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When a River Becomes a Person

MATTHIAS KRAMM
Ethics Institute, Utrecht University, Utrecht, Netherlands

ABSTRACT *In March 2017, the Whanganui River in Aotearoa New Zealand was the first river to officially receive the status of a legal person. This legal personhood is based on the ontological understanding of the river as an indivisible and living whole and as the spiritual ancestor of the Whanganui Iwi (a Māori tribe). In this paper, I analyse the Te Awa Tupua Act in which the Whanganui River is declared a legal person and suggest to supplement the document with a cross-cultural account of the Whanganui River's wellbeing and with two normative principles that can help to effectively protect the river. First, I distinguish between a pre-political, a legal, and an institutional level within the Te Awa Tupua Act. I then identify the normative issues at stake in conceptualising and protecting the river's wellbeing. Subsequently, I discuss how the capability approach would need to be modified in order to incorporate the Whanganui River's wellbeing in terms of functionings. In the final section, I suggest two duties that could supplement the normative framework of the Te Awa Tupua Act. The paper concludes with a policy recommendation.*

KEYWORDS: environmental ethics, Māori philosophy, capability approach, personhood, rights of nature, Whanganui River

1. Introduction

In March 2017, the Whanganui River in Aotearoa New Zealand was the first river to officially be granted the status of a legal person. This declaration was the result of a legal battle, ongoing for more than 150 years, between the Whanganui Iwi (a Māori tribe) and the New Zealand Government. The dispute began in the second half of the nineteenth century when certain fishing rights of the Whanganui Iwi were challenged by the government. It ended in 2014 when both sides signed the Whanganui River Deed of Settlement,[1] which was confirmed and superseded by the Te Awa Tupua Act in 2017. The Te Awa Tupua Act implements the provisions of the Whanganui River Deed of Settlement and constitutes a milestone by settling the historical claims of the Whanganui Iwi with regard to the Whanganui River. The document assigns to the river the 'rights, powers, duties, and liabilities of a legal person' and declares two guardians responsible for maintaining the river's 'health and well-being' (New Zealand Ministry of Justice 2017, 15 and 88). One of those guardians is a

Correspondence Address. Ethics Institute, Department of Philosophy and Religious Studies, Faculty of Humanities, Utrecht University, Janskerkhof 13, Utrecht 3512 BL, Netherlands. Email: m.kramm@uu.nl

representative of the New Zealand Government, while the other is a representative of the Whanganui Iwi, which, by virtue of its genealogical origins, exercises the customary rights and responsibilities in relation to the Whanganui River (New Zealand Ministry of Justice 2017, 8).

The Te Awa Tupua Act establishes the office Te Pou Tupua, which comprises the two guardians. They are supported by an advisory group, Te Karewao, and a strategy group, Te Kōpuka (New Zealand Ministry of Justice 2017, 27–33). As the Act focuses primarily on legal and institutional questions, it does not provide a detailed account of the normative framework upon which the guardians should rely. It specifies merely that they should speak and act on behalf of the river and promote and protect its health and wellbeing (New Zealand Ministry of Justice 2017, 18–20). The document itself, then, contains no criteria to help the guardians come to informed decisions or to provide a basis upon which they could be held accountable for those decisions.[2]

This omission could become a problem, especially if seen in the light of two limitations of the document. First, although the Whanganui River has been declared a legal person, water is not included in its rights of ownership, because water cannot be owned according to the common law of New Zealand (Collins and Esterling 2019, 202). Hence, the consent of the guardians is not strictly required for the use of river water. Second, there are existing property rights to parts of the riverbed of the Whanganui River that are preserved in the Te Awa Tupua Act, including private property rights or the property rights of state-owned enterprises and mixed ownership model companies (Collins and Esterling 2019, 203). These property rights are held by companies whose commercial activities involve, amongst others, a hydroelectricity dam, farming irrigation, fishing, and tourism. Consequently, the guardians have to defend the river's legal rights and interests against the existing rights and interests of these companies.

