Reimagining Participation in International Environmental Law for the More-Than-Human: A Multi-Species Toolkit Applied to the Whanganui River

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This research critically examines the structural and conceptual limitations of international environmental law (IEL). It argues that IEL remains constrained in its response to accelerating ecological crises due to its deep entrenchment in anthropocentric, Eurocentric worldviews dominant in the Global North. Although IEL has expanded significantly since the 1970s, its foundational frameworks continue to prioritise human concerns, thereby limiting its capacity to respond meaningfully to the interconnected challenges of climate change, biodiversity loss, and ecological degradation.

Drawing on feminist legal scholarship, the thesis positions participation as a key site through which to challenge dominant legal logics. The research adopts a multidimensional methodology informed by ecofeminism, posthumanism, and Indigenous scholarship to interrogate whose voices are recognised within environmental decision-making and whose remain structurally excluded. It explores how legal subjectivity might be reconceived to include ecosystems, species, and non-human entities.

To operationalise this analysis, this thesis introduces a novel multispecies participation toolkit designed to both diagnose structural exclusions and to guide participatory redesign. Building on established human-centred participation models, the toolkit provides a structured framework for evaluating the quality and legitimacy of participation, and for identifying opportunities for institutional transformation.

The toolkit is applied to an in-depth longitudinal case study of the Whanganui River in Aotearoa New Zealand, which was granted legal personhood in 2017 following decades of Māori advocacy. This case offers valuable insights into the possibilities and limits of the current legal approaches to non-human participation. It demonstrates how participatory architecture can either enable or constrain meaningful multispecies recognition within existing institutional settings.

The thesis concludes that meaningful ecological governance requires a fundamental reorientation of IEL's participatory foundations. It argues that only by engaging seriously with pluralist and multispecies perspectives can environmental law begin to respond more adequately to contemporary ecological crises and to the wider community of life affected by environmental decision-making.

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Glossary[1]

ātea — open forecourt in front of wharenui

hau — vital essence, breath of life, or relational life force associated with persons, places, and things

hui - meeting

kaitiakitanga — guardianship/stewardship (but retain the relational nuance)

kāwanatanga — governance

mana — authority, prestige, standing

marae — communal meeting space

mauri — life force, vital essence

pōwhiri — welcome ceremony

rangatiratanga — chiefly authority/self-determination

taonga — treasured things

tapu — sacred, restricted

Te Awa Tupua — the Whanganui River legal entity

Te Kōpuka nā Te Awa Tupua — collaborative strategy group for the Whanganui River

Te Pou Tupua — human face/guardian of the river

Te Tiriti o Waitangi — Māori text of the Treaty

Tikanga Maori — correct/customary practice

tino rangatiratanga — full chiefly authority

Treaty of Waitangi — English text (usually not in Māori glossary but referenced)

Tupua te Kawa — intrinsic values framework for the Whanganui River

utu — reciprocity, balance, restoration

waiata — song/chant supporting speeches

whaikōrero — formal speech

whakapapa — genealogy, relational ordering

[1] Mary Boyce Mamari Stephens, *He Papakupu Reo Ture: A Dictionary of Maori Legal Terms* (1st edn, Lexis Nexis 2013).

wharenui — meeting house

Declaration

I declare that this thesis is the result of my own work and that it has not been submitted for a degree at any other university or institution. Information derived from the published and unpublished work of others has been acknowledged in the text and a list of references is given.

1. Chapter 1: Framing the Thesis

1.1. Introduction

The relationship between human societies and the non-human world is mediated by a complex web of norms, institutions, and decision-making processes understood broadly as environmental governance. At its most fundamental, this governance system is intended to manage the human impact on the ecosystems we inhabit and depend upon. However, this governance system is proving increasingly ill-equipped to manage the frictions between human systems and the non-human world. Human activity has altered the biological, chemical and geological processes of the Earth to such an extent it has led some scholars to propose that we have entered a new geological epoch: the Anthropocene.[2]This impact on the Earth's processes has far reaching consequences and jeopardises the extent to which the Earth will remain habitable for life.[3] Phenomena such as climate change, mass extinction, deforestation and desertification, reveal the severity and urgency of the environmental crises occurring throughout the world.[4] These issues have also revealed the extent to which existing legal and political frameworks are struggling to respond to the scale and urgency of the challenge.[5]

International environmental law (IEL) is the main framework for addressing transboundary environmental harm, and to some extent guides the development and implementation of domestic environmental law.[6] IEL has expanded significantly in scope in the last fifty years,[7] and yet alongside this, ecological decline has

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[2] Laura Mai and Emily Webster, 'Introduction' *Transnational and environmental law in the Anthropocene* (Routledge 2021); Anna Grear, 'Anthropocene, Capitalocene, Chthulucene': Re-Encountering Environmental Law and Its "Subject" with Haraway and New Materialism' in Louis Kotze (ed), *Re-Imagining Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017).

[3] Corey JA Bradshaw and others, 'Underestimating the Challenges of Avoiding a Ghastly Future' (2021) 1 Frontiers in Conservation Science 615419.

[4] Jennifer Sills, Gerardo Ceballos and Paul R Ehrlich, 'The Misunderstood Sixth Mass Extinction' (2018) 360 Science 1080; IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2022); Johan Rockström, 'A Safe Operating Space for Humanity' (2009) 461 Nature 472.

[5] Jacqueline Peel and Lavanya Rajamani, *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 28–29.

[6]Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 138.

[7]Peter H Sand, 'Origin and History' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 56.

accelerated.[8] These two realities sit in uneasy opposition and prompt deeper questions about IEL, and specifically whether it can provide an appropriate response to the crises that we face in the present moment.[9]. There is a growing body of scholarship arguing that IEL in its current form is not equipped to address the crises we face and offers various explanation for why this is so.[10] One thread of this scholarship explores concerns around the narrow set of voices that have created and continue to shape IEL. These critiques explore how decision-making within IEL tends to be dominated by those who wield political and economic power, leaving many human communities, and all non-humans, effectively excluded from IEL processes.[11] These exclusions shape which concerns are taken into consideration, how harms are understood and which solutions are considered. Therefore, one of the ways to address the shortcomings of IEL potentially lies in examining and reimagining participation within environmental decision-making. With this mind, this thesis begins by interrogating the historical exclusions of IEL.

1.2. IEL and its limits

1.2.1. Scope and structure

To understand the shortcomings of IEL, it is necessary to delve into how it developed and why this may account for the struggle to deliver the kind of transformation that the current crises demand.[12] IEL is a subsect of international law that seeks to address the harmful impacts of humankind's activity on the environment.[13] Since the 1970s IEL has

[8] Johan Rockström, 'Reflections on the Past and Future of Whole Earth System Science' (2024) 7 Global Sustainability e32.

[9]One example is this article which provides a comprehensive list of resources of this issue: Louis J Kotzé, 'Earth System Law for the Anthropocene: Rethinking Environmental Law alongside the Earth System Metaphor' (2020) 11 Transnational Legal Theory 75.

[10] There is a diverse body of scholarship on this topic, some of which will be explored in greater detail in this research such as Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 Leiden Journal of International Law 573; James Thuo Gathii, 'Twenty Second Annual Grotius Lecture: The Promise of International Law: A Third World View' (2020) 114 American University International Law Review 165; Emily Jones, *Feminist Theory and International Law* (Routledge 2023).

[11] For example Gathii (n 10); Grear (n 2).

[12] This thesis does not attempt a comprehensive review of the body of IEL. Instead, it engages with a selection of instruments as illustrative examples. These instruments are used to expose the broader anthropocentric and Eurocentric biases that underpin the discipline.

[13] Timo Koivurova, *Introduction to International Environmental Law* (1st edn, Routledge 2014) 9.

expanded into a substantial body of law that encompasses treaties[14], principles[15] and institutions.[16] IEL's international scope allows it to do things domestic law cannot such as address global problems[17], regulate activities beyond national borders[18,] and harmonise domestic environmental frameworks[19].

IEL encompasses laws that include binding 'hard' law such as conventions and judicial decisions, that set out obligations states must comply with.[20] An example of this is the UN Convention of the Law of the Sea.[21] 'Soft' law generally refers to commitments found in non-binding instruments such as resolutions, guidelines and standards.[22] Although soft law is not legal enforceable it still has an important role in guiding policy and influencing domestic legislation The Rio Declaration on Environment and Development (1992) is an example of a soft law. This legal architecture is underpinned by a set of key principles, examples of which include the prevention of transboundary harm, the precautionary principle, sustainable development.[23] Together these function as an overarching framework that essentially directs states to balance development with environmental responsibility – some scholars have referred to these principles as the conceptual pillars of IEL.[24] A further feature of IEL is its institutional fragmentation,

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[14] LexisNexis, 'International Environmental Law - overview' *Lexis PSL*, accessed 8 December 2022; an extensive list of treaties can be found here: United Nations, 'United Nations Treaty Collections: Multilateral Treaties Deposited with the Secretary General' https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en accessed 24 November 2022; Usha Natarajan and Julia Dehm, 'Where is the environment? Locating nature in international law' *Third World Approaches to International Law Review*, 17 December 2019 https://twailr.com/where-is-the-environment-locating-nature-in-international-law/ accessed 6 December 2022.

[15] Sands and Peel (n 6).

[16] Mario Prost and Alejandra Camprubí, 'Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice' (2012) 25 Leiden Journal of International Law <https://doi.org/10.1017/S092215651200009X>; Emily Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' [2022] Global Constitutionalism 1.

[17]E.g. air pollution, or climate change David Hunter, 'International Environmental Law' (2021) 19 Insights <https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/>.

[18] Such as whaling - ibid.

[19]For example the Convention on International Trade in Endangered Species (CITES) as detailed in Koivurova (n 13).

[20] Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 1982.

[21] ibid.

[22] Lexis Nexis, 'International Environmental Law - Overview' [2022] Lexis PSL; Christopher C Joyner and George E Little, 'It's Not Nice to Fool Mother Nature- The Mystique of Feminist Approaches to International Environmental Law' (1996) 14 Boston University International Law Journal 223.

[23] Sands and Peel (n 6).

[24] Peel and Rajamani (n 5) 267.

no single international body has responsibility for oversight or enforcement of these environmental laws.[25] While the United Nations General Assembly has established the UN Environment Programme (UNEP) its mandate falls well short of a dedicated supervisory or enforcement role.[26]

1.2.2. Structural critiques of IEL: power, geography and exclusion

Critiques of IEL are central to this thesis because they reveal that many of the discipline's shortcomings are rooted not just in issues such as weak enforcement or fragmentation of law (although these are important), but in deeper questions about power, knowledge and participation within the discipline. Critiques of IEL begin by noting that despite an extensive body of law, environmental degradation continues.[27] Numerous commentators and scholars have concluded that IEL has 'failed to provide the necessary solutions'[28] to the ecological crises we face.[29] Multiple reasons have been identified for the existence of this problem, often by prominent organisations such as the UNEP who addressed this issue in its 2019 *Environmental Rule of Law* report.[30] This report identifies systemic weaknesses throughout IEL such as poor enforcement, uneven power across institutions and regions, and fragmented decision making.[31] While acknowledging that these operational and institutional problems are significant drivers of IEL's current crisis, these findings point to deeper questions about the distribution of power within international law and who can shape environmental outcomes.[32] This thesis therefore, narrows its analytical scope to focus on the discipline's underlying participatory architecture. In principle, international law is a horizontal system where all states engage in the law-making process as sovereign equals. However, the reality is more complex as IEL (as a subsect of international law)

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[25] Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' (n 16).
[26] Resolution 2997 (XXVII) 1972.
[27] Carl Bruch and others, 'Environmental Rule of Law: First Global Report' (2019).
[28] Jones, *Feminist Theory and International Law* (n 10).
[29] Louis J Kotze, 'Earth System Law for the Anthropocene: Rethinking Environmental Law alongside the Earth System Metaphor' (2020) 11 Transnational Legal Theory. is one example that provides a comprehensive list of resources on this issue
[30] Bruch and others (n 27).
[31] It is noted that there is a vast body of literature diagnosing the operational failures of IEL. The scope of this enquiry is strictly confined to how IEL's anthropocentric and Eurocentric legal architecture functions to exclude non-human agencyfrom the spaces where environmental decisions are made.
[32] Tracy-Lynn Humby, 'Evaluating the Value of TWAIL, Environmental Justice and Decolonization Discourses as Framing Lenses for International Environmental Law' (2017) 26 Transnational Law and Contemporary Problems 317.

has been shaped by power asymmetries rooted in colonialism which continue to structure whose interests and perspectives prevail in global governance.[33] The consequence of this is that the Global North has played a dominant role in the creation and implementation of much international law, including IEL, often marginalising the voices and experiences of the Global South and Indigenous communities.[34]

This dominance of the Global North not only impacts the creation of law, but also operates in other, more subtle ways. Ghathii provides examples by explaining how international law is limited in the 'geography of places and ideas that dominate the beltway of our discipline in both our scholarship and practice'.[35] To illustrate this, he highlights how the privileging of the location of certain international courts is significant because it goes to who gets to participate in the creation of law that is recognised as authoritative. International law in locations such as Geneva, New York, Washington DC, Paris, London and The Hague are considered 'key international locales' and the products of this decision making are given significant weight. Whilst international law is produced all over the world, the priority afforded to these particular locales means that jurisprudence produced in the Global South does not receive the same attention.[36] Gathii explains 'it is the privileging and centrality given to certain locales and ideas in the production of very particular types of (governing) international law – against which other less visible locales and ideas are to be measured – that is the problem'.[37] This illustrates that the apparent horizontal structure of IEL obscures deeper structural inequalities, and these shape how IEL develops and limits its responsiveness to the environmental crisis.

1.2.3. Epistemic critiques: Enlightenment legacies

Building on these structural concerns, a further line of critique relates to IEL's intellectual foundations. Many Third World Approaches to International Law (TWAIL)

[33] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).
[34] Sumudu Atapattu, 'Global South Approaches' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021).
[35] Gathii (n 10).
[36] ibid.
[37] ibid.

and feminist scholars[38] argue that modern international law is deeply influenced by Enlightenment reasoning and knowledge production.[39] Enlightenment ideas relating to autonomy and self-determination were important in heralding the beginning of individual rights, and the legal framework that developed consequently is the basis of modern democracy and much Western law.[40] Whilst acknowledging these positive developments, it must also be recognised that Enlightenment epistemology was underpinned by a binary worldview starting with self/other, but extending to, for example, man/ woman, subject/object, nature/culture, and this organisation of society and knowledge production has had a number of detrimental impacts. These binaries organised the world into hierarchies, typically privileging those who most closely resembled the imagined rational subject – a white, European, property-owning male. Everything else was relegated as secondary because it was viewed as being the less desirable half of the dualism. [41] This binary view of the world is particularly relevant when considering the development of environmental law as it has influenced an ordering of the world that persists in international law and IEL today.[42] The nature/culture divide in Enlightenment thinking cast civilised men as aligned with culture and separate from and above nature.[43] Nature was viewed as having no inherent worth. It was only until nature was controlled that it acquired any value.[44] Consequently, in the Global North exerting control over nature was seen as a necessary part of development and 'the capacity for a society to shape and control their environment was understood to indicate [a] level of progress'.[45] For this reason,

[38] This thesis does not attempt a comprehensive review of the extensive literature within TWAIL and feminist jurisprudence critiquing international law. Instead, it draws from literature within these fields that share critique of how Enlightenment binaries have been coded into international law and serve to privilege certain voices.
[39] Marti Kheel, 'The Liberation of Nature: A Circular Affair' in Joesphine Donovan and Carol J Adams (ed), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007); Natarajan and Khoday (n 10); Shamara Shantu Riley, 'Ecology Is a Sistah's Issue Too' in Carol J Adams and Lori Gruen (ed), *Ecofeminism: Feminist intersections with other animals and the Earth* (2nd edn, Bloomsbury 2020).
[40] Kheel (n 40); Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 Journal of Environmental Law 91; john powell and Stephen Menendian, 'Remaking Law: Moving Beyond Enlightenment Jurisprudence' (2010) 54 St. Louis U. L.J. 3.
[41] Riley (n 40).
[42] Louise du Toit and Louis J Kotzé, 'Reimagining International Environmental Law for the Anthropocene: An Earth System Law Perspective' (2022) 11 Earth System Governance 100132.
[43] Kheel (n 40).
[44] Riley (n 40) 93–95.
[45] Natarajan and Khoday (n 10).

this perception of nature became one of the justifications for colonisation.[46] The perceived lack of control of land, through for example consistent agriculture, meant that land occupied by Indigenous people was not considered to be owned or inhabited, it was *terra nullius*, no one's land and so could be claimed by settlers.[47]

The separation of humans from nature, and the casual way the Global North considers nature an infinite resource is evident in early IEL instruments. The 1972 Stockholm Declaration[48] on the Human Environment is often regarded as the first piece of IEL, and it is notable how it addresses nature. The instrument refers to the 'human environment', thereby separating people from nature at the outset. It proceeds in paragraph 5 of the proclamation to set out, '[o]f all things in the world, people are the most precious*'.* The substance of the principles in the Declaration then move to consider how the environment can be protected, but only to support human wellbeing. There is little regard for the environment as being something of worth in and of itself.

It is acknowledged that the language used in IEL has evolved since the 1970s, but concerningly it is not clear that the underlying ideas have progressed. The notion that nature is a resource for humans is intrinsic to the principle of sustainable development, which is a core concept within IEL.[49] Indeed Vinuales asserts that '[s]ustainable development is the main concept underpinning our policy response to the environmental crisis the world faces'.[50] Sustainable development broadly refers to approaches that seek to meet present needs without undermining the environmental, social or economic conditions required by future generations.[51] The concern however, with sustainable development is that it does not seek to foster behavioural change to counter the drive for growth, rather it provides a foil for rampant consumerism.

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[46] Antonio Cardea-Salzmann, 'Global Governance, Sustainability and the Earth System: Criticial Reflections on the Role of Global Law' 437; Glenn Albrecht, 'The Extinction of Rights and the Extantion of Ghehds' (2021) 29 Griffith Law Review 1 <https://doi.org/10.1080/10383441.2020.1878596>; Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 Leiden Journal of International Law 621 <https://doi.org/10.1017/S0922156514000235>; Anne Salmond, *Tears of Rangi: Experiments Across Worlds* (Auckland University Press 2017) 305.

[47] Natarajan and Khoday (n 10); Mickelson (n 47); Salmond (n 47) 305.

[48] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 1972.

[49] Such as 'Paris Agreement to the United Nations Framework Convention on Climate Change'; Rio Declaration on Environment and Development 1992.; Bosire Maragia, 'The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That Is Needed?' (2006) 18 Georgetown International Environmental Law Review 197.

[50] Jorge E Vinuales, 'Sustainable Development' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 285.

[51] United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1'.

Cardesa-Salzmann and Cocciolo explain that '…sustainable development discourse actually legitimizes business as usual… specific regulatory approaches in the climate change and biodiversity regimes have opened new perspectives for development through the financialization of natural resources. In so doing … the sustainable development narrative deliberately conceals the enduring adverse impact that development has on the natural world'.[52] This critique brings to light how at the core of sustainable development is the notion that the natural world exists to sustain humans and that provided we continue to ensure humans will be protected, we can continue to plunder the natural world as much as we want. It is a deeply anthropocentric approach.

Viewed through this lens, the inability to respond effectively to the environmental crisis is a predictable consequence of its origins. As a legal system founded largely on anthropocentric and Eurocentric views, IEL often reproduces the very ideologies that have driven ecological decline. [53] This exposes both the depth and extent of the challenge faced. It is not simply that laws are not being enforced, but that there is a failure of IEL's foundational logic. The bias towards a Eurocentric approach has fostered a deep and understandable ambivalence across much of the Global South towards the content of these laws and the assumptions they carry with them.[54] This body of scholarship draws attention to the processes through which IEL is created, processes that determine whose knowledge counts and whose interests are represented. These assumptions also mean that non-humans remain largely outside the frame of participation and legal consideration.

1.3. Participation as a response to IEL's shortcomings and the lens through which to expose them

Given these foundational failings, participation[55] offers a critical vantage point from which to evaluate and potentially transform IEL. The unresponsiveness of IEL can be attributed, in significant part, to exclusionary nature of its participatory processes. As

[52] Cardea-Salzmann (n 47).
[53] Atapattu (n 35) 183–199; Rowena Maguire, 'Feminist Approaches' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 200–216.
[54] Atapattu (n 35).
[55] This thesis adopts a wide definition of 'participation' and approaches participation by looking at what power actors have to actively shape how environmental matters are understood, written, decided upon and applied.

indicated above, these processes tend to favour state-centric interests and Western knowledge systems, while marginalising the lived experiences of multispecies communities.[56] By prioritising specific forms of knowledge and interests, current frameworks dictate whose voices are considered credible and whose injuries are recognised as harm. This hierarchy has a direct bearing on the legitimacy of decisions and the implementation and enforcement of them. Conversely, more inclusive participation can surface alternative knowledges, expose systemic blind spots in current approaches. Participation therefore emerges as an important pathway to address the persistent challenges within IEL. Participation is important not merely as a procedural right, but as a tool to reimagine a more responsive IEL. Yet, as it stands, participation within IEL still remains constrained through its processes and the anthropocentric and Eurocentric assumptions that underlie it.

In response to this, a growing body of work has begun to question not only which human communities participate in environmental governance, but also whether non-humans should be included. Scholarship on non-human participation is growing across different disciplines such as posthumanism[57], animal law[58] and politics[59] to name a few.[60] This work explores how current frameworks ignore the agency and interests of non-humans and explores expanding participation to include non-human animals, ecosystems and other entities affected by environmental decision making. Alongside this conceptual scholarship there have also been practical experiments in "giving voice" to non-humans, often outside of formal legal structures. For example,

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[56] For a broad discussion on how procedural frameworks can marginalise non-Western forms of knowledge, see Duncan Ivison, *Can Liberal States Accomodate Indigenous Peoples?* (Polity 2020); Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality*, vol 1 (Berghahn Books 2005) 1–7; Sumudu Atapattu, 'Global South Approaches' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 183–199; on the exclusion of the more-than-human see Peter Burdon, 'The Great Jurispridence' in Peter Burdon (ed), *Exploring Wild Law* (Wakefield Press 2011) 59–69.

[57] For example Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory* (University of Chicago Press 2003).

[58] For example VAJ Kurki and P Siemieniec, 'Towards An Agency Turn in Animal Law' (2025) 45 Oxford Journal of Legal Studies 923.

[59] For example Eva Meijer, *When Animals Speak: Towards an Interspecies Democracy* (New York University Press 2019).

[60] This thesis intersects with Rights of Nature (RoN) literature, however it must be noted that the scope of this thesis is narrower and distinct. This thesis focusses on the procedural architecture of participation. It does not argue for rights in contrast with RoN. It investigates the barriers to non-humans being 'heard' within institutional processes in IEL.

there are several emerging social and artistic initiatives, such as MOTH[61], the Interspecies Council[62] and Nature on the Board[63], that experiment with ways of including non-human voices. This work is extremely valuable as it explores why multispecies participation matters and offers a glimpse of how it might be enacted in practice.

What is underdeveloped is empirical or analytical work examining efforts to involve non-human participants within existing legal participatory frameworks and an analysis of what might be learned from these efforts. We know relatively little about how non-human perspectives might be accommodated within legal systems, what institutional barriers arise, and what can be learned from processes that have attempted to do so. The gap that this thesis seeks to fill therefore is not in making the case for multispecies participation as much of this work has already been done, although it is acknowledged that it not necessarily mainstream. While practical experiments are underway outside of formal law, they risk remaining peripheral if the underlying legal architecture remains unchanged. This where the importance of this research lies. If legal systems do not evolve to recognise non-humans, even the most innovative external solution will remain on the sidelines of environmental governance.

This thesis does not attempt to describe what multispecies participation ought to look like. This would risk reinscribing the anthropocentrism this work seeks to unsettle, the position of the author is that multispecies participation must instead be co-created. The contribution therefore is in developing an approach that can support this co-creation within legal settings. This thesis produces a diagnostic and generative scaffold (the toolkit) that can assist efforts to open legal systems up to non-human perspectives and dismantle procedural barriers that currently ensure their exclusion. To achieve this, this thesis moves beyond critique to offer a practical proof of concept. This requires significant groundwork: first, tracing the historical and structural forces that have shaped IEL to understand how it operates to exclude certain perspectives; and second, to build a methodological framework that can surface these exclusions.

[61] NYU Law, 'The More-Than-Human Life (MOTH)' <https://mothlife.org/> accessed 22 February 2026.
[62] Pheobe Tickell, 'The Interspecies Council' (2021) <https://www.moralimaginations.com/interspecies-council> accessed 22 February 2026.
[63] Nature on the Board <https://www.natureontheboard.com/>.

By then applying the toolkit to the Whanganui River case study, the research investigates whether Western legal systems can be made porous to other worldviews.

It is with this focus in mind, that the following research questions have been framed.

1.4. Research questions

This thesis investigates whether, and in what ways, IEL could be strengthened to more effectively address the environmental crisis by rethinking participation through a multispecies lens. It argues that IEL's inability to respond effectively to ecological degradation is a consequence of its Eurocentric and anthropocentric participatory framework, which marginalises non-human participation. The overarching research question of this research is:

How can the participatory architecture of IEL be reimagined through a multispecies framework to increase the discipline's effectiveness in addressing the environmental crises?

Four sub questions assist in responding to this concern:

1. The Institutional Barrier: Why does IEL currently fail to respond to environmental crises, and how do its Eurocentric and anthropocentric foundations specifically block non-human participation?

2. The Diagnostic Tool: How might a multidimensional methodology be used to develop a 'multispecies toolkit' that can reveal how and why the law fails to recognise the non-human world?

3. The Case Study: What does a critical analysis of the Whanganui River Case using the multispecies toolkit, alongside archival and longitudinal research, reveal about the friction which is a consequence of recognising the River as a living, ancestral being (*Te Awa Tupua*) within a Western legal system?

4. Transformation: The New Zealand domestic system and international frameworks share a foundational anthropocentric and Eurocentric bias. How can the insights from the multispecies toolkit and the findings from the Whanganui case study, be used by scholars and practitioners to ensure that

participation functions as a transformative practice rather than symbolic procedural reform?

1.5. Contribution

The central contribution of this thesis is the development of a multispecies[64] participation toolkit. The multispecies toolkit is an analytical framework designed to move participation beyond traditional, human centred procedural rules. The toolkit is concerned with ensuring that the non-human is approached not just as an object of the law, but as an active participant with interests that the legal system must learn to recognise.

This toolkit performs two complementary and transformative functions:

(1) Diagnostic function: It enables a critical examination of how the procedural architecture of IEL influences who can participate, how, and on what terms. The toolkit aids in surfacing ethical, political and epistemic assumptions that shape participation.

(2) Generative function: The toolkit offers a set of principles to guide participatory processes in ways that create conceptual and physical space within legal processes for innovative approaches. The toolkit does not prescribe a single method, rather it details conditions and concepts that can assist to foster diverse forms of participation within environmental governance.

1.6. Outline of this thesis

This thesis adopts an interdisciplinary approach combining doctrinal analysis with critical scholarship that draws from such disciplines as ecofeminism and posthumanism (amongst others). It further grounds this analysis in Critical Legal Theory, such as TWAIL. The analysis spans a range of primary legal materials such as judicial decisions and legislative materials relating to the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Alongside this the research engages with a range of literature on participation and multispecies justice. The Whanganui River serves as a case study through which to explore the possibilities and limits of multispecies participation within existing legal frameworks. The case study is explored through the lens of a multispecies participation toolkit. This toolkit allows the case study to connect

[64] Multispecies in this research refers to non-humans such as animals, rivers, and ecosystems

theoretical ideas about participation with an existing example to understand the limits, and possibilities, for multispecies participation within legal frameworks.

The sections that follow summarise the focus of each chapter.

1.6.1. Chapter 2 : Methodological Foundations and Participation in IEL

Chapter 2 establishes the initial theoretical and methodological foundation for the thesis. It starts with consideration of intersectionality as a methodology, outlining its value in identifying how power structures intersect to marginalise certain groups. The chapter then moves to expand the methodology to develop a multidimensional approach. This is done in order address critiques of intersectionality and respond to scholarship that demonstrates how power is produced, reproduced and layered across social, political and legal contexts. The chapter argues that this approach is especially suited to analysing participation within IEL because the patterns of exclusion are shaped and layered through historical and structural dynamics that are based in Enlightenment thought and IEL's Eurocentric foundation.[65] It then turns to the concept of participation itself. It traces the evolution of participatory thought from Aristotle to contemporary theories of participatory democracy. It identifies certain key elements such as control, motivation, scope, venue and accountability that shape participatory processes, and examines the interplay between process and outcome.[66] The themes emerging from this examination form the basis of the analytical lens that will be used to examine participation in legal contexts in later chapters.

Chapter 2 then maps the development of participation within IEL from the Stockholm Conference in 1972, through to the Rio Earth Summit in 1992, and the Aarhus Convention of 1998. By applying the analytical lens noted above, this summary provides insight into how participatory processes within IEL have been shaped by established institutional practices that emphasise formal procedures and limited

[65] While Chapter 2 uses intersectionality, its scope is limited to drawing on the core idea relating to how multiple layers of oppression operate to exclude certain groups or individuals. It does not seek to intervene in the human-centered intersectional debates.

[66] There is a vast body of literature relating to participation. This thesis focussed on three interconnected fields: environmental decision making, development studies and participatory design. The reason for this is that: (1) environmental decision making provides immediate context to how participation is currently structured; (2) development studies offers insights (often from the Global South) into how formal participation can inadvertently reinforce power asymmetries; and (3) participatory design provides insight into how to approach participatory processes.

conceptions of who counts as a participant. It then moves to consider efforts to address the barriers that IEL poses for non-human participants with a focus on reform movements such as Rights of Nature and Global Animal Law. It argues that while both contribute meaningfully to rethinking environmental governance, they have distinct limitations and for this reason cannot alone address IEL's shortcomings.[67]

Drawing from best practice in human participatory process in environmental decision-making, the chapter builds on the key elements noted above (control, motivation, scope, venue etc) and expands these into seven core principles. These principles set out what effective and meaningful participation requires and highlights how decision-making processes can be improved for groups whose voices have often been overlooked. This chapter however acknowledges that the framework is incomplete, and serves as the scaffold for Chapter 3, where the seven core principles are reinterpreted through a multispecies lens.

1.6.2. Chapter 3 - Developing the Multispecies Participation Toolkit

Chapter 3 builds directly on the seven core principles in Chapter 2 to construct the multispecies participation toolkit. This reworking transforms the principles into a framework that supports more inclusive environmental governance. It does this in two steps: (1) by examining how non-human participation is currently constrained by dominant political and legal thought; and (2) by developing an ethical and practical framework that can guide more inclusive participatory processes. The chapter begins by tracing the barriers of logos – the historical insistence that reason and language should determine who is recognised as a political actor. It then evaluates sentience as the dominant modern threshold for determining the moral and legal considerability. The chapter unpacks the limitations of sentience based framework arguing that they often function to reinscribe anthropocentric qualities as the focus of concern.

Building on debates associated with the 'political turn' in animal ethics, the chapter considers arguments that political participation requires more complex forms of sentience and that the only appropriate way to protect sentient non-human interests

[67] The primary focus of this research is the development and application of the multispecies participation toolkit. For this reason, the engagement with RoN and GLA is limited. These frameworks are briefly examined to highlight their limitations to, illustrate how the toolkit can expand and complement these areas.

is through representative models. The chapter examines representative models and offers a critique of representation that draws on disability and children's rights scholarship, as well as work on epistemic justice. The section argues that representation easily reproduces domination, relies on arbitrary thresholds and often renders non-human voices invisible. This leads to a broader argument around what constitutes agency and political action and consideration of whether the broader barriers to participation do not lie with non-human capacities (or their supposed lack thereof), but rather that current political and legal systems were never designed to perceive or accommodate non-human agency.

The second half of the chapter builds directly on the seven core principles established in Chapter 2 to produce the multispecies participation toolkit. Chapter 3 subjects these core principles to radical redevelopment. The chapter first develops a relational ethical foundation for multispecies participation establishing the basis on which the threshold for inclusion is drawn. This framework moves away from restrictive thresholds like sentience and reinterprets the dimensions of the toolkit through a multispecies lens: good faith is reframed as an attitude of openness, humility and 'standing under' other ways of knowing; stakeholder identification is expanded through precautionary and relational approaches that treat non-humans and multispecies communities as potential participants; objectives are recast away from consensus towards 'staying with the trouble' and creating space to question the 'sensible givens' of a situation; and influence, learning and context are combined into an emphasis on listening as an embodied, place-based and ongoing practice that unfolds across different temporalities.

The chapter concludes by presenting the multispecies participation toolkit as both diagnostic and generative. It outlines how the toolkit can be used to reveal how existing processes exclude or constrain non-human voices, and it guides the design of more inclusive participatory practices. This toolkit then provides the structure for the analysis in Chapter 4, where it is applied to the Whanganui River Case.

1.6.3. Chapter 4 - Applying the Toolkit: The Whanganui River Case Study

Chapter 4 applies the multispecies participation toolkit to a detailed case study of the Whanganui River in Aotearoa New Zealand. The chapter begins by outlining the

rationale for the case study approach. Although IEL contains several non-binding declarations that lean towards ecocentrism, they provide little procedural guidance on how non-human perspectives might be operationalised. The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 presents one of the clearest attempts within a Western legal system to recognise a non-human as a legal subject. Crucially, the Whanganui case is chosen not merely as a success story of legal personhood, but rather because of what the Power struggle revealed. The case study encompasses 150-year dispute across multiple legal and political arenas, because of this it provides a unique site to consider how Māori relational world views intersect with the Western legal process. By tracing this long arc of transformation, the chapter uses the River Case to reveal the practical possibilities and the limits of multi-species participation.

The chapter situates the River's legal history within its broader cultural and political context. This provides the necessary grounding to understand why Whanganui iwi consistently held that the River is an ancestor and an indivisible whole, and how the imposition of English common law and colonial structures disrupted these relationships. The section then applies the multidimensional methodology developed earlier in the thesis to create a chronology of the River dispute. The reason for this approach is to take account of how power shapes what can be said, recorded and recognised within legal contexts. Hence the chronology seeks to gain a rounded understanding of what was occurring at the time by drawing on Indigenous and decolonial critiques of archives, and incorporating diverse sources including oral histories, government records, court files and academic commentary.

The second half of the chapter applies the multispecies participation toolkit to assess the three main phases of the River dispute within its specific phase in the chronology: early litigation, the Tribunal hearings, and the negotiation and legislative process. Each phase is analysed through the toolkit's core dimensions: good faith, stakeholder selection, timing, objectives, context and place, and multidirectional learning. The analysis shows that while participation expanded over time, significant constraints persisted. Taken together, the case study reveals how participatory processes are designed and conducted profoundly shapes whose perspectives can be heard and influences the outcomes of the process. It demonstrates both the constraints of existing legal frameworks and the possibilities for reimagining participation in ways that better accommodate multispecies relations. The chapter concludes that while the

Whanganui River settlement is jurisdictionally and culturally contingent, it provides crucial insights into the conditions that allow non-human concerns to gain visibility. It also illustrates how the multispecies participation toolkit can be used as both a diagnostic and generative tool for legal reform.

1.6.4. Chapter 5 - Analysis

The final analysis considers how legal systems might evolve to accommodate non-human participation. The chapter begins by reflecting on the toolkit itself and acknowledging the toolkit's limitations. The chapter then uses the findings from the application of the toolkit to reflect on the Whanganui River Case. It cautions against romanticising the legislation or viewing it as a final model for multispecies participation. In line with this caution there is a recognition that the settlement remains deeply anthropocentric and the River's 'voice' is still mediated through human representatives. However, the chapter also makes the point that the value of the Whanganui case does not lie in its final form, but in the 150-year arc of transformation that made the legislation possible. It highlights how the flaws and compromises in this case expose the structural constraints of existing frameworks, and how given the right conditions more ambitious forms of participation may emerge

The chapter explores why meaningful inclusion of non-human perspectives within legal systems has been a slow and difficult process. Drawing on posthumanist legal theory, particularly the work of Wolfe this section unpacks how legal systems only evolve by confronting their own limits. In essence the law only responds to what it already knows how to see, and because legal systems are built around human interests they struggle to 'see' non-humans. The law can only change when its basic assumptions are questioned. Wolfe considers that to fully include non-humans within our systems; we first must rethink how the law understands humans and the place they occupy in the system. These insights help to explain why early phases of the River Case centred human grievances – it was not a lack of Māori concern for the River, but rather that the legal system could not 'see' the River in any other way than as a property or resource.

A further set of reflections examines how legal frameworks shape participation. The case study highlights how statutory design, objectives and motivating ideals influence who can participate and how/whether their perspectives are recognised. By examining

the evolution of participation in the case study the analysis shows how participatory design influences outcomes. The chapter concludes by reiterating that the Whanganui settlement isn't a template for how IEL should expand or transform, but it does function as a proof of concept. It shows how legal systems shaped by Western thought can evolve to centre relational understanding of the environment. It also shows how participation can serve as a powerful way to generate this change.

1.7. Chapter 6 Conclusion

Chapter 6 synthesises the thesis findings to demonstrate how IEL remains structurally constrained by anthropocentric and Eurocentric assumptions that limit meaningful multispecies participation. It presents the multispecies participation toolkit as both a diagnostic and generative device for interrogating participatory design. Through the Whanganui River case, the chapter demonstrates that legal transformation depends not only on formal recognition, but on the restructuring of participatory architecture. It concludes by outlining the toolkit's practical implications for IEL scholars and practitioners, acknowledging the limits of current legal frameworks, and arguing that meaningful ecological governance requires an ongoing relational reorientation of participation rather than isolated procedural reform.

1.8. Conclusion

This thesis argues that the limitations of IEL are not only institutional but structural. This reflects deeper assumptions within IEL that affect participation and legal recognition. By developing and applying a multispecies participation toolkit, the research demonstrates how these constraints operate and how they might be identified and challenged in practice. The next chapter therefore sets out the theoretical framework for the thesis by examining intersectionality, multidimensionality, and the meaning of participation in environmental governance.

2. Chapter 2 – Developing a Multispecies Participation Toolkit: Setting the Foundation

2.1. Introduction

This chapter develops the concepts and methods that provide the foundation for a multispecies participation toolkit. There are five parts to this. First the chapter introduces an intersectional and multidimensional lens for analysing who or what is included or excluded from participatory processes, and why. Second, it traces the evolution of participation in IEL, identifying its achievements and its limits and highlights the anthropocentric nature of this branch of law which provides the justification for a multispecies participation toolkit. Third, the chapter canvasses key insights from participation literature and distils ideas from this into a framework that helps to identify key aspects of participatory approaches. Fourth, it situates this work alongside adjacent reform movements, specifically Rights of Nature (RoN) and Global Animal Law (GAL), to show the broader call for reimagining/reforming law and, to an extent, legal participation. Finally, it draws on scholarship addressing best practice in human participation to develop a novel framework for multispecies inclusive environmental decision-making. This section provides the foundation for extending participation beyond humans that is developed in Chapter 3.

2.2. Analytical Framework: From Intersectionality to Multidimensionality

2.2.1. What is intersectionality?

Intersectionality theory is concerned with understanding oppression.[68] It does this by identifying power structures and providing perspective as to how these structures can overlap and intersect to marginalise individuals or groups based on characteristics such as gender, class or race.[69] Intersectionality theory is valuable in helping to deconstruct the complex reasons why some groups or individuals are marginalised and how this occurs. As Bennet notes, intersectionality allows us to 'follow the trail of

[68] Although it is recognised that there is 'tremendous heterogeneity that currently characterizes how people understand and use intersectionality' - Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity P 2016) 16.
[69] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 140 The University of Chicago Legal Forum 139.

human power to expose social hegemonies'.[70] It is a powerful methodological approach that allows researchers to understand the roots of inequality and to use the insights thus gained to develop more effective strategies to implement change.

The term 'intersectionality' was coined[71] by Kimberlé Crenshaw in the late 1980s. Crenshaw outlined how black women are the subjects of intersecting oppressions - that of race and gender.[72] She detailed how race and sex were often treated as distinct, mutually exclusive categories in feminist theory and antiracist policy discourse. This meant that black women's diverse experiences of oppression were only provided with a partial remedy in law based in an action either for sexism or racism, but not the two combined.[73] However, Collins and Bilge argue that intersectionality has much deeper and longstanding roots than is often recognised.[74] They explain how intersectionality core concepts were forged in activism in the 1960s and 1970s where women of colour found themselves in 'conversation/tension with the civil rights, Black power, Chicano liberation, red Power and Asian-American movements'.[75] Early statements of intersectionality can be found in texts such as the Combahee River Collective Statement. This text was important in illustrating that intersectionality focuses on systemic, interlocking oppressions such as racism, patriarchy and capitalism.[76] Crucially these approaches were not isolated to African-American women, which highlights an important point for the use of intersectionality in this thesis. Intersectionality is fundamentally concerned challenging the dominant ontology of Western thought. The focus of this thesis is not Western law within particular geographic locations, but rather the Western ideologies that underlie and persist within international law. For this reason this powerful form of analysis has been adopted and extended to a wide range of movements beyond those concerned with race and sex discrimination.[77] Of significance for those working on environmental matters, is how

[70] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press 2010) vii–xv.
[71] Whilst Crenshaw coined the term there were movements that preceded her paper that adopted or developed an intersectional approach. For more on this see the discussion at p17 and chapter 3 about the history of intersectionality in Hill Collins and Bilge (n 69).
[72] Crenshaw (n 70).
[73] Also see Darren Lenard Hutchinson, 'Identity Crisis: "Intersectionality", "Multidimensionality", and the Development of an Adequate Theory of Subordination' (2001) 6 Michigan Journal of Race and Law 285, 301.
[74] Hill Collins and Bilge (n 69) ch 3.
[75] ibid 69.
[76] ibid.
[77] 'The intersectionality scholarship has inspired helpful analyses in areas outside of the contexts of feminism and antiracism. Lesbian feminists, gays and lesbians of colour, and other scholars have utilized the intersectional

intersectionality has become a crucial element of environmental activism in disciplines such as ecofeminism.[78] Adams and Gruen detail how ecofeminists and Black feminists use intersectionality to identify and examine power structures and the ideologies that underpin them to 'understand the complexity of overlapping oppression'.[79] As Lee explains this is demonstrated by how '…ecofeminists are committed to exposing systemic and structural sources of discrimination as an underlying cause of gendered and other forms of oppression, including on the grounds of race, class and species'.[80] However, while acknowledging the importance of intersectionality as a methodological tool, it is necessary to consider its limitations. The next section unpacks these concerns.[81]

2.2.2. Critiques of intersectionality

As indicated although intersectionality provides a good starting point from which to consider and understand the roots of oppression, the approach has drawbacks. Ko provides a compelling critique of these shortcomings. Specifically, Ko considers how intersectionality does not always account for the fact that multiple oppressions exists in ways that do not necessarily intersect. She explains that intersectionality can be '…seductive because it takes seemingly disparate oppressions and forces them into the same conversational space...'.[82] Ko's concern is that if we do not attend to nuance in understanding how oppressions arise this oversight can lead to the perception that all oppressions are connected. What follows from this is the idea that struggles against oppression should therefore also all be connected.[83] The concern is not that intersectionality recognises multiple forms of oppression, but that it is sometimes deployed in ways that assume these oppressions can be, and should be, addressed simultaneously through the same efforts and approaches. This is demonstrated in, for example, the work of jones, citing Lloyd Paige who explains that intersectionality is foundational to addressing oppression because '…all social inequities are linked' and

model in order to counter essentialism in feminism, law, and sexuality, critical race theory and poverty studies' - Hutchinson (n 74) 309.

[78] Carol J Adams and Lori Gruen, 'Ecofeminist Footings' in Carol J Adams and Lori Gruen (eds), *Ecofeminism: Feminist Intersections with Other Animals and the Earth* (Bloomsbury Academic 2022) 25.

[79] ibid. 25

[80] Angela Lee, 'The Milkmaid's Tale: Veganism, Feminism and Dystopian Food Futures' (2019) 40 Windsor Review of Legal and Social Studies.

[81] Hutchinson (n 74) 310.

[82] Aph Ko, *Racism as Zoological Witchcraft: A Guide to Getting Out* (Lantern Books 2019) 97.

[83] Ko (n 83).

systemic change will only happen if we understand this and work to address all inequalities, '…not just our favourite ones, or ones that most directly affect our part of the universe'.[84] Whilst the sentiment that all inequality should be addressed is sound, the concern expressed by Ko is that without sufficient attention to how oppression arises in distinct contexts, intersectionality can create forms of solidarity and resistance that flatten how power operates across different axes.

To explain her position Ko builds on earlier scholarship from Hutchinson in arguing that a simple application of intersectionality can be limiting.[85] For instance, in the case of racial profiling of Black men, an intersectional framework might struggle to account for the specific vulnerability of Black men because it assumes gender is inherently privileged and race is inherently oppressive. This obscures how the 'racialisation of masculinity' can produce unique forms of oppression. Ko explains that '[i]ntersectionality doesn't account for the messiness of race and gender'. That is very different from saying race *can* intersect with gender'.[86] Drawing on decolonial scholars, she suggests 'that race and gender *constitute one another* rather than intersect and this produces entirely new analyses that go above and beyond intersectional discourse'.[87] Ko explains the risk in failing to understand how oppression arises, is that '[i]f we don't see the full picture of our oppression, then our activism will be missing crucial parts and perspectives, with direct consequences for how we organize for our own liberation'[88]. Ko's argument that every analysis of power structures benefits from being nuanced and adaptable is compelling. What this means is that it is an approach that treats power as context specific and variable. To understand power, it is essential to be aware that how it emerges and shifts, is dependent on context. For this reason, the intersectional methodology adopted in this research has been expanded to include multidimensionality.

[84] patrice jones, 'Afterword: Liberation as Connection and the Decolonization of Desire' in A Breeze Harper (ed), *Sistah Vegan* (Lantern Books 2010) 194.
[85] Hutchinson (n 74).
[86] Ko (n 83).
[87] ibid 105.
[88] ibid 1316.

2.2.3. Multidimensionality

Hutchinson describes multidimensionality[89] as,

> …a framework that guides analysis of patterns and interactions between complex hierarchal systems and the social identity categories around which social power and disempowerment are distributed. [90]

One of the strengths of multidimensionality is that it takes forward a core idea from intersectionality - that oppression cannot be effectively considered and addressed in silos. Crucially, however, multidimensionality does not rest on the assumption that oppressions always intersect. Rather, as Ko suggests, oppressions are often layered but not always connected and this has an impact on how oppressions are understood and addressed. A multidimensional approach encourages an awareness of the broader systems in which a particular struggle sits. Mutua, for example, writes about how a multidimensional application requires a 'thick' description, being a 'detailed and relatively comprehensive' description of the context within which these systems arise, and an understanding and/or experience of how they operate in practice.[91] This methodology draws on Geertz's distinction between 'thick' and 'thin' description. A 'thin' description tends to reflect a superficial approach or act, a 'thick' description provides a rich, contextual account that has regard to broad contextual issues such as social and historical matters. [92] For this research a 'thick' lens helps to gain insight into the deeper social and legal constructs that impact on power structures.

2.2.4. Application of multidimensionality to the more-than-human/ environment analysis

This insistence on a thick description is valuable in the consideration of non-human subjects, particularly having regard to Ko's comments on co-constitution. As ko argues, identities are not the sum of separate parts, identity is formed through how systems overlap. Under this view, black womanhood should not be reduced to the

[89] It is acknowledged that the form of multidimensionality that is adopted here does not reject, or seek to replace intersectionality, rather it is drawn on to expand it.
[90] Hutchinson (n 74).
[91] Athena Matua, 'Multidimensionality Is to Masculinities What Intersectionality Is to Feminism' (2013) 13 Nevada Law Journal 341, 352–354.
[92] The terms 'thick' and 'thin' draws on the work of Clifford Geertz and can broadly be described as a thick description proves a rich, contextual account, whereas a thin description is superficial and does not have regard to contextual matters - Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' *The Interpretation of Cultures* (Basic Books 1973).

simple addition of gender and race. Regard should be given to the fact that it is a unique identity that has been created within a broader historical, social and legal framework. In the same way this approach can also help to better understand the non-human world. For example, the Whanganui River is not just a river and a story - it is also constituted through its place, its course, the people of the River, and its legal status. Part of this includes considering why the River has been treated the way it has, and whose concerns about it have been prioritised. For example, Māori views of the River and its history were often relegated to 'myth', which limited the weight they were afforded in legal processes.[93]

This same approach can be applied to IEL. IEL has been constituted by dominant knowledge systems, such as Western science and state-centric governance, which shape who counts as a participant and whose knowledge is marginalised. Here, Ko's concept of co-constitution is instructive, because she points out that identity is brought into being through the way systems categorise or treat certain beings or concepts. Therefore, the way in which IEL treats individuals or groups determines their value within the system – for example, if IEL does not consider non-humans as legitimate legal participants, it reinforces and reproduces the system's anthropocentric logic. The co-constituting nature of these systems is not necessarily inherently good or bad, but it is important to recognise that it is not neutral.

2.2.5. The use of multidimensionality to understand oppression

Whilst as noted above, co-constitution is not in itself good or evil, there are undoubtedly instances where it can entrench harm, and a multidimensional approach can expose how overlapping systems of power produce and sustain these harms. As far as non-humans are concerned, the example of domesticated pigs illustrates how their continued exploitation is shaped through the overlapping forces of speciesism, capitalism and patriarchy. Speciesism normalises pigs' exploitation[94], capitalism builds

[93] Salmond (n 47) 247–248; 307–313.

