution for riverine rights statutorily and constitutionally recognised; an expression of the might of human negotiation and settlement creation. This is an indication of creating change by routine everyday negotiations as espoused by Agrawal and Bauer, (2005). India had to use the judicial pronouncement approach because the political class seemed to be non-compromising in the quest by NGOs to have them recognise and enforce riverine rights despite the foundations stated in the Indian Constitution. Lack of political will, powerplay politics and misplaced priorities accounted for this and resulted in the non-use of the efficacy of negotiations but judicial compulsion in India.

An analysis of resource governance or management in a polycentric governance landscape found that New Zealand had a robust architecture for resource governance and management with greater powers and authority in the human institutions established for the purpose (Te Pou Tupua and Nga Tangata Tiaki O Whanganui Trust). This is an indication of how power relationships, political and geographical factors have shaped the resource governance and management regime of New Zealand (Cleaver & de Koning, 2015). India due to the judicial approach, has a less powerful institution which suffers some power imbalance with political arms' slowness in enforcing pronouncements of environmental law by the courts.

Altogether, it is concluded that on an assessment of the two cases from the perspective of critical institutionalism, the guardian institution set up in New Zealand tends to be better placed to deliver efficient protection of riverine rights and legal personality in comparison to the guardian institution set up in India.

7.1.3. Research question 3

Does the legal system adequately protect and sustain environmental rights?

The tenets of Kotze (2018) environmental constitutionalism were considered in light of the facts of the case study. In considering the rule of environmental law, New Zealand proves to ensure accessibility to environmental laws, access to Maori Land Court for redress, enforceability of the law, and recognition of these laws. In India, there are existing constitutional and statutory law, several rulings on protection of environment and accessibility of law and courts for enforcement to ensure environmental constitutionalism.

It was found on separation of environmental governance powers that New Zealand has established a guardian institution for river protection with regulatory and representational powers as well as mechanism for accountability or check and balances among the institutions established. Indian courts established an institution for enforcing environmental protection laws but its independence and assurance of checks and balance is not readily evident. Nevertheless, where focuses align, these personnel can use their offices to foster public interest in environmental protection. This means India does not satisfy this requirement by Kotze (2018).

The imperative roles of independent and impartial courts was also considered. The courts have been outstanding in India for boldly recognising what the political wings are intentionally ignoring. These courts have recognised and enforced the legal personalities of rivers and their associated water bodies in times of political apathy towards environmental protection. Their posture is in direct response to accusations by Macpherson et al of 'green washing' – a situation of non-enforceable environmental laws. In New Zealand, despite a history of unfavourable judicial pronouncements on this matter, there is now statutory recognition and jurisdiction for courts to adjudicate matters concerning the river granted a legal personality in accordance with law. This means in both cases, commendable efforts have been made towards satisfying this element by Kotze (2018).

On constitutional supremacy, it was found that without incorporating the Te Awa Tupua Act in New Zealand constitution, enforcement risks parallelism and rivalry in that other laws or actions contrary to the provisions of this Act shall not be declared unconstitutional. This encourages rival laws and acts or parallel laws and acts to environmental protection. India has a better approach. There are several constitutional and statutory provisions as well as judicial

findings and declarations upholding environmental protection goals. Acts and laws contrary to the constitutional provisions on environmental protection can therefore be declared unconstitutional and void by a court of competent jurisdiction. This is commendable in light of environmental constitutionalism as espoused by Kotze (2018).

On environmental democracy, it was found that both New Zealand and India are recognised democratic states working on firm political foundations based on the edicts of modern democracy and constitutionalism. Both states have working constitutions and the rule of law assured. In their separate and independent quests to recognise riverine rights, there were instances of private advocacy by NGOs, and access to relevant environmental information. However, whereas NZ exhibited a dominance in opinion on environmental protection and a stronger collective political and social aim towards promotion of environmental protection, these attributes were not readily observable in India. There was instead the will of the less politically powerful suffering masses and some NGOs which was upheld by the courts and not the political government in India. Nevertheless, both Inda and New Zealand have shown sufficient levels of environmental democracy in their states.

Finally, concerning the issue of rights, it is an exciting finding that both New Zealand and India have in their legal systems recognised that rivers have rights necessarily exercisable to ensure the welfare of the rivers and the environment in general. This resonates the ideas of Smith (1928) that conferment of legal rights on deserving aspects of the environment "facilitate the regulation, by organized society, of human conduct and intercourse". Both countries have made incredible efforts to confer on their rivers legal personalities which come with several natural and legal rights necessary to ensure their wellbeing and protection. This according to Kotze is a quintessential requirement if environmental constitutionalism is to thrive.

In all, it was found that there are impressive rates of implementing environmental constitutionalism in the two states under study. There is however, a few shortfalls in some of the elements of environmental constitutionalism that deserve attention and working. With the popularisation of the theory of environmental constitutionalism, the requirements become clearly and more realisable and the shortfalls will by conscious or unconscious efforts be equipped.