While the relationship between the Whanganui Iwi and the Whanganui River has had a profound effect on the identity of the iwi and their understanding of the river's wellbeing, which has even found its expression in Māori language (Ruru 2018, 216), such a relationship or understanding is missing on the part of the New Zealand Government. In order to bolster the protection of the Whanganui River, I would therefore like to propose two supplements to the 2017 Te Awa Tupua Act. First, the New Zealand Government needs to develop a cross-cultural account of the 'wellbeing' of the river based on Māori philosophy for which it can be held accountable. I propose that such a cross-cultural understanding of the river's wellbeing can be obtained by employing a modified version of the capability approach and by framing the wellbeing of the Whanganui River in terms of functionings. Second, I would like to suggest two normative principles that could assist the two guardians in their deliberation and support them to effectively protect the river's wellbeing.

As not all of my readers will be familiar with the Māori concepts underpinning the Te Awa Tupua Act, I introduce some Māori concepts before I incorporate them in my argument. To do that, I rely on the work of Māori scholars. In this paper, I take my starting point from the Māori notion of *whakapapa*, which can be understood as 'connectedness'. Within a *whakapapa* framework, each human being is born into a network of relationships that comprises living human beings, but also human and non-human ancestors (*tupuna*). Because I take *whakapapa* as my starting point, I do not develop an explicit defence of the claim that the Whanganui River should be assigned intrinsic value. Instead, I rely on a *whakapapa* framework, in which certain ecosystems (e.g., rivers, hills, mountains) are ancestors and therefore intrinsically valuable.

Methodologically, I follow what Jonathan Wolff has dubbed 'engaged political philosophy' (Wolff 2019). This methodology begins with the analysis of a specific public debate, identifies and evaluates possible solutions, and eventually makes policy

recommendations. Its starting point is current political practice, and its aim is to criticise and improve that practice. First, I analyse the Te Awa Tupua Act in which the Whanganui River is declared a legal person and distinguish between the pre-political, legal, and institutional levels within the document. Second, I identify the normative issues at stake in conceptualising and protecting the river's wellbeing. In section 4, I discuss how the capability approach would need to be modified in order to incorporate the Whanganui River as a person with intrinsic value. In section 5, I suggest two duties that could supplement the normative framework of the Te Awa Tupua Act. In the conclusion, I bring together the insights from the preceding sections and end with a policy recommendation.

2. The Three Levels of the Te Awa Tupua Act

Māori settled in Aotearoa New Zealand in the 13th century. The British began to colonise the country only at the beginning of the nineteenth century. In February 1840, the Treaty of Waitangi was signed by about 40 Māori chiefs. According to the British colonisers, by this act the Māori ceded their sovereignty to the British Crown. But the Māori translation of the treaty stated that their self-determination remained intact and granted a lesser degree of authority to the Crown than the British claimed (Kawharu 1989, 319; Jackson 2000; Hsiao 2012). In the aftermath, conflicts erupted about the interpretation of the treaty, and, when the Māori became less interested in selling land, the British confiscated territory or purchased it under dubious circumstances. In 1975, the Waitangi Tribunal was established to investigate grievances and land claims. While the Tribunal's jurisdiction was first limited to the period from 1975 onwards, it was later extended back to 1840. In 1990, one of the Whanganui tribes brought a claim to assert rights of ownership and control of the Whanganui River. This claim was recognised by the Tribunal. In 2014, both sides signed the Whanganui River Claims Settlement, which was confirmed and superseded by the Te Awa Tupua Act in 2017.

The Whanganui River was not the first ecosystem in New Zealand to attain the status of legal personhood. In 2014, Te Urewera (previously a National Park) was declared a legal entity with 'all the rights, powers, duties, and liabilities of a legal person' (New Zealand Department of Conservation 2014, 11). In both cases, assigning legal personhood was not merely a legal device but was accompanied by an acknowledgement of the Māori understanding of nature. Within a 'Western' conceptual framework, conservation usually consists in demarcating a certain territory and exempting it from human use. But with respect to Te Urewera and the Whanganui River, the New Zealand Government adopted a Māori conception of nature conservation that is compatible with a restricted form of human use (Strack 2017, 11).