[94] See for instance section 4 of the Animal Welfare Act 2006 (England and Wales) that permits animals protected by the Act to be inflicted with suffering provided it is deemed to be 'necessary'. The Welfare of Farmed Animals (England) Regulations 2007 provides that necessary (legal) suffering includes the use of farrowing crates (Part 4, section 23-26); that piglets may have their teeth clipped and tails docked (Part 6, section 41) and according to Paragraph 5 and 6 of Schedule 3 to the Mutilations (Permitted Procedures) (England) Regulations 2007 – these mutilations are considered 'necessary suffering' because piglets in confined, barren and stressed conditions may bite each other's or their own tails and cause injuries. These injuries are induced because of the conditions the

on this by commodifying pigs as units of production[95], and patriarchal logics of reproductive control[96] intensify this exploitation through practices such as forced impregnation and confinement of sows. Welfare legislation, such as the UK's Animal Welfare (Sentience) Act 2022, appears to challenge these logics by recognising pigs as sentient and therefore entitled to 'due regard'[97], yet the legislative framework reinforces these logics by leaving their status as property intact. The contradiction that pigs are both recognised as capable of suffering and treated as disposable property, is resolved in favour of ownership and profit. On a multidimensional reading, these systems reinforce one another: speciesism makes commodification thinkable, capitalism entrenches property logic, patriarchal control sustains production, and law legitimises the whole arrangement by subordinating welfare to property. Together, they demonstrate how these oppressions are layered and how they persist despite surface-level contradictions. Recognising how co-constitution works to sustain oppression leads to the question of how this oppression is addressed or, for the purposes of this research, whether the legal tools available can provide an adequate response. Seeing rights as a solution to this dilemma, however, needs to be viewed with caution.

2.2.6. The problem of seeing rights as the solution

The default Western response to addressing exclusion or oppression is through the conferral of rights. Yet, rights discourse is not neutral, it is steeped in Enlightenment

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pigs are kept in, and the mutilations are required to facilitate the producers' wish to keep pigs in these conditions for economic reasons.

[95] See for example The Welfare of Farmed Animals (England) Regulations 2007, Schedule 8, Section6(1) that provides, 'The dimensions of any stall or pen used for holding individual pigs must be such that the internal area is not less than the square of the length of the pig, and no internal side is less than 75% of the length of the pig, the length of the pig in each case being measured from the tip of its snout to the base of its tail while it is standing with its back straight'. In practice this means a legal pen must be just wide enough for a pig to stand, just long enough to lie down, but there is no space to walk, turn comfortably, nor are there separate areas for resting, toileting or rooting. These specifications, ostensibly there to protect animals' welfare, ensure they are regarded as units of production.

[96] Patriarchal logics further exploit female pigs by organising their bodies and their value around reproductive control and reproductive capacity. Sows are artificially impregnated irrespective of whether this may cause suffering or injury (see Paragraph 28 and 29 of Schedule 1 to the Welfare of Farmed Animals (England) Regulations 2007), forced to give birth to litters from which they are painfully separated (farrowing crates), have their litter weaned and removed from them (see part 5, Schedule 8 of the Welfare of Farmed Animals (England) Regulations 2007), and are forced to continue the cycle again and again until they are deemed insufficiently productive and are killed. As kemmerer explains, in patriarchal societies 'devalued individuals' such as women, non-white racialised minorities, nature, nonhuman animals (and so on) 'are viewed as a means to the ends of the dominant group' - lisa kemmerer, 'Introduction' in lisa kemmerer (ed), *sister species: women, animals and social justice* (University of Illinois Press 2011) 12–13.

[97] Section 2 Animal Welfare (Sentience) Act 2022}

philosophy which is based on 'hierarchically organized binaries'.[98] This approach tends to universalise experience and provide a one size fits all response to divergent circumstances and problems. The concern with the continued use of rights-based approaches is that they may reproduce, or legitimise, the underlying logics of the very problems rights are seeking to address. For example, the extension of rights to marginalised groups may secure some protection in law, but it leaves intact the social, economic and political structures that produced the exclusion in the first place. Equal rights do not necessarily translate into equal power, but the existence of these rights gives legitimacy to existing structures that are then seen to be fair, when in practice they have not altered the status quo. Himonga writes about this in the context of women's rights and customary law in Southern Africa and notes,

> …these interventions may create an illusion in the minds of the relevant government officials and members of civil society that they have achieved the goal of protecting women's rights… in reality, women's lives have remained much the same as before the interventions… it has been observed that the "model of state generated rights has been tried and found wanting for too long…"[99]

Himonga goes on to explain that the conferral of these rights has not worked because the rights are 'predicated upon decontextualization and the severance of women from their contexts when in fact the aim should be "to find ways to strengthen women's positions within existing contexts"'.[100]

What then of animal rights? Do the same structural issues arise in a multispecies context? As Fasel and Butler outline, modern legal theory predominantly relies on an 'interest-based' approach to rights to argue for non-human protections.[101] Under this framework, rights exist fundamentally to protect and promote the well-being of a rights-holder. Because sentient animals possess significant interests (such as the avoidance of pain), they are considered fit to hold legal rights. Fasel and Butler highlight that

[98] Danielle Celermajer and others, 'Multispecies Justice: Theories, Challenges, and a Research Agenda for Environmental Politics' 119 119.
[99] Chuma Himonga, 'Constitutional Rights of Women under Customary Law in Southern Africa' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012) 325.
[100] ibid 325–326.
[101] Raffael N Fasel and Sean C Butler, *Animal Rights Law* (Hart 2023) 105.

many jurisdictions already grant animals a form of passive, 'thin' legal rights through anti-cruelty and welfare statutes.[102] Often proponents of animal rights argue that this is insufficient and that sentient animals should be granted thick rights that confer similar levels of protection as human rights.[103]

While a full exploration of the internal debates within animal rights law can be found in Fasel and Butler[104], the two related critiques in this thesis concerning animal rights is that extending rights to non-humans ultimately requires translating their interests into pre-existing human legal categories. This approach is highly problematic because it forces non-human interests to be contorted to fit human frameworks just to be considered valid by a court. Furthermore, this thesis is fundamentally concerned with the broader structural architectures that support these legal categories. Because rights discourse relies on an Enlightenment approach that views the world through hierarchical binaries, it cannot easily accommodate relational approaches.Therefore, for the reasons outlined, this thesis adopts an ambivalent stance towards rights. It is acknowledged that rights, particularly within Indigenous-informed Rights of Nature (RON) scholarship, can open legal space for non-humans, and contest human exceptionalism. However, as scholars warn, this potential is mitigated by international law's 'persistent adaptive capacity to return or rebound [to] frames of "oppression as usual"'.[105] Grear argues that the only effective response to oppression or exclusion is a return to the 'very foundation of our understanding of reality itself'.[106] This requires us to reconstitute that reality. Gear argues that transformation requires engagement not just with the law, but with the assumptions that underpin the legal system. Similarly, Philippopoulos-Mihalopoulos, also highlights how environmental law is unable to deal with the complexity of environmental issues when it remains tethered to Enlightenment concepts and human centred reasoning. [107]It is on this basis that this research engages with rights but is not beholden to them.

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[102] ibid 110–112.
[103] ibid 114–118.
[104] ibid 3, Section VI.
[105] Dianne Otto and Anna Grear, 'International Law, Social Change and Resistance: A Conversation Between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)' (2018) 26 Feminist Legal Studies 351.
[106] ibid 354.
[107] Andreas Philippopoulos-Mihalopoulos, '"... The Sounds of a Breaking String": Critical Environmental Law and Ontological Vulnerability' (2011) 2 Journal of Human Rights and the Environment 5.

2.2.7. Looking beyond rights to participation

The adopted methodology enables a nuanced tracing of power that considers how participation is designed, rather than assuming that recognition through rights, or participation conferred by rights, is sufficient. This approach foregrounds that law is not neutral and that it creates structures that can both enable voices to be heard but can also obscure or constrain them. This critical perspective informs the author's analysis of IEL, and the participation of entities within it. The ambivalence expressed in this thesis towards rights also directs attention from the isolated issue of participation as a right, to the broader issue of participation as a practice. This prompts questions around what it means to participate, and who is allowed to participate, and on what terms. It recognises participation as a mechanism within which power circulates and does not position the right to participate as inherently progressive or positive. However, before participation can be analysed within the context of non-humans, it is first necessary to examine what participation is understood to mean and how it has developed within IEL.

2.3. An analysis of the concept of participation - from historical to contemporary accounts

Participation is a concept that encompasses a broad range of meanings. It has been described as 'infinitely malleable'.[108] It is generally understood as the involvement of individuals or groups in decision making processes through activities such as providing input, influencing outcomes, or sharing control over decisions. In its broadest conception, participation is a process that involves people and which can take place in vastly different spaces and be conducted in varying ways.[109] What participation is, who it involves, and how it is facilitated is highly context dependent.

Within this broad landscape, this research narrows the focus to participatory democracy - the process by which those outside formal government structures can directly engage in, and influence, public decision-making. This includes mechanisms that enable meaningful public input into shaping environmental policy and legal outcomes. IEL cannot be described as a participatory democracy in any full sense as

[108] Andrea Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 Community Development Journal 269, 269.
[109] Cornwall (n 109).

it is structurally state-centric, but non-state actors have played a significant role from its early foundation.[110] So to the extent that decision-making by public bodies involves public input, the process can be understood as engaging participatory democracy. Understanding how participatory democracy works within IEL and how it has evolved requires unpacking the historical development of participation and considering its contemporary forms. Establishing this foundation will support the analysis in chapter three that considers how these participatory models might be reimagined to include non-human participants.

Democracy is often described as a guiding principle of international law and IEL.[111] Although there is no universally accepted definition of democracy[112], the term derives from the Greek *dēmokratia* for 'rule by the people'.[113] At its most basic, this means that people who are governed have a say in who governs them and how. Participation has been part of democratic thought since Ancient Greece, but it has not always been considered central to democracy. As Pateman notes, in some theories of democracy 'participation has no special or central role'.[114] In these 'thin' or purely representative versions of democracy, participation only occurs at the ballot box.[115]

From the Enlightenment onwards, arguments for deeper public involvement in political decision-making gained prominence. Rosseau, for example, argued that participation was not only a check on power, but helped to align the values of individuals with the institutions that governed them – in turn giving those institutions legitimacy and stability.[116] He emphasised that meaningful participation depends on conditions of relative equality, and to achieve this, citizens should be guaranteed a degree of security.[117] The concern with ensuring conditions that enable full and fair engagement

[110] Jonas Ebbesson, 'Public Participation' in Lavanya Rajamani and Jacqueline Peel (ed), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 363–366; du Toit and Kotzé (n 43).
[111]Richard Burchill, 'The Developing International Law of Democracy' 123; Nicola Sharman, 'OBJECTIVES OF PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL DECISION-MAKING' (2023) 72 International and Comparative Law Quarterly 333.
[112] Jason William Vick and Keith Topper, 'A 21st Century Defense of Participatory Democracy' (PhD, University of California, Irvine 2015).
[113] ibid.
[114] Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970) loc 231.
[115]Karen Czapanskiy and Rashida Manjoo, 'The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of This Right' (2008) 19 All Faculty Publications 14–15.
[116] Pateman (n 115).
[117] Often referred to as 'The Social Contract' - for extensive discussion on this see Martha Nussbaum, *Frontiers of Justice* (1st edn, Harvard University Press 2006).

remain central to participatory theory today. This concern becomes even more complex when considering non-humans.

Participatory democracy is now used as a broad term for 'any degree of public opportunity to provide input into, influence or control political decisions'.[118] It extends beyond elections to the many ways people can be involved in decisions between elections. This can include, for example, citizen councils, participatory planning processes, or public consultations.[119] As Bherer *et al* caution, it is difficult to 'objectively define what are and are not participatory arrangements' as the boundaries of participation are ultimately shaped by the perspectives of those involved.[120]

2.4. Participatory Frameworks

Because participation is such a broad and nebulous concept, scholars have developed a range of frameworks to analyse how it is designed and experienced. Drawing from the scholarship of Arnstein, White, Stirling and Ebbesson, amongst others, this section distils from this literature six dimensions that often shape participatory processes: control, motivation, scope, venue, accountability and process/outcome. These perspectives are helpful for understanding how participation is currently conceived, and for revealing the assumptions and limitations that shape it. This necessary groundwork assists a determination of how non-human participation might be facilitated.

2.4.1. Degree of control

This first dimension considers the extent of influence participants have over decisions. One of the most well-known pieces of scholarship that considers this is Arnstein's work on 'the ladder of participation'.[121] The ladder conceptualises participation according to the degree of engagement with stakeholders and 'each rung correspond[s] to the extent of citizens' power in determining the end product'.[122] It focuses on the 'perspective of those on the receiving end' of the participatory process and considers

[118]Sharman (n 112).
[119] Laurence Bherer, Pascale Dufour and Françoise Montambeault, 'The Participatory Democracy Turn: An Introduction' 225 225.
[120]ibid 227.
[121]Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216, 216.
[122] Arnstein (n 122).

what participation delivers from the viewpoint of the participants, rather than what authorities may suggest they are conferring on the participants.[123]

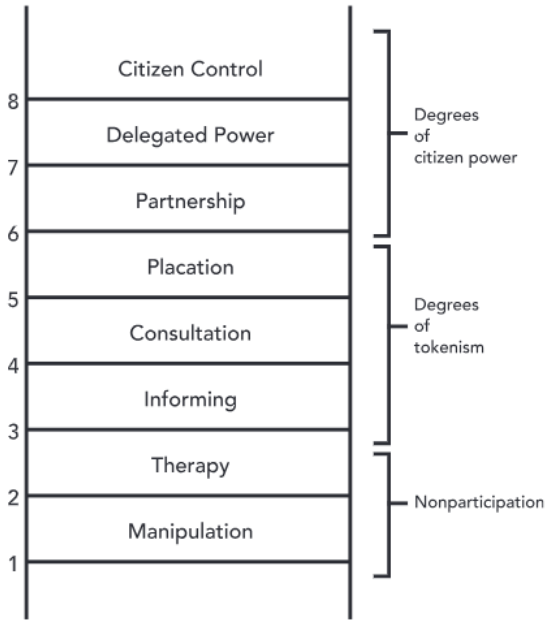

Figure 1: Arnstein's Ladder of Citizen Participation (source: Arnstein, 1969) [124]

Arnstein acknowledges that the ladder is a simplification but suggests it is useful for showing that participatory processes vary widely in the extent of public influence, and that officials' motivations can shape how processes are conducted. It also highlights that participants' perception of a process can depend on whether the outcome reflects the concerns they raise. To provide an example of what this means in practice, planning law and participatory processes within these frameworks can provide a helpful illustration. In the case of a planning application for a factory farm for example, a member of the public who submits objections opposing the farm on environmental grounds may perceive the process as tokenistic if permission is granted on economic grounds, because their input appears to have had little influence (see rungs three, four and five of the ladder). By contrast, another participant who supports the development for the local jobs it could create may view the same process as meaningful and collaborative (rung 7 of the ladder). This example is also helpful because it is illustrative of another point that Arnstein stresses which is that neither 'participants' nor

[123]Cornwall (n 109) 270.
[124] Arnstein (n 122); Cornwall (n 109).

'officials' are homogenous groups, and this influences how each group perceives how meaningful the process is.

Subsequent critiques have challenged the ladder's hierarchical structure, which implies that higher rungs are preferable. This hierarchical structure has been questioned because not all contexts necessarily require extensive engagement with participants. For this reason, alternatives such as Sarah Davidson's 'wheel of participation' have been proposed as different ways to conceptualise participation.[125] Despite these critiques, Arnstein's model remains widely cited because, as Cornwall observes, it 'reminds us that participation is ultimately about power and control'.[126] The concept of power and control in the process of participation is one of the central concerns of this thesis.[127]

2.4.2. Motivations for participation

The second dimension considers why participatory processes are created. As White notes, participation is inherently political, there are always tensions over who is involved, how, and on whose terms.[128] Stirling identifies three broad motivations for participatory processes: normative, pragmatic (sometimes called substantive), and instrumental.[129] These categories are useful for understanding how underlying drivers influence the way participation is designed and experienced. Each category reflects a different rational for why participation is valued.

Normative motivations are rooted in democratic ideals.[130] Participation is seen as valuable because those affected by a decision should have a say in it[131] (the 'all-affected principle), and because it helps keep power accountable.[132] This framing treats participation as a good in itself and emphasises its role in securing legitimacy. Pragmatic or substantive motivations focus on decision quality.[133] Participation brings

[125] Scott Davidson, 'Spinning the Wheel of Empowerment' (1998) 1262 Planning.
[126] Cornwall (n 109).
[127] ibid.
[128] Sarah C White, 'Depoliticising Development: The Uses and Abuses of Participation' (1996) 6 Development in Practice 6, 6.
[129] Andrew Stirling, 'Analysis, Participation and Power: Justification and Closure in Participatory Multi-Criteria Analysis' (2006) 23 Land Use Policy 95, 95.
[130] Stirling (n 130).
[131] Ciaran O'Faircheallaigh, 'Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making' (2010) 30 Environmental Impact Assessment Review 19, 19.
[132] Ebbesson (n 111); Sharman (n 112).
[133] Stirling (n 130).

a diversity of perspectives that can improve the information base for decisions and help identify better solutions. In environmental contexts, Sharman notes that decisions must balance social, economic and ecological factors, so broad participation is needed to capture these complexities.[134] This framing regards participation as a means to an end, rather than valuing the process intrinsically.[135] Instrumental motivations are more strategic. They emphasise participation as a way to build trust, reduce resistance, and foster acceptance of outcomes.[136] Pateman notes that Rousseau highlighted how participation is psychologically important, creating a sense of ownership and connection between individuals and the institutions that govern them.[137]

The motivations for engaging in participatory processes often overlap, but they can also pull in different directions, for example, a process designed primarily for legitimacy may look very different from one designed to improve decision quality or build acceptance. A recent example of this can be seen in the UK's approach to breed specific legislation[138], where the participatory process appears to have been geared towards legitimacy, rather than improving decision making. Throughout the consultation and decision process expert submissions repeatedly criticised the effectiveness of breed specific bans and provided compelling evidence to support their position.[139] Despite this information the ban was not reviewed but was instead extended.[140] This reflects participation being treated as a procedural requirement, rather than a way to improve decision-making outcomes. Recognising these underlying drivers makes clear that participation is not a neutral process. How the process is structured, how the participants are selected and how much weight is given to participants' contributions are all factors that are shaped by the underlying motivation of the process. For this reason, Stirling's framework is useful for exposing

[134] Sharman (n 112).
[135] Stirling (n 130).
[136] Sharman (n 112).
[137] Pateman (n 115).
[138] This is legislation that bans specific breeds of dogs which are deemed to be inherently more dangerous to public safety
[139] British Veterinary Association, '"These Dogs Don't Deserve to Die": UK's Leading Animal Welfare and Vet Groups Call for Urgent End to Breed Specific Legislation' (2022) <https://www.bva.co.uk/news-and-blog/news-article/these-dogs-don-t-deserve-to-die-uk-s-leading-animal-welfare-and-vet-groups-call-for-urgent-end-to-breed-specific-legislation>.
[140] DEFRA, 'Environment Secretary on the XL Bully Ban' <https://deframedia.blog.gov.uk/2023/09/17/environment-secretary-on-the-xl-bully-ban/> accessed 28 November 2025.

the assumptions that drive participatory initiatives in IEL and for showing how participation can entrench existing hierarchies as easily as it can disrupt them.

2.4.3. Scope

This dimension considers who is determined to be a legitimate participant. Many processes presume the 'public' consists of directly affected human individuals or stakeholder groups - but participation can also involve representatives. In the context of non-human participation, representational models are common in existing scholarship and practice, but they risk reinforcing the anthropocentric assumptions about voice and agency.[141] This thesis is concerned primarily with the possibilities for direct participation and engages with representational approaches critically in Chapter 3.

Who constitutes the 'public' in this process is also contested. Public participation tends to be more inclusive than stakeholder participation, because it can involve those who are not directly affected by the decision in issue, whereas stakeholder participation usually refers to those who 'are affected by or can affect a decision'.[142] Some authors frame the public as a diffuse collection of individuals, and stakeholders as organised groups with defined interests.[143] In practice, this definition is not consistent - for example *public* participation in UK planning law includes recognised stakeholder groups.[144] For the purposes of this research, *public* is used as a catch-all term that includes both stakeholders and public participants, irrespective of their degrees of organisation.

Who is allowed to participate is a question that arises in a unique way within legal proceedings, particularly in judicial review, through the doctrine of standing. This doctrine deals with who has 'the right to be heard in a court or other proceeding'.[145] Standing rules operate as a gatekeeping device setting subjective[146] criteria for who is

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[141] For example, Angie Pepper, 'Political Agency in Humans and Other Animals' (2021) 20 Contemporary political theory 296, 296; Dan Hooley, 'Political Agency, Citizenship, and Non-Human Animals' 509 509.

[142] Mark S Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 Biological Conservation 2417, 2418.

[143] Rodolphe Schlaepfer Vincent Luyet and Alexander Buttler, 'A Framework to Implement Stakeholder Participation in Environmental Projects' (2012) 111 Journal of Environmental Management 213, 213.

[144] In so far as submissions are open to anyone – Section 71 Town and Country Planning Act

[145] Mick Woodley, *Osborn's Concise Law Dictionary* (Sweet and Maxwell 2013).

[146] As to the subjectivity of the criteria, it is instructive to have regard to the definition from Stroud's Judicial Dictionary, '*…I would not like to risk a definition of what constitutes standing in the public law context. But I*

considered to have a sufficient interest to bring a proceeding, in other words to participate in litigation. Notably, the doctrine of standing often operates to exclude non-humans from bringing legal proceedings, on the basis that they are not human. The Nonhuman Rights Project is one of the most high-profile recent attempts to challenge the human exclusivity of legal standing by pursuing legal personhood for non-humans.[147]

2.4.4. Venue

Participatory processes can occur in a range of venues and where the process takes place is often determined by the type of decision being made – for example litigation occurs in courts and tribunals, voting in spaces as such as town halls and ballot boxes. It is crucial to note that the spaces in which participation occurs are not power-free environments. As Cornwall explains, '[s]paces are never neutral, rather they are infused with existing relations of power, interactions within them may come to reproduce rather than challenge hierarchies and inequalities'.[148] In the courtroom, for example, power is exercised through multiple layers of control. There are rules about who may enter the physical space, who may speak, and what types of knowledge in the form of evidence and case law is acceptable. Non-humans are excluded by rules of personhood and standing. Authority is concentrated in the Judge. Participation is channelled through lawyers who are required to comply with particular procedures and language. The courtroom is an example of how participatory spaces actively organise power, rather than simply providing a space in which participation may occur. Participation is not only shaped by formal rules, social and power relations shape how people come to places of participation and what they feel they can voice.[149] In a multispecies context, these issues are even more acute because the venues and the

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would hold that the words 'directly affected' which appear in Rule 58.8 (2) capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in R v Inland Revenue commissioners, Ex p National Federation of Self-Employed and Small Businesses Limited [1982] AC 617, 646, and the interests of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word 'directly' provides the necessary qualification to the word 'affected' to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent - AXA General Insurance Ltd v Lord Advocate (Scotland) 26 (UKSC); Daniel Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* (11th edn, Sweet and Maxwell 2025).

[147] *Nonhuman Rights Project, Inc v Lavery*.

[148] Andrea Cornwall, 'Spaces for Transformation? Reflections on Issues of Power and Difference in Participation in Development' in Samuel Hickey and Giles Mohan (eds), *Participation: from Tyranny to Transformation?* (Zed Books 2004) 80.

[149] ibid.

governing rules are fundamentally human-centred. Therefore, having regard to the places in which decisions are made is crucial when considering inclusive decision making.

2.4.5. Accountability

Accountability is important as it ensures the integrity of the participatory process. However, the mechanism by which accountability is implemented is contested. Participatory processes are often assumed to require transparency, but this assumption reflects the norms of Western legal and political systems. In these systems, transparency is linked to accountability and so is protected through mechanisms such as access to information and the ability to seek a review of decisions.[150] In contrast to this, other forms of governance, such as tikanga Māori[151], do not approach accountability in the same way. Here, concepts of accountability sit within relational approaches that are based on collective responsibility. In these communities, access to information often depends on relationships built up over time.[152] Related to this, processes grounded in relational cultures can be difficult to capture in a standardised output that can be readily reproduced and accessed.[153]

This contrast in approaches highlights cultural tensions regarding the application of transparency within participatory activities. While Western frameworks view transparency as a prerequisite for establishing trust, an overreliance on standardised disclosure can undermine relational systems. The demand for transparency can reduce nuanced relational approaches to procedural checkboxes. Approaches that value standardised outputs such as minutes, or reports, sidelines different approaches to accountability. Conversely, too little transparency can erode public trust and/or allow exclusionary practices to continue unchecked. These tensions are especially important where participants cannot self-advocate or contest how they are represented. In such cases, safeguards are needed - whether through transparent records or other mechanisms. Designing these safeguards requires care. It is crucial that calls for greater transparency do not become a way to reinscribe Western norms.

[150] Ebbesson (n 111).
[151] It is noted that tikanga Māori is a rich and layered concept for which the meaning varies according to context.
[152] Linda Tuwhai Smith, *Decolonizing Methodologies* (3rd edn, Bloomsbury 2022) 15–17.
[153] Miriama Cribb, Elizabeth Macpherson and Axel Borchgrevink, 'Beyond Legal Personhood for the Whanganui River: Collaboration and Pluralism in Implementing the Te Awa Tupua Act' 1.

Instead, as Ryan suggests, conversations about accountability should begin with clarity about the objectives of the participatory process and the roles of those involved.[154] Transparency should be calibrated in context, rather than considered a fixed requirement that must respond to particular parameters.

2.4.6. Process versus outcome

Participation can be oriented towards outcomes i.e. the decisions produced, or toward the quality of the process itself.[155] Outcome-based approaches value participation insofar as it contributes to robust decisions, whereas process-based approaches are concerned with meaningful engagement, deliberation and inclusion. This research focusses on a process-based approach to participation for two reasons. First critics have argued that IEL lacks a clear set of substantive goals and suffers from a lack of 'normative ambition', so there are no set goals to direct the process toward.[156] Secondly, there is evidence that participation improves environmental governance, particularly where participants are given meaningful opportunities to influence what is decided.[157] Related to these two points, is the concern that many voices, particularly marginalised and non-human interests, have historically been excluded from shaping the focus and outcomes IEL attempts to achieve. Therefore, a focus on process can highlight whose perspectives have been included, marginalised or are absent altogether. As Reed notes, the quality of decisions depends heavily on 'the process that leads to it'.[158]

However, an exclusive focus on process also has its limits. Cornwall cautions against treating participation as a mechanistic exercise, where the process is reduced to a set of procedural tick boxes. She explains that participation must be treated with caution and that processes should be '...contextual and contingent, conditional on a host of

[154] John Ryan, 'Observations on Effective Accountability in Collaborative Working Arrangements' (2025) 21 Policy Quarterly 15.
[155] Nombulelo Kitsepile Ngulube, Hirokazu Tatano and Subhajyoti Samaddar, 'Toward Participatory Participation: A Community Perspective on Effective Engagement in Post-Disaster Recovery and Reconstruction' [2024] Community Development 1.
[156] du Toit and Kotzé (n 43); Peel and Rajamani (n 5) 24–28.
[157] Nicolas W Jager and others, 'Pathways to Implementation: Evidence on How Participation in Environmental Governance Impacts on Environmental Outcomes' (2019) 30 Journal of Public Administration Research and Theory 383.
[158] Reed (n 143).

complexities...', rather than simply a one size fits all approach.[159] Likewise, Doelle *et al* argue, on the basis of case studies, that focusing on process over outcomes can negatively impact public participation.[160] Their position is that it is unrealistic to assume that if a process is put in place and properly facilitated the public will engage and better outcomes will be achieved. They explain that without some focus and direction to the participatory effort it can become mired in 'process and inconsistent application'.[161] Taken together these critiques suggest that there is a balance to be struck and that good participatory design must have regard to both process and outcome. Process-based approaches can help to surface diverse perspectives, while outcome-based approaches ensure the effort remains directed. This balance is particularly relevant when considering non-human participation, where objectives and methods are still being defined, and where robust processes will be critical to establishing legitimacy and trust.

The six dimensions of control, motivation, scope, venue, accountability and process/outcome form a practical framework for analysing how participation is presently imagined and enacted. By using these dimensions as a lens, it becomes possible to interrogate the power dynamics and anthropocentric assumptions that impact on participation within IEL. The following sections apply these six dimensions chronologically, tracing the evolution of participation from the 1972 Stockholm Conference to the present day.

2.5. Participation in IEL

As outlined in Chapter One, IEL is a subsect of international law that seeks to address the harmful impacts of humankind's activity on the environment.[162]In contrast to domestic law, IEL can address issues that are transboundary or global in nature, can address international activities that impact on the environment and can be used to harmonise domestic approaches.[163] The current body of IEL developed substantially from the 1970s prompted by a growing awareness that environmental matters were

[159]Cornwall (n 149) 85.
[160] Meinhard Doelle and A John Sinclair, 'Time for a New Approach to Public Participation in EA: Promoting Cooperation and Consensus for Sustainability' (2006) 26 Environmental Impact Assessment Review 185.
[161] ibid.
[162] Koivurova (n 13).
[163] Hunter (n 17); Koivurova (n 13).

increasingly a transnational problem.[164] Building on the dimensions of participation outlined above, the next sections consider IEL's development through these categories to show how participation within IEL has been imagined or constrained over time.

2.5.1. Stockholm Conference: The beginnings of IEL?

The historical account of IEL from scholars in the Global North details how environmental law developed substantially in the 1960s and 1970s with the rise of modern environmentalism.[165] The emergence of a strong public concern for the environment is attributed to particular events and concerns arising within this period. These include a number of significant environmental disasters in the late 1960s[166] and the publication of books such as Rachel Carson's *Silent Spring*.[167] These accounts also note advances in Western science that 'increased public awareness about the complexity, interconnectedness, uniqueness, and fragility of our planet'.[168] Such events led to a growing understanding of the threats that human activity posed to the environment resulting in efforts to introduce environmental issues to international law.[169] For this reason, the 1972 Conference on the Human Environment (Stockholm Conference) is often considered to be the genesis of IEL marking the 'emergence of international environmental law as a distinct branch of international law'.[170] Under this view, Stockholm was a progressive response to a growing concern around global ecological fragility.

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[164] Lexis Nexis, 'International Environmental Law - Overview' [2022] Lexis PSL; an extensive list of treaties can be accessed here United Nations, 'United Nations Treaty Collections: Multilateral Treaties Deposited with the Secretary General' <24 November 2024>; Usha Natarajan and Julia Dehm, 'Where Is the Environment? Locating Nature in International Law' [2019] Third World Approaches to International Law Review.

[165] A Dan Tarlock, 'IS THERE A THERE THERE IN ENVIRONMENTAL LAW?' (2004) 19 Journal of Land Use & Environmental Law 213; Natarajan and Khoday (n 10).

[166] In particular oil spills off the coast of Scilly and Santa Barbara - Michigan in the World and the Environmental Justice HistoryLab and University of Michigan History Department, '"Environmental Crisis" in the Late 1960s' (*Give earth a chance*) <https://michiganintheworld.history.lsa.umich.edu/environmentalism/exhibits/show/main_exhibit/origins/-environmental-crisis--in-the-> accessed 20 February 2026; Adam Vaughan, 'Torrey Canyon Disaster – the UK's Worst-Ever Oil Spill 50 Years On' *The Guardian* (2017) <https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary>.

[167] Gary Haq and Alistair Paul, *Environmentalism Since 1945* (Routledge 2012) 2–5; Natarajan and Khoday (n 10).

[168] Natarajan and Khoday (n 10).

[169] Dehm (n 165).

[170] Joyner and Little (n 22); Natarajan and Khoday (n 10).

Critical scholars, however, argue that this celebratory narrative is in fact a selective retelling of the history of IEL shaped by the Global North.[171] They argue that this account obscures the structural conditions that preceded it and lead to environmental decline. Feminist and TWAIL scholars contend that histories of slavery, colonisation, and plunder have structured international law, and the focus on the 1960s environmentalism obscures concerns that were raised by those from outside the Global North long before this environmental awakening. [172] From the perspective of critical scholars, the anthropocentric and Eurocentric assumptions of IEL are not accidental oversights but are legacies of these earlier periods of exploitation that continue to impact the law's current form.

In a similar vein, Humphreys and Otomo argue that IEL is best understood as a tension between two competing historical lines of thought. On the one hand there is a romantic conception of nature as sacred and morally charged, and on the other a colonial legacy that is rooted in extraction and control.[173] Ultimately, as these voices identify, international law does not begin with a clean starting point like Stockholm, rather it operates 'within particular affective realms rooted in histories, memories and experiences'.[174] These broader considerations must be unpacked to understand why current participatory models remains so exclusionary.

To understand how these legacies have influenced participation in IEL, it is useful to return to consider Enlightenment ideas which underpin much of modern international law.[175] Enlightenment philosophy emphasised autonomy and self-determination, laying the foundation for individual rights and Western legal systems.[176] Yet it did so through a binary worldview - self/other, man/woman, nature/culture - that positioned white European men as the centre of concern and the dominant source of authority. [177] This

[171] Natarajan and Khoday (n 10); Prost and Camprubí (n 16).
[172] Natarajan and Khoday (n 10); Prost and Camprubí (n 16); Klaus Bosselman, ''From Reductionist Environmental Law to Sustainability Law' *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011); Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' (n 16); Gathii (n 10).
[173]Stephen Humphreys and Yoriko Otomo, 'Theorizing International Environmental Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).
[174] Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and The Pan-Africanist Pushback* (2019) 266.
[175] Carol J Adams and Josephine Donovan, *The Feminist Care Tradition in Animal Ethics* (Josephine Donovan ed, Columbia University Press 2007) 1–2.
[176] Kheel (n 40); De Lucia (n 41); powell and Menendian (n 41); Natarajan and Khoday (n 10).
[177] Riley (n 40).

in turn meant that this group of people wielded an unparalleled power in shaping and directing international law.[178]

In environmental terms, Enlightenment thinking cast 'civilised' man as aligned with culture, set apart from, and superior to, nature.[179] Controlling land and resources was seen as a marker of progress, while Indigenous relationships to land were erased under the doctrine of *terra nullius* (no one's land). [180] Nature was considered valuable only when controlled and exploited, a belief that justified colonisation and development models based on limitless growth. [181] This framing continued to constrain IEL, which rarely recognises the intrinsic value of the environment. As Jones notes, there is 'no general obligation in international law to protect the environment in and of itself'.[182] Asthar-Khavari expresses a similar concern and comments on how this limits the effectiveness of the law because it approaches the problems we face within a very narrow frame, one that requires 'the natural world [to] remain viable and able to absorb the impact that human beings have on it. This limits how the natural world can assert itself and flourish'.[183]

With this background it is possible to see how these intellectual and historical legacies are visible in the Stockholm Declaration itself, which consistently refers to the 'human environment' and proclaims at paragraph 5 that 'of all things in the world, people are the most precious'. [184] Applied through the participatory framework developed earlier in this chapter Stockholm further reflects a very narrow conception of participation which is in keeping with the legacy of Enlightenment philosophical assumptions about authority, knowledge and control. The scope of participants[185] was limited to states with participation occurring through governments or intergovernmental agencies.[186] In terms of control, participation was top down and state-centric. The venue reinforced

[178] Joyner and Little (n 22).
[179] Kheel (n 40).
[180] Cardea-Salzmann (n 47); Albrecht (n 47); Mickelson (n 47).
[181] Natarajan and Khoday (n 10).
[182] Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' (n 16).
[183] Afshin Akhtar-Khavari, 'Restoration and Cooperation for Flourishing Socio-Ecological Landscapes'.
[184] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).
[185] The entire declaration is informed by the opening statement which sets out 'Having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the reservation and enhancement of the human environment' - ibid.
[186] Chapter VII, section 13 -16 ibid.

this as the proceedings were situated in official buildings.[187] Accountability was largely symbolic – whilst observers from intergovernmental bodies were allowed and a general report of the proceedings was produced, there was no general public entitlement to observe, no mechanism to challenge decisions, and no means to hold states accountable for how deliberation unfolded or for the commitments they made in these proceedings. This was heavily outcome-focused with emphasis placed on the production of the declaration, and not on embedding participatory procedures.

2.5.2. Stockholm to Rio

From the 1990s onwards there was a rapid expansion of participatory rights.[188] The 1992 Rio Declaration on the Environment and Development affirmed the principle of participation and placed a duty on states to require public participation.[189] Article 10 of the Rio Declaration introduced three main concepts that have been referred to as 'environmental democracy'[190] – access to environmental information, the right the participate in environmental decision making, and a right to judicial recourse.[191] This was significant in reframing participation not only as an entitlement to be heard, but also as a process supported by enforceable mechanisms.[192]

Using the participation framework as a reference it appears that the Rio Declaration shifted IEL in important ways. Whilst the scope was still limited to humans, Principle 10 affirmed the rights of 'all concerned citizens' to participate.[193] The control however did not substantively shift. Participation remained largely consultative as the public could contribute but not co-determine.[194] Venues remained as official governmental/intergovernmental buildings, which privileged formalised knowledge

[187] Folkets Hus Building, Stockholm - United Nations, 'Conferences | Environment and Sustainable Development' (*United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm*) <https://www.un.org/en/conferences/environment/stockholm1972> accessed 22 November 2025.
[188] '...there is some support for access to information or public participation in decision-making in nearly *all* global environmental treaties adopted at or after 1992 UNCED' Ebbesson (n 111) 358.
[189] Jorge E Vinuales and Pierre-Marie Dupuy, *International Environmental Law* (2nd edn, Cambridge University Press 2018).
[190] ibid 87.
[191] Jeroen Bekhoven, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' 219 230.
[192] The principles closely align with concepts in human rights law such as the right to political participation and a fair trial – Ebbesson (n 111) 352.
[193] Also see Agenda 21 which was negotiated alongside the Rio Declaration - United Nations Conference on Environment and Development, 'Agenda 21' <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.
[194] See Principle 10 Rio Declaration on Environment and Development.

and institutions. The focus of Principle 10 on procedure - such as access to information, participation and the ability to review decisions - was arguably transformative and demonstrates how Rio moved IEL closer to valuing process and accountability, even though final outcomes remained state-dominated.

Rio entrenched sustainable development as IEL's central organising principle.[195] This potentially solidified IELs anthropocentric orientation. Sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[196]. The concept suggests a balance between growth and environmental protection. Whilst this may seem to be an important development, there is a real concern that it has not actually challenged the fundamental issue - which is a seemingly insatiable need for growth within the Global North. The concern with sustainable development is that it does not affect any behavioural change to counter the perception that humans need to focus on growth and constantly produce, rather it provides a foil for rampant consumerism. Cardesa-Salzmann and Cocciolo explain that,

> '…sustainable development discourse actually legitimizes business as usual… specific regulatory approaches in the climate change and biodiversity regimes have opened new perspectives for development through the financialization of natural resources. In so doing … the sustainable development narrative deliberately conceals the enduring adverse impact that development has on the natural world'.[197]

This focus on sustainable development reflects a deeper problem with IEL, which is that it remains rooted in the anthropocentric ideas of international law. Participation is still framed as a human-centred exercise, designed to make nature more manageable or useful for human purposes. This is why, despite Rio's advances, participation within IEL remains constrained both in scope and ambition. Rather than opening space for plural forms of engagement or creating space for alternative ways of approaching the

[195] See Principle 4 ibid; Maragia (n 50); Vinuales (n 51).

[196] United Nations, 'The Sustainable Development Goals' <https://www.un.org/sustainabledevelopment/development-goals/>; also see Principle 3 Rio Declaration on Environment and Development 1992; The concept initially came to prominence in the Bruntland Report - World Commission on Environment and Development, 'Report of the World Commission on Environment and Development : "Our Common Future" [Bruntland Report]' (1987).

[197] Cardea-Salzmann (n 47).

human-environment relationship, participation after Rio was limited to large degree by the focus on sustainable development.

2.5.3. Rio to Aarhus

The human centred approach embedded within IEL informed the next phase of its development. The Aarhus Convention (1998) is a significant international instrument on environmental procedural justice and rights. Aarhus formalised what are now known as the three pillars of environmental democracy proposed initially at Rio: access to information, public participation in decision-making, and access to justice.[198] These principles sought to move participation in IEL beyond symbolic recognition by requiring states to provide information, create procedures for involvement, and establish mechanisms to enforce participation rights.[199] In this sense, Aarhus marked a substantive step towards embedding participation into IEL. The importance of this development is reflected in how the Aarhus Convention is characterised in the literature. As Sparks and Peters observe, the Aarhus Convention 'has acquired totemic importance... It 'has become a symbol for environmental democracy, representing a set of ideas which transcend the details of the obligations under the Convention'.[200]

The three pillars of Aarhus can be understood using the participatory dimensions outlined earlier – particularly that of scope, control and accountability. The first pillar - access to information - has been considered essential to meaningful participation because full and effective engagement in decision-making requires that affected communities and the wider public are aware of what is proposed, and of the potential impacts of those proposals.[201] While IEL has not articulated a general right of access to information in all cases, instruments such as the Aarhus Convention have enshrined specific obligations that in practice create a right of access in certain contexts.

However, this first pillar is not without issue and the application of its provisions has been uneven.[202] The Aarhus Convention is not a global treaty, is not binding on all

[198] Vinuales and Dupuy (n 190) 87.
[199] The principles closely align with concepts in human rights law such as the right to political participation and a fair trial – Ebbesson (n 111) 352.
[200] Tom Sparks and Anne Peters, 'Transparency Procedures' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook on International Environmental Law* (2nd edn, Oxford University Press 2021) 915.
[201] ibid.
[202] Other concerns might include when/ if public authorities are required to collate data, who decides what information is relevant etc

states, and has not been ratified by some of the world's most significant polluters[203] including the United States, Saudi Arabia, Australia, and Canada.[204] Even within states that have ratified, compliance and implementation have proved difficult. For example, Ireland has repeatedly been criticised for failing to implement Aarhus in ways that make information truly accessible across all sectors of the public.[205] This goes directly to the issue of control and accountability.

The second pillar, public participation in environmental decision making, relates to the extent of inclusion and the degree of influence afforded to participants. This pillar obliges states to provide channels for individuals and groups to engage in environmental policy and regulatory processes.[206] 'Public' is generally defined negatively, meaning anyone outside of government or administration, which can include NGOs, academics, Indigenous peoples, and local communities.[207] The private sector, when acting commercially, is usually excluded, although in practice lobby groups may sometimes fall within the definition.[208] The scope of public participation under the Convention is extensive, it encompasses the drafting of regulations and their enforcement, impact assessments, as well as strategies, policies, and plans at both local and national levels.[209] Yet here too the strength of the obligation can be diluted. For example, the Convention on Biological Diversity (CBD) provides in Article 14(1)(a) that states should introduce procedures 'where appropriate' to allow for public participation in assessing environmental impacts.[210] Such language confers broad discretion on states to decide when participation is warranted, which risks reducing participation to a procedural formality rather than a substantive guarantee.

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[203] On a per capita basis - Laura Paddison and Annette Choi, 'As Climate Chaos Accelerates, Which Countries Are Polluting the Most?' (2024) <https://edition.cnn.com/interactive/2023/12/us/countries-climate-change-emissions-cop28/> accessed 28 November 2025.

[204] United Nations, 'Chapter XXVII: Environment- 13. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en> accessed 28 November 2025.

[205] Alison Hough, 'Report on Aarhus Implementation - Ireland' (Finding Common Ground 2022) <https://research.thea.ie/bitstream/handle/20.500.12065/4466/Report%20on%20Aarhus%20Implementation.pdf?sequence=1&isAllowed=y>.

[206] Vinuales and Dupuy (n 190) 86.

[207] Ebbesson (n 111) 352.

[208] ibid.

[209] Bekhoven (n 192) 230.

[210] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 1992.

It is relevant to note a related development here, namely the principle of Free, Prior and Informed Consent (FPIC) which, while having a distinct legal basis, also centres on participation. This provides a useful contrast to the Aarhus Convention procedural approach because FPIC positions participation (at least in principle) around the idea of consent and consultation. FPIC obligations arise most clearly in instruments relating to Indigenous peoples. The International Labour Organisation's Convention No. 169 requires states to consult with Indigenous and tribal peoples and to obtain their prior informed consent before authorising displacement or relocation. [211] Similarly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[212] includes provisions on FPIC across other provisions, framing participation as an expression of self-determination.[213]

Indigenous led participatory approaches are further seen within IEL in the CBD and its Nagoya Protocol.[214] This Protocol mandates that access to traditional knowledge requires FPIC and Mutually Agreed Terms and explicitly validates Indigenous led community protocols.[215] Similarly the Escazu Agreement, which is the Latin American counterpart to Aarhus mandates affirmative participatory measures for Indigenous people.[216]These measures appear, at least in principle, to move participation closer to consent – which is missing from Aarhus. In practice, however, FPIC remains subject to state discretion[217] and is often implemented weakly, leaving Indigenous communities with little real power over decisions that affect their lands and livelihoods.[218]

The third pillar, access to justice, extends the logic of participation into enforcement by requiring that individuals and groups be allowed to challenge decisions where access

[211] C169 - Indigenous and Tribal Peoples Convention 1989.
[212] Declaration on the Rights of Indigenous Peoples (13 September 2007) 2007 (UNGA Res 61/295).
[213] See for example Article 4 and 5 of UNDRIP - ibid.
[214] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010.
[215] ibid 7.
[216] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) 2018 art 5,7.
[217] See for example the critique from Irene Watson cited in Jacinta Ruru, 'Indigenous Peoples' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021).–'Our hope was that [UNDRIP] might provide a reprieve from the genocidal impact of colonialism. However, it has been a disappointment… [I]t is a bit like states having their cake and eating it too in its approach to the recognition of First nations… [O]n the one hand it recognises the right of First Nations to self-determination, and, on the other hand, it limits self-determination to being exercised in accord with state power.'
[218] ibid 746–747.

to information or participatory rights have been denied. This pillar brings in the elements of accountability and control from the framework. However, the reality is that in practice this pillar remains underdeveloped in IEL. Access to justice is heavily dependent on domestic legal systems, resources, and political will, and as noted above, even within states that have ratified, compliance and implementation have proved difficult.[219]

Taken together, Aarhus and related instruments such as the CBD and UNDRIP represent important progress in recognising that participation must be supported by access to information, procedures for engagement, and mechanisms for enforcement. Yet their limits are equally clear. They remain anthropocentric, confined to human participation and they are unevenly adopted and weakly enforced. While they strengthen accountability through transparency and procedural rights, they do not transform participation into a more inclusive practice capable of accommodating non-humans or alternative knowledge systems. Given the trajectory that Rio established by focussing on sustainable development, it is unsurprising that Aarhus was formulated through the same anthropocentric and state-centred lens that lacks the imagination and flexibility to extend to different ways of being and participating. So, whilst Aarhus undoubtedly represented an important procedural advance, Aarhus shows its limitations as it continues to measure participation in human terms.

2.5.4. Critical evaluation

An important body of recent scholarship considers participation as central to the effectiveness of IEL, but it has identified the disconnect between the substantive aims of IEL and the procedural mechanisms to achieve this. [220] So whilst intergovernmental spaces have, as Sharman notes, 'opened increasingly to non-state actors and espouse values of democracy', the translation of these ideals into the international forum is still largely 'fragmented, tokenistic or ineffective'.[221] Sharman further observes that environmental democracy is an ongoing project that is dependent on 'supportive

[219] For example: Hough (n 206).

[220] Such as Sharman (n 112); Jin Guo and Junhong Bai, 'The Role of Public Participation in Environmental Governance: Empirical Evidence from China' (2019) 11 Sustainability 4696; Goda Perlaviciute, 'Understanding the Relationship between Public Participation and Public Acceptability of Climate Policies' (2025) 2 Cell Reports Sustainability 100441.

[221] Nicola Sharman, 'Exporting Environmental Democracy to International Forums: Understanding the Role of the Aarhus Convention' [2025] Ambio <https://doi.org/10.1007/s13280-025-02293-8>.

institutional and legal frameworks, sustained state engagement and scrutiny of evolving practice'.[222] This aligns with studies comparing the Aarhus Convention with the Escazú Agreement[223] which suggests that the main issue is not just the existence of participatory procedures, but how they operate in practice.[224] In many cases participation exists formally but has little impact on outcomes.

One legal response to this disconnect is the effort to integrate procedural mechanisms into substantive aims. As Barrit proposes, the recognition of the right to a healthy environment in the Aarhus Convention, a right which has increasingly come to prominence in other arenas[225], should be used to 'reinvigorate the procedural Aarhus rights'.[226] Under this approach, a substantive right serves as a normative benchmark, so that procedural guarantees are no longer evaluated simply by procedures such as whether a meeting was held or a document produced, but by how those actions effectively protect the underlying right. For instance, access to information is transformed from an administrative hurdle into a tool that must be clear enough to enable affected parties to determine if their right to a healthy environment is being infringed. By tethering procedure to substance in this way, participation shifts from empty ritual to something more meaningful.

This discussion returns to a broader point made by Kothari, which is that whilst IEL has a strong public participatory element to it, and efforts have been made to ensure it is more inclusive, critical scholarship has identified that participatory processes do not occur in a vacuum. Rather, they are shaped by social, economic, political and cultural power.[227] In the context of international law, and by extension IEL, the frameworks which structure participation are not neutral. As Jones remarks '[f]eminist scholars have long noted the inherent bias that underlies international law's gendered structure, from the way the state is conceptualized through gendered paradigms to the

[222] ibid.
[223] Which is similar to Aarhus in entrenching environmental democratic rights, but is confined to the Latin America and Caribbean region - Uzuazo Etemire, 'Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective' (2023) 12 Transnational Environmental Law 175.
[224] ibid; Otelemate Ibim Dokubo, Maria Alina Radulescu and Lorenzo Squintani, 'What Law Does Not Understand about Public Participation' (2024) 10 Heliyon e32001.
[225] Barritt refers to the Human Rights Council and the UN General Assembly
[226] Emily Barritt, 'The Aarhus Convention and the Latent Right to a Healthy Environment' 67.
[227] Uma Kothari, 'Power, Knowledge and Social Control in Participatory Development' in Bill Cooke and Uma Kothari (ed), *Participation: the New Tyranny?* (Zed Books 2001).

gendered and racialized norms upheld through international human rights law'[228]. What this makes clear is that the adoption of participatory methods alone is insufficient. Meaningful participation depends on how participatory processes are designed and operationalised within existing power structures.