7.2. CONCLUSIONS

Considering the immediate and long term effects of these approaches, it is reasonable and prudent to agree that the statutory approach adopted in New Zealand is more efficient and effective because that approach yields enormous consideration, recognition and force of law. It also reflects greater political will in both strands of welfarism – ensuring the wellbeing of the environment and the welfare of the people – which is a realisation of the duty to uphold, protect and ensure the interdependence of human and environmental interaction. In effect, the use of the statutory approach shows strong interest of the mechanism of state as a representation of the popular views and needs of the people to ensure environmental protection.

Despite the preference for the statutory approach, the judicial pronouncement approach also has its advantages. First is the speed in recognition. Second is affording an alternative yet legitimate route in situations of lack of political will. Also, the force of enforcement is an added advantage in that, as Justice Oliver Wendell Holmes proffers, the practical realisation of law enforcement is found in the attitude of courts towards enforcement (Holmes, 1897).

Furthermore, proactive and capable institutions are needed if the quest for environmental constitutionalism and environmental welfarism are to be enforced as pertinent political and social targets. The formations, funding and empowerment of these institutions must not be taken lightly as they act as the guardians of our planet ensuring we have the most fundamental asset which underlies the enjoyment of our rights. In detail, such institutions must incorporate appropriate implementation of features of critical institutions including considerations on the origins of institutions, proper socially informed models, more appropriate use of negotiations in conflict resolution and resource governance or management policies beneficial to both environmental and human welfare. A helpful cue is taken from the broad, divergent, inclusive consultation and long effective planning approach used by New Zealand to produce a highly efficient sustainable solution to the issue of environmental protection by the grant of riverine rights.

On the implementation of environmental constitutionalism, it is agreeable that where in the most fundamental legal foundations and structures of a state environmental protection issues take their appropriate salience, there is an assurance of sustainability of a healthy populace and the enjoyment of all other human and political rights. For without a safe and healthy territory,

the very machinery of a state may not be exercisable in vacuum. Environmental constitutionalism, as championed by Kotze (2018), thus promises that giving environmental protection an entrenched position among all the tenets of democratic constitutionalism, a nation is bound to enjoy an easier, more effective regime of environmental protection.

7.3. RECOMMENDATIONS

Considering the findings and conclusions of this study, several recommendations are made towards sustainable recognition and enforcement of riverine rights towards the goals of environmental protection. Above is a list of recommendations on pertinent aspects of riverine rights recognition and enforcement based on the outcome of this study. It is recommended that;

a. States adopt and implement statutory recognition of riverine rights as that approach wields considerable force of law. In the ideal sense, the statutory approach is expected to entrench principles of environmental and riverine protection in the state constitutions for greater legal recognition and enforcement. In adopting the statutory approach however, there is a recognisable need to sensitize the judiciary on their role as final arbiters in enforcing relevant environmental protection laws and policies.

b. A movement from theory and soft law into strong political will to ensure welfare of the environment and uphold interdependence of human and environmental interaction has become pertinent. In the continuous development and progress of human civilisation, there has come this time for the strong advocacy and recognition of political necessity for environmental protection policies, laws and rights. A step away from brutal capitalist anthropocentric tendencies of man towards strong ecocentric will to protect and preserve our environment for its associated benefits make it ripe to invest political efforts in environmental protection and welfare.

c. There is recommendation for bold and capable institutions for environmental protection and regulations established with appropriate considerations and mechanisms and equipped with adequate necessary resources and powers to act in defence of and to the benefit of the environment. Critical institutions with sufficient resources are necessary for guarding environmental rights and resources because of its added advantage of perpetual succession, capitalisation of resources of its members and the strong recognition of the authority of such institutions in our legal systems.

d. States should as a matter of prudence ensure the idea of environmental protection is entrenched across all the tenets of their democratic constitutionalism for environmental protection to assume its rightful credence and salience in national planning and constitutional affairs. The fundamental role of environmental protection in our states cannot be overemphasised and this recognition leads unerringly towards inclusion of policies and laws on environmental protection in the most fundamental norms of our modern states.

e. It is further recommended that riverine legal personality and rights should be recognised and upheld in all legal systems as it has become a fundamental requirement for the enjoying of legal protection of rivers. In a global political era of rights, without riverine rights and legal personalities, the enforcement of environmental protection laws become a daunting task unachievable by most public interest litigants. But with a recognised legal personality and a working guardianship body, there is greater confidence in the protection of riverine and environmental rights. The recognition of riverine rights and other rights of the natural environment has thus become imminent in a just and progressive society.

f. A framework for the conferment and incidents of riverine rights also comes in handy. With the increased recognition of riverine rights, there has to be clear and reliable standards and indicators of the nature and extent of rights to be expected of rivers and their guardians. This satisfies a requirement of certainty under the rule of law where the policy and law on the nature and extent of riverine rights are made clear and accessible to guide expectations and behaviour.

g. Balance is also recommended. With the conferment of legal rights of rivers and establishment of empowered guardian institutions, there is a temptation for over-enforcement of environmental protection laws and policies. This in effect lead to a reduced use of environmental resources necessary for human use and comfort. What is recommended here is a balance in the objectives of environmental protection and environmental exploitation; that regulators set reasonable and workable standards to harvesting and extraction of environmental resources needed for human survival and

industry. With this is expected a harmonious cooperation between human industry and environmental protection which sustains the interdependence between both parties.