In the case of the Te Awa Tupua Act, we can distinguish between a pre-political, a legal, and an institutional level in the document. At the pre-political level, the river is respected as a living being with intrinsic value. According to the Whanganui Iwi, the river is an indivisible and living whole, referred to as *Te Awa Tupua* (New Zealand Ministry of Justice 2017, 12–15). *Te Awa Tupua* encompasses the natural environment of the river and the interrelationship of all people within it (Barraclough 2013). At the legal level, the river has been declared a legal person with rights and duties. Legal personhood is a concept embedded within a liberal framework and only loosely connected to the Māori understanding of the river as the spiritual ancestor of the Whanganui Iwi. At the institutional level, the solution has been a co-management system of protection. In the Te Awa Tupua Act, two guardians—one from the Whanganui Iwi and one from the Government – are assigned the task of defending the river's interests (Charpleix 2018).

How do these three levels relate to one another? The pre-political level is based on Māori philosophy, in which the Whanganui River or *Te Awa Tupua* is considered an ancestor (*tupuna*) of the Whanganui Iwi. The relationship to ancestors includes reciprocal obligations and is maintained by mutual giving and receiving.[3] The legal level, however, employs a legal notion of personhood that is based on a liberal framework. Legal personhood does not emerge from existing relationships, but is assigned to an entity in order to confer rights and duties upon it. One example is corporate personhood. The Te Awa Tupua Act provides an implicit justification for the transition from a Māori understanding of personhood to legal personhood: it describes the river as 'a spiritual and physical entity' that sustains the life within and around it and the wellbeing of the Whanganui Iwi (New Zealand Ministry of Justice 2017, 13a). Consequently, the ancestor is reframed as a spiritual and physical agent and the reciprocal obligations from the pre-political level are supplemented with formal rights and duties at the legal level.[4] At the institutional level, the river is to be represented by the office of Te Pou Tupua, which consists of two guardians who defend the river's rights and interests and promote and protect the river's health and wellbeing. This institutional solution builds partly on the liberal understanding of legal personhood and partly on the Māori understanding of reciprocal obligations. The river is treated as a living being and legal person that cannot express or defend its own interests and rights and is therefore dependent on proxies. As it is difficult to delimit an ecosystem in a non-arbitrary way (Cripps 2010, 12–13; Garcia and Newman 2016, 172–75), the document follows the Whanganui Iwi in identifying the river geographically as leading from the mountains to the sea and by its relationship with the tribes and sub-tribes that surround it. While the legal level supplements the pre-political level with a legal notion of personhood, the institutional level builds upon the legal and the pre-political levels in order to incorporate both the Māori perspective and the liberal perspective into its treatment of the river as a person with interests and rights.

3. Conceptualising and Protecting the Wellbeing of the Whanganui River

In order to develop two normative supplements to the Te Awa Tupua Act that could provide better protection of the river's wellbeing, I intend to strengthen the link between the pre-political and the institutional level. The institutional level integrates the Māori perspective by referring to the Whanganui River as *Te Awa Tupua* and by appointing two guardians to take care of it. Furthermore, the Te Awa Tupua Act acknowledges Māori customs and values (*tikanga Māori*) by recognising the river as a legal person and by establishing a system of co-governance and co-management for the river (New Zealand Ministry of Justice 2017, 69). It also incorporates to a certain extent the Māori notion of *whakapapa* with its emphasis on intrinsic values that 'represent the essence of Te Awa Tupua' (New Zealand Ministry of Justice 2017, 13).

The two supplements that I would like to propose concern the normative aspect of the Māori notion of *whakapapa*. Based on Māori philosophy, a cross-cultural account of the river's wellbeing could be constructed for which the New Zealand Government could be held accountable. In addition, two normative principles could be introduced in order to assist the two guardians in their deliberation.

However, there are a number of differences between a 'Western' understanding of nature and a Māori understanding of nature that I have to take into account in developing these two proposals.[5] According to Māori philosophy, the Whanganui River is important not only because it sustains a community economically. To the extent that the culture and political structure of the community has developed in response to the river, it also forms part of the community's identity (Kawharu 2010, 1). According to Krushil Watene, the relationship

between human beings and nature gives rise to certain trustee obligations 'to protect, enhance, and conserve' nature (Watene 2016, 292). Nature is not a substitutable resource with a specific set of functions that could possibly be replaced by other resources that fulfil the same set of functions. For example, a specific river that ceases to provide fresh water cannot simply be replaced by importing fresh water from abroad. If the river is dead, it has not merely ceased to fulfil a certain function. It is above all lost as a living being to which human beings can relate. As a partner within a relationship, nature cannot be substituted for but is valuable for its own sake.