The embedded Eurocentrism of IEL impacts participation because it tends to prioritise western thinking and approaches to environmental problems whilst marginalising voices and knowledge from outside this worldview.[229] This argument is supported by TWAIL scholars who explain that IEL is premised on Eurocentric concepts and often remains 'rooted in a colonial discourse', and the structural inequalities created by colonialism manifest in subtle ways to impact participation. [230] Ghathii explains how international law (and by extension IEL) is limited in the 'geography of places and ideas that dominate the beltway of our discipline in both our scholarship and practice'.[231] Indigenous scholars echo these concerns. Writing about environmental justice from the perspective of Indigenous people, Winter unpacks how liberal worldviews and participatory processes can work to reinforce power imbalances and deliberately sideline Indigenous knowledges. She provides an example of this by outlining how the United Nations Universal Declaration of Human Rights (UDHR) does not address the concerns of Indigenous people:[232]

> '...there are assumptions within the UDHR which do not work for Indigenous Peoples – assumptions about material versus non-material needs, human relationships with place, the primacy of individuals or community, relationships with and to other living creatures, plants and the inanimate world, and conceptions of time. The philosophies that determine their values, lore and laws create a set of life needs that cannot be protected by the UDHR, in fact worse, the UDHR undermines their lifestyle integrity'.[233]

[228] Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' (n 16).
[229] See Section 1.2.2. - 1.2.3. and 2.5.
[230]Louisa Parks, 'Spaces for Local Voices? A Discourse Analysis of the Decisions of the Convention on Biological Diversity' (2018) 9 Journal of human rights and the environment 141, 4.
[231] Gathii (n 10).
[232]Christine J Winter, *Subjects of Intergenerational Justice: Indigenous Philosophy, the Environment and Relationships* (Routledge 2022) 1–13.
[233]ibid 13.

What is perhaps more concerning is that the recognition of the inadequacy of the UDHR, led to the subsequent creation of the Declaration on the Rights of Indigenous People (UNDRIP). Winter explains that these two instruments serve to underscore the separation of the Indigenous experience from the dominant Western liberal discourse and is a deliberate act of exclusion. This process, whilst superficially presenting as helping Indigenous people, serves to emphasise that Indigenous people sit outside dominant paradigms within international law. This illustrates how participatory processes can marginalise perspectives. But it also highlights the potential for participation to bring disparate voices together to achieve outcomes that draw on different worldviews.[234] In bringing people together and affirming their views as relevant and worthy of consideration as part of a participatory process, this upholds and values their beliefs rather than consigning them as *other.*

Winter's critique is part of a growing interrogation of environmental law 'participation' through an intersectional and decolonial lens. These authors show how current decision-making models often sideline those most affected by environmental harms such as women and racial and ethnic minorities.[235] What much of this scholarship concludes is that meaningful participation requires attending to these structural inequalities through place-based decision making and an ethics of care.[236] Across this literature participation is highlighted as central to environmental democracy, but caution is also expressed as it can be a place where existing hierarchies are reinforced. One particular concern in this regard is that IEL remains decisively anthropocentric and dominated by ideas and approaches from the Global North.[237]

These limitations have prompted not only critique within IEL, but also the emergence of reform movements that seek a reimagining of the relationship between humans, law, and the non-human world including within international law. Two particularly influential developments in this respect are Rights of Nature (RoN) and Global Animal

[234] See also '"That's Not the Entire Story:" Youth and Indigenous Voices Call for Intersectional Environmental and Multispecies Justice Approaches at Great Salt Lake' (2025) <https://digitalcommons.usu.edu/tcpodcastsandvideo/1>.

[235] Ana T Amorim-Maia and others, 'Intersectional Climate Justice: A Conceptual Pathway for Bridging Adaptation Planning, Transformative Action, and Social Equity' 101053.

[236] ibid; M Parsons and others, 'Participatory Approaches to Climate Adaptation, Resilience, and Mitigation: A Systematic Review' (2025) 54 Ambio 2005.

[237] Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' [2018] Global journal of comparative law 5, 5.

Law (GAL). Both engage with IEL and seek to disrupt its anthropocentric underpinnings but do so in distinct ways that will be explored below.

2.6. Adjacent reform movements: Rights of Nature and Global Animal Law

The persistence of anthropocentricism within IEL raises questions about whether participatory reform alone can address the issues described above. As a result, attention has turned to movements that seek to reconfigure and reimagine the relationship between humans, law and the non-human world – rather than just expanding opportunities within existing frameworks. As noted, two prominent efforts include RoN and GAL.

2.6.1. Rights of Nature

The Rights of Nature movement (RoN) has gained momentum as an intervention to IEL's anthropocentric foundations. RoN seeks to extend legal protection beyond humans by recognising that nature itself may hold rights 'to exist, thrive and regenerate',[238] with a reciprocal entitlement to enforce these rights.[239] In this way RoN is not just an ethical movement, but it is also a legal strategy and way in which to attend to some of the shortcomings of IEL. It therefore presents both a continuation of existing legal traditions, through the familiar concept of rights, and a challenge to them, in that it displaces humans as the bearer of these rights.

The foundations of the RoN movement lie in two root sources. The first is human rights and environmental law that recognises the right to a healthy environment.[240] As this source developed from a human right, it was initially anthropocentric and only focussed on protecting nature in so far as it sustained a healthy human existence. This right has since developed to recognise the intrinsic importance of nature independent of humans. An example of this development can be found in the Advisory Opinion of the Inter-American Court of Human Rights OC23/17.[241] This opinion recognised that an element of the right to a healthy environment was 'an autonomous right that

[238] IPBES, 'Policy Instrument: Rights of Nature' <https://www.ipbes.net/policy-support/tools-instruments/rights-nature-ron>.
[239] ibid.
[240] Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021) 134 Harvard Law Review; Knox also provides a helpful explanation of the development of this right - John Knox, 'Human Rights' in Lavanya Rajmani and Jacqueline Peel (ed), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021).
[241] 'Advisory Opinion OC-23/17, The Environment and Human Rights'.

protects the elements of the environment as legal interests in themselves'.[242] This strand of RoN reflects a liberal rights logic, extending recognition to new subjects by incorporating them into familiar categories. The difficulty is that RoN leaves the participation issue under-theorised and instead defaults to human representation for nature.

The second source lies in certain Indigenous cultures[243] 'which hold that nature or natural entities themselves have 'value or moral importance and thus are deserving of respect and protection'.[244] For example, the Māori worldview sees the land, nature and people as being intertwined.[245] Māori consider that hau (the breath of life) 'animates all phenomena… flows through all things, whether rivers, mountains, forests, reefs, fishing grounds, plants, animals or people'.[246] There is 'an understanding of the intrinsic value in and interconnectivity between everything. The whole and the things that make it up all bear intrinsic value'.[247] However, the value that is ascribed to the non-human in Indigenous cultures is not signified through the conferment of rights. As Corrigan and Oksanen outline, 'rights' are not a familiar construct within indigenous philosophies.[248] What this means is that RoN is, to a large extent, a hybrid of the Western concept of rights and Indigenous philosophies. In this version of RoN, participation is not about recognition through rights, but rather about maintaining relationships of care and responsibility. But even within this hybrid approach, the Western legal framing can risk flattening these nuanced relational approaches – for example the Whanganui River is brought within an anthropocentric frame by being conferred with 'personhood'. This legal framing alters what and who the River is regarded to be, in an effort to bring it within a familiar legal construct.

These two strands highlight some of the shortcomings of the RoN framework. Whilst it has undoubtedly opened conceptual and legal space for considering non-human participation, it risks reproducing logics that flatten relational understandings and fails

[242] Patricio Trincado Vera, 'Rights of Nature in the Inter-American Court of Human Rights: Understanding the Ecocentric Approach to the Right to a Healthy Environment' (2024) 33 Review of European, Comparative & International Environmental Law 521 <https://doi.org/10.1111/reel.12580>.
[243] Indigenous cultures of the Māori and Abya Yala peoples are two examples
[244] Daniel Corrigan and Markku Oksanen, *Rights of Nature: A Re-Examination* (1st edn, Routledge 2021) 1.
[245] Winter (n 233) 84.
[246] Salmond (n 47) 15.
[247] Winter (n 233) 84.
[248] Corrigan and Oksanen (n 245) 1–13.

to consider procedural aspects of participation beyond human involvement. This becomes evident when thinking about how RoN cases may be litigated - courts can affirm that non-humans have rights, but such cases are still brought, litigated and decided by humans, within the framework of a state institution. This does not mean RoN is devoid of transformative potential, but it does remain firmly within state-based systems and adjudication processes. The approach of this research is therefore intended to respond to the limits of a RoN approach by adding a procedural dimension that provides an outline for how to create conditions under which direct non-human participation can begin to be facilitated.

2.6.2. Global Animal Law (GAL)

GAL has emerged in response to the concern that animals are largely absent from international legal regimes, and the fact that animal law is largely regulated by domestic regimes, but animal concerns are becoming increasingly transnational in nature. For example, vast numbers of industries involve animals, and the global nature of supply chains mean that the environmental, social and ethical consequences of these industries cannot be managed in isolation and global legal responses are needed.[249] GAL is therefore defined by Peters as 'the sum of legal rules and principles (both state made and non-state made) governing the interactions between humans and other animals on a domestic, local, regional, and international level.'[250] GAL seeks to address the inadequacy of the fragmented national legislation in the face of globalisation.[251]

Unlike RoN, which is primarily concerned with ecosystems, rivers, forests *etc*. as legal subjects, GAL is especially concerned with individual animals and their welfare, but it also engages critically with 'environmental' concerns such as the Convention on Biological Diversity (CBD).[252] From the perspective of participation, GAL represents an important expansion of scope from RoN which often treats animals as elements of ecological systems, rather than as subjects of concern in their own right. GAL attempts to broaden the circle of legal concern from humans and nature to individual non-human

[249] Anne Peters, 'Introduction' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020).
[250] ibid.
[251] Guillaume Futhazar, 'Biodiversity, Species Protection, and Animal Welfare Under International Law' in Anne Peters (ed), *Studies in Global Animal Law* (Springer Berlin Heidelberg 2020).
[252] Peters (n 250) 2.

animals.[253] This is also one of the fundamental ways in which GAL moves beyond traditional IEL instruments, because it takes seriously the claim that individual animals have interests. In this sense, it seeks to close what Peters terms the 'animal welfare gap' in international law.[254] Under GAL, legal intervention is justified by reference to harm suffered by animals, distinct from environmental damage or human concerns – as seen for example in GAL's concern with animal welfare in the context of live trade which is the practice of transporting animals long distances in compromised welfare to jurisdictions that do not have welfare protections.[255] GAL approaches its concerns about animal interests, primarily, by seeking to regulate human actions in relation to animals such as protection of animals during war[256], prohibition on wildlife trafficking[257], and focusing on farming practices[258]. The consequence is that whilst animals are increasingly recognised as bearers of morally relevant interests, the legal subject remains the human. This means that because GAL focuses on human behaviour, it remains human centric.

This is not to detract from the important and creative efforts of GAL to improve the lives of animals. One prominent site where GAL has sought to strengthen accountability is in international trade, where it has sought to embed animal welfare concerns into trade law through mechanisms such as certification schemes and import bans.[259] Yet, this example also highlights a difficulty as it demonstrates how participation can be shaped by global inequalities. States with so-called high animal welfare standards, particularly in the European Union, have sought to 'export' their animal welfare norms through trade agreements and market leverage.[260] This has created new forms of participation – for example where consumer preferences in one jurisdiction influences production practices in another. But this raises questions of legitimacy and whether GAL reproduces power imbalances, because economic power

[253] ibid.
[254] ibid.
[255] Kristen Stilt, 'Trading in Sacrifice' in Anne Peters (ed), *Studies in Global Animal Law* (Springer Open 2020).
[256] Jerome de Hemptinne, 'Challenges Regarding the Protection of Animals During Warfare' in Anne Peters (ed), *Studies in Global Animal Law* (Springer Open 2020).
[257] Jiwen Chang, 'China's Legal Response to Trafficking in Wild Animals: The Relationship between International Treaties and Chinese Law' in Anne Peters (ed), *Studies in Global Animal Law* (Springer Open 2020).
[258] Saskia Stucki, '(Certified) Humane Violence? Animal Production, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has To Do With It' in Anne Peters (ed), *Studies in Global Animal Law* (Springer Open 2020).
[259] Peters (n 250) 4–7.
[260] ibid 7–8.

allows wealthier countries to enforce their preferences and by doing so marginalises other perspectives.

As with RoN, GAL has both promise and limits. It is helpful in critiquing the anthropocentrism of IEL and it makes space for animals as subjects of concern, but its participatory structures don't seek to move beyond the human. Animals can only participate by proxy, and even then, their interests are filtered through market logics or bureaucratic processes. The original contribution of this thesis is in its insistence on moving beyond representation. The participation toolkit developed in Chapter 3 therefore complements and extends the ambitions of both GAL and RoN. Like GAL and RoN it takes seriously the status of animals and nature as being more than resources or property. Where it differs, is that it foregrounds participation as the central concern. It does this by introducing a novel procedural mechanism to seek to involve non-humans – it starts by drawing awareness to issues such as who speaks for non-humans and why, it directs attention to the venues of decision-making, it looks at what forms of accountability exist, and it considers whether outcomes are prioritised over processes. This shift matters because if we acknowledge that deep structural problems within IEL are rooted in the narrow worldviews on which it is based, then meaningful reform must be directed toward broadening whose perspectives, values and ways of knowing are included.

2.7. Best Practice in human participation – towards a multispecies toolkit

The critique surveyed above shows that participation is never neutral. This does not mean we should abandon participatory methods. Rather, because of the promise that participation holds as a tool to address environmental degradation, it is important to understand how to create better processes and frameworks to enable full participation of all stakeholders.[261] Understanding dynamics that influence participation is not only vital for improving participation among marginalised human groups, but also offers a foundation for imagining how participation might be reconfigured to include non-human interests. As this research argues, the conditions that exclude non-humans from

[261] For a general discussion on the importance of participation that provides a different context to support the points above, specifically the need to include of marginalised female voices in international law see Aoife O'Donoghue and others, 'Chapter 6: Can Global Constitutionalisation Be Feminist?' *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing 2019).

participatory processes are not unique, they reflect and extend many of the same logics that have historically excluded certain human groups. Given this common thread, the next section distils best practice insights from participation research to identify key conditions that support meaningful and inclusive engagement. These insights are mapped onto the participation framework considered above: scope, control, venue, accountability and process/outcome. This approach enables human participation to provide insight into how multispecies participation can be better facilitated and provides the conceptual scaffolding for the multispecies participation toolkit as the basis of the method for this thesis.

2.7.1. Good faith

In his review of best practice, Reed considers that '[s]takeholder participation needs to be underpinned by a philosophy that emphasizes empowerment, equity, trust and learning'.[262] This philosophy is realised by ensuring certain conditions are met in both the design of the participatory process, and the behaviour and approach of the organisers and participants. Broadly, these preconditions can be described as 'good faith'. As Cornwall explains, achieving a proper interchange between different worldviews is more than just enabling spaces to talk and listen:

> [r]esisting discursive closure, reframing what counts as knowledge and articulating alternatives, especially in the face of apparently incommensurable knowledge systems, requires more than simply seeking to allow everyone to speak and asserting the need to listen[263].

Whilst talking and listening are undoubtedly an important aspect of participatory processes; they must be accompanied by an ethos to make such exchanges meaningful. There needs to be a willingness to not just listen, but to understand.

The importance of this broad concept is explored in such diverse fields as participatory development, disability activism and feminist care ethics. Hailey, writing about participatory development, considers that 'respect, trust, and even friendship' are significant in determining the success of a project.[264] He critically analyses a trend

[262] Reed (n 143).
[263] Cornwall (n 149) 84.
[264] John Hailey, 'Beyond the Formulaic: Process and Practice in South Asian NGOs' *Participation: The new tyranny?* (2001).

within NGOs to impose formulaic approaches to process and practice in participatory efforts. His study reveals that what makes a participatory processes work is fluid and dependent on context, but it is important that any approach be 'rooted in a dynamic relationship of mutual trust and respect'.[265] A similar sentiment is expressed by Taylor, a disability activist who writes about what it means to involve *the other* as a 'vital participant and contributor to our shared world'.[266] She refers to the work of feminist care ethicists such as Adams, Donovan and Gruen. What she considers important in feminist care ethics and disability activism is contained in a quote she cites from Gruen,

> Being in ethical relation involves, in part, being able to understand and respond to another's needs, interests, desires, vulnerabilities, hopes, perspectives etc. Not simply by positing, from one's own point of view, what they might or should be but by working to try to grasp them from the perspective of the other[267]

McKibbin and Harris articulate similar concerns in proposing politics grounded in love.[268] Referencing the work of bell hooks, they consider a politics of love is about showing concern for others and is connected with concepts of 'kindness, generosity and commitment'.[269] They address the argument that concepts of love and good faith may be considered 'too soft - too airy-fairy, too waffly - for the hard discussions that need to be had', but go on to reject this critique by pointing out that having 'motivating ideals' can help difficult discussions and debates as these can provide a focus when addressing divisive issues.[270] They note that having these values are the heart of decision-making can 'inspire action without compromising their capacity to provide us with different solutions in different situations'.[271]

Good faith maps on to the participatory framework developed above because it relates to motivation, control and accountability. For example, good faith in participatory processes ensures that the exercise is not purely driven by extractive motivations.

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[265] ibid 101.
[266] Sunaura Taylor, *Beasts of Burden: Animal and Disability Liberation* (The New Press 2017) 207.
[267] ibid 224.
[268] Philip McKibbin, *Love Notes - for a Politics of Love* (Lantern Books ed, 2019).
[269] ibid.
[270] ibid.
[271] ibid.

When considering control, good faith shifts the power from top down to shared control because it is necessary to cede power to understand. Finally, good faith speaks to accountability because trust in the process is generated by the extent to which participants consider that their involvement or input is being taken seriously, and, in turn, this impacts outcomes, as inclusion goes to the legitimacy of the decision made.

2.7.2. Identification/ inclusion of stakeholders

The need to include a diversity of voices in decision making has become a common theme in environmental governance.[272] There are a multitude of reasons for this, one is that a plurality of voices can provide new and imaginative ways to address problems and an opportunity to incorporate local knowledge – which in turn can improve decision making.[273] In legal terms plurality is significant, particularly in Indigenous contexts, because it can mean recognising Indigenous law as a source of legal authority.[274] A further advantage of this approach is that by bringing the decision making closer to those who are impacted empowers the communities involved and may mean that the decision is better received and implemented.[275] Hence, the identification and inclusion of stakeholders is an important aspect of the participatory process.

The failure to include marginalised groups early in the participatory process has been identified more generally as an issue in literature on participation.[276] This problem of marginalisation often arises when a top-down approach has been adopted where a public body or government organization determines what they consider the issue to be and the parameters of the problem-solving exercise to be carried out.[277] It is only after this stage that participants are invited to provide their views. The consequence of this approach is that the framing of the agenda is not always appropriate for the issues encountered, or does not reflect the most pressing needs on the ground.[278] As Rautio *et al* note, such endeavours raise questions about *for whom* and *on whose*

[272] N Mirumachi and E Van Wyk, 'Cooperation at Different Scales: Challenges for Local and International Water Resource Governance in South Africa' (2010) 176 The Geographical journal 25.
[273] Sharman (n 112).
[274] An example of this is explored in the case study in Chapter 4 on the Whanganui River
[275] Mirumachi and Van Wyk (n 273).
[276] White (n 129).
[277] Reed (n 143).
[278] ibid.

terms the participatory process is being conducted.[279] Hence literature on best practice indicates that where possible there should be stakeholder involvement as early as possible, for these foundational issues to be addressed.[280]

A further reason why the inclusion of stakeholders at an early stage can be of benefit is that it may bring in perspectives that can challenge power dynamics. Examples of this may be seen in how the participatory process is conducted, such as through formal meetings which may have ingrained patterns of domination where certain groups or individuals feel more comfortable asserting their views.[281] Bringing in voices from outside the dominant discourse and from groups that are, or have been marginalized, can help to identify how these oppressive paradigms have been naturalised in Western culture.[282] As Muhlbacher, who writes from the perspective of queer ecofeminism explains, by identifying these oppressive paradigms these perspectives serve as a 'liberatory framework' because,

> by drawing on the voices, perspectives, practices of those who have been marginalized, discursively erased, left vulnerable … and yet have found ways to survive and even thrive in a system that works against them, we can find inspiring imaginaries and impulses for paradigmatic alternatives to the dominant, and ultimately the possibility of a joint liberation.[283]

Much of the feminist work in this area considers how the absence of women in the development of international law has impacted them by legitimising and perpetuating unequal power structures.[284] The work of feminist scholars such as Charlesworth and Chinkin is to 'rethink the discipline... so that it can offer a more useful framework...'.[285] An example of this can be seen in the work of O'Donoghue and Houghton who propose a seven-part manifesto as a means by which to include feminist concerns in a global

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[279] Pauliina Rautio and others, '"For Whom? By Whom?": Critical Perspectives of Participation in Ecological Citizen Science' 765.
[280] Reed (n 143); Caron Chess and Kristen Purcell, 'Public Participation and the Environment: Do We Know What Works?' (1999) 33 Environmental Science & Technology 2685; Ngulube, Tatano and Samaddar (n 156).
[281] Cornwall (n 149) 86.
[282] Judith Ezra Mühlbacher, '"Melancholic? Naturally!": Impulses for Cultural Transformation from Queer-Ecological Worldmaking, Activism, and Art in a Western Context' (2020) 76 World futures 353.
[283] ibid.
[284] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).
[285] ibid 1.

constitution.[286] Viewed through the participatory framework developed earlier, early and deliberate stakeholder identification ensures that participation starts with clarity and breadth of scope. This in turn sets the foundation for more balanced control and inclusive identification of those affected.

2.7.3. Clear objectives & consensus versus agonism

Noting the earlier discussion on process versus outcome approaches[287] best practice literature identifies that it is important that the objectives of the participatory process are clear from the outset.[288] This is closely linked to the identification and early inclusion of stakeholders because if the objectives are clear, it is easier to identify stakeholders or enable them to self-identify. But the reason for clear objectives extends beyond stakeholder selection and includes issues relating to transparency and expectation management.[289] If stakeholders are to have meaningful input into the decision being made, they need to understand the intended objective of the process, or at least the initial intended objective. As Lynam *et al* state 'well formulated questions are more likely to generate robust answers'.[290]

Reed touches on an important aspect of setting objectives, which is that it is often assumed that one of the purposes of a participatory process is to achieve consensus.[291] Weale explains that consensus building can be seen as a more democratic way of making decisions because it gives decisions legitimacy.[292] Citing the work of van de Kerkhof, Reed cautions, however, that seeking consensus can direct the focus to achieving an 'agreeable decision' rather than a 'quality decision'.[293] Kothari and Weale identify one of the main critiques of consensus building which is that in seeking a unitary view, this approach flattens differences.[294] Drawing on the work of Mouffe, Weale explains that this approach seeks to 'erase irreducible

[286] O'Donoghue and others (n 262).
[287] See section 2.4.6.
[288] Reed (n 143); M Buchy and S Hoverman, 'Understanding Public Participation in Forest Planning: A Review' (2000) 1 Forest Policy and Economics 15.
[289] Buchy and Hoverman (n 289).
[290] T Lynam, 'A Review of Tools for Incorporating Community Knowledge, Preferences, and Values into Decision Making in Natural Resources Management' (2007) 12 Ecology and Society.
[291] Reed (n 143).
[292] Albert Weale, 'Between Consensus and Contestation' (2016) 30 Journal of Health Organization and Management 786.
[293] Reed (n 143).
[294] Kothari (n 228).

differences present in society rather than acknowledge them... that any putative consensus will always in practice be a form of intellectual and political hegemony excluding certain perspectives, whilst pretending at the same time to be general and impartial'[295]. Peterson *et al* share similar concerns, further explaining that 'the attempt to placate everyone risks the attenuation of any impetus for change and reifies the status quo'.[296]

The alternative to building consensus as an objective is to create a forum in which to explore difference, referred to variously as the 'shared adversity principle', 'argument-based model' or agonism.[297] Peterson proposes an argument-based model for environmental decision making. One of the advantages of an argument based model is that it avoids an all-or-nothing approach, it allows differences of opinion without reducing the 'other' to an enemy.[298] Rather than flattening difference to achieve consensus, an argument based model anticipates difference and works to find a way to negotiate 'the politics of opposing identities and interests'.[299] Looking back then at the participatory framework, clear objectives evidently function as a practical guide for directing a process, but also a way to surface where power sits. It brings to the fore what the direction of the process is, who decides and whose arguments carry more weight.

2.7.4. Ability to influence decisions

As Arnstein explains 'there is a critical difference between going through the empty ritual of participation and having real power needed to affect the outcome of the process'.[300] Best practice literature sets out that stakeholders must be able to participate in a meaningful way. A study by de Vente *et al* reviewing participatory designs in decision making processes in an environmental context, found that it was important for participants to know how they would benefit from involvement, and this

[295] Weale (n 293).
[296] M Nils Peterson, Markus J Peterson and Tarla Rai Peterson, 'Conservation and the Myth of Consensus' (2005) 19 Conservation biology 762.
[297] Weale (n 293).
[298] Robert L Ivie, 'Rhetorical Deliberation and Democratic Politics in the Here and Now' (2002) 5 Rhetoric & public affairs 277.
[299] ibid; Peterson, Peterson and Peterson (n 297).
[300] Arnstein (n 122).

included understanding how their input would be acted upon.[301] The best practice literature also proposes that methods should be tailored to the decision-making context that includes having regard to sociocultural and environmental factors, and this is because the ability to influence decisions is also dependent on other processes such as how the procedure accounts for local context, access to information and multidirectional learning - all of which are explained below. In the context of the participatory framework, ensuring that participation can shape outcomes shifts the process from performative to real participation, and it becomes a process of reciprocity. This embeds agency and control as structural features of the process.

2.7.4.1. Equal Access to Information

For participants to make a meaningful contribution, it is important that the problem requiring input is clearly articulated and that there is sufficient information available to 'identify with the problem' and understand it.[302] As noted in section 2.5.3. access to information forms a key pillar of IEL. So, whilst there is a recognition within IEL that access to information is important, it is still necessary to address who determines what information is relevant and what form that information takes.[303] One of the concerns that has been expressed about the engagement of the public in scientific concerns is that the public do not always have a sufficient technical grasp of the subject to effectively engage with the issues.[304] To address this, efforts have been made to democratise science through, for example, citizen science initiatives.[305] But there are still ongoing debates about 'how lay knowledge is framed alongside scientific expertise and whose knowledge counts within the realm of institutionalized science'.[306] This further highlights the importance of ensuring that technical or specialised information is presented in a way that is accessible - and what counts as 'accessible' is a matter that will be dependent on context and the stakeholders involved.

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[301] Joris de Vente and others, 'How Does the Context and Design of Participatory Decision Making Processes Affect Their Outcomes? Evidence from Sustainable Land Management in Global Drylands' 24.
[302] Reed (n 143); Anna Berti Suman, 'Striving for Good Environmental Information: Civic Sentinels of Oil Pollution in the South of the North' [2022] Law, Environment and Development Journal 161.
[303] RA Samndong, 'The Participation Illusion Questioning Community Participation in a REDD+ Pilot Project in the Democratic Republic of Congo' (2018) 20 The International Forestry Review 390.
[304] Rautio and others (n 280); Rick Bonney and others, 'Can Citizen Science Enhance Public Understanding of Science?' (2016) 25 Public understanding of science 2.
[305] Bonney and others (n 305).
[306] Rautio and others (n 280); Bonney and others (n 305).

Literature on best practice suggests that stakeholders should be involved in determining what information is relevant and where necessary co-producing the materials.[307] This approach may assist in addressing concerns around accessibility. Where participation is broad and inclusive, it may also mitigate concerns regarding the marginalisation of particular forms of knowledge. Viewed through the participatory framework, access to information shapes who can engage, which forms of knowledge are legitimised and provides a basis on which participants can hold power to account.

2.7.5. Multidirectional learning and collaboration

Participation is often centred around the exchange of ideas communicated through speech. Language is often an insight into the value system of a culture. For example, because many indigenous cultures do not view the world through a nature/culture divide, they do not tend to have a word for nature as a whole.[308] A complete reliance on language can present roadblocks to participation because speech is neither a neutral medium, nor is it necessarily a universal medium. Language and speech can privilege those fluent in a dominant language and those familiar with the more formal and technical modes of speech required by legal processes. Further, relying on language assumes that meaning can be fully conveyed through words – when communication can be embodied in non-verbal cues such as silence or gesture. So, when participation is framed solely through speech there is a risk that those who don't speak in the right 'register' are sidelined or excluded.[309]

Listening therefore, is a process that is informed by context and culture, it 'is not just a passive, receptive process, but one of rhetorical invention in which the listener productively engages in meaning-making processes'.[310] If participation is to be genuinely inclusive, this requires rethinking not only who is allowed to speak, but what it means to listen. To explore this, it is helpful to briefly introduce the concept of semiosis. Semiosis describes the process by which humans (and non-humans) make meaning by interpreting and responding to signs in our environment. These signs often

[307] Christina Prell and others, 'If You Have a Hammer Everything Looks Like a Nail: Traditional Versus Participatory Model Building' 263.
[308] Erin O'Donnell and others, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9 Transnational Environmental Law 403.
[309] Gathii (n 10).
[310] Megan Poole, 'Witnessing the Open Semiosis: A Method for Rhetorical Listening beyond the Human' (2023) 53 Rhetoric Society Quarterly 30.

take conventional symbolic forms such as words, but they can also include physical cues such as heat, movement or sound.[311] While much rhetoric scholarship has focussed on language, a strand of this scholarship expresses a view that there is more to rhetorical matters than language alone. This scholarship embraces the idea that meaning also arises through bodily experience, perception and emotion.[312] Drawing on this work, Poole refers to Kohn's concept of open semiosis to describe ways of making meaning that extend beyond language and symbolic representation. Poole explains that one way in which to practice this form of listening is to listen and witness without specific questions in mind or looking for specific answers. She explains what can be left is something that 'does not fit and cannot be understood with the symbols and methodologies our disciplines have given us..'[313] Where this may lead is an experience that cannot be articulated, but it may forge a sense of understanding or solidarity with *the other* – what Keeling terms 'a shared arena of sensation'.[314] The willingness to recognise that a process as fundamental as listening, is not in and of itself a neutral exercise, opens up space for different ways to engage and promotes a more reflective participatory process that is in keeping with the ethos of good faith.

As noted above, a critical element of multidirectional learning is developing an awareness of how knowledge frameworks shape participation. This is because, as Winter explains, 'all theorizing, both moral and non-moral, takes places in an intellectual realm dominated by concepts, assumptions, norms, values, and framing perspectives that reflect the experience and group interests of the privileged group'.[315] Winter goes on to describe how within these frameworks it is essential to be 'self-conscious' about knowledge and where ideas originate because 'dominant concepts will obscure certain crucial realities, blocking them from sight or naturalizing them'.[316]

In the context of IEL, these knowledge hierarchies can make participation appear inclusive whilst subtly reproducing exclusion. For example, terms like sustainable development are presented as neutral but they embed specific cultural assumptions

[311] Daniel Chandler, 'Semiotics for Beginners' (2019) <https://www.cs.princeton.edu/~chazelle/courses/BIB/semio2.htm> accessed 28 November 2025.
[312] Poole (n 311); David Abram, *The Spell of the Sensuous: Perception and Language in the More-Than-Human World* (Vintage 2017) 77–86.
[313] Poole (n 311).
[314] ibid.
[315] Winter (n 233) 43.
[316] ibid.

about progress, growth, and intergenerational justice. As Winter and Shue both note, such frameworks privilege living, Western humans, and marginalise worldviews that are based on restraint and relations with non-humans.[317] Awareness of these knowledge frameworks is therefore essential to participatory processes. However, because these frameworks are often deeply embedded, participatory design might need to create space to allow these assumptions to surface, such as opportunities to ask questions about whose knowledge counts and why.

An important context in which to question knowledge frameworks is when considering Indigenous and local knowledge alongside Western science. Integrating Indigenous and local knowledge alongside scientific expertise is recognised as improving environmental governance.[318] This, however, is not a straightforward process, because as Blaikie notes, local knowledge is often reshaped to fit official frameworks. Consequently, the local Indigenous voices can become distorted within the participatory process.[319] As Blaikie explains,

> there are many instances where local knowledge has not been able to negotiate on an equal basis with official scientific knowledge, but has instead been shaped by what is offered by outsiders who make strategic choices about which "local knowledge" is heard and conformable to their scientifically given environmental goals, and then ventriloquised as the voice of the community.[320]

At the same time, the literature on best practice also echoes a note of caution – simply prioritising local knowledge can reproduce dualisms by inverting, rather than dismantling, hierarchies. Mohan proposes that the more constructive collaboration arising from multidirectional learning is a form of knowledge hybridization - a way to 'work the hyphen between dualisms because it is within these intersubjective worlds that meaning, knowledge and political action will emerge'.[321] This approach chimes with the work of Plumwood who, in considering how to address the problem of

[317]ibid 59.
[318] Reed (n 143).
[319] Piers Blaikie, 'Is Small Really Beautiful? Community-Based Natural Resource Management in Malawi and Botswana' (2006) 34 World Development 1942.
[320] ibid.
[321]Giles Mohan and Samuel Hickey, 'Towards Participation as Transformation: Critical Themes and Challenges' in Giles Mohan and Samuel Hickey (eds), *Participation: from tyranny to transformation?* (Zed Books 2004) 164.

dualisms, sets out that resolution requires 'not just the recognition of difference, but recognition of a complex, interacting pattern of both continuity *and* difference'[322].

2.7.6. Awareness of context

Best practice recognises that participation never occurs in a vacuum. Every process is embedded in specific histories, places and power relations that shape how people come to 'the table' and what they can express.[323] Attending to this context is not just about having a greater awareness of the background, but it is part of the procedural design of the process as well. Two contexts are detailed here: history and place.

2.7.6.1. Historical Context

Environmental decision-making can intersect with legacies of violence and dispossession. For example, in cultures where the more-than-human world are considered kin, environmental destruction is mourned as a death.[324] These experiences all impact on how participants come to a process, what they seek from the process, and the basis on which they engage with it. As Herman warns in the context of Truth Commissions, revisiting harm without protection or follow up 'can leave [participants] with nowhere to go'.[325] In this context, several elements of participatory best practice become particularly significant, including good faith, early and ongoing involvement and the ability to influence outcomes. Without such safeguards participatory processes risk becoming extractive exercises. Good faith processes, coupled with early participation and genuine influence, enables participants to set the parameters of their involvement and increases the likelihood that engagement will affect substantive outcomes.

2.7.6.2. Place

Place shapes who can participate and how. As Cornwall notes, '[s]paces are never neutral, rather they are 'infused with existing relations of power, interactions within them may come to reproduce rather than challenge hierarchies and inequalities'[326].

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[322]Val Plumwood, *Feminism and the Mastery of Nature* (Routledge 1993) 67.
[323] Reed (n 143).
[324] Sophie Chao, 'Multispecies Mourning: Grieving as Resistance on the West Papuan Plantation Frontier' [2022] Cultural Studies 1.
[325]Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2001).
[326]Cornwall (n 149) 80.

Places may have links to particular historical events or constructs that can reinforce hierarchies, for example government buildings in settler states may represent spaces of oppression for Indigenous people. Therefore, as Cornwall explains

> effective participation within the 'public sphere' may indeed come to depend on access to other spaces, 'sites of radical possibility' from which marginalized actors are able to define themselves and only then to act.[327]

As Winter explains when summarising the views of Dotson and Whyte, understanding Indigenous perspectives requires dominant actors to experience those communities *in situ*, not only intellectually. [328] Yet, even newly created spaces can carry inherited meanings, and acts of silence or non-participation may signal that the design itself remains exclusionary. [329] Cleaver reminds us that silence can be resistance – but it can sometimes also reflect a lack of agency rather than being a deliberate act of dissent. [330] It is important to be attuned to all these possibilities. Within the participatory framework, considering participation within its historical and spatial context acknowledges unseen power and allows it to be challenged and attended to.

2.8. Conclusion

This chapter has traced how participation in IEL has evolved, how it is shaped by historical and philosophical assumptions, and what best practice in participatory design reveals about power, inclusion and voice. Yet even the most progressive approaches remain framed by human agency – these approaches can widen the circle of concern but only within the limits of anthropocentric institutions and knowledge systems. The challenge that follows is therefore not to simply improve participation – but to reimagine it – to consider participation beyond the human. The next chapter develops a novel multispecies participation toolkit to address this gap and is an original contribution to the scholarship. The toolkit is a procedural framework that draws on the best of human participatory practice but reconfigures its dimensions to make space for other forms of agency and relation.

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[327] ibid 87.
[328] Winter (n 233) 13.
[329] Cornwall (n 149) 85.
[330] Frances Cleaver, 'The Social Embeddedness of Agency and Decision-Making' in Samuel Hickey and Giles Mohan (eds), *Participation: From Tyranny to Transformation?* (Zed Books 2004) 273.

3. Chapter 3: A new methodological framework for multispecies participation

3.1. Introduction

This chapter operationalises the participation principles in Chapter 2, by translating them into a toolkit that guides multispecies participation. It does this by building on the on best practice methods for human participation in environmental decision-making identified in the previous chapter. The toolkit is informed by a wider body of theoretical scholarship that is not always explicitly concerned with participation, but examines how humans can better come to know, listen and relate with the non-human world.

Before introducing the toolkit, it is first necessary to understand how non-human participation is approached within current political and legal frameworks. This background provides context for the proposed adaptions to the toolkit. For this reason, this chapter begins by outlining current barriers to non-human participation. It examines the dominant legal and political criteria for participation by tracing the foundations of this development from Aristotle, through the Enlightenment, to current thinking. Understanding this evolution shows how these logics continue to influence who is a political actor.

The chapter examines how and why sentience has become a dominant threshold for political inclusion for non-humans within contemporary legal and political debates. It critiques the use of sentience as a basis for participation, offering both philosophical and practical analyses of its limitations. The chapter argues that sentience-based frameworks restrict the scope of non-human involvement in political decision-making and tend to rely on representational models. The section concludes by suggesting that if we are concerned about including the interests of non-humans, then the goal should not be better representation of non-humans within human institutions, but rather the creation of avenues for direct participation of non-humans. This discussion prefaces a broader critique of existing political structures and proposes that the fundamental issue when seeking to accommodate the interest of the non-humans is not their absence of agency, but rather that our systems have only been designed to perceive or accommodate human interests.

Building on this critique, this chapter then considers how the structural shifts required within the political and legal frameworks of IEL to enable multispecies participation. It proposes an alternative ethical foundation for the toolkit, grounded in an ethic of care and relationality. By synthesising insights from ecofeminism, Indigenous studies, new materialism and posthumanism, this section demonstrates that the conceptual tools for rethinking participation beyond the human already exists within these longstanding intellectual traditions. Far from being a radical departure, this approach draws on established knowledge framework to challenge the human exclusivity of current legal systems and provides the necessary scaffolding for a multispecies toolkit.

3.2. Current Barriers to Non-Human Participation

3.2.1. Development of the Legal/Political Criteria for Participation

Political inclusion has never been based on a neutral threshold – it has always reflected culturally specific ideas regarding who possesses the necessary attributes to be recognised as a legal and political subject. The ability to speak human languages and engage in rational thought has generally been the basis on which access to political spaces is granted.[331] There is a long historical and philosophical background to the emergence of this position. Some of the earliest scholarship on this issue begins with Aristotle who famously described man as a 'political animal', but in his view the only animal capable of participating in politics.[332] He considered the capacity for *logos,* which is the capacity for rational speech and the ability to articulate moral concepts, to be unique to humans. Aristotle's position was that rational expression was required for political participation and as only humans possessed *logos,* only humans could participate in politics. This concept became embedded in law and politics in the West during the Enlightenment period.[333]

A particular aspect of *logos*, that of rationality, became a central concept during the Enlightenment. John Locke who is considered one of the most influential political philosophers from this period, placed great emphasis on the capacity to reason when

[331] Meijer (n 60).
[332] ibid 3.
[333] ibid.

writing about human nature and rights.[334] As Resendiz *et al* explain 'Locke saw human nature as being directed by reason and moved humans towards civil society'.[335] Those individuals who were entitled to submit to the social contract, became subjects of justice. They were protected in their pursuits and economic activities, were allowed to own property, were entitled to liberty and significantly were able to seek redress where these rights were unnecessarily interfered with. Crucially though, this individual at the centre of the social contract who was the subject of these rights, was never a universal figure. The emphasis on the capacity to reason as the basis on which an individual could submit to the social contract meant that certain humans, and all non-humans, were disenfranchised because of a perceived inability to engage in rational thought.[336] For example, various groups, such as women, racial and religious minorities, Indigenous people and disabled people, have during periods of history not been considered in possession of the full capacity to reason[337] and have been excluded as subjects of justice.[338] Rationality therefore functioned not just as a descriptive account of capacity, but also as a threshold for political inclusion.

3.2.2. Moral considerability and political inclusion

While rationality continues to structure political and legal practices, Enlightenment ideas of rationality as a basis for political inclusion are no longer regarded as legitimate. In response to the movement away from Enlightenment rationality, sentience has now emerged as a way to extend moral consideration without relying on the assessments of cognition associated with rationality. It is important to emphasise that currently sentience performs a narrower function - it supports arguments for moral inclusion for the purposes of protection, but sentience does not currently resolve questions around political standing. There is however a clear link between moral considerability and political inclusion. Within liberal legal thought, moral considerability is linked to the logic of the social contract which, in basic terms, provides that where a being is understood to have interests of its own, those interests

[334] Rosalva Resendiz, Lucas E Espinoza and Luis E Espinoza, 'Classical Liberal Philosophers and Their Contributions to Democracy and Justice: Discourses on Freedom, Equality, Reason and Law' (2022) 41 Journal of Ideology.
[335] ibid 2.
[336] Nussbaum, *Frontiers of Justice* (n 118).
[337] Rationality was not necessarily the sole determinant of political inclusion – property ownership was also an important factor – see Pablo Magaña, 'Nonhuman Animals and the All Affected Interests Principle' Critical Review of International Social and Political Philosophy 1, 10.
[338] Danielle Celermajer and others, 'Justice Through a Multispecies Lens' 475 475.

are taken to generate an entitlement to protection against unreasonable interference. Once interests are recognised as morally significant, this in turn gives rise to questions around whether and how those interests are represented in political spaces.

For this reason, whilst sentience does not currently operate as a basis on which to extend political inclusion, it has increasingly been suggested as a basis to do so. Whether sentience should ground political participation has become a central question within contemporary scholarship and one that will be explored in greater detail below.

3.3. Sentience as a Threshold

Sentience at its most basic relates to an individual's capacity to experience pleasure or pain.[339] But the definitions of sentience, and the parameters of the concept have become increasingly nuanced. Broom for example, defines a sentient being as,

> one that has some ability to: (1) evaluate the actions of others in relation to itself and third parties; (ii) remember some of its own actions and their consequences; (iii) assess risks and benefits; (iv) have some feelings; and (v) have some degree of awareness.[340]

Likewise, Nussbaum offers a more expansive interpretation of the term which extends beyond the capacity to feel pain or pleasure, to consideration for an animal's capacity for 'significant thriving'. Significant thriving includes

> the ability to move toward or away from objects as the animal's view dictates... this will involve not just desires but also emotions, since emotions have evolved as ways living creatures take in news about how things are with their most important goals and projects.[341]

Sentience appears to be a more inclusive criteria because it extends moral concern between, and beyond the human, without requiring cognitive sameness. Sentience, at least on the face of it, is concerned with vulnerability and the capacity to suffer, and this has in recent times been the basis on which it has been determined whether a being's interests are deserving of protection.[342] For this reason sentience has widely

[339] Donald Broom, *Sentience and Animal Welfare* (2014) 2.
[340] ibid 5.
[341] Martha Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster 2022).
[342] Peter Singer, *Animal Liberation* (Harper Collins 1975) 8.

been adopted as the foundation of moral *considerability* in animal ethics. Singer casts sentience as 'the only defensible boundary of concern for the interests of others'.[343] In a similar vein Regan advances a rights-based approach grounded in the concept of the animal as the 'subject of a life', a term that encapsulates individuals who possess a sense of their existence and selves. The two approaches frame the concept differently, but both locate moral worth in the possession of a certain mental capacity.[344]

3.3.1. Sentience as a flawed threshold for moral considerability

Whilst superficially sentience may appear to avoid the moral pitfalls of rationality as the basis for moral considerability, on closer analysis it is shown to be a problematic threshold on both scientific and moral grounds. This is because sentience is in essence, a way to determine a form of cognitive capacity recognisable to humans, using human yardsticks. Sentience ultimately can be reduced to a test of similarity between humans and other species. Taylor acknowledges that 'the work of finding similarities between human beings and animals of other species can be very valuable' but using it as a measure to determine worth is problematic. One of the critiques of sentience is that it rests on an unstable scientific foundation. As Meijer explains, sentience is an 'empirical matter [that] is not settled'.[345] Tests to determine levels of sentience have been shown to be highly subjective, culturally biased and anthropocentric. [346] Taylor gives examples of this by referring to studies on the 'mirror self-recognition' test[347] which was a study developed in the 1970s to measure self-awareness.[348] She explains that until recently it was believed that all children without intellectual disability older than 24 months would pass the test. A 2010 study found this was not the case and many non-Western children failed to pass the test not because of any intellectual disability, but because of cultural difference.[349] A subsequent article

[343] ibid.
[344] Tom Regan, *Empty Cages: Facing the Challenge of Animal Rights* (Rowman and Littlefield Publishers 2004).
[345] Meijer (n 60).
[346] Heather Browning and Jonathan Birch, 'Animal Sentience' (2022) 17 Philosophy Compass e12822.
[347] Also referred to as the 'mark' test – as Taylor explains it is 'a test in which some sort of mark surreptitiously placed upon a subject (animal or human) somewhere they cannot see without help [such as the face]. They are then placed in front of a mirror. To pass the test , the subject must recognize that the image in the mirror is not someone else, which they have to demonstrate by noticing the mark and trying to remove it' Taylor (n 267) 77.
[348] ibid.
[349] Tanya Broesch and others, 'Cultural Variations in Children's Mirror Self-Recognition' [2010] Journal of Cross-Cultural Psychology <http://jcc.sagepub.com/content/early/2010/09/08/0022022110381114>.

in *Scientific American* explained '[I]f the relatively small differences among human cultures can alter mark test results so profoundly, then we have to consider what researchers really learn – and don't learn – when they run the test on an animal'.[350] The flaw in these tests and the adequacy of assessments of sentience is best captured by De Waal who asked whether humans are clever enough to understand how clever other animals are.[351]

De Waal gestures towards an important point which is that humans are limited by their own capacities and understanding of what intelligence is. Taylor cites Gruen who cuts to the heart of this issue when she writes,

> "[w]hen what we are looking for is similarities… we tend to obscure or overlook distinctly valuable aspects of the lives of others." The unfortunate reality is that by focusing on similarities we are still promoting a hierarchy of value – one in which human abilities are the only abilities given worth.[352]

Taylor touches on what might be the most troubling aspect of using sentience as a measure of moral worth, which is that it reinforces speciesism.[353] Sentience, perhaps inadvertently, reinforces a hierarchy that prioritises cognitive thought, which as a result, places humans at the apex.[354] Wolfe addresses this issue and cautions that determining who matters on the basis of similarity to humans, means that the

> discourse of species will always be available for use by some humans against other humans... to countenance violence against the social other of *whatever* species - or gender, or race, or class, or sexual difference.[355]

Hence using sentience to assist animals actually reenforces structures that enable their domination. When thinking about IEL this approach can also have significant implications for the environment. As Waldow and Schlosberg explain extending justice only to sentient beings ignores the reality that the flourishing of sentient beings is in part dependent on the flourishing of non-sentient life.[356] Celermajer *et. al* echo this

[350] Taylor (n 267) 77.
[351] Meijer (n 60) 159.
[352] Taylor (n 267) 79.
[353] ibid 67.
[354] ibid.
[355] Wolfe (n 58) 7.
[356] Celermajer and others (n 339).

critique pointing out that a failure to recognise how non-sentient beings are necessary for flourishing is not just counterproductive, but it 'atomizes nature and devalues a form of life'.[357] These scholars say what is needed is an approach that calls on us 'to respect, recognize and acknowledge the claims of a system as a whole'.[358] These rigid partitionings of the world based on perceived cognition, is a distinctly Eurocentric construct. Frameworks like tikanga Māori and Buen Vivir[359] do not isolate sentient animals from non-sentient environments/objects. In relational frameworks, such as whakapapa, a human, a bird, a forest and a river are all bound within a web of kinship obligations. In these ontologies, moral considerability is not conferred based on cognition, but on relationships and place within a living whole.