To sum it all up, this study has forged a sustainable framework for the continuous recognition of riverine rights and environmental protection and recommends the adoption of a system of guardianship of environmental resources by putting up critical guardian institutions which will function in a political economy built on environmental constitutionalism. Upon an enthusiastic implementation of this approach to environmental protection, one cannot doubt the robust protection to be enjoyed by the environment from destructive human activities.

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APPENDICES

APPENDIX A

Māori Version (Literal English Translation By Dr. Mānuka Hēnare)

The Maori version of the treaty translated from English by Dr. Manuka Henare reads as follows;

1. "We, the absolute leaders of the tribes (iwi) of New Zealand (Nu Tireni) to the north of Hauraki (Thames) having assembled in the Bay of Islands (Tokerau) on 28th October 1835. [We] declare the authority and leadership of our country and say and declare them to be prosperous economy and chiefly country (Wenua Rangatira) under the title of 'Te Wakaminenga o ngā Hapū o Nu Tireni' (The sacred Confederation of Tribes of New Zealand).
2. The sovereignty/kingship (Kīngitanga) and the mana from the land of the Confederation of New Zealand are here declared to belong solely to the true leaders (Tino Rangatira) of our gathering, and we also declare that we will not allow (tukua) any other group to frame laws (wakarite ture), nor any Governorship (Kawanatanga) to be established in the lands of the Confederation, unless (by persons) appointed by us to carry out (wakarite) the laws (ture) we have enacted in our assembly (huihuinga).
3. We, the true leaders have agreed to meet in a formal gathering (rūnanga) at Waitangi in the autumn (Ngahuru) of each year to enact laws (wakarite ture) that justice may be done (kia tika ai te wakawakanga), so that peace may prevail and wrong-doing cease and trade (hokohoko) be fair. [We] invite the southern tribes to set aside their animosities, consider the well-being of our land and enter into the sacred Confederation of New Zealand.
4. We agree that a copy of our declaration should be written and sent to the King of England to express our appreciation (aroha) for this approval of our flag. And because we are showing friendship and care for the Pākehā who live on our shores, who have come here to trade (hokohoko), we ask the King to remain as a protector (matua) for us in our inexperienced statehood (tamarikitanga), lest our authority and leadership be ended (kei whakakahoretia tō mātou Rangatiratanga).

The Codicil

We are the rangatira who, although we did not attend the meeting due to the widespread flooding or other reasons, fully agree with He Whakaputanga Rangatiratanga o Nu Tirene and join the sacred Confederation."

APPENDIX B

Declaration of Independence (Original English Version)

The original English version of the treaty reads as follows;

1. "We, the hereditary chiefs and heads of the tribes of the Northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, on this 28th day of October, 1835, declare the Independence of our country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand.
2. All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.
3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi, in the autumn of each year, for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade; and they cordially invite the Southern tribes to lay aside their private animosities, and to consult the safety and welfare of our common country by joining the Confederation of the United Tribes.
4. They also agree to send a copy of this Declaration to His Majesty the King of England, to thank him for his acknowledgement of their flag; and in return for the friendship and protection they have shown, and are prepared to show, to such of his subjects as have settled in their country, or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence. Agreed to unanimously on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.

(Here follow the signatures or marks of thirty-five Hereditary chiefs or Heads of tribes, which form a fair representation of the tribes of New Zealand from the North Cape to the latitude of the River Thames.) English witnesses:

1. (Signed) Henry Williams, Missionary, CMS.
2. George Clarke, CMS.
3. James C Clendon, Merchant.
4. Gilbert Mair, Merchant.

I certify that the above is a correct copy of the Declaration of the Chiefs, according to the translation of Missionaries who have resided ten years and upwards in the country ; and it is transmitted to His Most Gracious Majesty the King of England, at the unanimous request of the chiefs. (Signed) JAMES BUSBY, British Resident at New Zealand."

(Source: https://www.archives.govt.nz/discover-our-stories/the-declaration-of-independence-of-new-zealand).

APPENDIX C

The Treaty of Waitangi (Māori version)

The Maori version of the Treaty of Waitangi contains the following provisions.

"Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson, a Captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The first

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

William Hobson Consul and Lieutenant-Governor.

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840."

Translated by Professor Hugh Kawharu, 1975 (Archives New Zealand, 2005)

APPENDIX D

The Treaty of Waitangi (Original English Version)

The original English version of the Treaty of Waitangi reads as follows.

"Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant-Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed

upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

William Hobson, Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified. Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty."

(Archives New Zealand, 2005)