According to Māori philosophy, the Whanganui River must be considered an ancestor, one with whom other persons can build relationships and to whom they owe certain duties. Yet we cannot apply to nature the criteria of personhood that are commonly discussed in contemporary Anglo-American philosophy, such as rationality and self-consciousness (Singer 1993, 87). Assigning personhood to non-human animals can be justified by referring to them as conscious and self-conscious living beings who act intentionally, with agency, and communicate intelligently and deliberately (Graham 2017, 187). But in the case of an ecosystem like a river it is much more difficult to ascribe to it consciousness, intentionality, or agency, as it is a balanced system of life that consists of many parts and components (Regan 1992, 171). To claim that this system can be viewed as a single conscious agent would risk belying the dynamic interconnectedness of these various parts. Therefore, the most promising strategy is to abstain from defining a fixed set of criteria for personhood and rely instead on the Māori notion of ancestry. In regarding the Whanganui River as their ancestor, the Māori relate to it in the same way as they relate to a person. Personhood is thus not interpreted in terms of the necessary and sufficient conditions for an entity to be assigned personhood, but in terms of the network of relationships in which it is embedded.

The first supplement that I would like to propose aims at providing a cross-cultural account of the Whanganui River's wellbeing for which the New Zealand Government could be held accountable. A good candidate for a theory with which to conceptualise the wellbeing of an ecosystem from an Indigenous point of view is the capability approach. Binder and Binder (2016, 304–5) emphasise the ability of this approach to integrate Indigenous knowledge, Indigenous values, and the Indigenous quest for self-determination. Yet there remain certain tensions between Indigenous philosophies and the capability approach, specifically in terms of the role of culture for development; the role of communities, relationships, and collective capabilities; and the role of nature (Schlosberg and Carruthers 2010). Erika Bockstael and Krushil Watene recommend, therefore, 'full and cross-disciplinary conversations' (2016, 268) between capability scholars, Indigenous scholars, and Indigenous communities. Such a cross-disciplinary conversation will be necessary, also, if we want to explore how we can use the capability approach to strengthen the protection of the Whanganui River. In section 4, I demonstrate how the wellbeing of the Whanganui River can be conceptualised in terms of functionings. When it is conceptualised in this way, it becomes easier to distinguish cases in which the river's wellbeing is irreversibly harmed from cases in which the harm is transitory or reversible. If functionings can be restored, the harm is reversible, but if they are irrevocably undermined, the harm has become irreversible. In light of such a distinction it becomes possible to develop clearer criteria for the guardians.

Extending the capability approach to include ecosystems like rivers is not uncontroversial. Amartya Sen's work on the capability approach has focused mainly on human beings and the promotion of freedom as 'the primary end and as the principal means of development' (Sen 2001, xii). Yet from an anthropocentric, freedom-based perspective, nature can only be appreciated as an instrumental value that enhances human freedom. Martha

Nussbaum, who bases her capability theory on the notion of dignity, has suggested that non-human animals should be entitled to a range of capabilities and in particular to those that are 'essential to a flourishing life, a life worthy of the dignity of each creature' (Nussbaum 2007, 393). But in Nussbaum's theory, too, the value of nature remains secondary to human and non-human dignity. Neither Sen nor Nussbaum provides the conceptual resources to apply the concept of freedom or dignity to ecosystems. In the conceptual frameworks of both thinkers, ecosystems can form part of the capabilities or functionings of other agents, but cannot have capabilities or functionings of their own. In his critique of Nussbaum's capability theory, David Schlosberg has claimed that we cannot talk about the flourishing of animals without reference to the environment. He therefore suggests treating ecosystems as 'living entities with their own integrity' (Schlosberg 2007, 148) and assigning capabilities to them.[6]

With this paper, I do not intend to contribute to the discussion of whether the capability approach should be extended to ecosystems. Instead, I presuppose a Māori understanding of ecosystems and attempt to translate this understanding into a capability framework. My aim is not to revise the capability approach, but rather to use its resources in order to suggest a way of conceptualising the Whanganui River's wellbeing and to develop a cross-cultural account of the river's wellbeing for which the New Zealand Government could be held accountable. The Māori do not merely value ecosystems because of their contribution to the flourishing of human beings or animals. They rather regard them as ancestors (*tupuna*) who are intrinsically valuable. Hence, ecosystems should not merely form part of the capabilities or functionings of other living beings, but have their own functionings. In that case, functionings are no longer restricted to human agents or non-human animals, but can also be assigned to rivers, hills, and mountains. I discuss a Māori perspective on capabilities and functionings in section 4.