At this critical juncture in environmental and animal scholarship where we are grappling with issues around moral and political inclusion, it must be remembered that, as noted above, sentience and rationality are not the only frameworks available to us. As Meijer notes other ethical frameworks exist and these will be explored later in this chapter.[360] Indeed, as Meijer further highlights there is no clear basis to assert that 'sentience should be seen as the sole political or moral value'.[361]

In practice sentience has not proved a particularly helpful tool in dismantling structures that *other*. For example, the limits of sentience become visible when translated into law. In the UK, for example, legislation has designated certain species as sentient in the Animal Welfare (Sentience) Act 2022, but this has neither created enforceable protections against all kinds of suffering,[362] nor has it conferred any entitlement to participate in legal or political decision-making. In practice sentience has not destabilised the Enlightenment framework within which exclusion is embedded. It is acknowledged that there may be a multitude of reasons for this outcome, but one

[357] ibid 488.
[358] ibid.
[359] Other cultures/religions that also do not distinguish moral considerability on the basis of sentience include Shintoism, the beliefs of the Anishinaabe and Aboriginal Australian peoples - Rosemarie Bernard, 'Yale Forum on Religion and Ecology' (*Shinto and Ecology: Practice and Orientations to Nature*) <https://fore.yale.edu/World-Religions/Shinto/Overview-Essay> accessed 6 June 2026; Robin Michigiizhigookwe Clark and others, 'Gathering Giizhik in a Changing Landscape' (2022) 27 Ecology and Society <https://www.ecologyandsociety.org/vol27/iss4/art29/>; Tyson Yunkaporta, *Sand Talk* (The Text Publishing Company 2019).
[360] Meijer (n 60) 159.
[361] ibid.
[362] Protection from suffering is often qualified by phrases such as a prohibition on "unnecessary suffering" – the implication being that some forms of suffering for human needs are appropriate.

prominent explanation must be, borrowing from Gruen, that it still promotes 'a hierarchy of value'.

Despite its flaws, sentience remains a prominent concept within animal ethics. The relatively well accepted stance that sentience establishes moral considerability, has prompted questions about when moral considerability should enable political inclusion. This can be seen in scholarship about the involvement of non-humans in political spaces, referred to as the 'political turn' in animal ethics. This literature is concerned with whether non-humans might be recognised as participants in legal and political life, and if so, the terms on which it should occur.[363]

3.3.2. Political turn in animal ethics

Scholars working in this area generally accept that non-human animals have moral significance and that their needs should be taken seriously. However, most maintain that basic sentience is insufficient to warrant political participation. Access to political spaces is limited by the belief[364] that non-humans do not possess the language and rational thought required for meaningful engagement. Scholars such as Potter,[365] Hooley[366] and Cochrane[367] argue that political participation requires a more advanced form of sentience. The contention is that whilst sentient non-human animals undoubtedly have preferences, they do not have the capacity to take collective action to advocate and deliberate with others about how to advance these preferences. Pepper draws a distinction between agency and political agency, suggesting that the latter rests on the possession of three distinct capacities: (1) the capacity to intend to affect institutions; (2) the capacity to engage in complex forms of shared intentionality; and (3) the capacity to imagine alternative political futures.[368] Pepper's view is that there are very few, if any, non-human animals that possess the cognitive abilities to fulfil all three criteria.

Pepper stresses however, that political agency does not equate to higher moral standing – it simply confers rights and responsibilities, including the duty to consider

[363] Robert Garner, 'The Case for an Interspecies Theory of Democracy' (2022) 12 Journal of Animal Ethics 96.
[364] Often grounded in significant scientific research - Broom provides a detailed outline of the research into non-human sentience - Broom (n 340).
[365] Pepper (n 142).
[366] Hooley (n 142).
[367] Alasdair Cochrane, 'Moral Obligations to Non-Humans' (LSE 2014).
[368] Pepper (n 142) 298.

the preferences of those without such agency.[369] Hooley similarly accepts the moral significance of sentient non-humans, but maintains that denying them participation causes no harm, since they cannot comprehend this exclusion.[370] For Hooley, the more important question is how the preferences of these animals can be 'solicited, interpreted and used to shape laws and policies affecting their lives'.[371] These scholars all acknowledge that sentient non-human animals have moral significance and should have their interests protected. But their reluctance to using this as a basis to extend political agency to sentient non-humans is that it may undermine what political agency currently entails.

3.3.3. Sentience & representation: Representative models in current law and theory

3.3.3.1. Direct representation

The acknowledgement of moral considerability, but the concern with extending political agency to sentient non-humans, has brought representative models to the fore. This is where humans act as intermediaries for non-human interests. These approaches are not new and can be seen in theory and practice. In law, examples can be seen in animal welfare inspectors, conservation trustees/ guardians and animal advocates in legal cases.

3.3.3.2. Hybrid models

A middle ground between representation and direct participation is explored by Nussbaum. Nussbaum does not consider that sentient non-humans can participate fully in political systems, but like Hooley she considers it essential to understand the needs of these animals to shape law and policy. Nussbaum calls for a limited form of direct participation by sentient non-humans. Through her concept of 'sympathetic imagining' she invites humans to 'cross the species barrier' to imagine what others need to flourish.[372] To operationalise this, Nussbaum considers the involvement of animals in 'legislation and institution-building' facilitated by humans ('animal

[369] Pepper (n 142).
[370] Hooley (n 142).
[371] ibid.
[372] Nussbaum, *Justice for Animals: Our Collective Responsibility* (n 342).

collaborators')[373] who have a deep connection and understanding of particular species and can attend carefully to their behaviour and what may be being communicated.[374] She does not consider that animals' inability to speak human language should preclude them from these activities as animals have a multitude of ways of communicating and it is for 'humans to attend to those voices'.[375] Nussbaum details how there is precedent for this as society already makes accommodations for humans whose disabilities prevent them participating in political activities 'in the usual way'.[376] Her proposal of 'animal collaborators' aims to create policy informed by multispecies experience.[377] While this approach still relies on representation and sentience, it moves toward greater attentiveness to non-human agency.

3.3.3.3. Representation through Citizenship

A related, but more explicitly political model, is offered by Donaldson and Kymlicka.[378] Like Nussbaum, Donaldson and Kymlicka adopt sentience as their moral baseline, however they extend this logic by arguing that sentient animals should be recognised as citizens. Under this model it is the specific status of citizenship that provides the formal basis for animals to engage in political and legal participation. Rather than requiring that political participation be predicated on a rational evaluation of policies or platforms, Donaldson and Kymlicka propose a more expansive model of engagement.[379] They argue for varied forms of political participation based on the degree of intimacy and proximity between humans and sentient non-humans. Particular consideration is given to domesticated animals because their lives are deeply interwoven with human societies, and this is advanced as the basis on which they should be extended political participation. [380]

To operationalise this, Donladson and Kymlicka propose that we reconceptualise what a political action is. As one example they suggest presence may be a political action.

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[373] Such as humans that have lived alongside a particular species 'for years and with love and sensitivity, for example Barbara Smuts with baboons, Joyce Poole and Cynthia Moss with elephants...'- Martha Nussbaum, 'What We Owe Our Fellow Animals' [2020] The New York Review.
[374] Nussbaum, *Justice for Animals: Our Collective Responsibility* (n 342).
[375] ibid.
[376] ibid 97.
[377] Nussbaum, 'What We Owe Our Fellow Animals' (n 374).
[378] Sue Donaldson and Will Kymlicka, *Zoopolis* (Oxford University Press 2011) 50–69.
[379] Donaldson and Kymlicka (n 379).
[380] ibid.

An example of this is service dogs in areas where animals have historically been prevented from accessing. Donaldson and Kymlicka argue that by merely occupying space these dogs have helped to shift assumptions and have 'shape[d] their shared community with humans'.[381] This shifts the framework from negative rights to positive relational duties of care that are anchored in ideas of co-existence. However, this approach remains grounded in sentience as a threshold for inclusion, and it remains bound within human defined categories of membership and human institutions. The question this raises, not just for the citizenship model, but all representational models, is whether this can ever provide a just form of participation. The next section considers this issue.

3.3.4. Critical analysis - Representation

At first blush representative models appear to bridge the gap between acknowledging moral considerability in sentient non-humans and addressing concerns around maintaining the viability and integrity of current political participatory approaches. However, these models are deeply problematic. Some of the strongest arguments against representative[382] models are made in children's and disability rights scholarship.[383] In exploring representative models for animals, Donaldson draws on *The Capacity Contract* which is Simplican's exploration of disability and citizenship.[384] This work examines the concept of wardship, a form of representation, where '"competent" able-bodied and neuro-typical adults agree to treat each other as political equals, but at the very same moment assert their right to rule over the "incompetent"'.[385]

This scholarship points to the concern that such arrangements are in fact a form of 'domination contract' where members of dominant groups 'treat each other according to norms of equality and consent, while asserting the natural right to govern over others'.[386] Donaldson unpacks the long and dark history that underpins this logic, from

[381] ibid 115.
[382] Also referred to as fiduciary or wardship
[383] Sue Donaldson, 'Animal Agora: Animal Citizens and the Democratic Challenge' 709 709.
[384] Stacy Clifford Simplican, *The Capacity Contract* (University of Minnesota Press 2015); Donaldson (n 384).
[385] Donaldson (n 384) 716.
[386] ibid.

‘sexual contracts’ where men agreed to treat each other like equals while exercising dominion over women, to examples involving racial and colonial hierarchies.[387] The historical context is instructive because many of these contracts are now considered unethical, and they illustrate how representation based on presumed incapacity is inherently undemocratic. As Donaldson observes ‘the idea that one group has the natural right to rule over others is in fact, the antithesis of democracy’.[388]

The second criticism is that capacity contracts rely on arbitrary thresholds. Access to political participation often turns on the ability to speak and reason, yet there is a huge degree of variance within human societies in terms of knowledge, communicative and cognitive ability. It is therefore unclear how, or where, thresholds are drawn to determine who is regarded as having sufficient capacity.[389] This problem echoes the discussion of sentience above. In both cases the line between inclusion and exclusion is unstable and is shaped by assumptions about what kinds of abilities matter and how those abilities should be expressed. To illustrate this Taylor focuses on the emphasis placed on spoken language.[390] She points to studies that attempted to teach chimps human speech. These studies were considered failures as the chimps only managed to articulate a few basic words. Yet both the experiments and the conclusions they generated exposed several ableist assumptions, which were that the framing of the experiment constrained what counted as language in the first place. Taylor notes two distinct problems with this: the first, that chimps do not have the ‘anatomical structures for vocalisation’; and the second was the underlying belief that ‘if a chimpanzee were able to use language, it would be in the same way as nondisabled hearing humans do: through sound’.[391]

Too often in the assessments of capacity described above there is a failure to broaden the question beyond the narrow human experience, and rarely is the question asked whether other animals have their own language.[392] As one linguist Taylor cites explains, ‘Linguistic criteria are established prominently and immutably in human terms, establishing human pre-eminence before the debate about linguistic placement

[387] Donaldson (n 384).
[388] ibid 717.
[389] ibid.
[390] Taylor (n 267).
[391] ibid 53.
[392] ibid 54.

of humans' animal subordinates even begin'.[393] The notion that the non-human world is 'voiceless' and requires human advocacy is misleading and potentially harmful. The non-human world communicates its needs daily: from the roar of wildfires[394], to 'a lobster banging from the inside of a pot of boiling water'.[395] There are not absences of voices – rather these are expressions that humans often fail to recognise as communicative.

A further concern relates to epistemic justice. Even well-intentioned efforts at representation risk reinscribing human dominance when they presume to know what non-humans want or need. As Meijer explains, 'the epistemic problem with humans representing non-human animal interests on the basis of expert knowledge, is that this knowledge is partly shaped by centuries of oppression and unequal power relations'.[396] Speaking for others in this way risks imposing human values and priorities onto lives that we only, at best, partially understand and renders other ways of knowing invisible. This also reveals an inconsistency with representation reasoning – non-humans are excluded from political participation on the grounds they cannot communicate in human terms, yet in representative models it is entirely acceptable for humans to routinely claim to know and articulate non-humans' interests.

The invisibility that representation creates of the *other*, is not only epistemic, but it is also social. As Donaldson observes political rights carry huge symbolic significance and have social implications, 'if groups are excluded from political participation – if they are not seen and heard – this reflects and reproduces a wider problem of social invisibility'.[397] Inclusion that relies solely on representation through human proxies risks reproducing the hierarchies that it seeks to dismantle by obscuring non-human perspectives through a human lens, and by keeping them symbolically absent from political life. For the reasons articulated above, representation does not provide an adequate response to the issue of how to include non-human interests in decision making. While it is acknowledged that some degree of representation may be a necessary starting point, it should not be regarded as the end point. Representation

[393] ibid.
[394] Celermajer and others (n 99).
[395] Taylor (n 267) 63.
[396] Meijer (n 60) 204.
[397] Donaldson (n 384) 717.

should remain an interim measure because inherent in its function is the risk that it reproduces the very hierarchies it seeks to undo. The question then of how to include non-humans in political spaces remains and leads to the next discussion, which concerns how the political space itself is structured.

3.4. Rethinking what counts as political action

The scholarship of Pepper, Cochrane and Hooley outlined above, explores involving sentient non-humans in political spaces as they are currently constructed. The difficulty with this approach is that political and legal systems are themselves products of human design, built to facilitate human forms of agency. Therefore, is it unsurprising that the arguments framed within these systems conclude that non-humans cannot qualify as political agents. The logic is circular: unless non-humans can empirically demonstrate their similarity to humans, on a measure devised and interpreted by humans, they remain excluded. As Pepper concedes, if we are looking for a justification to include non-humans in democratic participation, then we must look elsewhere.

If we are serious about developing more inclusive politics, then Pepper is correct that looking at how to include non-humans within a humancentric political system seems to be the wrong place to start. Indeed, there is good reason to avoid this approach because as Celermajer warns, attempts to include non-humans in this system means that we risk 'bring[ing] them into a politics or epistemology of domination'.[398] Meijer makes a similar point explaining that

> rights and other liberal democratic institutions, practices, and processes, may play a role in improving the lives of other animals…they cannot be the final goal. It is not up to humans to come up with a full political theory into which other animals fit; to do so would be to repeat anthropocentricism. Just relations can only ultimately come into being through interaction with other animals.[399]

This research takes that insight as a point of departure – to consider how participatory processes can be used to develop a political system with non-humans requires reimagining the political through multispecies encounters. In other words, if we take

[398] Celermajer and others (n 339) 480.
[399] Meijer (n 60) 9.

seriously the critiques of sentience and representative models, then the way through is to develop a new political system *with* our fellow species. This may seem radical and yet as the discussion below outlines, the ideas that this thesis builds on are not new, indeed many have been in existence for some time.

Bennet recognises that expanding politics beyond the human presents 'many practical and conceptual obstacles'.[400] One of the most obvious hurdles is

> how can communication proceed when many members are non-linguistic… how can humans learn to hear or enhance our receptivity for "propositions" not expressed in words.[401]

Bennett suggests that to make progress in expanding the political sphere, we should look toward democratic theories developed to provide a voice for marginalised humans. She considers Ranciere's theory of democracy as disruption.[402] For Ranciere democracy occurs not through routine processes, what we would usually consider political acts or events (such as voting), but rather, 'when the demos[403] does something that exposes the arbitrariness of the "dominant partition of the sensible"'.[404] An example of this is seen in the Civil Rights Movement, where groups systematically excluded from the political order began to act and speak as political equals. These acts were disruptive because they do not simply ask for permission to enter, but because they also expose the arbitrariness of the existing order and reveal whose voices have been missing.[405] Although Ranciere's theory was not written for the non-human world, scholars such as Bennett and Booth have considered its application to this sphere. Bennet notes that to extend Ranciere's theory, first requires loosening 'the tie between participation and human language'.[406] It is here that we can start to test how politics can be practised and understood, in the absence of human language.

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[400] Bennett (n 71) 104.
[401] ibid.
[402] ibid.
[403] *Demos* refers to the 'entire citizen body' -Daniela Cammack, 'THE DĒMOS IN DĒMOKRATIA' (2019) 69 The Classical Quarterly 42, 42.
[404] Bennett (n 71) 105.
[405] ibid 105–106.
[406] ibid.

Booth *et al* explore this concept of disruption through the lens of wildfires in Australia.[407] Wildfires represent a force that defies containment, they escape the conceptual boundaries of the 'wilderness' to reconfigure and redistribute places, people, authorities and activities.[408] As Booth *et al* note the impacts of these events are more than merely spatial,

> it is not a non-human collective making a claim of rights and value, but a huge, sweeping, potentially brutal re-configuration within which areas, selves, roles and wherewithal are disrupted and redistributed on more-than-human terms.[409]

Wildfires function as political moments, not because they make claims in human terms, but because they force a rupture in the existing order. These events reveal the limits of political frameworks that assume participation can only occur in certain human centred ways. Rethinking participation to accommodate the non-human, moves beyond arbitrary tests of capacity and instead requires humans to adopt a broader understanding of what counts as political action. If we are willing to loosen the tie between speech and participation such events can be read as political moments - what Serres might describe as the Earth speaking to us.[410]

It is important here to note that not all acts of disruption are necessarily violent or inflict harm. Non-human political action can also be seen in sites of peace and harmony, this is because it is not the violence of the democratic act that necessarily causes the disruption, but the what the act exposes and exists in contrast to. Gruen identifies farmed animal sanctuaries as sites of quiet transformation that can subvert the political order.[411] In sanctuaries where residents, irrespective of species or sentience, are given the ability to participate in shaping the community they live in, sanctuaries are also sites of disruption. As Abrall explains they are 'models of alternative modes of

[407] Kate Booth and Stewart Williams, 'A More-than-Human Political Moment (and Other Natural Catastrophes)' (2014) 18 Space and Polity 182.
[408] For an account of the wildfires experienced in Australia during the Black Summer of 2019-2020 see Danielle Celermajer, *Summertime: Reflections on a Vanishing Future* (Penguin Random House 2021).
[409] Booth and Williams (n 408).
[410] ibid 189.
[411] Lori Gruen, 'The Change We Need' in Carol J Adams, Alice Crary and Lori Gruen (eds), *The Good It Promises, The Harm It Does* (Oxford University Press 2023).

interspecies engagement… counter sites to the political-economic arenas of animal use'.[412]

This discussion, however, does not resolve the question of language or communication in more-than-human politics. Rather the purpose of this section is to expose how much contemporary debate remains focussed on assessing whether non-humans can be made to fit pre-existing human political criteria, without reflecting on whether these are the rights criteria or questions. What the examples above illustrate is that participation and political action are not fixed categories and are open to reconfiguration. This invites a shift in perspective – a move away from asking whether non-humans qualify as political agents under existing frameworks, and a move towards asking how those frameworks can take account of the more-than-human.

The next section, therefore, returns to Bennett's proposal to explore how democratic theories developed to include *excluded* humans could open pathways toward a more-than-human democracy. This is where the multidimensional lens proves valuable because it draws attention to how the same power structures that operate to exclude humans, also serve to exclude non-humans. What this suggests is that the path towards multispecies democracy does not require inventing entirely new political theories but rather re-examining those already developed to include marginalised humans. This is why the human-centred participation frameworks discussed in chapter two remain relevant here – not because they are sufficient (they are not), but because they offer conceptual and procedural tools, that can be extended for multispecies approaches. This process of adaptation also demonstrates that inclusion is a process of revision from within, and this work necessarily must begin with the human. Humans must first reckon with their own boundaries that create exclusion and produce hierarchies to make room for the *other.* The challenge then is to interrogate the boundaries and logics that structure human systems, to work through them and critically engage with the frameworks that exist to transform them from the inside.

[412] ibid 258.

3.5. Facilitating multispecies participation – towards a new framework for participation

3.5.1. An alternative to sentience and rationality for determining moral considerability

Garner observes that despite over 40 years of 'convincing arguments for the moral considerability of animals so little has changed in the way that they are treated in practice'.[413] He notes one potential way to address this is through a 'formal arena where these interests can be made to count'.[414] But building such arenas first requires clarity about the ethical commitments that underpin them, and this prompts questions about who enters these arenas, who decides, and on what basis. It is at this juncture that the ethical baseline for inclusion needs to be revisited. Having rejected sentience as an appropriate measure of moral significance, this research proposes a different starting point. Rather than ground moral considerability in capacities of individuals or species, this research relies on scholarship that locates moral significance in relationships of interdependence, vulnerability or care. Moral considerability arises from the fact that we are embedded in shared worlds and impact on each other's flourishing. Moral significance is therefore relational rather than individual and is found in the recognition that humans and non-humans are bound together through ecological, social and material entanglements. This section will explore literature that grounds this approach in both theory and practice. A relational approach is not a novel concept, indeed in many worldviews relations are not framed as optional but as kinship obligations.[415]. Ecofeminism, feminist care ethics and Indigenous world views begin from a premise of interconnection and mutual responsibility. For this reason, the ethical framework proposed here draws from these traditions.

The notion of human entanglement with the natural world is central to many Indigenous worldviews. Winter illustrates this through the Māori concept of whakapapa, which is broadly translated as genealogy, but Winter makes clear how it is so much more than simply human lineage.[416] To explain this she refers to the affidavit of Te Kou Rikirangi Gage submitted as part of legal proceedings brought against the

[413] Garner (n 364) 97.
[414] ibid.
[415] Chao (n 325).
[416] Winter (n 233).

Crown in which he describes how whakapapa is '…[a] genealogy of all things, spiritual, human and non-human built up in layers from the beginning of time, through ancestral links to the present'.[417] The significance of this approach to others is made clear when Gage explains how when his iwi (tribe)

> ask themselves the question "how must I relate?" the domain of relationship is all things – individually and as a collective whole. The whole and the things that make it up all bear intrinsic value.[418]

This understanding of kinship and reciprocity is echoed in other Indigenous philosophies, for example the *Sumak Kawsay*/*Buen Vivir* philosophy/ cosmovision of the people of Abya Yala. Walsh notes

> In its most general sense, *buen vivir* denotes, organizes, and constructs a system of knowledge and living based on the communion of humans and nature and on the spatial-temporal-harmonious totality of existence. That is, on the necessary interrelation of beings, knowledges, logics, and rationalities of thought, action, existence, and living.[419]

These Indigenous philosophies resonate strongly with ideas explored in feminist care ethics. As Modi highlights, feminist ethics has a similar ethos at its core with an emphasis on 'interconnection and interdependency' which puts it in opposition to modern industrialized cultures that prize individual agency.[420] Adams *et al* citing Gilligan explains that feminist care ethics is concerned with 'responsibility and relationships' with a focus on sustaining relationships.[421] The feminist care ethic rejects 'abstract rule-based principles in favor of situational, contextual ethics, allowing for a narrative understanding of the particulars of a situation or an issue'.[422]

Building on this foundation is a version of the ethic of care developed by Gruen – that of *entangled empathy* which provides a particularly useful framing for multispecies

[417] ibid 84.
[418] ibid.
[419] Johannes M Waldmüller, 'Buen Vivir, Sumak Kawsay, "Good Living": An Introduction and Overview' (2014) 1 Alternautas.
[420] Kaajal Modi, 'Fermenting Futures: Food Fermentation as an "Art of Noticing"' (2023) 3 Journal of Posthumanism 269.
[421] Adams and Donovan (n 176) 2.
[422] ibid.

participation.[423] Entangled empathy requires 'reflecting on proximity and distance, thinking and feeling, sameness and difference… to attend to the individual personality and the history and relations that the other is in'. Importantly, this relational orientation does not erase individuals but situates them within the relationships that shape their lives. In this way, entangled empathy provides a bridge to ecofeminism and the politics of love[424] which insist that moral imagination and problem solving must begin with the messy, situated work of living and remaining accountable to others. Crucial to this work is being alive to difference and context. Entangled empathy resists the erasure of difference that often comes with abstract rules-based principles and frameworks. These rules-based approaches tend to isolate moral questions from their broader context, treating specific elements of a situation as fixed. The problem with this approach is that when the 'background conditions that led to the moral problem are overlooked 'the capacity for moral imagination becomes limited'.[425] What is obscured by these abstract, one size fits all approaches, is recognition that relationships and power structures shape how harm arises in the first place. As multidimensionalism reveals, how power structures work to impact individuals is highly context dependent. Hence, turning from rules-based approaches to entangled empathy expands the moral imagination by reorienting the ethical inquiry. Consequently, the purpose of a participatory process shifts from consensus or control to attentiveness and reciprocity, and from the production of outcomes to the process of remaining in relation. This approach is important for multispecies participation because it offers a way of recognising moral significance without reverting to a capacity-based threshold.

This reorientation finds resonance in Earth Jurisprudence which similarly seeks to ground law in relational ethics rather than human exceptionalism. As Burdon explains 'anthropocentricism no longer has any credibility in modern science and [that] human beings exist as one equal part of a broader Earth community'.[426] Earth Jurisprudence encapsulates the idea that humans, non-humans and 'innate living systems' are all part of a 'community of life' and for this reason we should strive for 'mutual enhancement'.[427] Burdon outlines how the goal of mutual enhancement 'necessitates

[423] Adams and Gruen (n 79) 41.
[424] McKibbin (n 269).
[425] Adams and Gruen (n 79) 41.
[426] Burdon (n 57) 60.
[427] ibid 64.

[an understanding] that nature is not only relevant, but also appropriate and necessary to our idea of law'.[428] For participatory processes this shift has practical and ethical implications. If law is to recognise the interdependent community of life, then participation cannot be dominated by human interests or perspectives.

Tsing offers a grounded understanding of what this looks like in practice. Her work on precarious survival draws attention to the messy collaborations through which life persists between species, materials and environments.[429] Tsing explains that 'precarity is the condition of being vulnerable to others' – not as something exceptional but simply as a consequence of being alive. Precarity makes clear the instability of life in shared worlds and reminds us that survival is never achieved alone. This framing unsettles liberal political thought which sees the individual as autonomous and self-sufficient. Tsing explains how vulnerability forces us into moments of assemblage-encounters and reliance between human and non-human actors, '[w]hen I sprain my ankle, a stout stick may help me walk, and I enlist its assistance. I am now an encounter in motion, a woman-and-stick'.[430] This resonates strongly with Haraway's concept of 'becoming with' which also reinforces the idea that our lives are co-constituted through encounters and relations.[431] These ideas provide a clear way of demonstrating that humans do not in fact live apart from what surrounds us, and guides towards a model of politics grounded not in individual autonomy, but in dependency and co-production.

This approach impacts on political participation because it affects considerations of who is entitled to participate and the boundaries of that participation. If our lives are entangled, if we approach problems by seeking to remain in relation, and if we accept that our futures are co-created - this significantly alters how we approach the issue of who counts and why. It is acknowledged that this presents practical problems for participatory processes, in particular how to draw some kind of boundary around who gets to particate in a given process. To provide an approximate response to this problem, this research proposes implementing an 'all affected interest principle' - a principle whereby those whose interests are impacted by a decision should be allowed

[428] ibid.
[429] Anna Lowenhaupt Tsing, *The Mushroom at the End of the World* (Princeton University Press 2015) 20.
[430] ibid 29.
[431] Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016).

to participate in the decision making.[432] This principle will be briefly considered further in the discussion below.

Having set out the limitations of existing participation models, and proposed a more inclusive ethical framework grounded in care and relationality, the next step is practical: how might we begin to design participatory processes that reflect these values? The challenge is significant. Multispecies participation requires not just a reimagining of who counts as a political agent, but a reckoning with how to translate those agents' needs and expressions into participatory decision-making within systems such as IEL. There is currently no well-established method for how to do this and much of this work sits in experimental territory.

Within this experimental landscape, it is important to acknowledge the emerging field of Participatory Action Research (PAR), especially that extending to non-humans. PAR,

> aspires to develop socially responsible, democratic research methods to enable the co-production of knowledge among stakeholders. Such a co-production process is instrumental to support the inclusion of otherwise marginalized actors, enabling them to share research goals and expected outcomes, thus redressing existing power relations among stakeholders. [433]

PAR is concerned with challenging traditional assumptions of what counts as knowledge, and for this reason some PAR researchers have argued for the inclusion of more-than-human agents in PAR frameworks. Mancini and Lehtonen note that this is particularly important in the current environmental crisis 'in order to support a process of co-learning and co-construction of the world'.[434] This thesis aligns deeply with the foundations of multispecies PAR, however an exhaustive review of this literature is outside the scope of this research.[435] The reason PAR was not initially

[432] Mark E Warren, 'The All Affected Interests Principle in Democratic Theory and Practice' [2017] IHS Politicial Science Series 145; Sofia Nasstrom, 'The Challenge of the All-Affected Principle' (2011) 59 Political studies 116; Jonas Hultin Rosenberg, 'The All-Affected Principle Reconsidered' (2020) 46 Social Theory and Practice 847.
[433] Clara Mancini and Jussi Lehtonen, *The Emerging Nature of Participation in Multispecies Interaction Design* (2018) <https://doi.org/10.1145/3196709.3196785>.
[434] ibid.
[435] Some resources include: Peter Reason, 'Living as Part of the Whole: The Implications of Participation' [2011] Perspectives 35; Michelle Bastien and others, *Participatory Research in More-than-Human Worlds* (1st edn, Routledge 2016).

drawn upon when examining participation is because PAR tends to be an empirical, field based methodology. Whereas the participatory research considered earlier was focussed more on a critical enquiry of participatory processes. It is recognised that both the multispecies toolkit developed below and PAR adopt similar approaches to the participatory model, such as place based listening, and for this reason, there is real promise in drawing on multispecies PAR to further inform the toolkit.

Highlighting this parallel with PAR also helps to clarify the theory of participation underpinning this thesis. Here, participation is distinct from traditional Western models that view it as a spoken/written language-based act. Instead, this research adopts a relational approach that is both diagnostic - surfacing how legal systems exclude non-humans - and generative as it provides guidelines for how to overcome these problems. Because this theory provides a structural critique of Western legal architecture rather than an empirical field study, local human communities, especially the iwi and hapu represented by Te Pou Tupua, were not directly involved in the creation of this toolkit.

Initial outreach was attempted but was not pursued. There were several reasons for this decision. The first is that, as noted above, the toolkit did not require an empirical field study. Further, Indigenous methodologies caution against extractavist academic practices.[436] Within tikanga Māori authentic partnership requires long term cultivation of place-based relationships.[437] Given that the researcher is based in the United Kingdom, this presented logistical difficulties. Operating in the United Kingdom under strict timelines made cultivating these relationships logistically unfeasible. It is acknowledged that community input would be a vital future avenue, this initial phase stands as a self-contained conceptual proof concept.

This next section takes steps to consider how to accommodate multispecies participation and does so by adapting the participation principles developed in Chapter 2. This provides a baseline to explore how IEL might begin to facilitate more-than-human forms of participation. Hence the next section builds on the participation principles to create a toolkit to guide participatory processes that foster the creation of conceptual, procedural and physical space for multispecies participation.

[436] Smith (n 153) 9–10.
[437] ibid 228–235.

3.6. A Redeveloped toolkit for multispecies participation

The toolkit developed in this section draws on the same dimensions as those from chapter 2: scope (stakeholder selection and inclusion), objectives, influence, multidirectional learning and context (history and place), but reinterprets them through the ethical and theoretical insights explored above. This reframing recognises that while the human toolkit provides a foundation, it is necessary to embed this in literature that considers these elements from a multispecies perspective. The task is therefore to adapt each element to accommodate both humans and non-humans.

3.6.1. Good faith

The first principle, good faith, grounds the toolkit and informs how the other participatory elements are approached. It refers to the state of mind in which the participants come to a process – a willingness not just to listen but to work to understand the perspective of the other. As discussed in section 2.7.1. this connects closely to the feminist care ethic which emphasises the need to '[work] to try to grasp the perspective from the other'.[438]

Borrowing from Morrow's observation that knowledge is situated, contested and incomplete, a good faith approach to participation requires participants to recognise the limits of their own understanding.[439] Post humanist scholar Wolfe expands on this point recognising that this is a confronting and vulnerable position for humans to occupy, particularly in Western contexts where humans are positioned as a superior species. To act in good faith is to accept that we may not know more, we may not know first, and we may not know better. Wolfe captures this vividly when he writes,

> ..our stance toward the animal is an index for how we stand in a field of otherness and difference generally, and in some ways is the most reliable index, the "hardest case" of our readiness to be vulnerable to other knowledges in our embodiment of our own, an embodiment that arrives at the site of the other

[438] Adams and Gruen (n 79) 224.
[439] Karen Morrow, 'Ecofeminist Approaches to the Construction of Knowledge and Coalition Building - Offering a Way Forward for International Environmental Law and Policy' in Andreas Philippopoulos-Mihalopoulos (ed), *Research methods in environmental law: A handbook* (Edward Elgar Publishing 2017).

> before we do, as our scent reaches the dog's nose before we round the corner, telling a story we can never wholly script to a present we have not yet reached[440]

Wolfe calls this openness *standing under*. This concept incorporates positionality, rejects dominance and insists that genuine understanding cannot occur from above. This idea will be returned to later because it also informs discussions of place and situatedness in participation.

Zuniga extends this idea of *standing under* into a wider political ethos. She notes that

> …the critical work of dismantling cannot be brought about without the positive task of cultivating an ethical sensibility that can inform our relations with others in transformative ways. And this involves engaging in ethical practices of openness, receptivity, and attentiveness to the representations, teloi, and points of view of differently human and more-than-human beings and constellations of beings.[441]

The ideas of receptivity and positional humility are central to human efforts to interpret non-human behaviour. Humans have demonstrated a deep self interest in how we 'translate' communication from the non-human world. Humans show a willingness to attribute meaning to non-human communication that fits conveniently within our lives, but not when it challenges us. For example, a dog's barking at a familiar time of day is readily understood as a request for a regular activity, such as an afternoon walk. It is a communication that is interpreted in the context of routines and lives. Yet, as Hribal observes, humans are far less willing to interpret other animal actions signalling distress or resistance in the same good faith. Acts by animals in circuses or zoos are routinely characterised as misbehaviour when they arise from confinement or abuse. Hribal's case studies, as St Clair notes in his foreword, show that,

> …most of these violent acts of resistance were motivated by their abusive treatment and the miserable conditions of their confinement. These animals are far from mindless. Their actions reveal memory not mere conditioning,

[440] Wolfe (n 58) 5.
[441] Didier Zúñiga, 'Ecologizing Democratic Theory: Agency, Representation, Animacy' 198.

> contemplation not instinct, and most compellingly, discrimination not blind rage[442]

Similarly, Bertenthal observes that the ecological world also communicates its distress. She Argues that events such as mass extinctions, wildfires, and ocean heatwaves function as statements of ecological crisis.[443] Interpreting these phenomena in good faith requires us to move beyond narrow, human centred definitions of speech. However, Bertenthal also warns that this translation process requires profound humility. Drawing on Powers' *The Overstory*, she illustrates that making the needs of another species, such as trees, legible to human audience involves more than mere reporting, it requires a transformative leap. This kind of representation however must include a recognition of its own limits and then acceptance that some aspects of non-human existence will remain fundamentally unknowable and beyond the reach of human language. In this sense, good faith participation demands an admission that our knowledge is inherently partial and incomplete.[444]

The following sections re-examine the framework of participation outlined in Chapter 2 including the identification and inclusion of stakeholders, the timing and form of their involvement, the clarity of objectives, and the influence and accountability built into the process. The dimensions remain essential, but in the context of multispecies participation require reinterpretation. Hence, the focus necessarily shifts from human interests, to cultivating conditions that enable more-than-human participation.

3.6.2. Identification of stakeholders & stakeholder selection

3.6.2.1. Who gets to be a stakeholder?

The question of who counts as a stakeholder builds directly on the ethical framework developed above, extending it to all living beings whose interests may be affected by the decision in issue. The reference to 'living' is not to foreclose the potential expansion of stakeholders to concepts explored in new materialism such as vibrant matter[445] – but this requires deeper exploration that is outside the scope of this research.

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[442] Jason Hribal, *Fear of the Animal Planet: The Hidden History of Animal Resistance* (CounterPunch 2010) 16.
[443] Alyse Bertenthal, 'Standing Up for Trees: Rethinking Representation in a Multispecies Context' (2020) 32 Law & Literature 355, 355.
[444] Bertenthal (n 444); Richard Powers, *The Overstory* (Vintage 2018).
[445] Bennett (n 71).

Determining what it means to be 'affected' will need to be addressed as part of the participatory process. One of the issues that has become clear from research into sentience is that humans lack a full understanding of what does and does not affect other beings. Therefore, it would be presumptive to outline definitively what would constitute 'affect'. In the first instance it may be appropriate to adopt a precautionary approach[446] and extend participation to any beings whose flourishing may be impacted by the decision. As noted earlier it is proposed that the 'all affected principle' is adopted as a starting point. Therefore, if a being may be affected by a decision in issue, they would be considered a stakeholder. This expands the 'scope' dimension of the framework, where the human toolkit looked to identify marginalised individuals or communities, the multispecies approach simply broadens that frame to include affected multispecies communities.

3.6.2.2. Process of stakeholder selection

The question of how stakeholders should be selected is linked to the point above and it is suggested a precautionary approach is suitable starting point. Yet this still requires a process for identifying potential participants. One way to address this issue is through Nussbaum's concept of *sympathetic imagining*. Although Nussbaum's focus is on sentient beings, Waldow and Schlosberg see promise in the use of this idea for non-sentient life.[447] The reason for this is that sympathetic imagining begins as an ethical exercise in connection. Taylor provides an example of this concept, reflecting on her own disability that limits her use of her arms and hands she explains how, '…hands represent our physical agility and separateness from other species'.[448] So when she 'rummages through [her] purse with [her] face' she thinks of others 'who use their bodies in beautifully strange and unique ways' like pigs who root with their noses, her dog who moves his blankets with his mouth to 'nest' and birds who create nests with their beaks. Taylor explains that it is not that she *knows* what it is like to be these beings, but that there are shared experiences that enable a degree of connection and insight.[449]

[446] Noting that the precautionary principle is an established concept within environmental law
[447] Celermajer and others (n 339) 481–487.
[448] Taylor (n 267) 115.
[449] ibid 116.

Waldow and Schlosberg extend this to the ecological level. They consider that sympathetic engagement is not developed in isolation and must be developed within a 'field of immersive relations'.[450] They explain '[t]his reality of relational subjectivity enables a conception of sympathetic imagination open to ecological flows and interactions that bring into focus the connectivity of human and non-human life'.[451] So, for example attempting to understand what allows a squirrel to flourish means engaging with the environment the squirrel inhabits - tree networks, insects, weather, water sources and so on. Such exercises offer a practical way to map who might be affected by a given decision.

This relational approach resonates with systems theory. As Ruhl argues, ecosystems operate as complex adaptive systems in which all components interact, and removing or protecting a single part without considering the whole undermines ecological integrity.[452] Thinking systematically therefore offers another method for identifying stakeholders, one attentive to interdependence rather than individual species. Petersmann extends the idea of what a system may constitute through sympoeisis, the idea that life is made up assemblages of networks that continually combine and co-create in unpredictable and sometimes transformatory[453] ways.[454] This recalls the 'collaborations' described by Tsing earlier in the chapter[455], as well as Modi who states 'life is symbiosis "all the way down"'.[456] In essence it is, to borrow from Whitman, the idea that we 'contain multitudes' and indeed that we may, without knowing it, also constitute other multitudes.[457] Petersmann recognises the challenge that this poses for the law. If the world is to be understood as constituted through ongoing, relational

[450] Celermajer and others (n 339) 483.
[451] ibid.
[452] JB Ruhl, 'Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law' [1997] Houston Law Review 933.
[453] An example of this is provided by Akhtar-Khavari citing the work of Kelly Clancy – '…billions of years ago… ancient cyanobacteria was engulfed and 'domesticated' by an ancestor of plants. It shed most of the genes it needed for independent existence and became what we now know as the chloroplast. In return for a safe environment, these chloroplasts performed photosynthesis for their hosts, fuelling a new form of life that eventually spread over much of the earth' - Akhtar-Khavari (n 184).
[454] Marie-Catherine Petersmann, 'Sympoietic Thinking and Earth System Law: The Earth, Its Subjects and the Law' (2021) 9 Earth System Governance.
[455] Anna Lowenhaupt Tsing, 'Contamination as Collaboration' *The Mushroom at the End of the World* (Princeton University Press 2015) <http://www.jstor.org/stable/j.ctvc77bcc.7 %[2022/12/12/>.
[456] Modi (n 421).
[457] *Do I contradict myself?/ Very well then I contradict myself/(I am large, I contain multitudes)* Walt Whitman, 'Song of Myself' *Leaves of Grass, London* (HarperCollins Publishers Inc 2015).

processes then legal systems that are premised on hierarchy, separation, certainty and control are poorly equipped to respond. Petersmann expresses concern that the law cannot respond to these ways of conceiving of the world. However, she points to the work of, amongst others, Akhtar-Khavari who has started to grapple with how the law might respond to sympoeitic worlds.

Akhtar-Khavari argues that accommodating sympoeisis requires a fundamental reorientation of legal thought. To do this he proposes that we must move away from ideas premised on hierarchy and control, to frameworks grounded in restoration and cooperation.[458] If this is to succeed, humans must re-embed themselves in ecological systems and the law must reconfigure *around* these conditions rather than placing itself *above* them. The task for the legal system, therefore, is to move from regulating harm, to cultivating conditions under which multispecies worlds can flourish. Nussbaum provides a practical entry point for operationalising this shift through the co-creation of species-specific lists.[459] These lists identify what beings require to flourish, rather than abstractly defining welfare in universal terms. Crucially these lists should not operate as static checklists. They should function as tools for stakeholder identification and provide a way to make visible which beings are affected, how, and the ways in which their flourishing might be supported. Applying the lists to Akhtar-Khavari's work, the law would orientate itself around facilitating flourishing, rather than asserting control. This reorientation is important for multispecies participation because it foregrounds entanglement rather than separability. The reason for this is that if the objective is for the law to adopt a relational approach, then participation must also reflect this. Participation cannot then simply occur through representation or procedural, but not substantive, inclusion. In this sense lists, sympoeisis and participation converge because together they shift legal attention from control, towards a focus on flourishing as a relational practice.

3.6.3. Clear Objectives

Best practice literature emphasizes the importance of setting clear objectives for participatory processes.[460] However, this raises the question of how such objectives should be determined, whether through consensus, or some other process. Scholars

[458] Akhtar-Khavari (n 184).
[459] See section 3.3.3.2.
[460] Reed (n 143); Buchy and Hoverman (n 289).

such as Peterson observe that there may be merit to alternative decision-making models such as an argument-based model.[461] Argument-based models, unlike consensus do not ultimately erase or smooth over difference but rather create a forum in which difference can be surfaced, challenged and meaningfully explored.

Booth and Williams consider the concept of consensus in relation to climate change. They cite Ranciere who sets out,

> Consensus refers to that which is censored… Consensus means that the only point of contest lies on what has to be done as a response to the given situation. Correspondingly, dissensus and disagreement don't only mean conflicts of interest, ideas and so on. They mean that there is a debate on the sensible givens of a situation, a debate on that which you see and feel, on how it can be told and discussed, who is able to name it and argue about it.[462]

An apt example of what 'sensible givens' exist within the climate change discussions is outlined by Booth and Williams. They explain that the response to 'natural' catastrophes often focusses on who is to blame, how to fund and manage the recovery, how to prevent these events, warn about or control them.[463] These responses are the 'sensible givens' of political debate on climate change issues.[464] Left unexamined these existing 'sensible givens' feed into existing political arrangements by limiting disagreements to questions of policy response. In this way sensible givens actively foreclose discussion of systemic problems – they treat existing political, legal and economic viewpoints as fixed. Through this approach they narrow the scope of disagreement to technical questions of management and response, rather than deeper questions about underlying systems. Booth and Williams suggest questioning these 'sensible givens' opens up space 'for other logics to be heard'.[465]

Recognising that consensus is not always the appropriate goal, reflects the reality of our entangled lives. Co-existence is rarely peaceful or aligned, it is a condition of 'living

[461] Peterson, Peterson and Peterson (n 297).
[462] Booth and Williams (n 408) 192.
[463] Booth and Williams (n 408).
[464] Whilst not necessarily framed in exactly this way, Charlesworth and Chinkin adopt a similar approach when examining the role of women in international law and call into question the basis on which certain categories and choices are taken as givens - Charlesworth and Chinkin (n 285) 18–22.
[465] Booth and Williams (n 408).

and dying with' and survival for one often depends on the loss of another.[466] Consensus in this light is not only unrealistic, but conceptually misplaced, because life unfolds through competing needs. Modi's work on microorganisms exemplifies this. She shows that 'living with', in the sense of embracing that our lives and bodies are constituted by a multitude of other organisms, is never a straightforward process of all things being in agreement. Citing Paxson, Modi sets out,

> life with other species – bacteria particularly – involves pleasure and risk, nourishment and discomfort, labor and reward'… Our microbial kin are as likely to cause us illness as they are to keep us well. Our bodies are in a continuous and delicate balancing act with our cospecies organisms[467]

That our own bodies are not sites of harmony but collectives experiencing flourishing and decay is perhaps the most apt example of 'living with'.

This suggests that, borrowing from Harraway, the objectives of multispecies participation should be less about resolution and more about 'staying with the trouble'. As Harraway explains, 'staying with the trouble requires learning to be truly present, not as a vanishing pivot between awful or Edenic pasts and apocalyptic or salvific futures, but as mortal critters entwined in a myriad unfinished configurations of places, times, matters and meanings'.[468] In this spirit, the first objectives of participatory processes might be to simply create space where the sensible givens can be surfaced and questioned. In this way the process/outcome aspect of the framework is transformed. Success is not necessarily measured by reaching agreement, but by sustaining the capacity to remain in relation. This is fostered by a motivating ideal[469] that values response-ability[470] over resolution.

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[466] Modi (n 421).
[467] ibid 276.
[468] Haraway (n 432) 1.
[469] Noting the concept of 'motivating ideals' is explored in 2.7.1. and 3.6.1. and the phrase borrowed from McKibbin (n 269).
[470] Response-ability is a term coined by Haraway for which she does not provide a succinct definition. It is essentially the concept of a commitment to 'getting on together' in an entangled world where our lives and ideas may not always sit easily alongside each other. It is not about reconciliation or restoration, but angled to a deep commitment to more ' modest possibilities of partial recuperation…'Haraway (n 432) 10,28,34.

3.6.4. Two-way learning, influence and context

This section combines the following participatory elements from chapter 2: the need for participants to have genuine influence over decisions; the importance of multidirectional learning; and the significance of context, including history and place. Whilst these themes were previously addressed separately, there is value in bringing them together here. Not only do they overlap and reinforce one another, maintaining them as discrete issues can risk reproducing distinct categories that more relational approaches are trying to dissolve.

Where the human participation framework assumed that affected parties could speak for themselves within human forums, multispecies participation begins from the recognition that many beings do communicate, just not in ways those forums are structured to hear. Listening therefore becomes a central participatory act.[471] In many Indigenous and ecological worldviews, time, place and the acquisition of knowledge are intertwined.[472] Listening, therefore, requires being situated in place; it is embodied, it depends on proximity and responsiveness to a space. Being in place is not simply occupying space (although that is part of it), it is about being part of ongoing interactions with land, water, air, species and history tied to that place.[473] So, it is only through being in place that certain 'voices' can be encountered at all. What brings these themes together is that they all hinge on acts of listening and communication – yet listening also requires rethinking what language means within participatory contexts. Hence, thinking about participation through these combined lenses allows a more expansive and inclusive approach to what participation entails.

3.6.4.1. Being in place and accountability

Place is never neutral. It is layered physically, historically and symbolically. Indigenous scholars have examined how spaces of political and legal action are imbued with settler colonial history and ideas that are antithetical to Indigenous people's self-determination.[474] Courtrooms, government buildings, and parliamentary chambers are inscribed with hierarchies and histories of settler people and colonial ideas– carrying forward the power relations of colonisation. As Donaldson argues in *Animal Agora*

[471] Abram (n 313).
[472] Ranginui Walker, *Nga Pepa a Ranginui: The Walker Papers* (1st edn, Penguin 1996).
[473] Abram (n 313).
[474] Ivison (n 57) 79–116.

humans often influence the agency of others by 'creating and modifying different kinds of environments and opportunities' for response.[475] Place shapes not only who can be present, but how beings are able to express themselves and be recognised. Place also has a psychological impact, environments. that are structured by hierarchy and exclusion can generate anxiety and adaptive behaviour. This shapes what forms of participation feel possible to the participants. Kafka's fictional account *A Report to An Academy* exposes how those who are 'out of place' must perform belonging to be heard. He writes about how an ape, taken from his home and confined with humans, explains 'there was no attraction for me in imitating human beings: I imitated them because I needed a way out, and for no other reason'.[476] Donaldson implicitly acknowledges this concern when she calls for participatory spaces that can facilitate authentic engagement, spaces that provide 'the least restrictive environment possible'.[477] To enable this Donaldson explains that we need to create a

> canvas in physical space not simply discursive space. We need places for unpredictable encounters that allow thinking outside the box of existing human-animal relationships, and we need to empower these spaces as places of multi-species contestation, deliberation and "creative interaction"[478]

There may be very few places that meet these criteria, but it is certainly possible in existing spaces to renounce historical exclusion or privileging and to acknowledge and seek to move beyond problematic histories. Making spaces more accessible will likely require engaging with all parties to understand what barriers the space presents.

Yet, exclusion also arises through detachment from place. As Haskell observes humans have developed sound and speech as ways of communicating[479], but communications is not an exclusively human quality. Non-humans have also developed ways of communicating; it is often simply in ways that we do not know or fully understand. To start listening must then be to start being open to alternative forms

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[475] Donaldson (n 384) 719.
[476] Franz Kafka, 'A Report to An Academy' in Nahum N Glatzer (ed), *The Complete Stories* (Schoken Books 1983).
[477] Donaldson (n 384) 724.
[478] ibid.
[479] Haskell describes how the anatomical features that lead to humans developing sound and speech came in part from 'great-great-great grandmothers, the protomammals who started lactating about 200 million years ago', that in turn 'necessitated a reworking of the throat and jaw' which alongside various physical and cultural influences lead to speech'. Speech then is in many ways a by-product of human development rather than a central factor in it.

of communication, as Haskell explains it is 'to be open to the vitality and creativity of life. Not as a metaphor or mystical insight, but as a sensory connection to the physical and biological processes that lifted life and song from the Earth'.[480] This underscores the difficulty of humans making decisions at a distance from the ecologies in issue. Removed from place participants and decision makers they cannot hear the multiplicity of voices that inhabit those spaces. Multispecies participation therefore begins not with speech, but with the intention to seek to understand what/who is already speaking - an echo of the good faith precondition.