The second supplement that I would like to propose concerns the introduction of two normative principles that can guarantee effective protection of the wellbeing of the Whanganui River. These two principles could, on the one hand, guide the action of the two guardians and help them to fulfil their role in defending the river's interests and wellbeing. On the other hand, they could also be useful for holding the guardians accountable and for making their judgements more transparent. These normative principles build upon the Māori view of the river as an equal partner in a reciprocal relationship and on a conceptualisation of its wellbeing in terms of functionings.

These two principles are not based on a liberal understanding of ecosystems as a resource, but on a relational view of the river as an equal partner in a reciprocal relationship of mutual obligations. I therefore argue that we should conceptualise these principles in a deontological manner, although adhering to these principles requires more than merely conforming to a moral norm. Instead of relying on a liberal concept of duty, I refer to a Māori concept of duty, which is better suited to the relational ontology of *whakapapa* that allows us to see the river as an ancestor. According to a *whakapapa* framework, relationships are normatively laden and obligations form part of our relationships. Speaking about the river's duties towards human beings presupposes a historical perspective. The Māori are born into a network of relationships, and the river forms part of these relationships. Growing up next to the river and making use of it – benefiting from it – means that the river fulfils its duty within this network. Speaking of a duty with regard to the river is therefore not prescriptive for the future, but rather acknowledges that the river has fulfilled its duty in the past.

A Māori concept of duty would have the following four characteristics. First, it would be a direct duty (i.e., a duty owed by human beings to the river itself), and non-compliance would damage the human relationship to the river (Svoboda 2014, 312). Second, this duty would be based on reciprocity. I have an obligation towards the river because I

have received something from it already, and what I have received is not some merely external good but something constitutive of my identity. Growing up alongside the river has made me who I am and has likewise formed my family, my tribe, and my ancestors. It is neither possible nor necessary to give back the same type or amount of goods that I have received. Reciprocity is hence not a matter of strict equality, but a way of maintaining a specific relationship. Third, this duty is a specific case of my general duty towards ancestors. Although this paper does not develop a complete theory of ancestral relationships and the corresponding reciprocal obligations, such a theory is presupposed by the case of the river. I develop and discuss the two duties regarding the protection of the Whanganui River in section 5.

4. An Alternative Capability Framework from a Māori Perspective

If we presuppose the Māori notion of *whakapapa*, it becomes possible to conceptualise the wellbeing of the Whanganui River in terms of functionings. But in order to do so, one of the ethical presuppositions of the capability approach, ethical individualism, must be challenged. Ethical individualism treats individuals as units of ultimate moral concern. In thinking about wellbeing, the voice of each and every community member counts and is given equal consideration. But if the Māori relate to nature in the same way that they relate to a person, they will want nature to be included as one of those units of ultimate moral concern. Consequently, ethical individualism will have to be transformed into 'ethical personalism' and include everything that the Māori regard as equal partners in their relationships, including ancestors and ecosystems. In order to avoid the connotations that the concept of 'person' carries in the context of the history of ideas, an even better name would be 'ethical ancestorialism', including every being that can be considered an ancestor (*tupuna*) or future ancestor of somebody else.[7] Replacing ethical individualism with ethical ancestorialism could therefore result in an alternative capability framework that would be able to integrate the Māori notion of *whakapapa* and the relationships of Māori to intrinsically valuable ancestors. In the following paragraphs, I outline what this alternative wellbeing framework would look like. I first analyse the modifications that must be made to ethical individualism and the capability approach, and offer then an outline of the resulting theory.

Ingrid Robeyns (2017, 38–39) distinguishes within capability theories between a non-optional core, non-optional modules with optional content, and contingent modules. Introducing intrinsic values like the intrinsic value of ecosystems would have certain consequences for the core. In her book, Robeyns enumerates eight non-optional elements that form the core of the capability approach:

A1: Functionings and capabilities as core concepts

A2: Functionings and capabilities are value-neutral categories

A3: Conversion factors

A4: The distinction between means and ends

A5: Functionings and/or capabilities form the evaluative space

A6: Other dimensions of ultimate value

A7: Value pluralism

A8: Valuing each person as an end

(Robeyns 2017, 38)

The challenge of intrinsic values concerns elements A6 and A8, with A6 allowing us to add other dimensions of ultimate value to the core and A8 expressing the principle of ethical individualism. One example of an ultimate value that could be added to the core of the capability approach is 'procedural fairness' (Robeyns 2017, 53). Yet procedural fairness would be compatible with the ultimate value of freedom in the capability approach. The fairness of a procedure to choose certain capabilities and functionings does not contradict the individual freedom to be or do certain things. But if we assign an intrinsic value to ecosystems, such conflicts can occur. In the case of the Whanganui River, a group of fishermen might want to enhance their capability space by introducing new machinery and by extending their fishing grounds. But if this would lead to irreversible pollution of the river, their claim would have to be rejected. The freedom of the fishermen is not traded off against the freedom of other community members but rather is trumped by the intrinsic value of the river. Hence, we do not weigh the wellbeing of human beings against the wellbeing of other human beings, but against the wellbeing of the Whanganui River.[8]

The capability approach would thus have to be modified. Ethical individualism could be retained at the level of human beings and their relationships with one another. But once nature is affected, ethical ancestorialism would become the underlying principle. According to ethical ancestorialism, everything that the Māori regard as equal partners in their relationships, particularly ancestors and ecosystems, would have to be taken into consideration. Additional principles would need to be introduced detailing when and how the wellbeing of ancestors and ecosystems can be traded off against the wellbeing of human beings and when one simply trumps the other. Ethical ancestorialism deviates from ethical individualism, since in some cases the wellbeing of individual human beings would need to be curtailed to promote the wellbeing of non-human beings. While the wellbeing of non-human beings with some degree of purposeful agency could be conceptualised in terms of capabilities and the freedom to choose certain beings or doings, the wellbeing of non-human beings that lack such agency would better be conceptualised in terms of functionings. Rather than having the freedom to be unpolluted, a river should be granted to remain clean. A preliminary list of such functionings could contain, for example, elements like 'being clean', 'flowing unhindered', and 'being respected as an ancestor'.

According to Robeyns's modular view of the capability approach, the resulting capability framework would be a hybrid one, because it would contain normative principles that go against elements A6 and A8 of the core of the capability approach (Robeyns 2017, 76). This hybrid framework would be able to include the intrinsic values that form part of Māori philosophy and accommodate ethical ancestorialism. If a Māori standard of wellbeing was to be framed in terms of capabilities and functionings, it would require this hybrid framework as a presupposition.

5. Two Duties

After this sketch of an alternative capability framework, we can now turn to the two duties that shall guarantee an effective protection of the Whanganui River's wellbeing. While these two duties are also required by the alternative capability framework to regulate eventual trade-offs between human beings and ecosystems, there is an additional political reason

for their introduction: the worry, which I explained in section 1, that the guidelines of the Te Awa Tupua Act are not sufficient. While the Te Awa Tupua Act assigns two guardians the task to defend the river's interests, this also means that these interests remain open to interpretation and negotiable. As the guardians have to face the difficult task to defend the river's rights and interests against the rights and interests of private, state-owned, and mixed ownership model companies, a normative framework could assist them in their deliberation and support them to effectively protect the river's wellbeing. There is consequently a need to supplement the legal regulations of the Te Awa Tupua Act with an additional set of normative principles that can arbitrate between the interests of human beings and the river. As there are different ways in which the interests of human beings can conflict with the interests of the river, it is important to define a line of demarcation between conflicts in which trade-offs are possible and conflicts in which they are not.