Yet, as Celermajer *et al* reminds us, not all places can, or should, be directly known or inhabited.[481] To create the conditions for multispecies flourishing requires cultivating a sense 'of those other worlds and species', this includes developing an awareness of what we can and cannot know.[482] Western science, rooted in Enlightenment ideals and the pursuit of scientific knowledge is bound up with colonialism and extractivism. Western science seeks to know all in order to assimilate these lifeworlds into our own. But in multispecies relations, care may instead require not knowing completely and allowing some spaces and beings to remain unknowable. [483]

Celermajer's call for humility in knowledge finds a parallel in Meijer's work on animal communication. Where Celermajer cautions against assimilating other lifeworlds, Meijer reorients this insight toward language itself. She argues that rather than assuming only human speech counts as communication, we must learn about language through interaction with other animals. That we must 'develop a new understanding of language that can take into account the multitude of non-human animal expressions and ways of creating meaning, and that begins from the idea that other animals are beings who have their own perspective on life and their own way of communicating this to others of their own and other species'.[484] But the call for humility is echoed here too because she cautions that this must not be an exercise that is left to humans alone as that would likely remain a self-referential and anthropocentric

[480] David G Haskell, 'When the Earth Started to Sing' (2023) 4 *Emergence* 211–212.
[481] For example, Fishel and Reid explain the importance of leaving the deep ocean untouched and unknown.
[482] Celermajer and others (n 339) 493.
[483] ibid.
[484] Meijer (n 60).

endeavour – rather we need to learn about language through 'interaction with other animals'.[485]

3.6.4.2. Temporality

These ideas also all have a temporal dimension because if communication and understanding develop through being in relation then they are not fixed, once off events, but instead processes that evolve over time. In Indigenous conceptions of time being in relation is a process that extends both backwards and forwards and so reevaluating how participation takes place also means reevaluating how we understand time. In Enlightenment traditions time is linear – the past is behind us and the future ahead. Indigenous cultures often approach time in a different way. This is exemplified, for example, by that fact that in Māori, the word for time and space are the same[486], this is also true of Aboriginal culture[487]. The limits of language and translation reveal more fundamental differences in how time is understood in two integral ways: the first is that in Māori cosmology time is often expressed through the symbol of the double helix, so that the past and future are entwined.[488] Time is not linear way, it is not 'calibrated by the mechanically measured standardised units… life in Māori spirals in an out with the rhythms of the hau[489], the seasons, the tides, the ebb and flow of breath, life and death, exchanges between the present, past and future'.[490] In Māori culture humans do not face the future, they walk backwards into it. As Walker explains 'the past 'is conceived of as being in front of the human consciousness, because only the present and past are knowable… the future cannot be seen. Thus, the individual is conceptualised as travelling backwards in time to the future, with the present unfolding in front as a continuum to the past'.[491] This orientation creates a sense of accountability, because to move forward is not to abandon the past, but to continually face it and remain in relation to what has unfolded. This understanding of time anchors us in place - to understand time, is to also understand the space we occupy.

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[485] ibid 9.
[486] Smith (n 153) 57.
[487] Emmanuel Vaughan-Lee, 'Deep Time Diligence: An Interview with Tyson Yunkaporta' (2024) 5 *Emergence*.
[488] Georgina Tuari Stewart, *Maori Philosophy: Indigenous Thinking from Aotearoa* (Bloomsbury 2021) 87.
[489] Wind
[490] Salmond (n 47) 45.
[491] Walker (n 473) 14.

Listening unfolds within this space-time weave because it attunes us not only to what is present, but to what has passed and what is emerging. Listening is not limited to hearing alone; it also involves other embodied forms of sensing such as vibration and proximity. In this sense listening names an openness to forms of knowing that is relational and embodied and temporally dispersed. Haskell addresses this idea when he describes listening as rooting us in the 'stories of the Ancient Earth'.[492] He describes how sound is ephemeral, but also connective because, '[s]ound passes through obstacles. It links vibrating beings even in the dark or in dense foliage. Listening therefore opens us to what is hidden or unappreciated'.[493] In this way sound connects us to the Ancient Earth because all sound bears traces of the bodies that have produced it, or that it has passed through. Recognising these different conceptions of sensing and listening has implications for participation because existing participatory frameworks are often structured around human timelines and the length of human lifespans, and within this, human activities such as election cycles, consultation periods, project deadlines. These are often brief, one-off events that view participation and listening as an event rather than ongoing relation. Yet ecological and non-human processes move at varying speeds – rivers change course over centuries whilst mayflies live for one human day. If participation is to be genuinely inclusive, if it is to attend to the more-than-human, then it must accommodate different temporalties.

3.7. Conclusion

The redeveloped toolkit set out above reframes the human participation framework developed in Chapter 2 through a multispecies lens. While the earlier version emphasised procedural fairness, access to information and representation in human institutions, this chapter has shifted the orientation. It is argued that for genuine multispecies participation there needs to be movement from procedure to relationship. The revised toolkit therefore rests on the interrelated principles of good faith, inclusive stakeholder identification, clarity of purpose and openness to debate, and multidirectional learning situated in place and time.

The toolkit serves a dual purpose. It is both diagnostic in that it helps to reveal how existing participatory processes may exclude or constrain non-human voices, and it is

[492] David G Haskell, 'Playful Listening'.
[493] ibid.

generative - offering a roadmap for how these processes might be re-imagined to support multispecies participation. The toolkit doesn't prescribe outcomes – it invites inquiry into how current systems make room for other beings and surfaces where they may close or limit the opportunities for other beings to be heard. Chapter 4 now applies this framework to the Whanganui River case study. The toolkit provides the structure through which the participatory processes are examined identifying where multispecies participation was fostered or limited and exploring what these moments reveal about how the law could evolve.

4. Chapter 4 – Operationalising Multispecies Participation: The Whanganui River Case Study

4.1. Introduction

This chapter operationalises the multispecies participation toolkit developed in chapter three by applying it to the longitudinal case study of the Whanganui River in New Zealand. By drawing on the unique flexibility of the case study approach, which allows the breadth and depth of inquiry not offered by other qualitative designs, this research moves beyond mere doctrinal analysis to examine how institutions operate in practice. It traces how legal processes that were not designed to accommodate non-human perspectives, such as that of the Whanganui River, came over time to enable the River's limited participation in legal processes through human and institutional representatives. Rather than assessing the broad implications for IEL at this stage, the chapter uses the Whanganui River case study as a diagnostic site to surface the specific possibilities and limits of the multi-species toolkit. In doing so, it demonstrates how a decolonial and multidimensional framework can reconfigure participation within systems grounded in anthropocentric assumptions.

4.2. Case Study

4.2.1. Why Use a Case Study Method?

The case study method is a well-established qualitative research approach for examining complex legal and institutional processes within their real-world contexts.[494] Yin defines a case study as 'an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident'.[495] By leveraging this methodological framework, the research moves beyond mere doctrinal analysis to understand how law operates in society. This is an approach that recognises and 'examine[s] the relationship between law and political, cultural and institutional forces.[496] As Yin further explains, this design is particularly suited to research questions that ask *how* and *why*

[494] Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sage 2018) 14.
[495] ibid 18.
[496] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 6.

certain dynamics emerge, making it an ideal vehicle for exploring how multispecies perspectives might be incorporated into environmental decision making.

In legal scholarship, contextualised case studies[497] have been widely used to trace how norms and institutions evolve over time and how they interact with broader political and social processes.[498] This approach aligns with the aims of the present research which seeks to understand not only whether multispecies participation is recognised in law, but how this recognition is put into practise and whether or not it is limited or altered through institutional design. By examining a real-world example in depth, the case study method allows for a detailed analysis of the intended functions of the law against its real-world application and effects.[499]

This research is underpinned by a relativist and constructivist orientation. Bu adopting a relativist stance, the study 'acknoweldge[s] multiples realities… having multiple meanings, with findings that are observer dependent'.[500] In the context of the Whanganui River, this means recognising that 'participation' is not a fixed legal category but is understood differently by various actors across different situations. To navigate these multiple realities, the research employs the multidimensional framework introduced in Chapter 2 and developed into the multispecies toolkit in Chapter 3. This framework acts as the primary analytical lens to examine how power structures, relationships, and institutional norms overlap to marginalise non-human voices.

The case study method serves as the practical vehicle for this multidimensional inquiry. As Yin explains, it is not merely a data collection tool, but a way of organising research around a complex, real-world problem.[501] By integrating diverse sources such as legislation, case law, and oral testimony, the method makes it possible to move beyond formal legal structures to see how participation is actually constructed in practice.[502]

[497] Noting Charlesworth uses the term 'reconstruction'
[498] Lorie Charlesworth, 'On Historical Contextualisation: Some Critical Socio-Legal Reflections' (2007) 1 Crimes and Misdemeanours.
[499] Yin (n 495) 15.
[500] ibid 16.
[501] ibid.
[502] ibid 15.

While case studies do not aim to produce statistically generalisable findings, they allow 'analytic generalisation' – ways to expand and generalise theories.[503] Rather than providing a replicable blueprint, it instead offers a transferable analytical framework to evaluate how multi-species participation is enabled or constrained across different legal and political settings.

4.2.2. Selection of the Case

The focus of this research is on how multispecies perspectives might be incorporated into legal and policy decision-making processes. A necessary first step, therefore, was to identify existing legal processes that have attempted to include non-human perspectives in practice, as these provide empirical material for assessing how legal systems respond to moving beyond a human-centred model.

Initial consideration was given to case studies situated within an international framework as IEL has increasingly recognised the intrinsic value of nature. However, the analysis revealed that these efforts are largely contained in non-binding instruments and aspirational declarations. This includes initiatives such as the United Nations Harmony with Nature resolution[504]; the Kunming-Montreal Global Biodiversity Framework 2022[505] and proposals for Earth trusteeship and the Declaration on the Rights of Mother Earth. While these initiatives set out ambitious objectives, they have only been recently created and lack a record of how they might be operationalised within day-to-day legal processes. As a result, they offer insufficient empirical material for assessing how legal systems respond in practice to attempt to include non-human perspectives.

4.2.2.1. New Zealand

Consequently, the focus shifted to the domestic context where legal systems have begun to experiment more concretely with relational and multispecies approaches. Domestic legal systems are particularly relevant to IEL because they function as sites where emerging ideas are tested and contested. IEL has drawn on domestic legal systems to operationalise norms that have been articulated at an international level -

[503] ibid 21.

[504] NGA Res 64/196 (21 December 2009) UN Doc A/RES/64/196.

[505][CSL STYLE ERROR: reference with no printed form.]. broadly calls for humans to live in harmony with nature – post 2020 global biodiversity framework. The convention is however non-binding see particularly target 19(f) that calls for enhancing (amongst other things) Mother Earth centric actions which is an ecocentric and rights-based approach towards enhancing harmonic and complementary relationships between people and nature

such as principle 10 of the Rio Declaration. [506] Several countries with Indigenous populations have adopted legislation that incorporates elements of multispecies or relational thinking.[507]. Countries with some of the most progressive and advanced multispecies approaches are based in Central and South America[508] and would undoubtedly have provided valuable examples, However, the official language of Spanish and the distinct structure of the civil law systems presented practical barriers for an English-speaking researcher working within a common law framework. There was also some concern about the potential to undertake onsite research as certain countries in the area were (at the time of this research) politically unstable.[509]

New Zealand presents a particularly suitable domestic case study as it has been at the forefront of integrating Indigenous worldviews into environmental law, as seen in the legal personhood granted to the Whanganui River[510], Te Urewera National Park[511], and Mount Taranaki[512]. Further, New Zealand's common law legal system has institutional and procedural features that are comparable to those found in IEL[513]. There are structural parallels between New Zealand's legal system and IEL as both are historically shaped by Western ontologies and Enlightenment principles of rights and representation and are grounded in anthropocentric assumptions. By selecting a jurisdiction where the researcher possesses significant expertise, having completed undergraduate legal training and practised law within the system for five years, the study is able to perform a 'thick' analysis of how these entrenched Western legal traditions can be reconfigured from within.

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[506] "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided" Rio Declaration on Environment and Development.

[507]For example Ecuador and Bolivia - Viktoria Kahui, Claire W Armstrong and Margrethe Aanesen, 'Comparative Analysis of Rights of Nature (RoN) Case Studies Worldwide: Features of Emergence and Design' (2024) 221 Ecological Economics 108193.

[508] Such as Ecuador and Bolivia as noted above

[509] Ellen Ioanes, 'Ecuador's Political Instability, Explained' [2023] Vox <https://www.vox.com/world-politics/2023/4/30/23705442/ecuador-lasso-political-corruption>.

[510] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 2017.

[511] Te Urewera Act 2014 2014.

[512] Te Ture Whakatupua mō Te Kāhui Tupua 2025/Taranaki Maunga Collective Redress Act 2025 2025.

[513] Such as decision making through representation, similar judicial processes and adversarial dispute resolution

The researcher’s understanding of New Zealand's institutions and procedures, combined with eligibility to access official information as a passport holder, provided a significant advantage in gathering evidence. This access ensured the research was not limited to academic theory but was informed by a direct and detailed examination of actual court records and government documents. The accessibility of official documentation in English, supplemented by a familiarity with Māori culture and history, allowed for a comprehensive review of diverse sources. Ultimately, this professional background allowed the researcher to use the New Zealand legal system as a sophisticated diagnostic site, identifying how multispecies participation is enabled or constrained within a framework familiar to the broader Western legal tradition.

4.2.2.2. The Whanganui River

The Whanganui River Case provides one of the most comprehensive and well-documented examples of a legal system reckoning with attempts to embed a form of multispecies participation. The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 confers personhood on the River whilst also establishing a governance structure that creates a requirement to consider the River ‘s health and wellbeing. The proceedings that led to this Act have a long history, beginning with petitions and protests in the nineteenth century and formal litigation commencing in 1938. The case is especially rich for analytical purposes because it spans multiple procedural contexts from litigation in both first instance and appeals courts, a Royal Commission, a Tribunal inquiry, and a negotiation and legislative phase. The variety of fora in which the River Claims were contested, and the long running nature of the dispute means that there is a rich pool of data and secondary literature to consult. The River Claims provide a unique longitudinal view of how participation evolved across different institutional forms. When this is analysed through the multispecies participation toolkit developed in Chapter 3, the case study shows how participation is highly uneven across these different fora. Non-human perspectives were largely marginalised in the litigation phases, partially acknowledged in the Tribunal, and more formally embedded, although still mediated by humans, within the negotiation and legislation phases.

4.3. Methodological Approach: Charting the Dispute through a Chronology

To understand how multispecies participation has progressed over time in the Whanganui River conflict, this research charts the history of the 150-year dispute. Rather than acting as a mere historical record, the chronology serves as a diagnostic tool to evaluate the extent to which specific legal and political moments created or denied space for non-human agency. The purpose of this approach is to gain insight into what efforts have and have not worked, but to also contextualise these efforts and locate them within their history.

The first step in this process was to construct a chronology documenting the Whanganui iwi's longstanding efforts to seek the inclusion of their worldview into decisions that affecting the River. This method makes it possible to track the evolution of multi-species participation, or the lack thereof, across a century and a half of disputes. By applying the multispecies toolkit to this chronology, the researcher can identify how shifting institutional conditions either constrained or enabled iwi's capacity to speak for the River, or indeed opportunities for the River to be heard on its own terms. Crucially, the chronology services both the possibilities for and the structural barriers against multi-species participation, ensuring that even negative findings are captured to illustrate the limits of current participate re frameworks.

4.3.1. Key Principles informing the Chronology

Two primary functions informed the creation of the chronology. These were: (1) the ability to respond to decolonial critiques of archival research; and (2) the ability to situate legal proceedings affecting the River within their wider historical context. The overarching purpose of the chronology is to provide insight into factors both within the legal process and external to it, that impact on the inclusion of multispecies perspectives. To support this, a broad definition of 'legal proceedings' was adopted. This included not only formal litigation and Tribunal hearings, but also parliamentary debates, petitions, select committee hearings, and Royal Commissions.

This wider lens was essential for two reasons. The first is that it made visible the range of legal avenues that Whanganui iwi have pursued over time in defence of the River. Second, and more importantly, it allowed for an examination of how these different

legal fora constrained or enabled the articulation of Whanganui iwi's worldview in relation to the River. By taking a broad approach to what counts as a legal proceeding the research also sheds light on how legal frameworks themselves shape the form, language, and legitimacy of the claims being made. In some contexts, for example, relational or spiritual values are sidelined in favour of property-based arguments that fit within common law categories. In others, such as the Waitangi Tribunal, there is greater space for customary knowledge and lived experience. These differences are crucial to understanding not only what *has* been said, but what *could* be said.

4.3.2. A Multidimensional Approach to the Historical Record

Section 2.2.3. explains the multidimensional approach adopted in this research, but it is also briefly summarised here. Multidimensionality is concerned with understanding oppression and in doing so seeks to discern how power structures work, and how they overlap and intersect to marginalise certain individuals, communities, species and voices. In developing this chronology, the intention was not only to document a sequence of events, but to challenge the ways in which history itself is constructed and presented. This requires a recognition that the recording of legal and historical events is never neutral.

As Smith observes, the telling of history is an exercise of power.[514] The writing of a historical record is often presented as an objective exercise of the collation of facts – a concept many Indigenous scholars challenge.[515] How, and which events, are recorded, classified, ordered and included for the purposes of the historical record are all issues that speak to dominant power structures. One of the main critiques of traditional historical accounts is that it erases Indigenous history and dismisses Indigenous experiences of colonialism as coming from a 'primitive' viewpoint.[516] This practice is rooted in Enlightenment assumptions that privilege 'rationalism, individualism and capitalism' and people whose activities aligned with this.[517] This often meant that Indigenous communities were sidelined as irrelevant to this progress

[514] Smith (n 153).
[515] See for example Mikaere discusses myth-making and the colonial project Ani Mikaere, *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia 2012).
[516] Smith (n 153) 33.
[517] ibid 36.

narrative, and their stories were often excluded from the historical record altogether.[518] Fanon described this as colonialisms 'perverted logic' - the domination of the present though the distortion of the past. [519] Smith describes it as the 'reach of imperialism into "our heads"'[520]. Similarly, Keenan writing about Māori history, has shown how Māori interaction with colonial institutions has 'mudd[ied] the waters of customary Māori recollection' – as Māori were compelled to translate their histories into forms palatable to the Crown, or risk having their history ignored or relegated to myth.[521] The chronology seeks to surface those moments where Māori histories were reframed or constrained by colonial structures. The critiques explored above informed the construction of the chronology and this is explored in greater detail below.

While decolonial scholarship rightly centres Indigenous resistance, it is also important to recognise that counter narratives have also existed within Western traditions. Even within Enlightenment Europe there were counter currents. As Salmond notes Captain Cook's Quaker mentor embodied a radical relational worldview, 'with beliefs in spiritual equality for all (including women), freedom for slaves and fair treatment for indigenous peoples'.[522] These undercurrents remind us that alternative viewpoints are not exclusively external to Western thought but have often been silenced or marginalised by it. Acknowledging these counter currents helps to situate the Whanganui case not as an isolated, unique instance, but as part of a longer global conversation.

4.3.3. Implications of this approach for the Chronology: Sources, Access and Limitations

Constructing a chronology for this research required balancing empirical comprehensiveness with sensitivity for cultural considerations. The aim was to create an historically grounded, but ethically responsible account. This meant that the construction and application of the chronology needed to be conscious of the limits of archival records, as well as cultural constraints around the dissemination of

[518]ibid 32.
[519] Frantz Fanon, *The Wretched of the Earth* (Penguin Books 1961) 169.
[520]Smith (n 153) 25.
[521] Danny Keenan, 'Mā Pango Mā Whero Ka Oti: Unities and Fragments in Māori History' in Bronwyn Labrum Bronwyn Dalley (ed), *Fragments: New Zealand Social & Cultural History* (Auckland University Press 2000).
[522]Salmond (n 47) 36.

knowledge. It also required the researcher to remain prepared to engage critically with these issues as they arose in their specific contexts.

Following Keenan's call to extend Māori customary history beyond the pre-contact period[523] this research draws on a diversity of sources from whaikorero (oratory), oral testimony and written submissions, alongside government documents, court records and academic commentary. The Waitangi Tribunal has been undertaking this kind of work when preparing Tribunal reports for the last 40 years.[524] Whilst the Tribunal's approach is by no means perfect, it has started important conversations about what constitutes New Zealand history. As Byrnes explains,

> ...it stresses that the past has distinct meanings for various people, and implies that versions of the past, Māori as well as non-Māori are culturally shaped and socially constructed... the work of the Waitangi Tribunal has been expanding existing knowledge of the history of Māori-Crown relation in New Zealand. Through its published historical reports, the Tribunal has also challenged some previously held assumptions about the nature of past encounters between Māori and the Crown, Māori and Māori, as well as between Māori and non-Māori communities. It has asked questions about the nature of these encounters and has seriously muddied the waters regarding ideas of historical explanation, culpability and victimisation'.[525]

Byrnes' insight is important for the present research because it highlights how customary knowledge enters legal processes in a particular way, and this was evidenced in two examples seen in this research.[526] First, the context in which a history is being recounted will shape what is said. Keenan describes this as 'history being

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[523] Customary history is often delineated between pre-European settlement and post European settlement. Pre-European accounts draw heavily on customary knowledge and a wide range of sources such as 'waiata (songs), tauparapara (incantation), whaikorero (marae oratory), whakairo (carving), oral testimony, and ancient stories'. But Keenan notes that these ways of representing Māori past 'are seldom extended across the nineteenth century. Yet this needs to be done if the actions of Māori after 1800... are to be positioned within an ongoing context of 'customary knowledge'... customary knowledge offers vital insights into the activities of Māori right across the turbulent nineteenth century and beyond' - Keenan (n 523).

[524] ibid.

[525] Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Oxford University Press 2004) 109.

[526] It's also relevant to note at this point that Bynes considers the tribunal's approaches to the historical record and its attempts to rewrite history as a 'noble but ultimately flawed experiment' Byrnes (n 527).

attuned to specific occasions'.[527] In respect of legal proceedings, it is important to be aware that the narrative may be shaped to take account of legal constructs. This was seen in this research in submissions that addressed land ownership. Land ownership was not a concept within the Māori worldview pre-European settlement, yet it was alluded to in legal arguments to bring claims within the common law framework. This distortion was necessary at the time for Māori to be able to litigate their concerns.

The second example concerns issues relating to the access of historical records. Māori knowledge systems approach the sharing and transmission of knowledge differently to Western archival practices. Certain forms of knowledge are sacred and are subject to tikanga-based protocols around access and use. This is reflected, for example, in the way testimony is given in legal proceedings, including before the Waitangi Tribunal where testimony may be governed by marae-based conventions.[528] In some cases, witness statements are not publicly accessible and can only be consulted with the explicit permission of the individual or their whānau (family).[529] These protocols are both culturally appropriate and ethically necessary. Yet, at the same time, they present hurdles when conducting research, particularly for those working outside Māori communities. As a result, non-Māori or state-generated accounts often appear more prominently in the documentary record, not because they are inherently more reliable or complete, but because they are more easily accessed within conventional research systems. This asymmetry must be recognised and approached with care. These issues were borne in mind during the data collection process.

4.4. Data collection

4.4.1. Process

The chronology was developed through an iterative review of materials in the public domain combining Tribunal and government sources to build a multidimensional picture of the Whanganui River litigation and settlement process. Only public domain

[527] Keenan (n 523).
[528] ibid 39–40.
[529] See page 360 of the Whanganui River Report that marks certain documents as confidential and inaccessible to the public without an order of the Tribunal. Upon enquiry to the Tribunal the first step in obtaining an order to access the documents is to seek the consent of the individual or whanau - The Waitangi Tribunal, 'The Whanganui River Report: WAI 167' (1999).

material was used for two reasons. Firstly, for cultural reasons certain documents recording Māori history and knowledge are not publicly accessible and it therefore follows that if access was granted the information could not be made public. This would then be incompatible with public dissemination, which was a key concern of the researcher. Second, court records such as pleadings, affidavits and witness statements require formal applications and fees to access, and disclosure remains discretionary to non-parties.[530] Therefore, given the availability of secondary materials and transcripts, it was decided that such applications were unlikely to yield proportionate benefits.

Where possible, discrepancies between sources were addressed through triangulation, by cross checking data across multiple records. While gaps in the historical record remain, the available material is sufficient to identify consistent patterns across the relevant time period. Details of the process that was adopted to create the chronology and sources relied upon are set out in Appendix A.

4.4.1.1. Locating primary and secondary material

Each event relating to a legal proceeding within the chronology was identified and then investigated further. This meant that each legal proceeding was situated within the broader context within which it occurred. Primary material was sought in the first instance; this was supplemented by secondary material. Secondary material was also consulted where the primary material was either unavailable or potentially accessible, but not in the public domain. The chronology at Appendix A provides details of the primary and secondary material reviewed.

A great deal of the material was available electronically, but there was also a substantial body of material that could only be accessed by visiting the archives. This necessitated a visit to the New Zealand National Archives, National Library, and Whanganui District Council archives to locate records of legal proceedings and personal accounts of these proceedings. A list of the archival material consulted is provided in the spreadsheet at Appendix A.

[530] Senior Courts Rules 2016 (NZ).

Materials held in the archives were viewed on a four-week fieldtrip to New Zealand in March - April 2024.This enabled a direct review of archival and local materials and strengthened the contextual understanding of the River's geography and cultural landscape. Efforts were made to obtain recent Te Pou Tupua reports, but requests for the documents went unanswered.[531]

The chronology formed the basis for the next stage of the research in which the multispecies participation toolkit is applied to the River claim to consider how legal processes have shaped the conditions for the River's participation. To operationalise the toolkit, a set of guiding questions was developed and applied to the chronological material. These questions were intended to surface how different processes and institutions shaped the conditions for multispecies participation at various stages of the process.

4.4.2. How the multispecies participation toolkit was operationalised

The multispecies participation toolkit described in Chapter 3[532] is not designed as a prescriptive checklist. Rather it sets out a series of concepts intended to surface where and how participatory space is enabled or constrained. To apply the toolkit systematically to the Whanganui chronology, the concepts were translated into a set of guiding questions to interrogate the data.

The development of these questions was iterative and informed by the process of compiling the chronology. Familiarity with the data enabled the questions to be framed in a way that was responsive to the material while remaining grounded in the concepts of the toolkit. The questions are intended to surface how different legal processes and institutions shaped the conditions for multispecies participation. This approach reflects the exploratory purpose of the toolkit which is directed towards identifying structural

[531] Te Pou Tupua are the guardians of the River appointed by statute. There is an organisational structure that supports the guardians with a website. The website provides an address to send research requests to. Contact was made with the organisation in January 2024 and followed up on two further occasions. The first email was acknowledged and outlined that the research request would be sent for consideration. No response was received and all subsequent emails went unanswered. Te Pou Tupua is also required to produce annual reports. As of June 2025 the annual reports published on the website are for the years 2021 and 2022. Enquiries were made to the contact email address in April/May 2025 for access to more recent reports - these enquiries went unanswered.

[532] See section 3.6.

conditions that impact participation, rather than produce a binary assessment of success or failure. To this end the same set of questions were applied across the different phases of the River Claims.

Stakeholder recognition

- Who or what is recognised as a stakeholder, and on what basis (e.g. affectedness, legal status, group membership)?
- What does being a stakeholder enable/allow/entail?
- Do procedural or external factors (such as cost, legal standing, or institutional access) affect who can function as a stakeholder?

Timing

- At what stages of the process are stakeholders involved and why?
- How does the timing of involvement shape the extent or nature of participation?

Objectives

- Are the objectives of the process explicit?
- Who sets these objectives?
- When were the objectives determined (within the process e.g. beforehand, during etc)?
- Does the process allow for dissensus?
- Who decides whether the objectives are met, or not?

Multidirectional learning

- Is there space to consider/ include different forms of communication, language, expression, knowledge?
- Does the process allow for different knowledge frameworks to inform the outcome?

Influence

- How do stakeholders contribute to deliberations?
- Can stakeholders influence the outcome?

Context and participatory space

- Where is the participatory process held?
- Is historical/ cultural/ environmental context taken into account?

Before applying these questions to the River Claims, it is essential to establish the historical, cultural and legal context in which River dispute emerged. By providing a detailed background on the Māori worldview and the subsequent impact of European settlement, the researcher ensures that the analysis of the legal proceedings remains culturally grounded. The section moves beyond simple historical summary to identify the ontological foundations, specifically regarding the relationship between humans and the environment, that were later contested within the Western legal framework. Understanding these foundational Māori concepts is a necessary precursor to evaluating how multispecies participation was either suppressed by colonial law or revitalised through modern settlement processes.

4.4.3. Background to the Māori perspective

Māori are the Indigenous people of Aotearoa (New Zealand)[533] having arrived in approximately 1400AD[534] from East Polynesia.[535] The term Māori[536] is a general label for all Indigenous inhabitants of New Zealand, comprising many iwi (tribes) with distinct histories and cultural practices but connected through shared philosophical foundations.[537] One of the unifying ideas within Māori philosophy is the concept of whakapapa - translated as meaning something close to layer upon layer.[538] Broadly whakapapa encapsulates the concept of descent and genealogy[539], but it is more layered than this and describes relationships that bind humans, non-humans and the environment into one interdependent whole.[540]

[533] also referred to as tangata whenua (people of the land)
[534] Noting that there is some disagreement amongst scholars about this date -Richard Walter and others, 'Mass Migration and the Polynesian Settlement of New Zealand' (2017) 30 Journal of World Prehistory 351.
[535] ibid.
[536] Catalysed as a consequence of European settlement - Stewart (n 489).
[537] ibid 37.
[538] Walker (n 473) 13; Stewart (n 489) 85.
[539] Mamari Stephens (n 1).
[540] Stewart (n 489) 86.

Central to understanding whakapapa is the creation story which traces descent through entwined histories between people, plants, animals, waters and deities. All entities are descended from the sky father Ranginui and earth mother Papatūānuku. Māori cosmology describes the creation of the universe in three overlapping epochs.[541] The first, *Te Kore*, is a timeless void of potential where the seeds of the universe were scattered.[542] This is followed by *Te Pō*, the long night of darkness, and finally *Te Ao Mārama*, the world of light in which humans live.[543] In this final epoch, the sky father Ranginui and earth mother Papatūānuku were locked in an embrace that left their children trapped in darkness. Their son, Tāne Mahuta, pushed them apart, creating space and light. Tāne then became the god of the forest and the ancestor of all land-based life, including humans, plants, and animals.[544]

This creation story[545] forms the foundation of the Māori relationship to the natural world, where landforms are seen as part of Papatūānuku's body and living beings as kin descended from Tāne.[546] As Williams explains central to the creation story and Māori culture more broadly, are the ideas of responsibility and balance. This network of values is known as *tikanga*, a Polynesian system of law.[547] Williams details how *whanaungatanga* (kinship) is the

> infrastructure that holds the whole system together', it is the notion that wellbeing depends on maintaining balance 'between individuals and ecosystems… between the living and their ancestors, and between the living and their descendants as yet unborn.[548]

[541] Stewart (n 489); Walker (n 473) 14.
[542] Walker (n 473) 14.
[543] ibid.
[544] Stewart (n 489) 58–59.
[545] It also reflects a spatial and temporal worldview distinct from Western traditions. Time is not linear but spiral, embodied in the symbol of the double helix, where whakapapa (genealogy) connects generations and spaces in a dynamic, interwoven way. For Māori, epochs like *Te Pō*re remain accessible through dreams or the onset of night, demonstrating how the past, present and spiritual dimensions coexist. This cyclical, relational understanding of time and ancestry underpins Māori approaches to knowledge, memory, and the natural world.
[546] Stewart (n 489) 59.
[547] Joe Williams, '"Too Far, Too Soon": Speech given on 3 May 2023 at the Wananga on Tikanga and the Law' (2023) 4 Amicus Curiae 599, 599.
[548] Williams (n 549).

It extends care and responsibility across species, time and realms. Within this exist other basic tikanga principles such as *utu* which calls for reciprocity and restoration of harmony when balance is disturbed; *mana* which denotes both dignity and spiritual vitality; and kaitiakitanga which embodies the obligation to act as a guardian for one's community, land and waters. The principles are all animated by mauri which is the life force present in all things, and which join humans, animals, rivers and mountains into one interdependent whole.[549]

As Mikaere sets out, living within this system creates an

> …an acute awareness of interdependence, and of the fact that what affects one will ultimately affect all. This in turn impresses upon humans the need to fulfil our role on the planet in a responsible and thoughtful manner. The wider implications of every decision should be explored. The long-term affects of our actions must be considered. A lack of vigilance in this regard could have dire consequences for our non-human relations, for ourselves and for the generations to come.[550]

Understanding this worldview is essential to understanding the Whanganui River's legal history, because Māori have sought to have to have these philosophical ideas acknowledged and included within the legal framework. It was colonisation in the early nineteenth century that sidelined these worldviews in favour of European ideas of sovereignty and property, and it was against this backdrop that the Treaty of Waitangi was signed in 1840.

4.4.4. European settlement and the Treaty of Waitangi

The Treaty of Waitangi 'between the Māori chiefs and Queen Victoria was the basis on which Great Britain took possession of New Zealand in 1840'.[551] The signing of this instrument occurred against a particular backdrop of increasing European settlement and growing uncertainty about authority and governance in New Zealand. For the Crown the Treaty was broadly intended to establish a framework to assert sovereignty and secure strategic and commercial interests.[552] For many Māori it was viewed as a

[549] ibid.
[550] Mikaere (n 517).
[551] Ned Fletcher, *The English Text of the Treaty of Waitangi* (Bridget Williams Books 2022) 1.
[552] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd edn, Brookers 2001) 32–42.

way to manage the presence of Europeans, regulate interaction with the Crown and protect existing relationships and authority over land and resources.[553]

The Treaty of Waitangi was signed between representatives of the British Crown and a number of Māori chiefs and is often referred to as New Zealand's founding document.[554] However, rather than providing a stable basis for shared governance, the Treaty has been the source of disunity between Māori and the Crown. The reason for this lies largely in the differences between the English and Māori versions of the Treaty.[555] The Māori translation[556] is not an exact translation of the English text and many of the disputes relate to differences in the language and meaning attributed to specific words in the different versions.[557]

The Māori text guaranteed to uphold tino rangatiratanga which is 'the full chieftainship of the rangatira[558], the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their prized possessions'.[559] The English version guaranteed to Māori and their ancestors 'full and exclusive, undisturbed possession of their Lands and Estates Forests and Fisheries and other properties so long as it is their wish and desire to retain the same in their possession'.[560] In both cases this property included 'freshwater fisheries and their ancestral rivers, lakes, springs, wetlands and estuaries'.[561]

The fundamental problem with the Treaty was interpretive[562] – there was no direct translation for several key Māori concepts into English. The consequence was that in attempting to seek equivalence in languages that were so dissimilar, the translation process produced fundamentally different outcomes. Words such as rangatiratanga and mana carry particular social and spiritual associations that have no equivalent in

[553] Nicola Wheen and Janine Hayward, 'The Meaning of Treaty Settlements' in Nicola Wheen and Janine Hayward (eds), *Treaty of Waitangi Settlements* (Bridget Williams Books 2012) 16.
[554] Joseph (n 554) 42.
[555] This history and drafting of the Treaty has been the subject of much academic consideration. Some relevant titles include Claudia Orange, *The Treaty of Waitangi* (Bridget Williams Books Limited 1987); Fletcher (n 553).
[556] Described as being hastily translated
[557] Orange (n 557).
[558] Rangatira is a person, either male or female, who exercises chiefly authority on behalf of their iwi or hapu - Mamari Stephens (n 1).
[559]Salmond (n 47) 295.
[560] Salmond (n 47).
[561] ibid.
[562] Although noting that there was a distinct lack of good faith by the Crown in working to address concern over the differences between the two version

English.[563] In seeking to find an English approximation, the translation process altered the meaning of the Treaty and the relationship being negotiated. As Byrnes explains, the British viewed this 'as a treaty of cession' whereas the Māori who signed the Treaty[564] considered it a confirmation of their continued sovereignty, in exchange for British protection'.[565] The English version 'stated that the chiefs of New Zealand had 'absolutely and without reservation' ceded their rights of sovereignty. The Māori language version on the other hand, split the powers of authority into two: kāwanatanga which was to be ceded to the British, and rangatiratanga, was to be retained by Māori'.[566]

Once the Treaty was signed, the British proceeded on the assumption that 'all land in New Zealand was vested in the Crown, and subject to British law'.[567] This unilateral assumption stood in stark contrast to Māori expectations that were based on the Māori text. The British proceeded to allow land agents to divide the country into blocks for sale - that included waterways.[568] Salmond explains that the Crown regarded Māori rights under the Treaty as a "burden" on the Crown title.[569] In order to discharge this Māori rights had to be extinguished in some way and this was done variously through voluntary sales, military action, confiscation and through the mechanisms of the Native Land Court which converted customary collective rights into individual freehold titles.[570]

4.4.4.1. Impact of Treaty of Waitangi on the River

English Common Law was introduced to New Zealand following the signing of the Treaty and this brought with it property law informed by Enlightenment logics of control and ownership. Whilst the Treaty did not transplant English Common Law it provided the foundation for Crown sovereignty which was formalised through instruments such as the Charter for Erecting the Colony of New Zealand of 1840 and legislation such as the English Law Act of 1858. The combination of the extinguishment of Māori rights

[563] Joseph (n 554) 47.
[564] The Treaty was not signed by all Māori tribes in New Zealand
[565] Byrnes (n 527).
[566] ibid 34.
[567] Salmond (n 47) 305.
[568] ibid.
[569] ibid 306.
[570] ibid.

and the implementation of English Common law had particular consequences for Rivers.

Under English Common Law there is a presumption that riparian land – land in contact with the flow of an inland river[571] - confers ownership of that section of the river up to the middle point (*ad medium filum aquae*). However, this only conferred ownership of the bed of the river, the water remained incapable of ownership.[572] The status of water as not being able to 'owned' has its roots in the Enlightenment where it was believed that wild and untamed nature could only be owned once it had been brought under control – as Salmond explains, citing Sir William Blackstone, 'water is a moveable, wandering thing and must remain common by the law of nature'.[573]

Blackstone's declaration rested on the premise that water was wild and transient. Yet industrial development and colonial expansion altered this position so that when it was possible to harness water for such things as irrigation, navigation and hydroelectric power, it became redefined as controllable. This was essentially the realisation of the Enlightenment ideal of mastery over nature, and physical control over the water turned it from the 'commons' to a commodity. Regulation of water followed and transformed the water of the Whanganui River into a resource. This logic endures and is most aptly demonstrated by the fact that water use in New Zealand is currently regulated by the Resource Management Act 1991. As Salmond explains this process transforms water from a life sustaining force for all species into an economic asset, and this stands in sharp contrast to how Māori understand rivers.[574]

Māori consider rivers ancestral kin and indivisible beings. That the commodification of rivers is antithetical to the Māori worldview is made clear by Salmond when referencing the scholarship of Muru-Lanning who explains that in te ao Māori

> the relation between a person and a river is defined by their genealogical relationship. In laying claim to one's ancestral river one must say tōku awa – 'my river', using the subordinate possessive tōku which indicates that the speaker is junior… to the river, which is tukana, or from a senior line, and

[571] GW Hinde and others, *Hinde McMorland and Sim - Land Law in New Zealand* (Lexis Nexis 2003) 126–127.
[572] Salmond (n 47) 304.
[573] ibid 307.
[574] Salmond (n 47).

> dominant. Instead of translating tōku awa as ‘my river’ then, it would be more accurate to say, ‘I belong to this river’, thus turning the modernist idea of ownership on its head.[575]

The divergence in the worldviews is evident in the Treaty itself where the English version, rooted in Enlightenment ideals treated land as alienable and ownable. In contrast the Māori text emphasised rangatiratanga which is authority grounded in reciprocal relationships. Hence the implementation of the English legal framework, which is based on ownership and control, sat in direct opposition to Māori approaches to the natural world. It was concern for how European settlers were using the River, and its dissonance with how Māori considered it should be treated, that gave rise to the River claims.

4.4.5. The Waitangi Tribunal

The previous section details the history of the signing of the Treaty of Waitangi in 1840, although it should be noted for much of the nineteenth and twentieth centuries the Treaty had little impact on law making and governance - it was primarily a ‘symbolic story of origins’.[576] From the 1960s onwards, however, Māori activism and scholarship recentred the Treaty as a focal point.[577] Activists protested the failure of the government to uphold the principles of the Treaty and the poor treatment of Māori.[578] Examples of this activism include the 1975 Land March which saw thousands of protestors walk the length of the North Island down to Parliament in Wellington, to protest the loss of Māori land and rights.[579] Around the same time efforts were being made within parliament to have Māori grievances addressed by the government.[580]

Academic scholarship was also instrumental in bringing change. The critical scholarship of Ruth Ross exposed the divergences between the Māori and English Treaty texts and in doing to brought into question the dominant narrative of a ‘benign story of colonisation’.[581] Ross’s work was pivotal. She brought attention to the fact that

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[575] ibid 309.
[576] Miranda Johnson, *The Land Is Our History* (Oxford University Press 2016) 108.
[577] ibid.
[578] ibid 108–113.
[579] ibid 112–113.
[580] ibid 114.
[581] Bain Attwood, *A Bloody Difficult Subject: Ruth Ross, Te Tiriti o Waitangi and the Making of History* (Auckland University Press 2023).

the two versions of the Treaty had significantly different meanings – the Māori version preserved self-determination, their 'political authority and power'[582] and recognised responsibilities of guardianship. The English version did not acknowledge Māori sovereignty over their land and water. Instead, Māori were treated as subjects rather than partners which undermined their entitlement to assert sovereignty over their land. This in turn impacted their ability to care for the land in accordance with Māori principles of kaitiakitanga and this misalignment is what became central to later disputes over the Whanganui River

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal as a Commission of Inquiry[583] to address Māori grievances and interpret the principles of the Treaty.[584] Under the Act, the Tribunal was given jurisdiction to 'make recommendations on claims relating to the practical application of the principles of the Treaty, determine the meaning and effect of the treaty principles, and determine whether a claim showed Crown acts or omissions to be inconsistent with those principles'.[585] Its jurisdiction was extended in 1985 to cover historic breaches which paved the way for claims, such as those relating to the Whanganui River. The Tribunal's findings were advisory and non-binding, but it did provide a formal mechanism through which Māori could articulate their relationship with land and water.

4.5. The River Claims

The basis of the River claims was the belief that the Whanganui River is an indivisible and living being, not a resource. To be heard within the state's legal structures required this concept to be translated into English common law ideas – those of ownership and title. The early phases of the litigation can be viewed through the lens of how the proceedings were an act of resistance, most obviously an overt challenge to the Crown. They were also an act of resistance in that the proceedings sought to articulate a worldview within a system that was not designed to recognise it. These acts of

[582] Johnson (n 578) 121.
[583] The tribunal's findings generally remained advisory and not binding on the Crown – section 6 Treaty of Waitangi Act 1975.
[584] The preamble to the Waitangi Tribunal Act acknowledges 'the text of the Treaty in the English language differs from the text of the Treaty in the Māori language' - ibid.
[585] Johnson (n 578) 114–115.

surfaced how the legal system worked to constrain marginalised views, and in so doing, preserve the status quo.

At the core of the initial litigation was the contention that in breach of the Treaty, and without the consent of Whanganui iwi, the Crown had usurped authority of the River. Iwi were concerned that although the Treaty guaranteed them tino rangatiratanga – absolute authority over their land- and this could not be disturbed without their consent, the Crown had not given regard to this. Iwi asserted that the Crown interfered with the Whanganui iwi's tino rangatiratanga in the following ways:

- The destruction of eel weirs and the removal of gravel to make ways for boats;
- The imposition of water use laws for hydro-electric schemes;
- Pollution of the waterways; and
- The suppression of customary practices and the denial of fishing rights[586]

These grievances were not just about resource use, although they had to be framed in this way for the proceedings to be heard. They were also about reasserting that the River was kin. In this sense the River claims can be read as an early articulation of multispecies participation – it was an attempt to restore the River's presence within law through iwi. The following sections trace how this claim unfolded across three distinct, but connected, phases: the Early litigation (1938-1962), the Waitangi Tribunal hearings (1994-1999), and the Negotiation and Legislative phase culminating in the Te Awa Tupua Act 2017, collectively termed the River Claims.

4.5.1. Early litigation – 1938 – 1962

The formal legal proceedings in the River Claims commenced in 1938 when Whanganui iwi brought an application for the investigation of title into a particular stretch of the Whanganui River. The question in issue was whether the Whanganui tribe held the River in accordance with their customs and usages at the time of the Treaty. While the Māori Land Court initially found in favour of the Whanganui iwi, A protracted series of appeals to the Māori Appellate court and the Supreme Court followed between 1938 and 1962. An inquiry by the 1950 Royal Commission marked a moment of partial recognition for the claimants, as there was recognition of Māori

[586] Salmond (n 47) 295.

rights to the riverbed under English law, and there was recommended compensation for gravel that had been extracted from the riverbed. However, the Crown resisted this outcome, ultimately prevailing by asserting ownership of the River through the Coal Mines Act of 1903. This final decision in the riverbed litigation was handed down in 1962.

Despite the 1962 decision going against them, Whanganui Iwi continued to challenge the Crown's control of the River. Led by Titi Tihu and his nephew Hikaia Amohia[587], both influential members of the Whanganui iwi, iwi advocates sustained decades of petitions and advocacy. Much of this work focussed on seeking recognition of the Royal Commission's findings.[588] Their persistence kept the River's claims alive within Crown processes and laid the groundwork for a collective representative body. This culminated in the establishment of the Whanganui River Māori Trust Board ('the Board') in 1988. The Board was given authority to negotiate on river gravel and River matters on behalf of iwi.[589]

Soon after the Board was established, its focus shifted toward the state's diversion of water from the Whanganui and neighbouring rivers for hydroelectric power generation under the Tongariro power scheme. The scheme had been authorised in 1958 and had diverted significant volumes of water from the Whanganui River for over 30 years. This altered river flows and degraded river habitats. For Whanganui iwi the diversions were an environmental harm but were also a continuation of the Crown's encroachment on the Whanganui iwi's 'traditional and unextinguished right of control' of the River.[590]

In 1985 the state-owned entity, Electricorp, had to apply for resource consent to continue to abstract water from the Whanganui River. The Board intervened and the ensuing litigation became known as the 'minimum flows litigation'. After nearly four years of litigation in the Planning Tribunal and an appeal to the High Court, the outcome favoured the status quo and Electricorp was granted nearly five additional

[587] A detailed narrative of the work of Tihu and Amohia can be found in the brief of evidence of Archie Te Atawhia Taiaroa - Tribunal (n 531) B8 – paras 7-24.
[588] ibid 4.
[589] ibid.
[590] ibid 5.

years of water use under the existing regime.[591] The case revealed the limits of participation within planning and resource management regimes which allowed for iwi to be consulted or to lodge objections but it provided no mechanism for them to be included as actual decision makers with the power to be involved in the approval or denial of the resource consents. Iwi were treated as mere stakeholders to be heard, rather than as guardians with inherent authority over the River. This tension would become a key issue in later proceedings.

4.5.2. Waitangi Tribunal – 1994 - 1999

In 1993, because of the abstraction of water for the Tongariro power scheme, the Royal Forest and Bird Protection Society made an application for a water conservation order for the Whanganui River and its tributaries.[592] This application prompted the Board to make an urgent application to the Tribunal. The Board's concern was that new threats to River control were constantly emerging[593] and unless matters relating to control of the River were settled, the Board anticipated that they would continually be involved in litigation and 'always on the back foot'.[594] This was to herald a new chapter in advocacy about the River because whilst the legal forums of the 1980s and 1990s provided iwi with frameworks to talk about the River, they continued to be frameworks which recognised only certain human and state interests. The Tribunal process was different, it offered an opportunity for iwi to argue the River's vitality and its relation to iwi, in a forum that was more receptive to these concepts. From a participatory perspective, the hearings signified a widening of the circle. The River entered the legal framework through narrative, song, ceremony, oral testimony and through its presence in the location of some of the hearings. Yet the River's involvement in the proceedings was still dependent on human intermediaries.

The first Tribunal hearings relating to the River took place in the early part of 1994.[595] The Waitangi Tribunal released its report on the Whanganui River in 1999. It found that the River was an indivisible entity over which Whanganui iwi held rangatiratanga and that the iwi had never relinquished ownership. The Crown was found to have

[591] David Young, *Woven by Water: Histories from the Whanganui River* (First, Huia 1998) 255.
[592] Tribunal (n 531) 6.
[593] Such as the creation of a regional plan and the Crown's 'proposals for a generic policy on Māori claims to natural resources' that would impinge on the iwi's control' - ibid.
[594] ibid.
[595] Johnson (n 578) 134.

breached the Treaty of Waitangi, causing ongoing prejudice to iwi. The Tribunal recommended negotiations between the Crown and iwi, including recognition of iwi rights, compensation for past wrongs (such as hydroelectric diversion and gravel extraction), and frameworks for managing future resource consents.[596] Hence, the Tribunal was not the conclusion of the process, but the start of a new one as it provided recommendations for resolution, but could proscribe outcomes.[597] The Report also left unaddressed a crucial issue in that it did not provide any guidance on how to reconcile tikanga Māori with existing legal frameworks. As Salmond notes, the Tribunal identified the 'nub of the problem' in the Whanganui River Case to be the tension between English and New Zealand law and tikanga Māori, but did not offer any real solution for how to overcome this.[598] Whanganui iwi, however, had already been actively organising around these issues since before the Tribunal hearings, including drafting the Whanganui River Charter in 1993 so were prepared to take matters forward after the release of the report.[599] Following the report's release, they began work on a unified strategy for negotiations. [600]

4.5.3. Negotiations and Legislation – 2002 - 2017

The limitations of the Tribunal's findings marked an important turning point in the River Claims process. While the Tribunal provided recognition of the underlying tensions between tikanga Māori and the common law, it didn't resolve the practical questions of how this could be addressed. This gap shifted the focus of the River Claims away from adjudication, toward negotiation, and exploring ways to reconcile these two legal systems.