I suggest two duties that could help to arbitrate between the interests of human beings and those of the river. These duties are derived from a combination of James B. Sterba's principle of preservation (Taylor 1987, 264–304; Sterba 1994, 231) with the principle of reciprocity. This combination helps to ensure that the two duties protect the river's integrity. The principle of preservation permits aggressing against others in order to secure one's own survival. According to this principle, human beings may harm the river if it is necessary for their survival. Applying this principle to the river, we can interpret the river's basic interest as the interest of not being irreversibly harmed. Hence, in order to protect the river from being irreversibly harmed, capabilities and functionings of human beings can be curtailed. The principle of reciprocity, however, demands that one give back in one way or another in return for the benefits one has received. If human beings consider the river as their common ancestor, they acknowledge that they have received certain goods from it and should give something back in return.

From these two principles, we can derive two duties: First, the negative duty of human beings to not irreversibly harm the river with the only exception being cases in which they need to secure their survival. And second, the positive duty of human beings to protect the river from any harm – both irreversible and reversible – in order to give something back in return for what they have received from it. While the first duty trumps all non-basic interests on the part of human beings, the second duty contains leeway for possible trade-offs. Such trade-offs are possible within a Māori framework because conflicting interests do not necessarily require that one side has to be given priority. In some cases, harm to the environment is allowed, if balance is restored afterwards.[9] Based on the alternative capability framework of section 4, we can flesh out the meaning of the distinction between irreversible and reversible harm with regard to the river.

There could be a list of basic functionings with which human agents are not allowed to interfere, such as 'being free from irreversible pollution', 'flowing unhindered by dams and rerouting projects', and 'being respected as an ancestor'. Such a list of basic functionings could be supplemented with another list of non-basic functionings, such as 'being free from reversible pollution', 'being free from agricultural use', and 'being unaffected by commercial fishing'. According to these two lists, it would be forbidden to pollute the river irreversibly unless one's survival was at risk, but controlled and reversible pollution would be permitted. While it would be forbidden to reroute the river for irrigation purposes, it would be permissible to use it for the irrigation of fields that are located next to the river banks. In the case of reversible harm with regard to items on the second list, there would be an additional duty to repair the damage afterwards. This understanding of the river's wellbeing could be based on Māori knowledge and their long experience in maintaining a respectful relationship with the river. Lists of this kind would not be vulnerable to the naturalistic fallacy in which a specific state of the river is arbitrarily identified as healthy

(Newman, Varner, and Linquist 2017, 292). Instead, the concepts of wellbeing and harm could be derived from Indigenous knowledge and Indigenous best practices in adapting to an ever-changing ecosystem.[10]

In order to illustrate these two duties, we can return to the example of the fishermen that I introduced above. First, the two guardians would need to evaluate whether the machinery that the fishermen wanted to introduce could cause harm to the river's wellbeing and, if so, whether that harm concerned the first or the second list of functionings. In the case of irreversible harm, the fishermen would be forbidden to employ their technology unless their survival was endangered. In the case of reversible harm, they would be obliged to protect the river. This could either mean that they would be required to abstain from employing their technological devices or that they would be required to make up for the harm they caused by, for example, conducting a subsequent clean-up. The two guardians would then have to balance the interests of the fishermen against the river's wellbeing and determine what protection of the river amounted to in this case. Pollution would only be justifiable if the fishermen's interests were substantial. Otherwise, the protection of the river would have priority.

Alternatively, we could frame the two duties not in terms of conflict but in terms of coexistence. If the members of a community lived in accordance with both the negative and positive duties, they would be able to form structures and institutions that respected the intrinsic value of the river. These structures and institutions could then play a significant role in balancing the interests of the community members against the wellbeing of the river, and only in exceptional cases would the two guardians need to be involved. Such a perspective has the advantage that the two duties would not be restricted to prescribing individual behaviour, but could shape the life of the whole community. In addition, the community could retain a certain degree of autonomy. Interests of third parties like fishing companies or travel agencies, however, would have to be dealt with at a higher level, where the two guardians would represent the Whanganui Iwi and the New Zealand Government.[11]