4.5.3.1. Initial negotiations

The first round of settlement negotiations with the Crown started in 2002 and ended in 2004 without an agreement being reached. The Whanganui River Māori Trust Board's later submission to the Māori Select Committee in 2016 notes that this was for a 'variety of reasons' but the reasons are not specified.[601] As the negotiations were confidential, there is no publicly available record of what occurred. However, during

[596] Taken from the 2012 Settlement agreement
[597] Tribunal (n 531) 343–344.
[598] Salmond (n 47) 311.
[599] Whanganui River Maori Trust Board, 'Submissions to Maori Select Committee' (2016).
[600] Johnson (n 578).
[601] Whanganui River Maori Trust Board (n 601).

this initial negotiation phase, the Crown and iwi did reach agreement on some matters, and these included the Terms of Negotiation (March 2003) and the Processes and Procedures (April 2003) that would be followed during the negotiation. These remained relevant during the subsequent negotiation period and provide insight into how the negotiation process was approached.

4.5.3.2. Foreshore and Seabed dispute & the UN Special Rapporteur

The initial negotiations unfolded against a broader political backdrop that potentially had an impact on perceptions of the Crown's willingness to engage in good faith, particularly when it came to disputes over Māori rights to land. One of the most significant developments during this period was the foreshore[602] and seabed dispute. A dispute had arisen between Māori in the South Island and the Crown in relation to ownership and control of the foreshore and seabed. This matter was litigated and the decision found that the foreshore and seabed were owned by Māori unless it could be shown that their rights had been legally extinguished.[603] In reaction to the public outcry the government 'hastily passed legislation to ensure that the foreshore and seabed would be held in perpetuity by the Crown'.[604] As Ruru writes, the response from the Crown to a judicial decision 'not of its liking' was to override a peoples' property law rights.[605] This episode may have undermined confidence in the Crown's willingness to negotiate in good faith as it signalled that judicial recognition of Māori property rights could be overridden through legislative action when upholding such rights were politically inconvenient.

4.5.3.3. Second round of negotiations, resolution and legislation

Four years after the initial round of negotiations ended, a hui (meeting) was held in August 2008 where it was agreed that Whanganui iwi should return to the negotiations.[606] Negotiations recommenced in 2009 and a final agreement was reached in 2014. The settlement agreement formed the basis of the Te Awa Tupua (Whanganui River Settlement) Bill[607] that was presented to parliament in 2016 and

[602] land at the intertidal zone
[603] Salmond (n 47) 371.
[604] ibid 373.
[605] Jacinta Ruru, 'A POLITICALLY FUELLED TSUNAMI: THE FORESHORE/SEABED CONTROVERSY IN AOTEAROA ME TE WAI POUNAMU / NEW ZEALAND' (2004) 113 The Journal of the Polynesian Society 57, 68.
[606] Johnson (n 578).
[607] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 s 3.

passed into legislation in 2017. The Act recognises the River as an indivisible and living whole[608], grants the River personhood and with this the rights, duties and liabilities of a legal person[609]. The act establishes guardians to be appointed to represent the interests of the River (Te Pou Tupua)[610] as well as advisory groups[611] to support and assist the decision making of Te Pou Tupua and Whanganui Iwi. The Act acknowledges the special connection iwi have to the River and provides an apology for historical wrongdoing and compensation[612].

From a participatory perspective Te Awa Tupua represents a significant reorientation where the River is no longer treated as an object of ownership, but rather as a subject within the law that is capable of being represented and having its views included as part of decision-making processes. The River's involvement is still reliant on human guardians, but instead of decisions being made about the River, they are being made for the River – for its health and wellbeing. This is not a complete form of multispecies participation; indeed, it is some way from it, but it is a gesture in that direction. The analysis that follows builds on this trajectory by applying the multispecies participation toolkit to the legal proceedings, evaluating the extent to which these processes expanded or constrained the River's voice.

4.6. Applying the Toolkit: Evaluating Participatory Processes in the River Case

The section operationalizes the evaluation framework detailed in chapter 3. By applying the guiding questions to the procedural design and decision-making structures of each phase, the researcher identifies the specific legal mechanisms that either fostered or limited non-human involvement. This diagnostic approach allows for a critical assessment about participation was structured and practised, moving beyond formal recognition to evaluate substantive influence.

4.6.1. Good Faith

In the early stages of the River's legal history, there was no mechanism for non-human participation. As the law could not conceive of the River as a subject with standing,

[608] ibid 12.
[609] ibid 14.
[610] ibid 19.
[611] ibid 27.
[612] ibid 3.

good faith could not be identified through an openness to the non-human world. Rather good faith was signalled by a precursor to this, a willingness to engage with Māori on their own terms. Taking the Māori worldview seriously enabled conversations that challenged the anthropocentric assumptions of the legal system and started to make space for other voices. Good faith, in these early stages, therefore, turned largely on whether Māori were given space and afforded the opportunity to articulate their unique relationship with the River that was based on a relationship of connection. The extent to which the good faith underpinned these exchanges within the legal process can be measured by the willingness to allow Māori views to guide actions and outcomes. In practice this can broadly be seen in the legal proceedings in two ways: (1) as an openness to tikanga and how they are expressed such as through oral testimony and waiata; and (2) a willingness to treat the River as other than, or more than, a resource. The analysis that follows traces how this evolved across three key phases: early litigation, the Waitangi Tribunal, and the negotiation of the settlement.

4.6.1.1. Litigation Phase: 1938 – 1962

The early litigation phase demonstrated the limits of good faith in a legal structure that retained control over how Māori claims were recognised, considered and resolved. While Māori were heard, the Crown and certain courts demonstrated a consistent unwillingness to accept outcomes that challenged state objectives that only viewed the River within the framework of property and ownership. Māori claimants were compelled to translate their relationship with the River into concepts recognised by common law, and courts demonstrated little willingness to revisit or expand those concepts. As Salmond notes, this required a form of 'ontological submission' as Māori were forced to reshape their worldview to fit within a legal order that did not recognise the River as a being, but as a thing to be owned or controlled. While cases such as *R v Symonds* (1847)[613], recognised the legitimacy of Māori proprietary rights under common law, later Courts either ignored or narrowed this precedent.[614] This makes the picture more complex because there were moments of legal recognition of Māori ownership on its own terms, yet they were inconsistently applied. This provides insight

[613] *R v Symonds* [1847] NZPCC 387.

[614] As Williams explains *Symonds* is usually 'cited as New Zealand's acceptance, early on, of the enforceability of aboriginal title…' This was significant because it affirmed Māori title arising from Māori possession without it needing to be converted into a concept of ownership framed within English law. Later cases, including *Public Trustee v Loasby* (1908) and *Baldick v Jackson* (1910), also hinted at the potential for Māori customary law (tikanga) to be incorporated into the common law - Williams (n 549).

into the decision making during the early River litigation where the judiciary elected to depart from a line of precedent that impacted on how Māori claimants could demonstrate customary ownership. The judiciary departed from *Symonds* and interpreted custom through a narrow, property-focused lens - an approach where Māori worldviews could be cited, but only to the extent that they could be translated into legal concepts acceptable to the colonial state.

The research demonstrates that there were, however, some procedural innovations. For example, the Native Land Court made site visits, used Māori Assessors[615], and checked sources to ensure the veracity of evidence given on both sides.[616] However, these practices were still bound within an essentially monocultural logic because the legal process did not fundamentally accommodate Māori concepts of law. This was because, as Mead notes, it was the state that ultimately decided what Māori custom was. Mead explains this happened because issues that were essentially cultural, such as the identity of landholders or the meaning of customary practices, were decided by people with little or no understanding of Māori custom.[617] Crown conduct during this period also raised concerns about the willingness to engage in good faith. When decisions were unfavourable[618], the Crown escalated the matter through appeal, further litigation, or legislative intervention. These patterns suggest that good faith was largely performative – there was a willingness to listen up to the point that Māori views clashed with state objectives.

When considering multispecies participation, the litigation phase reveals how it was structurally foreclosed. The River could not appear as a participant in its own right. Māori could not articulate their relationship with the River because the legal language of property and ownership created no space for these types of conversations to occur. Participation was limited to human claimants speaking within a particular legal framework. This phase illustrates how common law litigation not only constrained

[615] Māori assessors helped judges to understand Tikanga Māori- although it must also be noted that the creation of assessors was as a consequence of demoting Māori judges , so whilst there was still the capacity to consider Māori custom, the creation of the assessor position is not as innovative as it may first appear - Manatū Taonga-Ministry for Culture and Heritage, 'Obtaining Land' (2016) <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/obtaining-land> accessed 22 February 2026.
[616] Ministry of Justice, '150 Years of the Maori Land Court' (2015).
[617] Hirini Moko Mead, *Tikanga Maori: Living by Maori Values* (1st edn, Huia Publishers 2003) 9.
[618] Tom Bennion, 'Whanganui River Report: Research Report for Urgent Hearing, Wai 167' (1994) 111–112.- This was partly driven by the Crown's desire to retain control of water resources for hydroelectric development -

Māori participation but rendered multispecies participation impossible. This phase exposes the limits of an adversarial, property based legal process for accommodating non-human perspectives.

4.6.1.2. Waitangi Tribunal: 1994-1998

The Waitangi Tribunal marked a turning point under Edward Taihakurei Durie's leadership in 1980.[619] Durie implemented procedures within the Tribunal 'that were intended to help Māori claimants feel more comfortable with the process of inquiry'.[620] This was possible because the Treaty of Waitangi Act 1975 conferred on the Tribunal a broad discretion to determine how and where it conducts its proceedings[621]. These changes included relocating hearings of Māori evidence to marae and allowing Māori witnesses to speak Māori[622]. As Johnson notes '[c]hanges in procedural norms were also important in gaining the support of Māori themselves, who were beginning to see the Tribunal as a place more hospitable to their cultural protocols as well as their needs'.[623] The other significant development attributed to Durie was that he introduced the principle of the Māori version of the Treaty to 'widen the Tribunal's scope for enquiry, investigation and comment'.[624] This reflected the start of a broader conversation that began within the Tribunal about the historical record.[625]

As has been outlined earlier, western legal contexts tend to privilege written records and verifiable facts over oral traditions, myths and ancestral knowledge.[626] This has often been true of the account of New Zealand history which has relegated Māori historical accounts because they are seen to lack grounding in reason and evidence[627].

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[619] It should be noted that the Tribunal was not always viewed in a positive light. The Tribunal was established in 1975, and at the time was criticised by Māori for having procedures that were inhospitable to them - Johnson (n 578) 115–116.

[620] ibid 117.

[621] Treaty of Waitangi Act 1975 sch 2, para 5.

[622] ibid sch 2, para 6(2).

[623] Johnson (n 578) 119.

[624] Amy L Catalinac, 'The Establishment and Subsequent Expansion of the Waitangi Tribunal: The Politics of Agenda Setting' 5 18.

[625] For example - Attwood (n 583); Byrnes (n 527).

[626] Chakrabaty considers how 'historicism has been a close ally' of Enlightenment thinking and that "reason" must 'prevail over all that was "irrational" and "superstitious" - Dipesh Chakrabaty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2008) 237.

[627] This can be seen in the 1958 opinion of the Maori Appeallate Court , '... we have reached the conclusion that the principal merit or significance which evidence of this class possesses is to provide, at most, a background to an understanding of the general and cosmogenic conceptions which the ancient Maori had towards his property. We think it can go no further than that, in the circumstances related to us. And we are of the opinion that the

As Attwood explains, this position was being challenged in aspects of New Zealand society where

> other forms of knowledge than history, such as myth, oral tradition and matuaranga Māori which the discipline was previously able to rule out as invalid ways of representing the past, [had] been at work in the world outside universities and [had] emerged as rivals.[628]

This updated approach to the historical record was reflected in the procedures of the Tribunal, which incorporated traditional knowledge and storytelling as part of the ways in which stakeholders may give evidence. Incorporating non-Western ways of knowing is not simply a procedural gesture, rather it reflects a deeper good faith commitment to acknowledging Māori as equal participants in shaping the historical record.[629] By reframing what counts as credible knowledge, the Tribunal makes space for different ontologies.

These changes proved to be an important moment for the Whanganui River because it was able to enter the legal record in ways other than as a resource or property. It entered the conversation through story, song, as ancestor (whakapapa), and through physical presence at some hearings. Yet its entry was still mediated through human voices, within an anthropocentric framework and it was only recognised through expressions of culture. Therefore, whilst the Tribunal was significant in creating space in which the River could be considered in different terms, it was still some way removed from full participation.

4.6.1.3. Negotiation, Settlement and Legislative Phase: 2002-2017

The negotiation process presented challenges for evaluating good faith as the discussions were held in private and were without prejudice, so there is no publicly available record of who spoke, what was said in the meetings and how disagreements were handled or resolved. There are three framework documents that set out how the parties intended to engage. These are: (1) the Agreement on Processes and

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Maori Land Court, in conducting an investigation of title to Maori customary land, required for inclusion in a title to be tied more to the foundations of practical realism rather than to those of mere symbolism…' - *In re the Bed of the Wanganui River* [1958] 1 Wanganui ACMB 13.

[628] Bain Attwood, *Empire and the Making of Native Title: Sovreignty, Property and Indigenous People* (Cambridge University Press 2020) 208.

[629] Catalinac provides an overview of the some of the factors that influenced this change - Catalinac (n 626).

Procedures from April 2003; (2) the Terms of Negotiation dated 6 March 2003; and (3) the Record of Understanding 2011. These clarify the parties' intentions, but they do not reveal how the parties actually engaged.

These documents contain several of the factors considered in chapters 2 and 3 that address how an environment of good faith can be created within a decision-making process. Good faith includes demonstrating qualities such as openness, respect, trust and so on. Relevant parts of the 2003 agreements are set out in Table 4.1 below and detail how these principles were operationalised during the negotiation phases.

Table 4.1: Commitments to good faith in the Whanganui River negotiation framework documents 2003

Source Document and Clause	**Commitment between iwi and Crown**	**Intended demonstration of good faith**
Agreement on Processes and Procedures - para 2 Terms of Negotiation – para 3	Open and frank negotiations	Openness[630] Working to understand the perspective of the other[631]
Agreement on Processes and Procedures - para 7	Keeping each other informed to ensure the principle of 'no surprises' is maintained	Respect, trust[632]
Agreement on Processes and Procedures - para 10 a and b	Acknowledge that each party has different methods of consultation and decision making	Respect[633]
Agreement on Processes and Procedures - para 16 Terms of Negotiation – para 4	Commitment to abide by the processes in good faith and a spirit of goodwill	Respect and trust[634]

[630] Cornwall (n 149).
[631] ibid.
[632] Hailey (n 265).
[633] ibid.
[634] ibid.

Terms of Negotiation – para 5	Seeking an outcome that will enhance the relationship between iwi and the crown, foster an environment of cultural cohesion, self-awareness and community identity	Working to understand perspective of the other[635]

Despite the recognition of the importance of a good faith negotiation, a settlement was not achieved during this first phase of negotiations. The Whanganui River Māori Trust Board wrote in its submissions to the Māori Select Committee in 2016 there were a variety of reasons why settlement was not achieved, but these have not been made public.[636]

A new phase of negotiations began in 2009, and during which the 'Record of Understanding 2011' was developed. This document built on the earlier framework agreements from 2003, but it differed in that it made certain principles more explicit and central to the process. In particular, the 2011 Record of Understanding articulated what can be described as the 'motivating ideals'[637] guiding the negotiations. These ideals functioned as shared values that shaped the process without prescribing specific outcomes. Motivating ideals operate as a moral and practical framework for decision-making. Rather than setting fixed objectives, they guide how decisions are approached (this is seen to some extent in the 2003 documents). As McKibben illustrates through the example of love as a motivating ideal, such ideals not only orient actions toward compassion and fairness but also exclude incompatible approaches, like domination[638] which oppose the core value of love.[639] Because motivating ideals do not proscribe solutions, they can be a way to navigate 'potentially divisive debates' by providing common ground without constraining the range of possible outcomes.[640]

[635] Adams and Gruen (n 79).
[636] Whanganui River Maori Trust Board (n 601).
[637]The term is borrowed from McKibbin and the concept is explored more fully in chapter 3 - McKibbin (n 269).
[638] bell hooks, *Outlaw Culture* (Routledge 1994) 293.
[639] McKibbin (n 269).
[640] ibid.

In the 2011 Record of Understanding Whanganui iwi articulated two such ideals as the ‘‘aspirations of Whanganui iwi’[641]:

- **Te Awa Tupua mai I te Kahui Maunga ki Tangaroa**: An integrated, indivisible view of Te Awa Tupua in both biophysical and metaphysical terms from the mountains to the sea.

- **Ko au te awa, ko te awa ko au**: The health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people.

While similar sentiments appeared in the 2003 Terms of Negotiation, they were buried amongst other objectives. In 2011 by contrast, the ideals were placed at the heart of the process and became the organising principles of the negotiations and the subsequent settlement framework. [642] The settlement agreement, *Ruruku Whakatupua*, is also structured around these two principles.

- **Te Mana o Te Awa**: recognising, promoting and protecting the health and wellbeing of the River and its status as Te Awa Tupua; and

- **Te Mana o Te Iwi**: recognising and providing for the mana and relationship of the Whanganui Iwi in respect of the River[643]

Undoubtedly there was no single factor that led to the settlement being reached in this second phase of the negotiations, but the motivating ideals appear to have played a role. The articulation of the ideals demonstrated good faith because, through expressing them publicly, iwi undertook an act of vulnerability by trusting that their worldview would be engaged with and not dismissed. Alongside this, by allowing another party to experiment with these important values Whanganui iwi created a framework where there was a degree of trust and an openness to collaboration. The willingness of the Crown to use these examples as the basis of settlement

[641] Iwi described these as ‘fundamental principles’ that formed the basis of their vision for the settlement
[642] Whanganui Iwi and the Crown, ‘Record of Understanding in Relation to Whanganui River Settlement’ (2011) para 1.17-1.24.
[643] Whanganui River Maori Trust Board (n 601).

demonstrated an openness to other knowledge systems. It is what Salmond, referring to Povinelli, describes as experiments across worlds which, '[draw] on divergent strands from different philosophical legacies to confront challenges and dilemmas, generating new kinds of insights and outcomes on the way'.[644] From a multispecies participation perspective, these principles marked an important shift in how the River was positioned within the negotiation framework. While participation remained mediated through human actors, the River was no longer framed solely as a resource. The River was redefined as an entity whose health and wellbeing were central to decision making. This was a clear departure from earlier phases which translated Māori relations with the River into property-based concepts. The River was now framed as a subject of concern, rather than an object to be regulated.

Yet this should not be treated as a complete ethical transformation. The Crown ultimately retained control over the scope of negotiations, and any settlement had to be approved by the legislature. Nonetheless, the shift from 2003 to 2011, driven by the articulation of the motivating ideals, appears to have marked a turning point in the negotiations, and it was one that laid the groundwork for the recognition of the River in the 2017 legislation. Non-human participation was not explicitly part of the negotiation framework but the inclusion and acceptance of the fundamental principles (such as *I am the River and the River is me*) started to open space for non-human interests. The motivating ideals provided a bridge between human and non-human interests by pointing out that the health and wellbeing of the River is inseparable from that of its people. At this stage, however, multispecies participation remained partial. The River began to be recognised as a subject of concern, but this did not yet extend to distinct consideration of the multiple non-human lives and ecologies entangled in the River system. The significance of this phase was that it disrupted a purely anthropocentric framework. This phase did not realise full multispecies participation, but it laid the conceptual groundwork for these conversations to take place.

The analysis demonstrates that over time the state and stakeholders understanding of good faith evolved. Good faith came to encompass more than just respectful engagement and compliance with rules, but a willingness to accommodate

[644] Salmond (n 47) 314.

fundamentally different ways of understanding the world. This accommodation went to the heart of how the parties engaged with each other. The willingness to open up space to recognise the River as a living and indivisible entity has potentially laid the conceptual and ethical foundation for the inclusion of other non-humans in decision making processes. What this demonstrates is that good faith has significant potential to support more inclusive decision-making elsewhere.

4.6.2. Stakeholder Selection, Timing and Objectives

The importance of including a diversity of voices in decision making has become a common theme in environmental governance.[645] Diverse participation brings new ideas, local knowledge, and legitimacy to decision-making, improving both outcomes and their acceptance by affected communities.[646] The identification and inclusion of stakeholders is therefore critical to participatory processes. Alongside this, setting clear objectives at the outset ensures that participation is directed towards specific purposes and can be measured against these. But the timing of participation in relation to the objectives is important because *when* voices can contribute to the process determines whether they have any ability to help shape the objectives of that process. Across the Whanganui River legal proceedings, the selection of stakeholders, the timing of their involvement, the clarity of the objectives differed markedly. A critical finding of this analysis is that the design of the participatory process directly dictated the extent to which stakeholders could shape these objectives, rather than merely responding to predetermined goals. This section examines the dynamics across the three phases of litigation, negotiation and legislation, showing how the absence of non-human representation limited the scope of the process.

4.6.2.1. Litigation phase

Before detailing the analysis for the litigation phase, it is necessary to ~~pause to~~ acknowledge that court proceedings are generally limited by their very nature. Litigation is not designed to canvass all perspectives or facilitate broad-based participation. Litigation is an adversarial process focused on resolving specific legal questions between defined parties, with outcomes shaped by precedent, procedural rules, and the pursuit of legal certainty. As such, it operates quite differently from other

[645] Mirumachi and Van Wyk (n 273).
[646] Sharman (n 112); Mirumachi and Van Wyk (n 273).

participatory processes that might aim to include a wider range of voices. However, because so many questions of public importance are determined through the Courts, it is considered appropriate to extend the same scrutiny within this research to litigation as to other participatory decision -making processes.

When the 1938 application was made to the Native Land Court, stakeholders were defined as those with a claim to customary rights to land.[647] Participation depended on navigating complex statutory and procedural requirements.[648] These procedural rules reflected colonial priorities and Māori had little or no input into the design of the legislative framework itself.[649] There were also invisible barriers impacting stakeholder inclusion because while in theory any Māori with a claim based on custom could be heard, this was contingent on navigating an involved and costly legal process.[650] Hearings were often scheduled some distance from the land in question and with little predictability around when a claim would be heard.[651] The process demanded considerable time and financial investment, which had the practical effect of excluding potential claimants because of the financial cost.[652] The 1950 Royal Commission, whilst conducted under a different procedural and legislative framework, only offered marginal improvement. The Commissioner had some discretion[653], but the scope and agenda of the Commission was ultimately determined by the Crown. Taken together, these proceedings reflect a system where the legal and procedural structures largely predetermined when, and how, iwi could engage, limiting their ability to shape or challenge the framing of the dispute, or introduce alternative worldviews.

[647] Native Land Act 1931.

[648] Such as that claims must be brought by written applications to have the title to land investigated

[649] Laws such as the Native Land Court Act and, later, the Māori Purposes Act were developed and enacted without meaningful consultation with Māori. Māori had limited representation in Parliament which in turn impacted on the extent to which they could influence legislation. The Māori Representation Act of 1867 provided for four Māori seats in parliament, and this was only increased in 1996. On this see alsoJohnson (n 578) 114.

[650] Rāwiri Taonui, 'Te Ture – Māori and Legislation – The Native Land Court, Te Ara – the Encyclopedia of New Zealand' (2017) <https://teara.govt.nz/en/te-ture-maori-and-legislation/page-3> accessed 22 February 2026.

[651] ibid.

[652] Young (n 593) 233.

[653] Per the terms of appointment and the Commission of Inquiry Act 1908 the commissioner could 'make and conduct any inquiry … at such times and places as [he] deemed fit' and could adjourn and recommence proceedings in the same way. There was also the opportunity to include whichever stakeholders the Commissioner wished to involve.

4.6.2.2. Tribunal

Section 6 of the Treaty of Waitangi Act only confers jurisdiction on the Tribunal to consider claims from Māori[654] relating to breaches of the Treaty of Waitangi[655]. This limits participation to human claimants. As was the case in the litigation phase, the extent of participation is constrained by the empowering legislation. The Act's purpose[656] however, did enable a broader framing in the litigation phase.[657] The legislation allowed the claimants to introduce concepts from Māori customary law, such as mana[658], that were not recognised within the common law. This broadened the space for Māori perspectives at the outset of the process, instead of requiring Māori claimants to contort their claims in order to even begin proceedings.[659]

However, despite this broad approach, there is little space given over to the inclusion of the non-human world. This may be due to the Tribunal's jurisdiction which is focussed on reconciling Crown-Māori disputes. Facilitating non-human participation would have required a process that either recognised the River as a legal entity with its own standing or created mechanisms for direct representation of its interests outside of a human claimant's framing. While such ideas have become more prominent in later legal developments (e.g. Te Awa Tupua), they were not within the design of the Tribunal. It should be noted that the Report does give limited consideration to the perspective of non-stakeholders and non-humans[660] – but these are all conveyed through the perspective of a human stakeholder. For example, there are sections that consider past voices – those who have died[661], a section on children's

[654] Section 2 defines Māori as a 'person of the Māori race of New Zealand; and includes any descendant of such a person'
[655] Treaty of Waitangi Act 1975 s 61(a)-(d).
[656] The Preamble to the Treaty of Waitangi Act 1975
[657] Section 6(1) of the Treaty of Waitangi Act sets out that any Māori or group of Māori who is or is likely to be prejudicially affected by the actions of the Crown may submit a claim to the Tribunal. The Tribunal has wide jurisdiction to consider the impact of current and historical Crown actions on Māori. The claimants must identify how the action may have or will prejudicially impact their rights under the Treaty.
[658] For example the Waitangi tribunal's Report on the Whanganui River noted '[t]he outcome that the claimants seek, in broad terms, is the restoration of their mana in the river' … The report then goes on to acknowledge '[t]he claim… gives vent to the people's anxiety that their culture, history, and traditions, and their customary association with the river, should be known and understood… the essential contention is that people's status in matters concerning use of the river should be acknowledged for the future. It is a question of recognition and mana. The claim touches upon the relationship between Maori and Pakeha generally and how the mana of each should be respected- Tribunal (n 531) 1–2.
[659] Which is one the issues Salmond identified as problematic with the Riverbed Litigation - Salmond (n 47).
[660] Tribunal (n 531) ch 3.
[661] ibid 55–56.

perspectives[662] and a section dedicated to River guardians (taniwha)[663]. Whilst the Māori worldview is not anthropocentric, the Tribunal process is not geared towards understanding the non-human perspective removed from the human. So, reliance may have been placed on the principle of kaitiakitanga whereby it was considered that the non-human world's interests, and particularly the River's, would be safeguarded through Māori. This, however, makes non-human interests derivatives of human claims and contingent on human actors to seek redress on their behalf.

Still, the way in which Māori voices were centred in the framing of the Tribunal's agenda and in the timing of Māori participation does provide an important example of how marginalised voices can be brought into view. The importance of having the stakeholders involved at the outset is underscored in the report where it states, '[w]hile both Māori and Pakeha perspectives of the river are relevant, we were reminded from the outset that, if the claim was to be fully understood, it had especially to be seen in light of the culture and experience of the people bringing it'.[664] The significance of this approach for proceedings that may seek to include the non-human perspective is that it resists discursive closure.[665] It allows the agenda to be framed in such a way as to include the marginalised perspective, it brings the *other* into the frame. Consequently, marginalised groups and perspectives are not from the outset seeking to gain a foothold in the agenda, instead these perspectives are integral to what is being considered. As Muhlbacher explains, this type of approach can serve as a 'liberatory framework'.[666]

4.6.2.3. Negotiation, settlement and legislation

By the negotiation phase the principal stakeholders of the Whanganui iwi and the Crown had already been established. Within iwi extensive internal discussions and hui-a-iwi (meeting of iwi) ensured that iwi objectives were clearly articulated before formal negotiations began.[667] This may have proven an important step to the success of the negotiations as Iwi had spent significant time outlining their objectives to be able to shape the agenda from the outset.

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[662] ibid 58.
[663] ibid 73–74.
[664] ibid 2.
[665] Cornwall (n 109).
[666] Mühlbacher (n 283).
[667] Whanganui River Maori Trust Board (n 601) paras 28 and 29.

The negotiations were conducted by way of a representative model - Whanganui Iwi were represented by the Te Awa Tupua Negotiating Committee and the government represented by Crown Negotiators. The Record of Understanding from 2011 anticipated that additional stakeholders might be involved in the negotiation process (such as neighbouring iwi or local authorities), but did not explicitly address whether non-humans should be recognised or represented. [668] This may be due to the fact that there was, however, no clear mechanism within these documents outlining how decisions were made to determine who or what might be considered a 'relevant stakeholder'. The submissions of Nga Tangata Tiaki o Whanganui provide some detail as to what occurred in practice where it is noted that '… Whanganui iwi insisted on a collaborative and inclusive approach from the outset'.[669] But there was still no detail as to the basis on which it was determined that a party had a sufficient interest to allow them to be considered a stakeholder. It may be that Whanganui iwi did engage with these issues and their obligations under kaitiakitanga in their own decision-making process, but there is no publicly available information to indicate this occurred. Had this issue been expressly broached, it may have resulted in consideration of whether non-human entities should have been considered stakeholders.

Timing again played a crucial role. Whanganui iwi proactively engaged with other affected groups early in the process to secure buy-in and improve implementation.[670] The reason given for this proactive approach is that Iwi were anxious to ensure that parties who had an interest in the River and the settlement could have input into the process, to ensure that the outcomes were considered achievable and had regard to the concerns of parties who would be impacted.[671] The rationale Iwi gave for this engagement, that early inclusion improves outcomes and ensures stakeholder buy-in, could equally have supported the early consideration of non-human perspectives.

[668] Whanganui Iwi and the Crown, 'Record of Understanding in Relation to Whanganui River Settlement' (n 644) para 4.4.
[669] Ngā Tāngata Tiaki o Whanganui, 'Submission to the Local Government and Environment Select Committee on the Te Awa Tupua (Whanganui River Claims Settlement) Bill' (2016) para 29.
[670] Whanganui River Maori Trust Board (n 601) para 39.
[671] ibid 15–29.

The subsequent legislative phase conducted under the Standing Orders of the House of Parliament, was similarly limited. Although the Select Committee invited public submissions, none were made on behalf of non-human entities. The River was still not treated as a stakeholder. Even as the legislation sought to recognise the River as a living entity, there was no procedural avenue for the River's own participation or representation during this phase. This omission highlights a key tension which is that while Whanganui iwi's worldview was underscored by a relationship between them and the River, the processes that formalised this relationship were still human-centred. There are explicit mechanisms to represent the River's voice, but because this is always required to be channelled through a human intermediary there is the risk that it reaffirms anthropocentric patterns of governance.

4.6.2.4. Objectives – litigation

Clear objectives matter because they establish direction in a participatory process.[672] However, objectives also raise questions about how agreement is reached. Consensus aims for agreement but in doing so can suppress difference. Conversely argument-based models treat disagreement as productive and provide a forum to challenge sensible givens which can create space for marginalised perspective to come into view.[673] In litigation, which may appear to be an argument-based approach, the reality is that there is a distinct difference between adversarial proceedings and an opportunity to challenge sensible givens. In this case, the objectives were determined by the legislation and the forum. This meant that iwi could only pursue recognition of title, and concerns relating to the control and care of the River had to be framed within a property law context. Although iwi had some opportunity to shape the specific legal questions put before the Court in line with their goals, those goals were ultimately constrained by the legislative context. Hence the initial claim was limited to the question of 'whether or not, at the time of the Treaty of Waitangi, the bed of the River was owned by natives according to Native Custom'.[674]

The objectives were reframed as the proceedings evolved, but the Crown and Courts did this without iwi input. For example, the passing of section 36 of the Māori Purposes Act 1951 dictated the issues in the 1955 Court of Appeal case, and the transcript

[672] Reed (n 143); Buchy and Hoverman (n 289).
[673] Peterson, Peterson and Peterson (n 297).
[674] *In re the Bed of the Wanganui River* (1939) 69 273.

reveals that Counsel for iwi noted the lack of consultation.[675] The later appellate proceedings in 1958[676] and 1962 continued this pattern with issues largely determined by the Court and little room was made for stakeholders to shape the process or agenda.

4.6.2.5. Objectives - Tribunal

The Tribunal's statutory mandate limited the remedies it could offer in relation to the practical application of the Treaty.[677] In effect the Tribunal could only determine whether certain matters were inconsistent with the principles of the Treaty, but it could not impose binding solutions. A crucial difference however between the Tribunal and the Courts, is that the Tribunal allowed claims to be articulated through tikanga. Hence, in the River claim iwi's objective was 'restoration of their mana in the river'.[678] To achieve this, the claimants sought to have their rights in the river settled.[679] Their claim was essentially a continuation of the Riverbed litigation in that the claimants were seeking that control of the River be returned to them, but the difference was that in this forum the objectives could be articulated and argued with reference to tikanga Māori. This was opposed by the Crown who approached the matter through the prism of a Western worldview and the common law.[680] The Crown's objective was for the River to remain in public control i.e. state control. The River was foregrounded as not simply a resource, but a 'taonga [sacred] to the identity, culture and spiritual wellbeing'.[681] The

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[675] This lack of consultation was explicitly noted by the Court itself, highlighting the Crown's unilateral determination of when and how legal questions about Māori rights would be addressed. In the Judgement North J sets out, 'Mr Spratt [counsel for Whanganui iwi] said that this section was drafted and enacted without any reference to him or his clients. I understood the Solicitor-General to agree that this was so…' *In re the Bed of the Wanganui River* (n 629).

[676] In an exchange where counsel was asked to respond to one of the questions set by the Court of Appeal, the transcript reads:
Mr Spratt (Counsel for iwi): I don't see any point in it at all. With respect, I say that, sir. I cannot advance it any further. I am not prepared to give any evidence on the point....'.
Mr Haughey (Counsel for the Crown in reply) '... I presume the Court -- Those questions, of course, have been framed by the Court of Appeal. I presume they will require some sort of answer'...
[later in the exchange]
Judge Jeune: 'Surely the parties had a hand in drawing up the case stated?'
Mr Spratt, 'When I was asked, sir, we didn't promote this a bit. I was asked by the Court of Appeal, and I told the Court of Appeal with respect, I thought these proceedings were unnecessary..' ibid.

[677] Section 6 (3) of the Act provides that the Tribunal can recommend to the Crown 'action to be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

[678] Tribunal (n 531) 1.

[679] ibid 6.

[680] ibid 24–25.

[681] ibid 23.

point of conflict between the objectives of the parties was articulated by the Tribunal as being 'two different approaches: the legal approach of Crown counsel, with its inevitable compartmentalisation, and the Māori approach of claimant counsel, with its inevitable holism'.[682] The Tribunal did not resolve this conflict, but it did create a forum in which the underlying assumptions, the 'sensible givens', of English property law could be challenged.

The Tribunal's historical inquiry also exposed the limits of a single 'shared'[683] narrative and underscored that objective setting in intercultural disputes should accommodate partial, situated knowledges rather than seek to force consensus on history. Attwood speaks to this issue when he observes that 'historical narratives are always partial and so the knowledge they produce is always limited'.[684] Again, the Tribunal did not necessarily resolve these tensions, but the recognition of the historical record as unsettled, marked a departure from earlier legal processes.

These developments have implications for multispecies participation. Although the Tribunal did not recognise the River as a participant in its own right, the forum expanded the conditions in which Māori could speak for the River. Unsettling these 'sensible givens' constituted a challenge to hierarchies that place some humans, some knowledge systems and some species above others. This aligns with feminist and posthumanist scholars who have noted that openness to other forms of knowledge and perspectives requires a degree of humility and vulnerability.[685] In the context of the Whanganui River claim, full multispecies participation was not achieved, but it embraced a process and a willingness to sit within difference and liminality. It is the creation of these spaces that fosters discussions that enabled recognition of the River beyond human property constructs.

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[682] ibid 25.

[683] '… the project of a *shared* history, irrespective of whose story or what kind of story is to be told, is flawed. This is… because it is utopian in assuming that Māori and Pakeha can and will necessarily transcend the pull of their respective identifications so that they can agree about the truth of the injustices committed in the past. This project ignores the differences that exist… In any society, let alone one that contains peoples who belong to two or more cultural traditions, it is inevitable that there will be conflicting attitudes, opinions, beliefs and feelings about the past and its presence today' Attwood (n 583) 210.

[684] ibid 212.

[685] Morrow (n 440); Wolfe (n 58).

4.6.2.1. Objectives - Negotiation, settlement and legislation

Documented objectives show growing common ground between 2003 and 2011.[686] There remained however a core tension which related to the treatment of the River as a living entity and an indivisible whole 'from the mountains to the sea'. The Record of Understanding recognises this, but at the same time provides that private rights in the River must not be affected.[687] These two positions are not compatible because the recognition of private rights means that the River is not treated as an indivisible whole. This inconsistency is later reflected in the Settlement Agreement signed in 2014.[688] It should also be noted that of the documentation that was reviewed there was no challenge to the position at common law that there is no ownership in water, so in practice the water of the River is treated differently from the other parts of it - such as the bed. This is yet another challenge to the position that the River is indivisible.

As the negotiation process was private it is not clear how this issue was broached and how the parties reconciled this apparently conflicting position. In this case Whanganui iwi, and Māori more generally, had challenged the 'sensible given' that English legal principles and New Zealand law should be the lens through which this dispute should be resolved. But, in the absence of further information it is not possible to comment more widely on the quality and extent of these debates. What remains uncertain, and worth further reflection, is whether the objectives, or the framing of those objectives, might have shifted if the River itself had been recognised and included as a stakeholder from the outset.

There was nothing within the available documentation about measurement and monitoring of the objectives of the settlement. This is a matter that was raised in submissions during the legislative phase. During the consultation process for the Bill, submissions from the Ngato Haua Iwi Charitable Trust expressed concern that there were no mechanisms to measure, monitor and appraise performance against the objectives of the Act. [689] These submissions noted that the Iwi wanted 'plain talk about

[686] See for example the Shared Principles for Negotiations at section 2 Whanganui Iwi and the Crown, 'Record of Understanding in Relation to Whanganui River Settlement' (n 644).
[687] ibid 2.1.7.
[688] Whanganui Iwi and the Crown, 'Te Awa Tupua (Whanganui River Claims Settlement) Deed of Settlement'.
[689] Ngāti Hāua Iwi Charitable Trust and Ngā Uri Whānui, Hapū Whānui Rūnanga o Hinengākau, 'Submission to the Māori Affairs Select Committee on the Te Awa Tupua (Whanganui River Claims Settlement) Bill' para 4.

the standards of excellence that need to be maintained' to measure the wellbeing and health of the river. This is an important criticism and one that was not addressed in the select committee's report to the house.[690] The absence of clear mechanisms to measure whether objectives were being met reveals a weakness in the Act. It is recognised that evaluating success is inherently complex, especially when the objectives are grounded in cultural and spiritual values that do not map neatly onto Western evaluative frameworks. This in turn raises a broader challenge for environmental governance in these types of scenarios, which is how to assess outcomes for *both* the River and Māori, in ways that respect Māori worldviews, but also determine whether the River's wellbeing is actually improving. Simply ignoring the issue does not overcome the concern.

4.7. Stakeholder Interaction

The analysis that follows applies the approach developed in Chapter 3, which brings together the interrelated themes of context which includes place and history. This approach was adopted because these aspects are interrelated – for example *where* participation occurs impacts on who can participate. The second part of the analysis then determines how these structural conditions affected the possibilities for genuine multidirectional learning and redistribution of influence. By examining the Whanganui proceedings through these lenses, the researcher can diagnose whether the legal framework merely accommodated non-human presence or if it allowed for a transformation of legal authority.

4.7.1. Context

4.7.1.1. Litigation

Stakeholder interaction was shaped not only by the procedural frameworks of English law, but also by the broader historical, political and social governance in which those processes operated. In the 1939 Native Land Court hearing, the Court demonstrated some procedural openness by admitting a wide range of evidence and ultimately accepting that the Whanganui iwi had maintained ownership in accordance with custom. Yet, the legal framing required Māori to argue ownership in ways that were alien to their understanding of land and River relationships. What counted as ownership was interpreted through a one-way lens where Māori had to prove their

[690] Ngāti Hāua Iwi Charitable Trust and Ngā Uri Whānui, Hapū Whānui Rūnanga o Hinengākau (n 691).

rights by evidencing control in a manner that still referenced western property concepts. An example of this can be seen in the cross examination where the question in issue was whether Māori held land in 1840 in accordance with Māori custom. Yet the cross examination was focussed on consideration of the use of the River and Māori witnesses understanding of 'ownership' and what that entailed, when ownership was a concept that did not align with Māori custom and iwi's relationship to the River.[691] This approach reflected no attempt to understand the context in which Māori interacted with the River, as Māori relationships were assessed solely through Western concepts rather than Māori custom.

The cases which followed including the 1949 *King v Morison* decision and the 1950 Royal Commission, continued this pattern of formal openness paired with substantive closure. While these proceedings sometimes referenced the cultural importance of the River or Māori modes of use (e.g. fishing weirs), they rarely allowed these to reshape the principles of a judgement. In *King v Morison,* the Court cited the prior Native Land and Appeal Court judgments (1939 and 1944) selectively, avoiding any broader engagement with Māori epistemologies or the spiritual meanings of the River for Māori. The Royal Commission, while finding in favour of Māori rights under English law, largely treated those rights as indistinguishable from those any settler might assert.[692] In particular, the 1958 Māori Appellate Court investigation and the 1962 Court of Appeal decision laid bare the tension between Māori ways of knowing and the restrictive format of legal proceedings. Judges were openly sceptical of evidence that did not conform to European evidentiary standards, or which relied on oral tradition and/or Māori cosmology.[693] The Māori worldview was acknowledge as background by

[691] *In re the Bed of the Wanganui River* (1939) 18 Wanganui Native Land Court Minute Book 243.

[692] The Commissioner noted, 'I wish to be quite clearly understood, that I think that no other than a right recognised in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the river in the same way and ownership were in European hands they would have made the same claim now made by the Maoris' - Royal Commission on Claims by Certain Maoris in Respect of the Wanganui River, 'Report of the Royal Commission' (1950).

[693] Examples of this can be seen in the 1958 proceedings when the Court considered the weight to be afforded to the evidence given by Titi Tihu. The judgement set out,
'Titi Tihu referred to trips of 40 miles (each way) by his group to an eel weir. The Court doubts whether many 80 mile canoe trips past other rapids and weirs were made for eels as stated by him; in fact, the Court places no great credence on his evidence in this respect...' - *In re the Bed of the Wanganui River* (n 629).

the Court but were not considered principles that should be relied upon to shape legal analysis.[694]

The physical setting of these proceedings such as the Native Land Court and Supreme Court (Figures 1 and 2 below) also shaped participation and interaction. These were formal, colonial spaces that offered little accommodation for Māori protocols or cultural expression. These spaces were often far from the Māori communities and from the River. This severed the legal process from the landscapes and communities it concerned. What emerges is a mismatch between the concept of participation and legal norms. The procedural aspects of litigation, particularly at this time, were not concerned with having regard to cultural context or custom. The courtroom adopted a narrow scope and is founded on legal concepts rooted in Western traditions. This made litigation a poor vehicle for inclusive stakeholder engagement, particularly when those some stakeholders operate within very different ontologies. Stakeholder interaction was allowed only to the extent it could be rendered legible within a Eurocentric legal frame.

[694] This can be seen in the 1958 opinion, '... we have reached the conclusion that the principal merit or significance which evidence of this class possesses is to provide, at most, a background to an understanding of the general and cosmogenic conceptions which the ancient Maori had towards his property. We think it can go no further than that, in the circumstances related to us. And we are of the opinion that the Maori Land Court, in conducting an investigation of title to Maori customary land, required for inclusion in a title to be tied more to the foundations of practical realism rather than to those of mere symbolism…'- ibid.

Figure 1 – Native Land Court Whanganui. Image: E Marland (2023)[695]

[695] Heritage New Zealand Pouhere Taonga, 'Image of the Native Land Court by E Marland' (2023) <https://www.heritage.org.nz/list-details/7783/Listing#gallery>.

Figure 2 – Supreme Court in Wellington. Image WCC – Charles Collins (2015). Source Wellington City Council Heritage[696]

4.7.1.2. The Waitangi Tribunal

The Tribunal process marked a partial move towards what is described in the toolkit as 'situated listening'. In contrast to the earlier litigation which was conducted far from Māori communities and the River, the Tribunal hearings[697] were situated within the Whanganui landscape. Proceedings were held on marae along the River which allowed the testimony to be grounded in the places under discussion.[698]

The River report acknowledges the importance of context and makes clear that 'if the claim was to be fully understood, it had especially to be seen in light of the culture and experience of the people bringing it',[699] and that the claim needed to be 'seen in its own cultural milieu'.[700] Site visits and hearings 'on location' were designed to let the environment '…corroborate or contextualise testimony. The hills, rich in history, the pa sites, the remains of former habitations are also important cues when recounting oral tradition'.[701] These procedures exemplify situated listening as they recognise that knowledge is spatially and relationally produced. [702]

The Tribunal adopted 'alternative procedures' for 'all to be heard in comfort'.[703] For Māori stakeholders the Tribunal travelled throughout the region to undertake site visits and hear stakeholders on several different marae.[704] The marae setting introduced new dynamics that altered the quality of the proceedings. Boast describes how the marae buildings are 'evocative and powerful' the carvings 'an architectural

[696] Wellington City Council, 'Old Supreme Court, Wellington (Photograph by Charles Collins)' (2015) <https://www.wellingtoncityheritage.org.nz/buildings/151-300/273-former-supreme-court-building>.
[697] Schedule 2 Part 5(9) of The Treaty of Waitangi Act gives the Tribunal power to 'regulate its procedure in such manner as it thinks fit'.
[698] The tribunal operates in a 'bi-cultural, bi-historical and bi-legal' manner and attributes considerable weight to Māori protocols, customary practices, and cultural concepts, both in proceedings and in its reports' – Johnson (n 578) 120.
[699] Tribunal (n 531) 2.
[700] ibid 3.
[701] ibid 7.
[702] ibid.- The Tribunal considered this important because the environment contextualises the testimony and may also provide 'cues when recounting oral tradition'
[703] Tribunal (n 531).
[704] ibid 355–356.

manifestation of claimant history'.[705] The Tribunal made efforts for the proceedings to be held 'along marae kawa lines but allowing for cross examination'.[706] The kawa of the marae are the protocol followed on each marae[707] which include formal welcomes (powhiri) and prayer. Boast explains how these protocols shape the nature of the proceedings,

> [c]laimants, the Tribunal, counsel and witnesses mingle freely and informally during tea breaks and lunch in the marae dining room… Kaumatua and kuia, male and female elders, give evidence in Maori; the day's sessions are opened and closed by prayers in the Maori language, and the opening of a hearing is always commenced by a formal calling-on to the marae and classical Maori oratory, in which the Tribunal's own elders participate fully. These are not small and inconsequential things, and it can certainly be argued that the Tribunal's willingness to conduct its sittings on marae has contributed in no small measure to its success.[708]

Cornwall explains that 'effective participation within the 'public sphere' may indeed come to depend on access to other spaces, 'sites of radical possibility' from which marginalised actors are able to define themselves and only then to act'.[709] Yet it is not clear whether Tribunal proceedings held on marae provided these sites of radical possibility, because European processes infiltrated this space. Boast describes how the 'alternative procedure' was still simply a 'variant of ordinary tribunal procedure'.[710] It was a process dominated by Western adversarial legal processes - counsel made opening and closing submissions, there was expert evidence, and crucially, extensive cross examination remained a key feature of how evidence was tested. The persistence of the adversarial form reveals a limited willingness to reexamine procedure. It is relatively easy to accommodate visible cultural practices such as

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[705] Richard P Boast, 'THE WAITANGI TRIBUNAL: "CONSCIENCE OF THE NATION", OR JUST ANOTHER COURT?' (1993) 16 UNSW Law Journal 223.
[706] Tribunal (n 531) 7.
[707] The exact protocol may differ from place to place, but there are some commonalities between them. These commonalities relate to the roles and procedure of the powhiri, which is ceremony to welcome newcomers onto the marae, but also concerns how people conduct themselves on the marae - Basil Keane, 'Te Kawa o Te Marae – Mythology and History of Marae Protocol , Te Ara – the Encyclopedia of New Zealand' (2016) <https://teara.govt.nz/en/te-kawa-o-te-marae/page-3> accessed 10 February 2026.
[708] Boast (n 707).
[709] Cornwall (n 149) 87.
[710] Boast (n 707).

powhiri and these are meaningful gestures – but they remain surface level. The harder test and the one which goes to the willingness to create sites of 'radical possibility' is the willingness to adapt the procedural heart of the process.

A good example of this tension can be seen in the persistence of cross-examination and where it occurs on marae. Cross-examination is a process of truth-seeking that is rooted in challenge and contradiction –it is a form of conflict. The meeting house on a marae is the 'domain of Rongo, the god of peace, and speeches inside are expected to be peaceful'.[711] The meeting house is a place intended for dialogue and affirmation of relationship. This is why the Tribunal had to specify that cross examination, a process that often is combative, needed to be accommodated within the marae protocol. For Māori participants the use of cross examination inside the meeting house required significant adaptation and yet this was not fully reciprocated. Whilst the Tribunal did relocate itself physically, it did not substantially alter its ways of determining what counts as valid participation and evidence.

The Tribunal also accommodated Pakeha witnesses by holding separate hearings in halls under Western protocols.[712] This procedure was intended to ensure the comfort of all stakeholders, but it potentially diluted the opportunity to challenge existing power structures and concepts. Winter summarises the research of Dotson and Whyte, and Figueroa and Waitt on the 'Indigenous experience' and explains that

> '[they] argue that unless members of the dominant culture experience, not intellectually, but in situ, the being of indigenous communities, those Indigenous communities remain invisible and incomprehensible to policymakers and the community at large'.[122]

There was no expectation for Pakeha participants to step outside their usual frames of reference or engage meaningfully with Māori worldviews in predominantly Māori spaces.

Further, in a process designed to address grievances relating to a particular place, it seems counterintuitive for parties not to collectively experience that space. It is true that participants in Tribunal proceedings are not themselves the decision-makers and

[711] Basil Keane, 'Story: Te Kawa o Te Marae' (2016) <https://teara.govt.nz/en/te-kawa-o-te-marae> accessed 24 February 2026.
[712] Tribunal (n 531) 7.

that role lies with the Tribunal. But the value of a participatory process goes beyond who ultimately makes the decision. Participatory mechanisms can serve as a means of building understanding, fostering mutual recognition, and laying the groundwork for durable outcomes. If decisions are to be received as legitimate, it may be worth asking whether all stakeholders should engage more fully with the place and perspective at the heart of the claim. This is particularly important when considering the inclusion of non-human stakeholders. If the legal system struggles to meaningfully accommodate Māori ways of being and knowing, which are at least expressed through human agents, it raises serious doubts about its capacity to make space for perspectives that are not human at all.

4.7.1.1. Negotiation, settlement and legislation

The negotiation and legislative phases built on the procedural changes adopted by the Tribunal, but still contained the tension highlighted previously between *being in place* and procedural flexibility. Whereas the Tribunal physically and symbolically recentred the River and Māori communities, the negotiations alternated between Whanganui and Wellington 'on an equal basis'.[713] This appears to signal a balance between the parties, but the critiques noted above about the importance of being in space remain. One potentially positive development was that the long duration of the negotiation process[714] allowed time for Māori protocol to be fully adhered to[715] in contrast to earlier processes that imposed short deadlines and required compliance with strict court timelines. This allowed the negotiation procedure to be more relational as it made space for consultation, discussion and reflection.

In contrast, the legislative phase imposed a very different sense of time and place. Once the Bill entered the parliamentary process, the Standing Orders[716] dictated the schedule for submissions and hearings. The Standing Orders allowed the Māori Affairs

[713] The Agreement on Processes and Procedures from 2003 sets out at paragraph 4 that negotiation meetings would be held 'in the rohe [tribal territory/ boundary] of Whanganui iwi and in Wellington on an equal basis or as agreed from time to time' - Whanganui Iwi and The Crown, 'Agreement on Processes and Procedures Re Whanganui River Claims'.

[714] The Agreement on Processes and Procedures from 2003 details at paragraph 10 how the decision making will take place and acknowledges 'the respective conventions and requirements of the other in terms of decision-making during formal negotiations' - ibid.

[715] The traditional responsibilities of iwi in making a decision involved duties to 'ancestors, duties to nonhuman kin, duties to the seas, foreshore and land, duties to pass to heirs an improved environment' - Winter (n 233) 178.

[716] New Zealand House of Representatives, 'Standing Orders of the House of Representatives' (2017).

Select Committee to hold hearings 'wherever it wished', but the consultation period was short and the opportunities for direct engagement limited. This stage of participation returned decision making to political institutions operating within specific timelines. This has implications for decision making as shorter timeframes do not accommodate protocols around Māori decision making that extend to ancestors, descendants and non-human kin. These narrow and rigid timelines for decision-making also foreclose other ways of knowing and deciding that unfold along non-human timescales, such as seasonal or tidal rhythms. This demonstrates that being in place must be more than a geographical location, it must mean being in connection with the place to understand how decision-making needs to be altered to fit within the temporalities of the communities impacted.

Taken together the three phases of the River Case reveal an evolving awareness of the significance of context, proximity and temporality in participatory processes. Each phase had elements where it brought the decision making closer to the River and iwi, although there is much room for growth. The next section turns to consider how these changes shaped the possibility for multidirectional learning and influence.

4.7.2. Multidimensional learning and influence

The literature canvassed in Section 3.6.4. suggests that participatory approaches are most meaningful when they are iterative and reflect the input of the participants – in essence that they support multidimensional learning.[717] This type of learning depends not only on the opportunity to contribute, but on the willingness of institutions to be open to transformation by those contributions. In practice this means that participants must be able to shape how problems are understood rather than there being a one-way flow of information from participants to decision makers. The following sections consider the extent to which multidimensional learning and influence were present across the three phases of the River proceedings.

4.7.2.1. Litigation

This phase offered little scope for multidimensional learning. The Court process is inherently adversarial and is designed to resolve disputes, not foster exchange or

[717] Reed (n 143).

collective understanding. Each party presents evidence in support of a fixed legal position, and outcomes are determined by the Court – not co-produced. The procedural structures of English Law further constrain the potential for mutual understanding. Māori participants were required to translate their concerns about the River into terms legible to the common law. There was no reciprocal exchange of knowledge. The litigation process precluded an iterative exchange. In other words, the law could consider whether it wished to receive Māori knowledge, but there was no requirement to consider it and be open to being changed by it.

4.7.2.2. Tribunal

In principle, the Tribunal offers greater potential for multidimensional learning. Section 5(2) of the Treaty of Waitangi Act empowers the Tribunal to inquire into and make recommendations on claims submitted to them. This section also empowers the Tribunal with exclusive authority to determine 'the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them'.[718] This creates the possibility of dialogue between knowledge systems, as it requires the Tribunal to engage with both Māori and Crown worldviews.

In practice the Tribunal's procedure, rooted in Western legal norms, limits the extent to which multidimensional learning can occur. This is because despite the Tribunal's discretionary powers and the inclusion of Māori customs and language,[719] the structure of the hearings remains largely adversarial – witnesses give evidence, counsel make submissions and the Tribunal determines the outcome. While members are culturally informed and open to diverse inputs, this process is not aimed at facilitating exchange between the participants, and it does not share learning across these cultural and knowledge boundaries. This is not a process that seeks to bridge the gaps between the parties through their participation in the Tribunal. Even so, it would be reductive to view the Tribunal's process as empty ritual. Claimants were able to shape the narrative and foreground Māori law and history which altered the terrain of the proceedings.

4.7.2.1. Negotiation, settlement and legislation

The negotiation process for the River was characterised by a focus on bringing together Māori and Crown views. Both the Terms of Negotiation (2003) and the Record

[718] Treaty of Waitangi Act 1975.
[719] Johnson (n 578) 120.

of Understanding (2011) commit the parties to open, respectful exchange of perspectives.[720] The documents explicitly recognise that each party brings different processes and knowledge systems to the table, and that both must contribute equally to the negotiation environment.

The negotiation phase which followed, is explicit in acknowledging and embedding how Whanganui iwi thinks about and approach matters relating to the River, demonstrating that there is a receptivity to different knowledge frameworks. The settlement which resulted from these negotiations further demonstrates that there was multidimensional learning, seen in the recognition of the River as an indivisible whole[721] and a legal person, as opposed to previously being considered a resource.[722] Multidimensional learning and influence is also demonstrated in the legislative provisions for the appointment of guardians to protect the health and wellbeing of the River.[723] Multidimensional learning was also demonstrated in other ways such as by the use of Māori proverbs throughout the agreement (Ko au te Awa, ko te Awa ko au) and the recognition of metaphysical and Māori spiritual concepts.[724]

In this dispute, there has undoubtedly been a significant shift in how the River has been approached and the weight afforded to Māori views and concerns. Yet English law still arguably maintains the dominant position. Consider, for example, the extent of matters not impacted by the settlement (and subsequent legislation) which include private property rights, resource consents and existing statutory authorisations, consent for legal structures and so on.[725] Further, due to ongoing negotiations relating to the rights and interest in water, this settlement does not resolve issues relating to the water of the River and in practice, the River is not treated as an indivisible whole.[726]

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[720] Whanganui Iwi and the Crown, 'He Kaupapa Kotahi – He Ara Whakamua: Whanganui River Claims – Terms of Negotiation' (2003); Whanganui Iwi and the Crown, 'Record of Understanding in Relation to Whanganui River Settlement' (n 644).

[721] Whanganui Iwi and the Crown, 'Te Awa Tupua (Whanganui River Claims Settlement) Deed of Settlement' (n 690) Clause 2.1.

[722] ibid clause 2.2-2.3.

[723] ibid clause 2.4-2.5.

[724] Te Awa Tupua mai I te Kahui Maunga ki Tanganroa – an integrated, indivisible view of te Awa Tupua in both biophsycial and metaphysical terms

[725] For the full list - Whanganui Iwi and the Crown, 'Te Awa Tupua (Whanganui River Claims Settlement) Deed of Settlement' (n 690) para 6.11.

[726] Te Kawanatanga o Aotearoa (New Zealand Government), 'Discussion Document: Freshwater'.

Moreover, the views of the River, as presented by the Guardians (Te Pou Tupua) are advisory, rather than determinative. In this sense the process risks performativity, it has the appearance of inclusivity without a full redistribution of authority. And yet this might be an overly pessimistic and short-term view of this negotiation and settlement process and how it has transformed the dominant legal position in New Zealand. Salmond writes,

> … the law has been a powerful force for domination and control in New Zealand. The agreement between Whanganui iwi and the crown is still constrained in many ways by power relations, and legislative frameworks based on modernist assumptions about how the world works. Nevertheless, the agreement shows that creative jurisprudence and experimental practice are possible.[727]

Salmond suggests this settlement, and similar ones, have had a profound impact on New Zealand society and law. So, whilst the concerns of Te Awa Tupua, as voiced by Te Pou Tupua are not binding, the views are being presented to decision makers, and they are required to have regard to them. The significance of this process should not be underestimated because as Amiria Salmond argues this means 'the legal process is being transformed by the irruption of ancestral conceptions, thus acknowledging 'the persistence and creativity of a distinctively Māori register of value''.[728]

4.8. Conclusion

The River Claims have undoubtedly brought consideration of the River's wellbeing to the fore, but at the same time this only occurs through the lens of Whanganui Iwi. There is clearly value in this approach and Whanganui iwi have undoubtedly achieved important protections for the River. Viewed through the multispecies participation framework however, participation during the negotiation and settlement phase remained mediated by humans and was thus partial. The context of decision making shifted closer to Māori values, enabling forms of multidirectional learning. However, the River itself was not recognised as a stakeholder with its own capacity to influence objectives or outcomes. As a result, there was a nod to non-human participation, but it was not explored. This raises the question as to whether the outcome of the

[727] Salmond (n 47) 314.
[728] ibid 313.

settlement may have been different had the River been included as a stakeholder, rather than represented through human intermediaries. The following chapter draws these findings together to examine what they mean for multispecies participation more broadly and considers the implications of this case study for participatory frameworks within IEL.

5. Chapter 5: Beyond symbolic access: A proof of concept for multispecies participation in IEL

5.1. Introduction

This thesis has argued that the unresponsiveness of IEL to the environmental crisis is rooted in a legal architecture that take limited account of non-human perspectives. Earlier chapters identified the need for a radical expansion of participation, and so this final analysis moves beyond the call for inclusion, to an exposition of how participation can become a transformative process. By drawing on the findings from the case study, this chapter demonstrates that addressing the shortcomings of IEL requires more than just adding new voices to existing frameworks and instead requires a fundamental redesign of the participatory space itself.

The Whanganui River Case is often celebrated for its outcome - the conferral of legal personhood on the River - but the central insight of this research does not arise from this endpoint. Rather, it lies in what the River Case reveals about how systems come to recognise non-humans as participants, and why this recognition unfolds unevenly and incrementally within human-centred institutions. By examining the arc of transformation that occurred over more than 150 years from European settlement to the enactment of the 2017 legislation, this thesis advances an original account of multispecies participation that treats it as a matter of institutional design and change, rather than a question of procedural inclusion alone.

This chapter does not seek to romanticise the Whanganui settlement or the legislation that followed. It recognises that the resulting legal framework remains deeply anthropocentric, characterised by significant structural limitations. These include that the River's participation is mediated entirely through human representatives and that the central concept of the River's indivisibility was compromised to accommodate existing Western legal constructs, such as private property and resource consents. Yet this research contends that these very limitations are what make the River Case so instructive because it reveals what occurs when a relational worldview interact with a Western legal system. By examining how the system attempted to 'fit' the River into its existing structures, the researcher can diagnose the specific barriers that still prevent multispecies participation.

The overarching contribution of this thesis, grounded in the findings of the case study, is that for IEL to address its shortcomings participation must not merely be a procedural formality. Instead, participation must be treated as a transformative practice that incorporates the multispecies communities that inhabit the world with us. This chapter substantiates the claim that IEL requires a fundamental redesign of its participatory architecture, through the following structure:

First the chapter reflects on the multispecies toolkit as a framework designed to surface how existing legal structures operate to marginalise non-humans. It situates these findings within broader ethical and theoretical work on legal change. Drawing on the scholarship of Derrida and Wolfe, the analysis argues that for the law to 'hear' and 'see' those it has historically excluded, the relevant legal systems need to confront the very foundations that allow it to exclude non-humans.

The chapter then moves to consider participatory design approaches as a path to inclusion. The River Case is used as an empirical foundation, and the chapter considers four key variables to demonstrate how the scope of participation can be widened from symbolic access to meaningful inclusion:

1. **Legal and procedural architecture**: This section argues that one way to improve IEL's rigidity is a shift from retrofitting alternative approaches into existing western legal moulds, and instead moving towards the co-design of legal spaces themselves.
2. **Objective setting**: This analysis demonstrates how participation can be used to contest the anthropocentric 'sensible givens' of IEL by moving towards motivating ideals as a way to evaluate objectives to understand what they are intended to achieve and who they are designed to serve.
3. **Space and perception**: This considers how reframing participation as an embodied spatial practice and a practice of noticing can expand who the law 'sees' and 'hears'. This section suggests that IEL must reconsider what participation entails in order to be able to recognise non-human perspectives
4. **Accountability and safeguards**: A distinction is drawn between thin procedural transparency and thick relational accountability as a necessary mechanism to ensure that when humans act as proxies, they remain tethered to the interests of the non-humans they represent

Finally, the chapter frames the River Case as a non-reformist reform. Unlike traditional reforms that merely refine or stabilise an existing system, a non-reformist reform serves to disrupt the very assumptions upon which a system is built. By advancing a critique that shifts power away from the centre, these reforms create the conditions for a deeper structural transformation of the legal imagination.

The River Case serves as a 'proof of concept' that even a deeply anthropocentric legal system can be reshaped from within to accommodate radically different worldviews. Rather than viewing the slow, incremental changes over 150 years as a failure of radicalism, this research identifies them as necessary 'seeds of change' the gradually alter the legal terrain. These changes make is increasingly difficult for the law to revert to a purely extractive and anthropocentric logic. The chapter concludes with a synthesis of the implication for IEL, demonstrating that this 'thick' redesign moves beyond symbolic gestures found in the Rights if Nature movement or the procedural limitations of the Aarhus Convention.

5.2. Review of the toolkit

The multispecies participation toolkit was developed as a way of analysing participatory processes to understand how certain structures or practices may enable or inhibit the inclusion of non-humans. It constitutes a central original contribution of the thesis. Rather than proposing a new participatory model, the toolkit provides an analytic framework for interrogating how participation is designed, who it serves, who it excludes, and why. The toolkit was developed through a two-stage process.

Stage One: The researcher first conducted a comprehensive review of literature relating to environmental decision making to identify a core set of participatory principles: stakeholder selection, timing, objective setting, influence and learning. These principles were selected because they address established concerns that relate to effective participation within human centred frameworks.

Stage Two: The second stage redeveloped human best practice by re-examining each principle through scholarship on multispecies justice and political theory. This literature was instrumental in exposing anthropocentric assumptions and exploring how human processes might better recognise and respond to non-human lives.

The intersectional methodology was central to this analysis. It was used here to trace patterns of power, exclusion, and representation across legal, political, cultural and ecological realms. This analysis provided support for the idea that framing the exclusion of non-humans as a purely procedural concern is far too simplistic. Rather, the exclusion of non-humans is indicative of a systemic issue that relates to how legal power has historically been created and distributed.

The result is a toolkit grounded in broad guiding principles for how to approach a participatory process, rather than a set of fixed procedures. The toolkit is intended to be a flexible framework to guide reflection and surface how procedures might open or limit inclusive participation. It calls for attention for attention to be paid to both internal dynamics, such as objective-setting and procedure, and external factors, including the legal, political, and cultural contexts in which participation occurs.

When applying the toolkit to the River Case, consistency was maintained through the use of a set of guiding questions that were developed from the toolkit's core principles[729]. These questions were applied systematically across all data at each of the three stages of the case study: litigation, Tribunal proceedings, and settlement and legislation. This approach ensured that the toolkit was applied consistently across different legal settings and time periods.

5.3. Reflections on the application of the toolkit to the River Case

The application of the toolkit to the River Case revealed three core findings about how participatory processes can impact on multispecies participation. First the analysis showed that participation is shaped by the legal and institutional settings in which they take place. Procedural guarantees of participation do not equate to the actual ability to participate and to do so meaningfully. This was most obvious in the early litigation phase where property law and evidentiary rules limited who could take part, on what terms and the basis on which the River could be discussed. Although participation existed in a formal sense, the legal framework here strongly shaped what participation could look like.

[729] See section 4.4.2.

Second, the application of the toolkit revealed that the expansion of participation does not necessarily develop in a linear way. In the Tribunal process and later negotiations, new ideas and relational understandings of the River entered the discussion, but these remained mediated through human representatives. These shifts did not amount to steady progress towards multispecies participation, rather they reflected the ebb and flow of openings for change that were contingent on particular legal forums, historical moments, and political conditions.

Third, the toolkit showed that these contingent advancements represented non-reformist reforms. This is the idea that whilst these contingent advancements occurred within the existing legal system, they provided a challenge to the status quo. For example, during the negotiation and settlement phase, participation expanded because key assumptions about ownership, authority, and the River's status had been brought into question throughout the River Case. This demonstrated that contingent advancements function as a wedge to create space within the existing orthodoxy allowing space for future, more radical concepts to enter the frame.

These findings were to some extent unexpected. At the outset of this research, it was anticipated that the toolkit might function as a clear procedural guide for participatory processes to involve non-humans and assess the quality of that participation. What emerged instead was the understanding that participation is too complex and contingent to be captured through a fixed metric. Consequently, the toolkit's value was found not in its prescriptive power, but in its flexibility. Upon reflection, this orientation is not a coincidence and arises because the toolkit is informed by literature that calls for relational and iterative approaches to reflect how life unfolds. This can be seen in the work of Haraway, Tsing and Meijer who argue that multispecies worlds and multispecies justice are co-created – that we must create *with*, rather than *for*.[730] The toolkit adds a practical dimension to this theory first by providing a way to diagnose where the law is currently closed to co-creation, and then to offer principles to assist with finding opportunities to engage in co-creation.

These features of the toolkit are particularly relevant for IEL. Participation in IEL is often assessed through formal criteria such as access rights and consultation requirements, which risk allowing participation to become a box ticking exercise. The

[730] Haraway (n 432) 33; Tsing (n 430); Meijer (n 60).

toolkit shifts attention away from a simple procedural entitlement to participate toward the underlying design of participatory processes. By focusing on issues such as the legal framework within which participation occurs, the toolkit offers a way of interrogating why IEL frequently struggles to accommodate non-human concerns, even in cases where stakeholders have a guaranteed right to participate. This highlights a gap between access and meaningful influence.

5.4. Limitations, scope and future development

When considering the limitation of the toolkit it is important to distinguish between the limitations of the toolkit as a design, and the limitations on the conclusions that can be drawn from its application. The primary limitation of this research is the focus on a single case study. However, the Whanganui River Case spans multiple legal settings and modes of participation and provides a rich empirical foundation. The toolkit has emerged as more than a proof of concept, and the application to the case study serves as a robust empirical validation of the toolkit's diagnostic power. By applying the toolkit to the River Case, the research has successfully addressed the central research question: the participatory architecture of IEL can be reimagined by shifting from thin procedural access to thick relational co-design. This analysis demonstrates that the participation gap in IEL is not a simple implementation failure (although this may be an issue), but a feature of a legal framework that was never built to hear the non-human. This finding is substantiated by the long-term friction observed in the Whanganui case between relational and Western worldviews. No claims are made about its general applicability across all legal or cultural contexts and further research is required to test the toolkit's applicability across different jurisdictional settings. This represents a starting point for future research.

The second limitation relates to the interpretive nature of the toolkit. The analysis is subjective and calls on the judgement and expertise of the person applying the toolkit to determine the boundaries of their enquiry, and whether this is sufficient for the purposes of the work being undertaken. The user of the toolkit must also decide when and where the participatory process begins and ends, and which voices and histories are relevant to the analysis. Subjectivity in this sense is not a flaw, or even necessarily a limitation, but rather a feature of this type of sociolegal research. What is important however, is that the user makes explicit their reasoning about boundaries and why

they have been drawn. In this sense the toolkit promotes reflexivity and resists claims as to neutrality.

A constraint of the toolkit is that it is labour intensive. Using the toolkit, requires the selection, collation, analysis and synthesis of a significant corpus of information from a wide variety of sources. This limits its suitability for quick assessments. However, the depth of the toolkit is also what allows it to surface patterns of exclusion, or identify areas that pose promise, which are unlikely to be made visible through a less robust review and a more restricted data pool.

Finally, the toolkit does not address facilitation practises, such as who convenes participation processes how power dynamics are managed in real time, or how conflict is navigated. These issues are clearly important, and future work could productively extend the toolkit to engage with facilitation. However, this thesis intentionally excluded consideration of this issue. Here, the boundaries of the toolkit are clear, and it is recognised that the toolkit may need to be complemented by other forms of expertise, or approaches. In the context of IEL, this limitation highlights the importance of moving beyond a single tool approach toward a more expansive model of global environmental governance. IEL often relies on high level procedures that ignore the real time power imbalances that occur when local communities, state actors, and non-human interests collide. To address the limitations of this toolkit, work on IEL should integrate complementary expertise. Participation should not be viewed solely as a legal entitlement, but as a process that requires the support of (amongst others) social scientists, mediators, Indigenous leaders, and ecological experts who can manage the power dynamics of these diverse groups. For this approach to be workable IEL must remain porous - in other words it must retain an ability to hold multiple forms of expertise and worldviews at once, rather than imposing a rigid procedural template.

5.5. The foundations of legal transformation

The River Case reveals that one of the core barriers to multispecies participation is the legal system's narrow design. Legal systems can only recognise participants it has the categories to understand, and the law's core rules are built predominately for humans. Because of this framing the law often lacks the conceptual space to accommodate non-human actors in a meaningful way. The River Case demonstrates this, as to participate, the River first had to be recognised as a legal *person*, and

because of the way participation occurs in legal systems its interests can only expressed and acted upon through *human* representatives. This illustrates why the River remained peripheral for much of the claim history - because the legal and political systems were incapable of accommodating it as anything other than property or a resource. The 2017 legislation is a significant development. Yet what is seen in this research is that the legislation remains limited, not because of a lack of political will or because the legislation could have been drafted better, but because the legislative imagination still tethered to human centred models being. However, this limitation is not necessarily permanent, it represents a specific moment in a much longer process of legal evolution.

This reality reflects the theoretical scholarship of Derrida who distinguishes between law and justice. He describes how law consists of rigid legal rules, such as statutes. Justice on the other hand is an ideal that sits outside of the legal system driving us to do better.[731] Derrida explains that because the law is a human creation, it is never complete, indeed the law is continually constituted through interpretation[732]. Laws remain open to being read and re-read. Through this constant interpretation the system of law is expanded when it is confronted by new ethical demands or realities that exist outside of the law.[733] This process is the basis on which the law expands to include previously excluded subjects.[734] Derrida emphasises this is not a flaw, rather the law's infinite alterability allows it to adapt to vastly different circumstances. What Derrida makes clear is that this iterability[735] is only possible because of the recognition of what falls within the legal system and what sits outside of it. As Wolfe explains, Luhmann refers to these as the 'blind spots' in a system which can only be made visible when placed in comparison to something else - 'all such observations and systems are built on an inescapable "blind spot" that only *other* observations, from

[731]'Here Motaigne is clearly distinguishing laws… from justice. The justice of law, justice as law is not justice. Laws are not just as laws. One obeys them not because they are just but because they have authority' - Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in David Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 12.

[732] Derrida describes this through the phrase that the law is always 'to come' (l'a-venir)

[733]For example Derrida explains, 'In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle' Derrida (n 733) 23.

[734] Derrida (n 733); Wolfe (n 58) 204–205.

[735] Noting that Luhmann calls this process the 'unfolding'

within *other* systems, can reveal'.[736] Because the system of the law excludes some, means it always produces an outside, an *other*, and it is this that has a 'fundamentally ethical force'. [737] It is only through the outsider that the law can reckon with the question of why some are *inside*.[738]

This process of comparison and reflection within the law, is at least to begin with, a human endeavour. To be able to address why the law *others* the non-human, will necessarily start with humans reckoning with what it means to be human. This crucial point is made by Wolfe who explains that the way forward is through humans doing the hard work of theoretical and ethical engagement with the problem of the human/other dualism. He explains that this reckoning, this process of finding our way to '"there" in which the animals reside, is to find them "here", in us and of us…'.[739] The River Case shows this process in practice: the law recognised the River as a legal person but only after decades of human advocacy brought out its blind spot which was the law's inability to recognise the River as anything other than property. It was only after the legal system was forced to confront what it could not accommodate, that the legal categories begin to shift.

This dynamic is directly relevant to the reimagining of IEL. Just as the New Zealand courts were constrained by property-based logic, IEL is constrained through particular approaches to environmental matters, such as sustainable development, that treats the environment as a resource to managed, rather than a community to be engaged. For IEL to address its shortcomings, the discipline must undergo a similar institutional reckoning.

5.5.1. Theory to transformation: The pitfalls of 'quick win' legal reform

The length of time the River Case took to unfold sits uncomfortably alongside calls for rapid, measurable solutions – termed here 'quick wins'. Given the scale and speed of environmental degradation, it is unsurprising that efforts are focussed on quick wins

[736] Wolfe (n 58) 204.
[737] ibid.
[738] ibid 205.
[739] ibid 207.

such as technical interventions like carbon extraction[740]. The problem with viewing these interventions as the solution, is that it overlooks the reality that complex problems such as environmental degradation are embedded in political, legal and societal systems. The difficulty with the 'quick win' approach has been seen very recently in animal rights circles within the Effective Altruism (EA) movement.[741]

EA approaches problems in abstraction and focusses on 'one morally relevant aspect of a situation' in an attempt to achieve rapid measurable interventions.[742] Clough explains that interventions that bypass deeper ethical engagement tend to fail once initial incentives change.[743] He provides the example of plant-based meats. EA, concerned about animal welfare, invested heavily in the plant-based meat sector as a way to stop animal suffering. The difficulty was that alongside these efforts the movement did not cultivate reasons to choose plant-based diets beyond cost or taste. What has subsequently been found is that behaviour reverts as soon as conditions shift – in the face of increased costs, significant numbers of consumers have reverted to animal products.[744] This 'quick win' dynamic is also visible in interventions in IEL, such as reliance on market-based mechanisms like carbon offsets[745] or biodiversity credits.[746] These tools offer a rapid, measurable response to the climate crisis, but they fail to address the underlying anthropocentric logic that treats the environment as a

[740] National Grid, 'What Is Carbon Capture and Storage?' <https://www.nationalgrid.com/stories/energy-explained/what-is-ccs-how-does-it-work> accessed 2 February 2026.

[741] 'EA has become a popular way of framing decisions about how to have a positive effect on the world. It has grown rapidly and not merely as an academic pursuit. It is represented not only by university-based institutes and research centres, but also by organisations that recommend grants and by foundations that make them. Several hundreds of millions of dollars are now donated annually in accordance with EA's principles, and tens of millions more are committed… EA-related organizations are strikingly influential in the realm of animal advocacy, where affiliated funders are so dominant that it is difficult for any pro-animal group to spurn them, and groups deemed "ineffective" stand to suffer significant losses of funds' - Carol J Adams, Alice Crary and Lori Gruen, 'Introduction' in Carol J Adams, Alice Crary and Lori Gruen (eds), *The Good it Promises, the Harm it Does* (Oxford University Press 2023).

[742] David L Clough, 'A Christian Critique of the Effective Altruism Approach to Animal Philanthropy' in Carol J Adams, Alice Crary and Lori Gruen (eds), *The Good It Promises, The Harm It Does* (Oxford University Press 2023).

[743] ibid.

[744] Julie Cresswell, 'Beyond Meat Is Struggling, and the Plant-Based Meat Industry Worries' *New York Times* (2021) <https://www.nytimes.com/2022/11/21/business/beyond-meat-industry.html> accessed 19 August 2023; Kenny Torella, 'Were the Impossible and Beyond Burgers a Fad, or Is Plant-Based Meat Here to Stay?' *Vox* (2023) <https://www.vox.com/future-perfect/2023/4/17/23682232/impossible-beyond-plant-based-meat-sales>.

[745] Danny Cullenward, Grayson Badgley and Freya Chay, 'Carbon Offsets Are Incompatible with the Paris Agreement' (2023) 6 One Earth 1085.

[746] A wealth of information on this can be found at International Advisory Panel on Biodiversity Credits <https://www.iapbiocredits.org/home> accessed 4 February 2026.

tradeable commodity. The same logic applies to legal change. Relying on shortcuts to multispecies participation, such as isolated legislation, risks bypassing the slow work of institutional and ethical change. Without a fundamental shift in the social and ethical framework, such interventions remain fragile and are susceptible to being undone as soon as political or economic conditions shift.

The River Case demonstrates that legal recognition does not precede shifts in understanding, it follows them. The River's eventual recognition as a legal person was not because of a single intervention, it was a through a long process of cultural and institutional change that extended beyond the River and its immediate community. This illuminates that what initially appeared in this research as a failure to foreground the River's interests, should rather be understood as a reflection that certain forms of legal change cannot be imposed. In other words, more-than-human inclusion cannot simply be legislated into existence without concurrent shifts in society, politics and institutions. In this light the iterative development of law is not a weakness, although it is acknowledged that the timescales are a concern. What appears as delay in the River Case, is perhaps then better understood as the time required for the legal imagination itself to expand.

5.6. Legal and procedural architecture as a determinant of participation

This section examines how legal and procedural frameworks do more than host participatory processes, they actively shape who can participate, what can be said, and what forms of knowledge and interests are recognised. The application of the toolkit to the case study demonstrated that participation was structured by the legal architecture in which it took place. The next section will briefly consider two examples to illustrate how these constraints played out in practice: (1) How statues limit the stakeholder; and (2) how retrofitting reforms into existing legislative frameworks can be a trap.

5.6.1. How statutes limit the stakeholder

The first example of architectural constraint concerns litigation initiated in the 1930s under the Native Land Act 1931[747]. This Act prescribed who could be recognised as a

[747] Subsequently renamed the Māori Land Act

claimant and, for the purposes of this research, as a stakeholder. As the literature review outlined, the composition of participants is not incidental, it shapes the agenda, the priorities, and the eventual outcomes of a process. This is why, as noted in Chapters 2 and 3, meaningful participation requires involving stakeholders from the outset and allowing them to influence how issues are framed. In the Whanganui River Case, however, the Native Land Act predetermined the terms of engagement, confining the dispute to questions of ownership and resource management - categories drawn from Western legal thought.[748] While this reflected the legal conventions of the time, it nonetheless had significant consequences. By legislating the terms in advance, the Crown effectively determined who could participate and precluded stakeholders from reshaping the agenda. Māori claims grounded in whakapapa, relational responsibilities, and spiritual connection to the River could not be meaningfully advanced within an ownership/exploitation paradigm. The effect was to limit the range of admissible arguments and constrain the scope of potential outcomes. Had the issue been framed in terms of kinship, or had stakeholders been able to set the agenda, a broader range of voices might have been included and alternative pathways to resolution made possible. This illustrates how legislative frameworks - whether intentionally or not - can structure participation as much by what they allow as by what they exclude.

5.6.1.1. Identifying design barriers

Participation can be limited through how the participatory process is carried out in practice. The ability to participate can be heavily shaped by financial, and logistical barriers that determine who can be present, be heard, or influence outcomes. This was shown to be the case in the Whanganui litigation process where the proceedings were held some distance from the claimants' homes creating cost and travel barriers. As a result, this precluded certain iwi living in the region from participating in the process, even though they had a formal entitlement to do so. The toolkit draws attention to these barriers as features of participatory design, and brings awareness to the implications of these barriers, rather than stressing that they should be treated as incidental inconveniences. This demonstrates how a process can formally be open, but in practice be inaccessible to certain voices. This emphasises that the design of a process shapes whose voices get to count. This in turn reinforces a concept that is

[748] Cribb, Macpherson and Borchgrevink (n 154).

central to this thesis- which is that there is a distinction between participation as legal right and participation as meaningful and effective practice.

5.6.2. How retrofitting can be a trap

The Durie reforms and the Tribunal process expanded how and where participation occurred.[749] The reforms sought to recognise Māori perspectives in two substantive ways: (1) the process allowed claims to be framed in relational terms, which introduced Māori ways of knowing into the legal system; and (2) through the introduction of spatial practice which included holding hearings on marae and, near to, or on the land or entity in issue. These approaches were undoubtedly progressive, but their transformative impact was limited by the fact that they were retrofitted into an existing legal framework grounded in Western legal thought. So, whilst accommodations such as holding hearings on marae were positive developments, the procedure remained fundamentally rooted in Western legal approaches. Māori worldviews entered the process, but Māori were not involved in the creation of the boundaries or the process. Hence the procedural architecture, such as adversarial practices and evidentiary rules remained intact, limiting the potential of these reforms.

This retrofitting trap is also observable within IEL. International instruments such as the Aarhus Convention are constrained by certain proceduralist assumptions. For example, the Convention places reliance on formal forms of communication (such as written communication) that occur within specific administrative timelines. This procedural design inherently limits the scope of participation, as it cannot accommodate non-human expressions that fall outside of these Western registers.

Because IEL and the New Zealand domestic system share a legal system with the foundation based in Eurocentric architecture, the failure of Aarhus to move beyond symbolic participation mirrors the Whanganui River litigation phase. This reflects a legal environment that is not necessarily exclusionary by choice but is structurally unable to respond to non-human expression. Consequently, attempts to foster inclusion within these existing frameworks results in a retrofitting that forces relational worldviews into an anthropocentric mould.

[749] See chapter 4

5.6.2.1. The potential of co-design

It is against this backdrop that the negotiation phase proved particularly instructive. Unlike the litigation phase described in section 5.6.1. the negotiations in the 2000s were not structured by statute. Instead, the process of negotiation was co-designed by the parties. This difference was reflected in the negotiation documents themselves. The documents set out shared aspirations and motivating ideals that were not constrained by a fixed procedural framework. Examples of this include the Record of Understanding that articulates relational understandings of the River that created space for the River to be recognised as an invisible being. Here the toolkit enabled a comparison between a procedurally constrained process and one free from legislative limits. The toolkit showed that allowing participatory processes to develop organically and be tailored to specific circumstances creates more scope for inclusive participation. While it is important to note that the negotiation phase took place in a different historical moment to the Tribunal proceedings, and followed shifts in societal attitudes, it nonetheless illustrates the value of participatory design unconstrained by rigid legal frameworks.

This insights from the case study reflect the scholarship of Veselova and Gaziulusoy who observe that design processes require critical reflection, as those embedded within dominant frameworks tend to produce outcomes that reinforce the worldview underpinning them.[750] In the context of multispecies participation, this poses a particular challenge because participatory processes are designed around human priorities and categories and so are likely to reproduce anthropocentric outcomes, even where participation is expanded.

The River Case illustrates this dynamic clearly. Where participation was retrofitted into existing legal frameworks, the Western, adversarial worldview remained the 'sensible given'. In contrast, during the co-design approach of the negotiation phase the parties were able to disrupt the extent to which the dominant legal frameworks were treated as the unquestioned starting point. Whilst the outcome of the negotiation is far from a perfect example of multispecies participation, the process succeeded in opening

[750] Emīlija Veselova and İdil Gaziulusoy, 'Bioinclusive Collaborative and Participatory Design: A Conceptual Framework and a Research Agenda' (2022) 14 Design and Culture 149.

conceptual space where the River could be reimagined as a subject, rather than a resource.

This shift from retrofitting to co-design is a vital concern for IEL. It suggests that the current participation gap in global governance cannot be bridged by simply adding non-human 'seats' to participants in an IEL forum. Instead, IEL should move towards a framework that enables co-designed participation.

5.6.2.2. The anthropocentric dilemma

If co-design opens the door to non-human inclusion, it simultaneously exposes a deeper question for multispecies governance: can legal frameworks structured around human interests and modes of expression ever fully accommodate non-human participation? An inherent difficulty in current participatory frameworks is that humans currently lack well-developed ways of perceiving, interpreting and responding to non-human forms of expression, so there are real barriers to moving beyond human centred approaches. The problem therefore is not only one of representation, but it is also that of human limitation. How does a legal system become responsive to beings that it does not yet know how to recognise? This creates a potential design dilemma. Any attempt to predetermine what participation should look like risks becoming anthropocentric because the framework will likely reflect human ideas of what participation should be. For this reason, the emphasis in this thesis is not on prescribing a single model of multispecies participation. Instead, the focus is on identifying design principles that keep participatory processes relational and responsive to what emerges.

Importantly the toolkit does not just stop at diagnosis. When the toolkit surfaces exclusions or constraints, these become prompts to consider the design of the participatory process. This is why the negotiation phase is instructive because even though the outcome was far from a complete version of multispecies participation, the codesigned process disrupted the assumption that dominant legal frameworks must be the unquestioned starting point (the sensible given of where negotiations begin). The negotiation phase suggests that legislation may be most effective when it sets out broad guiding principles, such as collaboration and attention to space, while leaving room for those principles to be interpreted and enacted in context.[751] This approach

[751] Cribb, Macpherson and Borchgrevink (n 154).

encourages innovation and responsiveness to local needs. In practice, this was reflected in how the negotiation phase allowed stakeholders to define guiding principles and then shape processes around them.

The legislation that was produced because of these negotiations follows a similar approach, it codifies a relational worldview and affirms the River as a legal person, but it does not prescribe how those relationships are to be enacted on a day-to-day basis. The legislation leaves the practical implementation to Te Pou Tupua and its supporting bodies. Here though, it is necessary to acknowledge that it has been difficult to ascertain the work (and its impact) undertaken by these bodies, as there is both a limited requirement for information to be made publicly available and, of the reports that are required to be produced, only reports from 2021 and 2022 have been published.[752] This makes it difficult to assess how the legislation is operating in practice, and highlights a tension between openness and respect for cultural values. This is an issue that will be returned to in section 5.7. on objectives.

5.6.3. Implications for IEL

The lessons drawn from the Whanganui River Case suggest that participation is often treated as a procedural requirement to be satisfied. Where this happens, the legal architecture that structures how participation operates in practice, tends to remain unexamined. This has relevance for IEL. In IEL, participatory rights are frequently articulated at a high level, and their implementation is left to domestic legal systems.[753] This decentralised approach is a double-edged sword. On the one hand it is problematic where domestic systems remain reluctant to consider more expansive participatory approaches. Similarly, if the international agenda is set too narrowly, it predetermines the 'sensible givens' of the process before local multispecies communities enter the room. On the other hand, the lack of specificity within IEL can also be understood as a potential strength. Leaving participation adaptable allows processes to be co-designed in ways that respond to specific ecological, cultural, and political contexts, and avoids the foreclosure that rigid procedural templates can produce. The case study suggests that IEL will be most effective when it functions not as a rigid template, but as a porous framework. IEL's

[752]Te Pou Tupua, 'Documents' <https://www.tepoutupua.nz/documents>; Cribb, Macpherson and Borchgrevink (n 154).
[753] du Toit and Kotzé (n 43).

role should be to mandate the necessity of co-designed participation but resist the impulse to predefine its form.

Ultimately, the River Case shows that participation cannot be assessed solely by reference to a procedural guarantee of participation. Even where participation is formally recognised, inherited legal categories and design choices at the domestic level continue to structure the terms of engagement. This demonstrates that the design of a participatory process is critical. This is the central analytic lens for the sections that follow, which examine how objectives, space, accountability, and institutional safeguards shape the possibilities and limits of multispecies participation in IEL.

5.7. Objectives

5.7.1. The importance of examining objectives

If the legal architecture provides the conceptual space in which participation occurs, the objectives of the process determine what can happen within this space. The central claim here is that the act of setting objectives can operate as a gatekeeping mechanism because objective setting is a process though which participation is either enabled or foreclosed. Setting objectives is not a neutral act, it is an exercise in power because objectives determine fundamental issues such as which questions are legitimate, whose interests are protected and what harms are being addressed

For multispecies participation to become embedded in participatory processes, objectives must remain open to contestation. In current IEL frameworks, objectives are frequently treated as 'sensible givens' - unquestioned technical or economic goals - such as sustainable development.[754] These are established before the participants even enter the room. For example, as Kirksey and Chao note in the context of multispecies justice,

> [w]hile government officials, lawyers and some activists rally to defend Nature, it is important to return to a question that Donna Haraway posed more than twenty years ago: "What counts as nature, for whom, and at what cost?"[755]

[754] See discussion on sustainable development in section 1.2.3. and 2.7.3.
[755] Eben Kirksey and Sophie Chao, 'Who Benefits from Multispecies Justice' in Sophie Chao, Karin Bolender and Eben Kirksey (eds), *The Promise of Multispecies Justice* (Duke University Press 2022) 7.

The toolkit brings focus to this issue because it embeds Ranciere's notion of 'contesting the sensible givens' directly into participatory design. The River Case is instructive here because it demonstrates that meaningful transformation is only possible when anthropocentric objectives are explicitly contested through the introduction of motivating ideals that speak to the inherent dignity of the ecosystem itself.

The relevance of the River Case for environmental governance is that it demonstrates that when objectives are framed through anthropocentric priorities such as risk or resource management, non-human participation is often foreclosed. In animal law contexts for example, the appointment of human representatives to advocate for an abused animal may appear to centre their interests.[756] In practice, however, if the legal framework fails to establish the animal's own objectives, the process risks being overtaken by human centric goals. As Marceau observes, proceedings often shift towards satisfying a human desire for punishment, rather than prioritising the needs of the animal concerned. Where the stated purpose of representation is displaced by objectives that serve different interests, the participatory process becomes a form of domination.[757] To guard against the risk of co-option, the toolkit moves away from the traditional goal of consensus, which often masks the silencing of non-human perspectives through the veneer of 'agreement'.

Instead, the toolkit identifies dissensus as a structural necessity. Drawing on Kirksey and Chao, this research argues that 'antagonism' or friction within the objective setting phase is essential because it produces 'ruptures in the established order that produce opportunities for new collaborations, alliances, and worlds'.[758] Dissensus prevents the process from sliding back into comfortable, human centred quick wins. This productive friction keeps the process ethically honest and ensures that marginalised voices are not lost through consensus driven models. The lesson for IEL is that the discipline must move away from seeking 'thin' consensus around predetermined anthropocentric goals such as sustainable development and instead allow space for dissensus

[756] Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge University Press 2019) 80.
[757] ibid.
[758] Kirksey and Chao (n 757) 7.

(productive friction) as s design feature to ensure that non-humans interests are not coopted by human-centric goals and this is explored in the section below.

5.7.2. Motivating ideals: Structuring the friction

In adopting a dissensus model it is important to ensure that the process remains productive rather than destructive. Here the toolkit introduces the concept of motivating ideals. Motivating ideals are an important element of participatory design. They create space for objectives to be contested whilst still allowing the participatory process to remain focussed by providing ethical guidelines to structure and direct the discussion.

When considering non-humans, one of the barriers to participation lies in understanding how their concerns can be identified, expressed and protected within objective setting. The toolkit does not assume that non-human interests are knowable in advance. Here motivating ideals provide a crucial function as they allow objectives to be shaped by relationships rather than metrics (which objectives often focus on). Motivating ideals allow commitment to more abstract concepts like care, responsibility and kinship, which do not need to be exhaustively specified in advance. Because motivating ideals are not prescriptive, they open space for participants to think creatively about objectives and the processes to reach them. In the context of multispecies participation, this can create conditions to focus attentiveness to the desires and concerns of non-humans. With this approach, establishing the objectives of a participatory process becomes an exercise in relation, rather than a symbolic procedural exercise. The importance of motivating ideals emerged through the case study as a mechanism by which participation was sustained. A powerful example of this comes from the negotiation phase.

5.7.2.1. Motivating ideals in practice: “Ko au te awa, ko to awa ko au - I am the River, the River is me”

In the 2011 Record of Understanding the section titled ‘aspirations of Whanganui Iwi’ are examples of motivating ideals:

- Te Awa Tupua mai I te Kahui Maunga ki Tangaroa: An integrated, indivisible view of Te Awa tupua in both biophysical and metaphysical terms from the mountains to the sea.

- Ko au te awa, ko te awa ko au: The health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people.

These concepts set out two principles that place relationality, kinship, and spiritual connection with the River at the centre of their approach. The importance of these ideals was also made clear because despite being headed 'aspirational' they were described in the document as 'fundamental principles'. This is not to suggest that these ideas were new concepts to these proceedings, but their significance for iwi may have been lost amongst many of the other considerations and discussions happening at the time. What the 2011 document did was to clearly assert the Whanganui iwi's core position, but without prescribing the legal form this should take.

This approach was a departure from usual common law negotiation practice where parties keep their true interests and limits concealed.[759] This speaks to a broader approach within adversarial systems to treat the other party as an adversary and as untrustworthy, and so silence or selective disclosure of information are used as tactics.[760] In contrast to this approach, Māori negotiators chose transparency and made their core concerns, their motivating ideals, clear. Making these motivating ideals explicit signalled that Māori negotiators were engaging in a principled way rather than simply pragmatically. Their aimed to transform the way in which the River was understood and managed – from a resource-based approach to a relational one. This openness reflected a trust in the process and a commitment to principle over gamesmanship. It set a clear moral benchmark.

5.7.3. Limits of motivating ideals

The Whanganui River settlement, however, exposes the limits of objective setting and motivating ideals. This is because whilst the settlement did make progress in terms of recognition of the River, the eventual outcome still required significant compromise.[761] As has been outlined, elements of the legislation are at odds with the Māori world view, in particular the carving out of private property rights, and the exclusion of the water from the ambit of the legislation. These matters are all at odds with Whanganui iwi's concerns about treating the River as a living and indivisible whole. This demonstrates

[759] Paulo da Silva, 'Adversarial Bargaining in Negotiation' (2020) 25 UNSWLJ Student Series.
[760] ibid.
[761] This was also noted by Cribb, Macpherson and Borchgrevink (n 154).

that whilst the motivating ideals helped maintain the negotiations, they were not a mechanism to entirely overcome the limitations of the legal and political frameworks within which the agreement was reached. This is an important consideration for non-human participation as it brings home the reality that even where the ethical concerns are clear, the outcome may well still be shaped by compromises that are required when working within established legal systems.

For IEL these limitations sound a warning that even the most robust 'motivating ideals' risk being diluted if they are retrofitted into a legal architecture that prioritises 'thin' procedural compromise, over 'thick' ontological shifts. This is explored further in section 5.7.5.

5.7.4. Rethinking objectives: The struggle for ontological shift

The true value of motivating ideals therefore does not lie in their ability to guarantee a perfect outcome, but in their capacity to open conceptual space. The Tribunal process provides an example of this. Whilst the legislation set out the objective of the Tribunal process, it was broadly framed and this allowed the participants to set the direction of the matter for consideration. So instead of requiring that concerns relating to land be dealt with in terms of property or resource management law, Māori could frame their claim in terms of mana. The significance of this cannot be understated as it allowed the focus to shift from a resource-based approach central to much of English law, to a relational approach central to tikanga Māori.

However, a persistent limitation remains when the underlying architecture remains anthropocentric. This is seen in the River Case where the River is still represented by humans.[762] These approaches are still centred around a human centric model. This is not, as Goodin rightly points out, a system that lends itself well to non-human participation.[763] This highlights a profound danger that efforts to include non-human communities can inadvertently reinscribe human centred concepts unless there is a sustained effort towards deeper ontological shifts. Drawing on Derrida and the iterative nature of the law, this highlights the importance of recognising that achieving inclusive participation is an ongoing process and must remain an ongoing concern. Objectives

[762] ibid.
[763] Robert E Goodin, 'Enfranchising the Earth, and Its Alternatives' (1996) XLIV Political Studies 835.

must be revisited regularly and the underlying assumptions interrogated. If we want to take multispecies concerns seriously, then assumptions around what it means to *participate* must be reevaluated.

5.7.5. Implications for IEL

Despite its shortcomings the River Case gives us reason for optimism. The case study shows that there is potential to interrogate the foundations on which environmental governance is constructed. The River Case illustrates how a foundational issue can be reframed, namely resource management shifted to ideas around mana. This signals the potential for a more expansive dialogue around multispecies participation. However, what must be borne in mind is that these shifts occurred because of the sustained engagement by Whanganui iwi around normative questions of *who* and *what* the law is prepared to recognise. This insight has direct implications for IEL. IEL frequently relies on organising concepts such as sustainable development. Whilst these concepts are often presented as politically neutral, they embed assumptions about whose interests count. With this in mind the River Case invites reconsideration of whether expanding participation within existing frameworks is sufficient, or whether participation must actually extend to scrutinising the frameworks themselves.

The toolkit therefore provides a mechanism through which such scrutiny can occur. Applying the toolkit's approach to objectives and motivating ideals, the toolkit moves the analysis beyond procedural inclusion to consideration of the norms that determine who can be included as a participant at all. The challenge for IEL then becomes more than simply widening participation, to engaging with the framework that shape who gets to be a participant in environmental decision making. In IEL its sensible givens – such as Sustainable Development - often act as a ceiling rather than a baseline for ecological protection. This occurs because such concepts are often framed through anthropocentric priorities that seek to balance economic growth against environmental health. In practice this sets a limit on how much 'protection' is allowed before it is considered to interfere with human development.[764] These types of approaches therefore foreclosure more radical and imaginative alternatives.

[764] Consider for example Maximum Sustainable Yields in fisheries where the goal is to sets limits to enable humans to extract as much fish as possible without causing stocks to collapse. Fisheries management and MSY is broadly discussed here - R Hilborn and others, 'Effective Fisheries Management Instrumental in Improving Fish Stock Status' (2020) 117 Proc Natl Acad Sci U S A 2218.

The toolkit's contribution is to provide the mechanism to reconsider what knowledge systems are informing our objectives. It calls on international legal actors to treat participation not as a way to gain consent for a preset agenda, but a space to scrutinise the framework itself. Practically, this means that non-human interests should not just be included as an afterthought. Rather, this approach requires that the motivating ideals of the ecosystem must inform the very basis of the legal instrument. This moves from a model of access where a non-human is a guest in a human system, to a model of co-design where the system is built to sustain the multispecies community it governs. The River Case demonstrates that one of the cures for IEL's narrowness is not just more voices, but different objectives.

5.8. Space, place, and epistemic modes of participation

The previous section focussed on how assumptions embedded in participatory processes impact on who gets to participate. A natural extension of this discussion is the move from viewing the location of the law as a neutral backdrop to recognising how it actively shapes power. Drawing on an intersectional framework, this thesis argues that the design of participatory space directly impacts the presence, voice, and influence of marginalised actors. As Donaldson explains in *Animal Agora*, for those who cannot participate in traditional political forums 'justice requires that we 'enable spaces' for a more embodied politics.'[765] These are 'spaces where human and animal co-citizens can engage one another in spontaneous, unpredictable encounters', allowing them to reshape the environment together.[766]

5.8.1. Tribunal as spatial intervention

One of the more significant contributions of the Tribunal phase was its recognition of the importance of space and place in shaping participation – acknowledging the reliance in Western legal forms on architecture and physical space to enforce power, manage bodies and impose state authority.[767] But, as discussed earlier, place is not solely a physical location, it is constitutive of identity. The Whanganui River cannot be

[765] Donaldson (n 384) 713.
[766] ibid.
[767] There is a rich body of scholarship examining the physical architecture and design of Westren courtrooms. Two notable texts include - Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (1st edn, Routledge 2011) <https://doi.org/10.4324/9780203836248>; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (1st edn, Routledge 2015) <https://doi.org/10.4324/9781315780528>.

substituted for any other river; it is what it is because of where it flows, what surrounds it, and the whakapapa that binds it to people, lands, and other beings. This challenges the Western legal habit of treating 'nature' as a resource and instead affirms the River as a being with its own history and place. Such relational recognition marks a shift in legal framing, one that moves from ownership to kinship, and from extraction to entanglement.

Whilst the Tribunal phase undoubtedly foregrounds place as an important consideration, it has not been perfect in its implementation. For the recognition of place to go beyond the symbolic, and instead for the processes to be attuned to the spaces in which they occur, it is necessary to reconsider how the participatory procedures align with these spaces. The Tribunal procedures arguably failed to fully engage with the spaces in which they operated. For example, hearings were held on marae, spaces that are imbued with cultural meaning and yet adversarial practices from western legal systems, such as cross examination, were imported wholesale. But more than this, legal procedures such as cross examination, were conducted in areas of the marae, like the meeting house, which are traditionally reserved for peaceful interactions.[768] Other parts of the marae were better placed to accommodate cross examination, indeed the outside space in front of the meeting house, is designated for more forceful interactions.[769]

Given that there were different spaces that could accommodate more confrontational exchanges, it is worth interrogating why these adversarial procedures were introduced to spaces not intended for such purposes. The issue is not just procedural preference, it is about what this spatial choice, or imposition, reveals about Western legal forms. This is not to deny that cross-examination can serve an important legal function, but rather to invite reflection on its character and the place in which it occurs. When Western adversarial techniques are imposed within settings structured by tikanga it raises questions about assertions of dominance and whether one jurisdiction is displacing, or intruding into, another. Gelderloos's question '[d]oes violence mean causing harm?' provides a useful point of departure here.[770] In considering this question it is helpful to reflect on Derrida's exploration of how the law is an ongoing

[768] Keane (n 709).
[769] ibid.
[770] Peter Gelderloos, *The Failure of Non-Violence* (Active Distribution 2013) 23.

act of violence against the *other*.[771] Violence need not be physical, it can operate through the authority to define the terms on which engagement occurs. Viewed through this lens, cross examination in the marae invites reflection as to whether such processes require Māori participants to engage on terms that subordinate their spatial and legal order. The toolkit identifies this practice as a spatial blind spot – it is a process that can appear formally inclusive but remain exclusive by refusing to relinquish its procedural dominance.

5.8.2. Spatial norms and the non-human

Spaces are shaped by norms that reflect particular histories, values, or indeed institutional practices (or a combination of all of these). Therefore, when, where and how participation unfolds either reinforce the underlying norms or bring them into view for critical scrutiny. Scrutinising how human perspectives shape spaces is crucial in understanding non-human participation. This is because space and process do not merely shape how interactions occur, they also frame how those interactions are interpreted. An example of this is found in Hribal's work on animal resistance, which demonstrates how shifts in spatial framing can strip acts of dissent or self-determination of their legitimacy, recasting them as threats to order that must be managed or suppressed.[772] For example, a wild orca ramming a boat in open waters may be understood as a defensive act, a response to a perceived threat. The same behaviour in a marine park, directed toward a trainer, is likely to be categorised as unpredictability and danger. In one space, the act is read as legitimate self-defence, in the other, it becomes evidence of a serious problem. As Hribal demonstrates, power often works in precisely the opposite way when it is the marginalised who resist dependent on where the resistance occurs. Acts of refusal or resistance by captive animals are reframed as aggression or violence rather than recognised as legitimate protest.[773] So without safeguards, participation that challenges the dominant script can risk being reclassified as illegitimate, further entrenching the very exclusions participatory processes are meant to overcome.

This spatial interpretation has profound implications for the River and IEL. If the space of participation remains for example, a Western courtroom, the River's natural

[771] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 920.
[772] Hribal (n 443).
[773] ibid.

expression such as flooding or changing course, are framed as natural disasters or risks to property that must be managed. These acts are stripped of their communicative value. However, when the space is shifted to a relational setting such as the riverbank, these same events can be interpreted as acts of sovereignty or self-determination by the River. Without intentional spatial design, participation that challenges the dominant human script risks being reclassified as illegitimate. For IEL, it is essential not just to let the River 'speak', but to ensure that the participatory space is designed to be able to receive that speech as a legitimate claim.

5.8.3. Space and relationality

The River Case did not provide any examples of practices that were designed to discern the River's wishes, but it did surface broader questions that are important to advancing multispecies participation. Specifically, the River Case showed that space and place are not neutral backdrops to participation as they shape what participation can mean and how behaviours within this are understood. This suggests that meaningful participation is inseparable from the shared physical space we inhabit – human and non-human lives are spatially entangled.

One of the clearest lessons from the River Case is that relationality is often very closely tied to place. The care shown for the River and the continued efforts by Whanganui iwi were rooted in their entangled history with it. This suggests that participatory efforts involving non-humans should consider those humans with long-standing, lived connections to the place in question.

Recognising that a place is made up of the multitude of beings that inhabit it and how they relate to one another, raises a further challenge about how to include the expressions of these beings within participatory processes. Listening often presumes a shared language, placing the burden of intelligibility on the non-human other. The concern is that where expression does not conform to familiar communicative forms, it goes unrecognised. What is needed is a practice that moves beyond language, and this is fundamentally what noticing entails. Noticing is being attuned to what surrounds us, it asks participants to attend closely to the rhythms and cues of the landscape, allowing it to guide the encounter. In this way, noticing shifts the frame so that the human/ non-human encounter is shaped by place.

Through this lens participation depends not only on institutional processes, but also on the perceptual capacities of those involved and what they are willing to recognise as meaningful expression. This reflects another insight developed earlier in this chapter – that legal systems are shaped by what the system is capable of recognising. For this reason, this thesis frames perception as a crucial element of participation. Before we can consider how to create the procedural elements of a participatory process, such as the meetings or consultation process, we need to first grapple with what decision makers are able to notice and recognise because this impacts on who can meaningfully be included in the process.

5.8.3.1. Perception as participation

If multispecies participation depends on recognition, a core design question emerges: how can humans be enabled to recognise forms of expression that fall outside of familiar human registers. The challenge is not simply to create participatory spaces, but to help humans cultivate forms of attentiveness that can begin the shift away from participation being framed within human modes of communication. Addressing this challenge requires a shift in how humans understand recognition. Recognition essentially comes in two phases: first, the ability to perceive the other, the second, the capacity to interpret their communication. It is the first phase, the initial act of perception that is frequently overlooked and yet without it, the non-human can never truly enter the legal process.

Abrams' work on perception is instructive here because he considers perception as an embodied practice.[774] Drawing on Merleau-Ponty, Abram Explores how human perception is a constant engagement with shifting terrain - an interplay between the 'perceiving body and that which it perceives'.[775] In this light, perception is itself an act of participation. Organisms do not just register their surroundings; they also participate in shaping and responding to them.[776] This suggests that participation does not begin with institutional processes such as meetings or consultations: it starts with the sensory act of noticing.

[774] Abram (n 313) 49–59.
[775] ibid 57.
[776] Here Abrams uses an example of how a spider spinning a web may have a genetic 'programming' that provides it with 'instructions' to create a web – these 'instructions' cannot account for the 'specifics of the micro terrain in which the spider may find itself in any particular moment'

Similar insights appear across anthropological scholarship where perception is understood as entangled[777]. Tsing explains how humans tend to think that we are the only actors that make worlds, but

> we are surrounded by many world-making projects, human and not human. World-making projects emerge from the practical activities of making lives; in the process these projects alter our planet. To see them, in the shadow of the Anthropocene's "anthropo-", we must reorient our attention.[778]

When we do this, we will see how others make worlds, but also how we make worlds with these others.

This openness parallels with Derrida's observation that the law is always 'to come'. Perception/noticing are always incomplete because everything is always in flux, always adjusting to the environment it is in. Participation, like perception, remains unfinished and is continually recalibrated through encounter. For multispecies governance this suggests that participatory design must remain open to forms of expression that may initially resist human interpretation.

5.8.3.2. Risks of place-based exclusivity

There is however a risk in tying participation too closely to situatedness. If an entitlement to participate is limited to those with a longstanding connection to a place we risk inscribing problematic logics that give preference to purity or history, rather than genuine engagement. If we say that relationship to place is essential, what do we make of those who are newly arrived - whether immigrants, or non-native species?

Theories for how to tackle the tension between relation with place, and place-based exclusivity can be found in the work of Taylor, Haraway and Tsing. These scholars shift the focus from a 'pure' past to the reality of the present. Taylor describes our current environment as 'disabled ecologies' – wounded landscapes that require new forms of care.[779] In this context, there is little benefit in yearning for an untouched ecological baseline that no longer exists. Instead, as Haraway urges, we must 'stay with the

[777] See for example Strathern who in describing the thread of thought writes 'that [it] can be caught, both caught hold of and getting itself caught into what is in its vicinity… Any particular thread of thought might appear as a singular twist, might seemingly take the form of genealogy or archaeology, but in truth was never unknotted from innumerable others' - Salmond (n 47) 308.
[778] Tsing (n 430) 21–22.
[779] Sunaura Taylor, *Disabled Ecologies: Lessons from a Wounded Desert* (University of California Press 2024).

trouble' and, as Tsing proposes 'live in our messes'. [780] From a disability perspective, Talor argues that we must learn to adapt to and care for multispecies disability'.[781] In such cases, the question is not whether newcomers (whether that be people or species) 'belong' but how relationships can be built that allow coexistence and mutual flourishing in these altered environmental conditions.

These ideas return to a central theme of this research which is that participation cannot be reduced to a formal, historical entitlement. By extending the practice of noticing into a practice of 'thinking with' the other, the toolkit resists static definitions of who counts as a stakeholder. The original contribution of the toolkit here lies in its emphasis on participation as an ongoing, iterative practice. It does not merely look backward at who held the land, it looks forward at who is currently entangled in its health. By treating participation as something continuously made and remade through relationship, the toolkit creates a flexible scaffold that makes space for those who arrive later, both human and non-human. This ensures that environmental governance remains responsive to the altered realities of the modern world.

5.8.4. Implications for IEL

The insights emerging from the River Case carry significant implications for IEL. IEL has often developed on the assumption that participatory procedures are transferable across different contexts, and as has been noted previously, participation is typically conceptualised as a matter of access. Yet the case study suggests that participation is not procedurally neutral. The spaces in which participation occurs, the forms of knowledge recognised as legitimate, and the frameworks through which such participation is interpreted, all shape participatory efforts. The challenge is not just for IEL to widen participatory access, but to consider whether the spaces it constructs for participation can allow for more expansive participatory approaches. IEL often disregards the importance of place in decision making, and the River Case calls this complacency into question. IEL must begin to attend to the space of decision-making with more care and precision.

However, centring place requires a nuanced approach that avoids the trap of exclusionary logics. While long-standing relationships to the landscape are vital, tying

[780] ibid 105.
[781] ibid.

participation too rigidly to 'belonging' can inadvertently reproduce patterns of exclusion. This is significant because as climate change accelerates ecological disruption, it produces species displacement and human migration and creates contestations around what it means to be 'in place' or to 'belong to' a place. Participatory frameworks must be attuned to these tensions and remain responsive to what long standing relationships can contribute to the process but also be alive to the impacts of environmental change. These insights invite a shift in the focus of IEL from participation as a procedural entitlement to participation as a spatial practice. This does not require abandoning international procedural frameworks, but it does require acknowledging that environmental governance cannot be disentangled from the places and relationships through which environmental knowledge is produced.

5.9. Accountability and the safeguarding of non-human agency

Where non-human participation is mediated through human representatives, there is a question around how the interests of the non-human are safeguarded. It is here that accountability becomes a design concern because without mechanisms to ensure that the representation is meaningful, participation risks becoming a symbolic gesture. As noted in Chapter 4, one of the more persistent challenges in analysing the Whanganui River legislation was the difficulty in accessing information about how it is functioning in practice. Beyond two publicly available Te Pou Tupua annual reports[782] (2021 and 2022), there is little documentation recording the deliberations or decisions of the key governance bodies. Organisations such as Te Karewao and Te Kōpuka[783] provide greater visibility through documents such as draft strategy and membership lists, but detailed minutes, regular progress reports, or records of decision-making are not publicly accessible. Where more detailed documentation exists, such as governance arrangements for the Te Pūwaha port revitalisation[784], this is generally because the project intersects with local government processes, rather than because the Act's institutions themselves have established regular public reporting practices. This lack

[782] Te Pou Tupua (n 754).
[783] Te Kopuka <https://www.tekopuka.co.nz/>.
[784] Whanganui Port, 'Te Pūwaha' <https://www.whanganuiport.co.nz/te-puwaha/> accessed 9 February 2026.

of visibility is not only a challenge when considering human participation, but it has a direct impact on how non-human interests are safeguarded.

5.9.1. The friction between procedural and relational accountability

The limited public documentation must be understood in its cultural context where Māori led processes do not necessarily align with Western conventions of open documentation. The framework underpinning the River legislation is grounded in tikanga, a relational approach that prioritises reciprocity, responsibility and trust.[785] Accountability is not necessarily achieved through formal mechanisms, but through sustained relationships and the cultural protocols that maintain them. As Smith writes, access to knowledge in Māori communities often depends on relationships built over time, grounded in respect, credibility, and collective responsibility. [786] This is reiterated by Cribb *et. al* who note, much of the governance work relating to the River is rooted in place-based processes that are difficult to capture in standardised, publicly accessible outputs.[787] The issue, therefore, is not the lack of accountability, but rather differing approaches to how it is achieved.

In Western legal systems, including IEL, accountability is achieved through procedural mechanisms such as public access to information, and opportunities for formal redress, such as judicial review. By contrast, and as noted above, tikanga draws on a relational approach based on mutual responsibility. While this may reflect how knowledge stewardship is approached within Māori communities, it raises questions about who can participate, ask questions, or seek involvement. Without consistent and accessible records, it is difficult for those outside the governance circle to assess how decisions are made and whether the principles of the legislation are upheld. This should not be read as a critique of Indigenous governance but instead is illustrative of the challenges that arise when differing accountability traditions intersect.

This reinforces a broader tension between openness and the protection of cultural values. Relational governance resists allowing a guardianship approach to be reduced to a set of procedural checkboxes. This approach conflicts with the notion that visibility

[785] Smith (n 153).
[786] ibid 15–17.
[787] Cribb, Macpherson and Borchgrevink (n 154).

is necessary to ensure that representation aligns with the needs of those who are being represented. Concerns around access to information become particularly important when the River is framed as belonging to all, and when there is a call for an approach to seek greater and broader engagement with environmental issues in order to ensure that we take collective responsibility.

The River Case exposes a structural problem that is equally visible within IEL, which is that participation and representation are frequently recognised as important components of the legal framework, but little regard is given to mechanisms to determine how effective these approaches are. The River Case is essentially a microcosm of IEL where participation and representation are recognised but safeguarding it in practice is fraught with difficulty. Navigating these tensions requires care but it is important that the exercise of this care is not used an argument against Indigenous governance. Rather, what this tension demonstrates is the problems that can arise where ideas are retrofitted into frameworks with which they fundamentally do not align. As Ryan notes, conversations about accountability should start with conversations around objectives and ensuring that everyone understands what the objectives are, and that they understand their role t in achieving these objectives.[788] It is also important to recognise the unfairness of expecting historically marginalised Indigenous communities whose approaches to non-human concerns have long been disregarded, to carry the burden of resolving environmental crises, and then to criticise them for not being sufficiently accountable to the very communities most responsible for the damage.

5.9.2. Safeguarding the silent participant

The issue of accountability is relevant for safeguarding the non-human. As outlined in Chapter 3 we are still developing ways of communicating with non-humans. In such an unsettled space, there is a real risk of co-option. As was noted in the animal advocate example cited earlier, the ‘voices’ of non-humans can be overtaken by those appointed to speak for them. Where a participant cannot self-advocate or contest their representation, it is essential to design safeguards - whether through transparent records, relationship-based accountability systems, a combination of both of these, or potentially something else. The issue raised here is not unique to the Whanganui

[788] Ryan (n 155).

River. Across IEL non-humans only appear indirectly, for example in impact assessment or conservation regimes. The River Case illustrates a potential structural problem in IEL more generally – that representation without accountability risks simply being a symbolic move that reinscribes new forms of exclusion.

5.9.3. Implications for IEL

This tension outlined in the River Case example is highly relevant to IEL and concerns around issues of accountability within this system. Should accountability rely solely on Western notions outlined in Aarhus such as transparency, reporting, access to information, or should accountability rather be grounded in a shared responsibility for the community and environment that we live within. The River Case demonstrates that Western expectations of accountability sit uneasily alongside governance systems rooted in Indigenous law. This is a difficult issue to confront, but it is precisely these uncomfortable conversations that the objective-setting process within the toolkit seeks to make possible. Dissensus and motivating ideals are particularly important here. Navigating such tensions does not require perfect alignment between worldviews, but rather a shared commitment to grappling with difference in good faith. While these ideals will not resolve all conflict, they can provide a common ethical thread that sustains a process when participants are working across divides.

5.10. Tempo and strategy: incrementalism as non-reformist reform

This research starts by acknowledging we need systemic change and new ways of thinking to address the environmental crises and the shortcoming of IEL. The River Case has demonstrated how change can be affected, but these observations are not without difficulty and there are two distinct issues that arise. The first is the length of time the River process has taken, and the second is that the River legislation is still situated within a deeply anthropocentric legal framework. Given the urgency of the environmental crisis, is this slow change insufficiently radical and too reformist to address the urgent issues of our time? This question is important, but it is perhaps too coarsely framed for the extent of the environmental crisis and the challenge faced.

Falling back on dualisms such as reform or revolution is not helpful and misses the nuanced transformations that are happening. As Salmond explains, referencing the changes occurring in New Zealand, ‘the legal process is being transformed by the

irruption of ancestral conceptions'.[789] This idea can be teased out by considering the scholarship of social theorist Gorz, as explored by Gruen.[790] Gorz considers an idea that moves beyond 'all or nothing strategies' what are termed 'non-reformist reforms'.[791] Gruen refers to Akbar who frames non-reformist reforms as changes that do more than refine existing systems, rather they disrupt the assumptions through which those systems sustain themselves. By advancing critique, shifting power from the centre, and allowing conditions for new forms of political imagination, these reforms create conditions for deeper structural transformation.[792] The River Case study does not fully align with all the characteristics described by Akbar, for example it shows power is still concentrated centrally, but it has, as Salmond notes above, shifted the framework and changed the language and ideas that are being used. It has also created space for New Zealand to challenge its historical record. This process is more than just a re-examining of the record itself; it is a deeper epistemic shift which has unsettled a Eurocentric legal narrative. This is shown, for example, in the Tribunal's willingness to engage Māori oral histories alongside archival materials and the incorporation of Māori cosmology into statute.

There are undoubtedly problems with the Tribunal process and what has followed. There are contradictions and ambiguities present in the outcomes. For example, the River was conferred with status as a living and indivisible being, but in practice it is still being divided up for the convenience of certain private property interests. As Byrne explains,

> '…this ambivalence may also be the Tribunal's history's greatest asset and redeeming feature. In the significance they attach to explicating Māori concepts and their attention to addressing Māori perspectives, Tribunal narratives demonstrate two important points about a historical methodology that relies on so-called 'rational' assumptions. First, they suggest that European and non-European ideas about the world can co-exist, and while they often undermine each other, the juxtaposition and contrast of the two is more than consensual

[789] Salmond citing Amiria Salmond - Salmond (n 47) 313.
[790] Gruen (n 412).
[791] ibid 254–255.
[792] ibid 256.

interpretations; and second, that a total reliance on Eurocentric worldviews and understandings is now inadequate in thinking about the past…'[793]

What the River Case reveals is that transformations in law can occur without fitting neatly into the binary of reform or revolution. Seen through the lens of non-reformist reform, the changes here have disrupted legal framings and embedded Māori concepts into law. While these shifts have not wholly decentralised power, they have altered the terrain in ways that can foster deeper change.

5.10.1. Implications for IEL

The tension between the 150-year arc of the case study and the immediate urgency of the environmental crisis poses a significant challenge for international environmental law. IEL is presently characterised by a bias towards quick solutions or market-based mechanisms.[794] However, as the non-reformist reform lens suggests, these fast-paced solutions often refine the existing anthropocentric system and do not disrupt its underlying assumptions.

For IEL, the case study presented in this thesis acts as a proof of concept to indicate that meaningful transformation requires a different temporal approach. By moving away from binaries of reform and revolution, IEL can begin to view incremental design changes, such as for incorporating relations approaches, as important seeds of change. These are not just administrative tweaks; they are shifts that gradually alter the legal terrain. In turn, these systemic changes make it increasingly difficult for the law to revert to extractive and anthropocentric logic. This suggests that the path to a multispecies IEL may not lie in a single global treaty/ a one off intervention[795], but rather in a series of iterative design shifts that slowly dismantle the dominant western legal approach. The case study shows that the law can be made porous enough to hold multiple worlds at once and this is a necessary precondition for any international legal system that seeks to address the environmental challenges we face. In this sense, the slow change seen in the River Case is not a failure of radicalism but rather a blueprint for a more durable form of institutional imagination.

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[793] Byrnes (n 527) 140.

[794] Robert Knox and David Whyte, 'Law's Quick Fix? Ecocide, Social Transformation and the Pitfalls of Criminalisation' [2025] Environmental Politics 1; William Boyd, 'The Poverty of Theory: Public Problems, Instrument Choice, and the Climate Emergency' (2021) 46 Columbia Journal of Environmental Law.

[795] For further discussion on this issue see section 5.5.1.

5.11. Beyond the Human: A proof of concept for IEL

To situate the findings explored above within the broader landscape of IEL, it is necessary to reflect on the current state of participation within this area of law. Contemporary IEL is at a procedural crossroads. Aarhus remains an important instrument as it clearly establishes the three pillars of environmental democracy of which participation is a foundational element.[796] The Aarhus model has exported this form of 'environmental democracy'[797] to a number of domestic fora, which has moved participation from a discretionary act of a State to a formal procedural entitlement.[798]

However, as recent scholarship has identified there is a persistent gap between these high-level commitments and their practical effectiveness.[799] At present participation in IEL still remains human-centred.[800] It assumes participants can communicate through written legal forms and administrative procedures.[801] It is procedurally reactive as it often occurs at late stages of decision-making, rather than during the initial agenda-setting.[802] While rights are articulated at an international level, the implementation is still largely left to domestic legal systems.[803] This is not in and of itself a problem, but it has been found that the implementation is often applied in a rigid manner that tends to foreclose more expansive or relational approaches.[804] The overriding concern is that a participation gap persists in IEL.[805] One of the reasons for this gap rests on the proceduralist focus of participation, that overlooks the importance of the design of the participatory process. This is where the design lens of the toolkit, as applied in the Whanganui River Case, really matters for IEL as it shows how participation is surface level. Where the legal architecture is inflexible and the objectives of the process are

[796] Sharman (n 222).
[797] Noting that there is concern about a recent weakening of some of the pillars of environmental governance as set out by Whittaker in relation to the UK - Sean Whittaker, 'Exploring a Right to Submit Environmental Information Under International Environmental Law' (2023) 35 Journal of Environmental Law 401.
[798] Sharman (n 222).
[799] Parsons and others (n 237).
[800] Emily Jones, 'No Future for Future Generations: Who Is International Environmental Law For?' (2025) 16 Journal of Human Rights and the Environment 4; du Toit and Kotzé (n 43).
[801] Vincent Chapaux, 'Non-Human Animals as Epistemic Subjects of International Law', vol 1 (1st edn, Routledge 2023). ;a review of how many participatory processes work confirms this for example Aarhus relies to a large degree on written communication
[802] Maria Lee, 'The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation' (2023) 86 Modern law review 756.
[803] du Toit and Kotzé (n 43).
[804] Lee (n 804).
[805] Sharman (n 222); Parsons and others (n 237).

determined, participation loses its meaning and runs the risk of devolving into a tool for managing dissent.

There is recognition of these concerns. As noted, the expansion of global animal law (GAL), the growing movement towards Rights of Nature (RoN) and legal personhood represent a significant normative shift. However, this case study sounds a note of caution for these movements by revealing a critical distinction between 'thin' and 'thick' recognition within these movements. 'Thin' recognition is where a system adopts the language of personhood, such as where particular rights are conferred or status granted. What the findings of this thesis show is that without a focus on participatory design, these efforts remain largely symbolic. The case study shows that legal personhood did not automatically dismantle the anthropocentric framework within which the River sits. The risk is that these 'thin' approaches may create forms of symbolic participation where human representatives speak for the non-human using the same legal frameworks and anthropocentric approaches (such as property-based approaches) that the toolkit has identified as barriers.

For IEL to avoid this trap, it must embrace 'thick' recognition which involves a shift from merely granting rights, to a redesign of the participatory architecture itself. 'Thick' recognition will require relational accountability to be intrinsic to the legal framework. In practice this demands, for example, human representatives to ensure their decision making is legally and spatially tethered to the non-humans they represent. This ensures that decision making is not conducted in abstraction. Ultimately all of this will require a profound ontological shift. A move from treating the non-human as a guest who granted access to a human system, to a model of co-constitution where the legal system is built to sustain the multispecies community as a whole.

It is acknowledged however, that one of the reasons participatory processes are currently so lacking is that they are often seen as a constraint on decision making, instead of being viewed as a source of insight or legitimacy. Where participation is framed as a hindrance as opposed to a benefit, states will remain reluctant to seek more meaningful participatory approaches.[806] The case study offers a counter

[806] An example of this can be seen in the UK where Sir Kier Starmer described those utilising the Court system to oppose planning applications for large infrastructure projects as 'nimbys and zealots gumming up the legal system', Michael Cross, 'Starmer Attacks "Nimbys and Zealots Gumming up the Legal System"' [2025] *The Law*

narrative to this, by showing that meaningful design creates durability. Whilst the move towards relational co-design is likely to take longer, the outcomes are likely to be more legitimate and ecologically sound. This is an example then of a non-reformist reform – an incremental change in design that fundamentally disrupts the anthropocentric underpinnings of the legal framework.

Ultimately, the application of the toolkit to the case study moves this thesis beyond a mere diagnosis of the participatory problems within IEL. This chapter has demonstrated that the participation gap in global environmental governance – typified for example by the Aarhus Conventions' reliance on thin procedural access - is not just an implementation failure. Rather, it is also a feature of a legal framework that was never built to hear the non-human. By surfacing the shortcomings of the legal architecture, considering how world views are filtered and identifying how relational accountability might be included in legal frameworks, this analysis demonstrates the difference between thin and thick legal recognition. This thesis does not dismiss the value in efforts to seek thin recognition such as through legal personhood, but it is to recognise that the true goal of transformation lies in what is done subsequently with these efforts, it lies in the thick redesign of the participatory spaces themselves.

The River Case serves as evidence that even within deeply anthropocentric systems, law can be made porous to relational worldviews. Having established this empirical foundation, the thesis now turns to its final chapter. Here, the research questions will be answered directly, moving from the specificities of the River to the broader, more uncomfortable reckoning required of IEL. Chapter 6 will consolidate these findings to argue that the future of environmental governance depends not on more rules, but on a fundamental redesign of the legal imagination. It requires a shift from managing resources to sustaining the multispecies communities in which we are entangled.

Society Gazette <https://www.lawgazette.co.uk/news/starmer-blasts-nimbys-and-zealots-gumming-up-the-legal-system/5122113.article>; 'Nimby Nation' (2025).

6. Chapter 6

6.1. Introduction

This thesis began with the concern that IEL is failing to effectively respond to accelerating ecological degradation. Although IEL has expanded significantly over the past fifty years into a substantial framework of law comprising treaties and institutions, environmental decline has accelerated.[807] This suggests that the discipline's shortcomings are not just a result of weak enforcement or institutional fragmentation.[808] Rather, this research has argued that the discipline's persistent failure is rooted in its Eurocentric and anthropocentric foundations, which structurally silence non-human perspectives.

By examining IEL's foundations and the barriers they produce, this thesis has explored how rethinking participation through a multispecies lens may move IEL toward forms of governance that are more responsive to the more-than-human world. The participation gap identified in this research does not simply describe the unequal access for marginalised groups. It points to a deeper structural limitation which is the legal system's inability to register the more-than-human as a meaningful participant. This thesis has demonstrated that if IEL is to be strengthened, then participation must shift from a procedural formality to a practice that recognises the multispecies communities in which humans are entangled.

This final chapter synthesises the findings of the previous chapters to answer the four research sub questions:

1. The Institutional Barrier: Why does IEL currently fail to respond to environmental crises, and how do its Eurocentric and anthropocentric foundations specifically block non-human participation?
2. The Diagnostic Tool: How might a multidimensional methodology be used to develop a 'multispecies toolkit' that can reveal how and why the law fails to recognise the non-human world?

[807] See section 1.1.
[808] Although these are undoubtedly concerns

3. The Case Study: What does a critical analysis of the Whanganui River Case using the multispecies toolkit, alongside archival and longitudinal research, reveal about the friction which is a consequence of recognising the River as a living, ancestral being (*Te Awa Tupua*) within a Western legal system?

4. Transformation: The New Zealand domestic system and international frameworks share a foundational anthropocentric and Eurocentric bias. How can the insights from the multispecies toolkit and the findings from the Whanganui case study, be used by scholars and practitioners to ensure that participation functions as a transformative practice rather than symbolic procedural reform?

Taking these questions in turn, the following section details how the research has addressed each:

6.1.1. The Institutional Barrier

To explain why IEL continues to respond inadequately to environmental crises, it is necessary to examine the discipline's intellectual and historical foundations. This research argues that IEL silence the non-human because it is built upon Eurocentric and anthropocentric principles that structurally preclude non-human participation.

The exclusion of non-humans from legal and political consideration is rooted in the concept of the ‘subject’. If one traces this concept from Aristotle through the Enlightenment it becomes apparent that the capacity for *logos*[809] became the primary threshold for political inclusion. Enlightenment philosophers, most notably John Locke, position the capacity to reason as the basis of the social contract. Within this framework only those capable of demonstrating rationality were recognised as *subjects* of justice, entitled to property ownership and legal redress.

Crucially, this threshold was never applied consistently, it historically disenfranchised women, racial minorities, and Indigenous people by casting them as irrational. [810] These legacies persist. The same conceptual barriers That once excluded marginalised human communities continue to block non-humans from the frame of legal consideration. Modern IEL remains structured by Enlightenment binaries of

[809] The capacity for rational speech and the articulation of moral concepts
[810] Riley (n 40).

self/other, subject/object, and nature/culture.[811] These dualisms have organised the world into hierarchies that have positioned white European men at the apex of authority while relegating nature to a secondary and subordinate status.[812] In this worldview nature acquires value primarily when brought under human control and exploited for human purposes.

This logic also underpinned colonial expansion through the doctrine of *terra nullius* (no one's land), which erased Indigenous relationships with land grounded in kinship, rather than ownership.[813] The anthropocentric and Eurocentric assumptions embedded in this history continue to shape contemporary IEL. They are particularly visible in early IEL instruments, such as the 1972 Stockholm Declaration, which separates humanity from the 'human environment' and proclaims that 'of all things in the world, people are the most precious'.[814] Although less explicit today, these human centred assumptions persist within modern IEL frameworks. One of the most significant barriers identified in this research is the disconnect between IEL's procedural aspirations and its actual capacity to hear marginalised voices, particularly those of the more-than-human world. The Aarhus Convention is widely considered best practice for environmental democracy, as it formalises the three pillars of access to information, public participation, and access to justice. However, these pillars are often constructed within a Western legal mould that privileges written communication, technical expertise and formal administrative procedures.

These dynamics are also visible in the earlier phases of the River Case, where the legal framework strongly shaped what participation could look like, often severing the process from the landscape and the community. More broadly, the Convention model exports a form of participation that is procedurally reactive, occurring at the late stages of decision making rather than during the initial agenda setting. This thesis argues therefore that IEL currently suffers from procedural bias that confuses symbolic access with meaningful influence. If instruments, such as the Aarhus Convention, are to realise their transformative potential, then participation must move beyond the focus

[811] Adams and Donovan (n 176) 1–2; Kheel (n 40); De Lucia (n 41) 91; powell and Menendian (n 41); Natarajan and Khoday (n 10).
[812] Kheel (n 40).
[813] Cardea-Salzmann (n 47); Albrecht (n 47); Mickelson (n 47).
[814] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).

on rigid procedures, towards more relational forms of co-design, such as those that emerged during the River's negotiation phase.

6.1.2. The Diagnostic Tool

The second sub question examines how a multidimensional methodology can be operationalised into a multispecies participation toolkit capable of revealing where, and why, current law fails to recognise the more-than-human world. This toolkit aims to serve as an analytic framework to interrogate how participation is designed, who it serves, and who it excludes.

The methodology in this thesis shifts from intersectionality to multidimensionality.[815] While intersectionality identifies how power structures overlap to marginalise groups based on characteristics like gender and race; multidimensionality recognises that forms of oppression may be layered but not always connected. Multi dimensionality foregrounds the need for thick[816], context sensitive analysis of how layered structures of power operate within specific institutional settings. This emphasis is essential for the multispecies toolkit, because it is concerned not only with who is excluded but with how different legal frameworks register, translate, or silence forms of life. By treating species as a distinct category of power and conducting a 'thick analysis of the impacts of this, the toolkit is better equipped to expose the structural conditions under which non-human participation is constrained within IEL.

In this thesis 'thin' recognition refers to superficial legal status, where a system adopts the language and gestures of inclusion – such as the conferral of personhood – without altering the underlying anthropocentric legal framework. Within this model a river may be formally designated as a 'person', yet the participatory arena remains a Western-centric legal space, such as a courtroom that is governed by property-based logic and rigid administrative procedures. In contrast, 'thick' recognition requires a detailed and comprehensive description of the context within which systems of power arise. It demands that the law looks beyond labels such as 'person/ personhood' to engage with the non-human. A 'thick' analysis surfaces the blind spots of IEL, identifying those areas where the law is structurally unable to see non-humans as anything other than

[815] Hutchinson (n 74).

[816] The terms 'thick' and 'thin' draws on the work of Clifford Geertz - a thick description proves a rich, contextual account, whereas a thin description is superficial and does not have regard to contextual matters - Geertz (n 93).

property or resource. This approach shifts the purpose of participatory process from discrete procedural outcomes to the ongoing ethical process of remaining in relation. It demands that legal practitioners look past the procedural checkbox of participation, to instead examine how power structures work to impact specific multi-species communities in specific contexts.

To make the toolkit's diagnostic and generative functions stand out, the toolkit reinterprets the best practice principles of human participation through an ecological and relational lens:

1. Scope: the toolkit moves away from human standing toward the 'all affected interest' principle. This approach identifies multispecies communities as potential participants based on their entanglement in the ecosystem rather than their cognitive similarity to humans.
2. Objectives: the toolkit rejects the focus on consensus as the default participatory endpoint, recognising that consensus can obscure non-human interests. Instead, it embraces the objective of participation initially focussing on sustaining relationships, rather than being entirely directed towards achieving specific outcomes.
3. Influence: the toolkit assesses whether participants can shape how problems are framed and addressed. It distinguishes between consultative approaches (thin access) and co-design (thick influence).
4. Place: the toolkit recognises that participatory spaces are never neutral. Spaces like courtrooms are infused with power relations that can generate anxiety, constraint or adaptive behaviour in marginalised actors. Meaningful participation requires an awareness of the impacts of space on participants and calls for a movement towards the practice of noticing. Noticing requires embodied, situated attention to the rhythms of place and its inhabitants.
5. Temporality: the toolkit challenges linear, human-centric timelines, such as project deadlines or election cycles. The toolkit proposes that inclusive participation must accommodate the multiple temporalities through which non-human processes unfold.

The diagnostic function of the toolkit reveals how legal concepts and processes such as standing, and standing orders, structure the terms of engagement to exclude the non-human. The generative function of the toolkit offers a road map for re-imagining participatory processes as sites of encounter between different worldviews. The toolkit, therefore, does not just ask who is included, but also asks how that inclusion is practised.

6.1.3. The Case Study

The application of the multi-species toolkit to the Whanganui River Case provides an empirical foundation for rethinking IEL. Rather than viewing the 2017 legislation as an endpoint, this research approaches the case as 150-year arc of transformation. This longitudinal view reveals the 'productive friction' that occurs when a relational worldview interacts with a Western legal system. The case study revealed the following key findings:

6.1.3.1. The retrofitting trap versus the potential of co-design

A central finding of the case study is that participation is shaped by the legal architecture in which it occurs. The analysis revealed two distinct approaches to inclusion that impact on the quality of the participatory process:

(1) The Retrofitting Trap: During the Waitangi Tribunal phase, various procedural innovations were implemented, including the holding of hearings on marae. However, innovations were retrofitted into an existing Western legal framework. The persistence of adversarial practises, such as cross examination within the meeting house- a space intended for peace- illustrates a spatial blind spot. In this context Western legal logic maintained dominance over Indigenous protocols, effectively forcing relational concepts into a non-relational mould.

(2) Co-design: In contrast, the negotiation phase was co-designed by the parties. This flexibility allowed for the emergence of 'motivating ideals' that disrupted the 'sensible givens' of Western property law. By articulating the principle 'Ko au te awa, ko te awa ko au/ I am the river, the river is me' the parties opened conceptual space to recognise the River as a subject rather than a resource.

The contrast between retrofitting and co-design reinforces that participation is never procedurally neutral. How participatory processes are structured, and who

controls that structuring, goes to the heart of what those processes are capable of producing.

6.1.3.2. Mediated representation

While the Te Awa Tupua Act 2017 is celebrated for conferring legal personhood on the River, the case study reveals that this recognition remains relatively 'thin'. The River's voice continues to be mediated through human guardians. It is important to acknowledge that these guardians are of Māori descent and operate within a relational worldview. However, within the statutory framework the River's interests remain channelled through a governance structure that is embedded within an anthropocentric legal order. This highlights a structural problem: if the law is not yet structured to listen to the non-human without human involvement, then representation risks becoming a domination contract. Consequently, the River Case illustrates that legal personhood should not be understood as an endpoint, but an interim measure that must be approached cautiously. Without a corresponding 'thick' redesign of participatory architecture, representational models risk reproducing the very hierarchies they seek to unsettle. Meaningful multi-species participation, therefore, requires not only formal recognition, but the creation of participatory conditions in which non-human presence can be more directly registered within legal processes.

6.1.3.3. Challenging the sensible givens

A critical finding from the application of the toolkit to the Whanganui settlement is the role of 'sensible givens' in predetermining legal outcomes. An example of this can be seen in IEL where the principle of sustainable development functions as a primary organising concept.[817] While presented as a neutral balance between growth and protection, it embeds an anthropocentric bias that treats nature as a resource to be managed for future human needs. More importantly for present purposes, it functions within IEL as 'sensible given' that pre-structures how environmental problems are framed and addressed.

The River Case is instructive here because transformation only became possible when comparable 'sensible givens' within English property law were unsettled. When the objectives of the River dispute shifted from resource management to mana, it disrupted the underlying anthropocentric logic that dominated the law. This

[817]See section 2.5.2. for discussion on this

demonstrates how IEL's current structing frameworks constrain the boundaries of the legal imagination. If IEL is to become genuinely transformative, then its organising 'sensible givens', such as sustainable development, must be open to contestation.

6.1.3.4. Productive friction and non-reformist reforms

The River Case study identifies three Interrelated insights into the relationship between participatory design and multi species inclusion. First is that context is determinative. The guarantee of the right to participation does not in itself, secure meaningful influence where the surrounding legal environment continues to constrain who can speak, and on what terms. The second is that the trajectory of participatory expansion is not linear. The study demonstrates that advances in inclusion do not unfold in a steady way but instead ebb and flow in response to specific political moments, legal developments, and broader social issues. The third is that these developments are best understood through the lens of non-reformist reforms. The incremental shifts observed in the River Case have not immediately displaced existing legal orthodoxy. Rather, they operated as a wedge within them. They have unsettled assumptions about matters such as ownership, authority, and legal personality to create space for more relational approaches to enter the legal frame. The friction produced by these encounters is productive because it renders visible the limits of the existing framework, while at the same time identifying the precise sites at which legal transformation could be most effectively pursued.

6.1.4. Transformation – the path forward

This analysis leads to one of the more uncomfortable implications of this research – which is that law may not yet be capable of recognising the more-than-human world Without a prior period of human reckoning regarding the inclusion of non-humans as legal subjects. Given the urgency of the environmental crisis and the current fractured international political environment, this is troubling.

There are, however, grounds for cautious optimism. These debates are happening already, and have been for some time, are an important part of the broader transformation process. Personhood for rivers is an imperfect device, but it disrupts the certainty with which law has long assumed its subject as exclusively human. In doing so, it starts the process of bringing the *other* into view.

Indigenous frameworks play a critical role in this shift They draw the law's attention to other living legal traditions that have long operated outside the dominant Western models. They demonstrate that law is not universally built on extraction, domination, and abstraction, and they show that alternative approaches toward the more-than-human world are possible. In this way Indigenous traditions also remind us that IEL's foundations are historic and contingent, not immutable.

As ecological crises intensify, the limits of current governance models become increasingly visible. Climate change, mass extinction, environmental degradation are not simply failures of policy; they reflect deeper failures of imagination. Participation emerges as one of the few spaces within IEL where different approaches can be worked out in practice and where assumptions about who or what matters can be asked. It is where alternative ways of being in the world can be explored. This does not mean that participation alone will transform IEL. Nor does it mean that expanded participation will automatically lead to better outcomes, but it offers a promising entry point for rethinking environmental governance in a way that can better address the environmental crises.

Having established the foundations for multi-species participation, the question remains: what should practitioners, legal scholars and activists do with these findings? This thesis offers the multi-species toolkit as a way to audit environmental government governance. This audit serves as a mechanism to evaluate both existing instruments, like the Aarhus convention, and to emerging fields such as Global Animal Law and the Rights of Nature movement.

One of the primary recommended applications is to use the toolkit prospectively. The toolkit can be used to interrogate the 'sensible givens' of proposed legislation before institutional agendas become fixed. Currently, international agendas are often set too narrowly at the outset, predetermining outcomes that prioritise concepts such as economic growth. A multi-species audit would require practitioners to ask questions such as whose knowledge is informing these objectives? Does the temporality of the agreement match the ecology of the place and issue? Practically, the toolkit can be used to inform current efforts to engage the wider New Zealand public with the Whanganui River, providing a guide to assist community interactions with the River. Beyond this the toolkit can be applied to interrogate domestic legal mechanisms such

as Biodiversity Net Gain (BNG)[818] to expose how using simple metrics to address biodiversity loss fails to capture ecological relationality. To can also provide a scaffold to amend the BNG processes to be more attuned to the more-than-human inhabitants of any proposed development site. It could also provide a framework to expand experimental practices, for instance by integrating with restorative justice approaches for environmental harm.[819]

Importantly, the deployment of the multispecies toolkit must not wait for formal institutional invitation. If the environmental crisis is to be taken seriously, the interrogation of participatory design and its underlying 'sensible givens' must occur wherever opportunities arise. The toolkit can therefore be mobilised across multiple sites: for example, in planning objections, parliamentary engagement, NGO advocacy, and within both state and non-state forums. Indeed, waiting for permission to participate on the system's own terms risks reproducing the very exclusions this thesis has sought to expose. Participatory frameworks often determine in advance when, where, and how challenges may be voiced. Where those frameworks are themselves part of the problem, strict adherence to their procedural boundaries may simply reinforce existing limits.

Challenging anthropocentric legal architectures therefore may require strategic engagement, that does not align with the formats anticipated by the system. Meaningful shifts in legal consciousness are rarely granted by institutional structures, they are forged through partial, contested, and uneven interventions – in other words through struggle. From this perspective, the objective is not to wait for the right moment to agitate for change, but rather to begin now within the imperfect spaces that already exist. This 'struggle' is also not a discrete event, but an ongoing ethical commitment to remain in relation. This process may start modestly – it may start with simply asking questions that unsettle the 'sensible givens' and creating conditions in which participants can feel comfortable to grapple with questions such as 'what is multispecies communication' and 'what does it mean to be part of a multispecies

[818] Environment Act 2021.
[819] Such as those explored in European Forum For Restorative Justice, 'RESTORATIVE JUSTICE APPROACHES FOR ENVIRONMENTAL HARM PRACTICE GUIDE'.

community'. While this research aims to challenge the anthropocentric focus of IEL, it is acknowledged that this thesis has limitations.

6.2. Scope and Limitations

This research has several limitations that need to be acknowledged. First, the multispecies toolkit has been developed and applied primarily through a single longitudinal case study. While the river case provides a rich insight into the interaction between relational and Western legal systems, further application across different jurisdictions and institutions is needed. Second, the toolkit is designed as an analytic and generative device, not a prescriptive model. It is intended to reveal structural blind spots and expand participatory possibilities. Finally, this thesis identifies structural limits within the law to register non-human interests, but this research does not claim to resolve those tensions. Rather it draws attention to these shortcomings and through this identifies places where the law might expand to include non-humans

6.3. Original contribution

This thesis advances an original account of multi-species participation that moves beyond existing legal and political theory in three ways.

- The multi-species participation toolkit

The primary contribution of this research is the development of the multi-species participation toolkit. Unlike existing approaches such as GAL or RoN which often default to human-centric representational models, this toolkit provides a novel diagnostic and generative framework. It operationalises multidimensionality to trace how legal power is distributed across social, cultural and ecological realms. By reinterpreting human participation principles through a multi-species lens the toolkit offers a practical mechanism to identify where the law is currently closed to non-human voices and identifiers opportunities for co-creation.

- Symbolic access to thick recognition

A second contribution lies in the theoretical distinction this research draws between 'thin' procedural recognition and 'thick' relation of accountability. This thesis demonstrates that legal innovations, such as the conferral of personhood, risk remaining purely symbolic unless accompanied by a redesign of participatory architecture. Through the application of the toolkit to the River Case this research

substantiates the claim that transformation occurs not through the ‘quick win’ of isolated legislation, but through the slow work of co-designing legal spaces that can receive non-human forms of expression as legitimate claims.

- The introduction of the concept of non reformist reforms

Finally, this research contributes a unique longitudinal analysis of the River claims as a proof of concept for IEL. By framing at the 150-year arc of the case not as a template for replication, but as a site of productive friction, this thesis demonstrates how law can be made incrementally more porous to relational worldviews. It introduces the concept of non-reformist reforms into the IEL discourse, advocating for incremental design shifts that act as a wedge within existing legal orthodoxy that create openings for other approaches to enter the frame This moves the debate in IEL beyond the binaries of reform versus revolution and offers a blueprint for more durable form of institutional transformation.

6.4. Conclusion

The success of IEL will be shaped by how the law learns to listen, and to whom. Whether law can learn to register non-human suffering as harm, non-human presence as participation, and non-human life as worthy of care, remains an open question. The case study seems to gesture towards the law’s capacity to do this- but this thesis does not claim to answer this with a resounding yes.

Any meaningful transformation must begin with a clear account of present conditions. - the world in which IEL operates is profoundly damaged. No framework will undo that harm; no legal innovation will restore what has already been lost. Acknowledging the scope of the problems is important, so too is recognising that IEL was not built for this kind of work. IEL emerged alongside and is embedded within projects of extraction and colonisation – those histories are part of its structure. That it might also become a site of ecological care is therefore neither obvious nor guaranteed. But history demonstrates that law is not static - it changes first through struggle. The recognition of Indigenous rights, the emergence of human rights law, and the slow expansion of environmental protection all attest to the fact that what once seemed impossible is not, and multispecies participation may one day appear similarly unremarkable.

For now the task is more modest, but no less urgent: to refuse further multispecies erasure within the law; to resist framing the environmental crisis as a technical problem, rather than a moral one; to reject the fiction that humanity is separate from the world it inhabits; to refuse the comfort of abstraction, and instead attend to particular lives, places, and relationships through which ecological responsibility must ultimately be enacted. Addressing the ecological crisis in this way, is not just about institutional or participatory design, it is an ongoing ethical practice of attending to others in a shared world.

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