6. Conclusion

In this paper, I have raised some concerns about the Te Awa Tupua Act. Although the Act constitutes a milestone by settling the historical claims of the Whanganui Iwi with regard to the Whanganui River, it lacks a normative framework that could support the guardians in coming to informed decisions and it leaves crucial concepts like health and wellbeing underdetermined. I proposed two supplements: First, I developed a cross-cultural account of the Whanganui River's wellbeing in terms of functionings for which the New Zealand Government could be held accountable. Second, I suggested two normative principles that could assist the two guardians in their deliberation and help them to effectively protect the river's wellbeing. I began with an analysis of the Te Awa Tupua Act, in which I distinguished between a pre-political, a legal, and an institutional level. In order to integrate the Māori notion of *whakapapa* on the institutional level, I argued for a renewed emphasis on the role of intrinsic values and mutual obligations. I then fleshed out my two proposals. First, I proposed to develop an alternative capability framework that can incorporate the Māori view of ecosystems as intrinsically valuable ancestors. Second, I recommended the introduction of two deontological principles that can regulate possible conflicts between the interests of human beings and the river's wellbeing. In a further step, I resorted to Robeyns's modular account of the capability approach in order to develop an alternative to ethical individualism, which I dubbed ethical ancestorialism. In the final part of the paper, I outlined two duties that can

supplement the normative framework of the Te Awa Tupua Act by determining when trade-offs between the interests of human beings and the river's wellbeing are allowed and when they are not.

Based on this argument, I propose the following supplements to the Te Awa Tupua Act: First, lists of basic and non-basic functionings should be drawn up in order to conceptualise the wellbeing of the Whanganui River and to distinguish between irreversible and reversible harm. These lists could be based on the Indigenous knowledge and best practices of the Whanganui Iwi. Second, a negative duty should be introduced that is able to protect the river's wellbeing from irreversible harm, along with a positive duty that is able to regulate cases in which trade-offs between human beings and the river's wellbeing are permitted. These two lists and two duties would require the consent of the Whanganui Iwi and the New Zealand Government before they could become legally binding.

Notes

1. The Whanganui River Deed of Settlement was signed by the New Zealand Government and the Whanganui Iwi on 5 August 2014 and consists of two documents: Ruruku Whakatupua – Te Mana o Te Awa Tupua and Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui (New Zealand Government 2016). The first document establishes a new legal framework for the Whanganui River, whereas the second document addresses the relationship between the Whanganui Iwi and the Whanganui River and claims of cultural and financial redress.
2. If the guardians are in need of support, they may convene the advisory group (Te Karewao), but are not allowed to delegate any decision-making functions to it.
3. In the case of a river or deceased ancestors, this relationship is somewhat asymmetrical. By growing up alongside a river or by being a descendant of one's grandparents, one has already received something from them and they have shaped one's identity. Giving back to the river can occur by maintaining its health and its wellbeing. Giving back to human ancestors, however, requires an indirect form of reciprocity. While a person may have received some benefits from an ancestor in the past, she cannot reciprocate to this ancestor directly, but only indirectly by giving benefits to a living or a future person. Hence, the duty to give back to ancestors would no longer be a duty to reciprocate towards a certain person, but a duty to maintain relationships between past, contemporary, and future persons. Regarding this duty, the amount of what is given would no longer have to equal the amount of what has been received. It would rather be crucial that something is given back.
4. In 2010, James Morris and Jacinta Ruru recommended to assign legal personhood to the Whanganui River, based on Christopher Stone's pioneering article on natural resources and legal personality from 1972 (Morris and Ruru 2010; Stone 1972). Gerrard Albert who had a leading role in the Treaty settlement negotiations confirms that legal personhood is the 'closest approximation' to the Māori understanding of *Te Awa Tupua* in New Zealand law (Freid 2018).
5. Opposing a Māori understanding of nature to a 'Western' understanding of nature is a simplification, since relational approaches to nature have also been developed in the West, for example, deep ecology and shallow ecology (Naess 1973; Stevens, Tait, and Varney 2018). There is some overlap between these approaches and a Māori understanding of nature.
6. In their paper on the Whanganui River and community entrepreneurship, Aikaterini Argyrou and Harry Hummels argue likewise that the capability approach could be extended to the 'realm of nature as conceived in Māori culture' (Argyrou and Hummels 2019, 758).
7. Extending the concept of ancestors to also include future ancestors allows us to add living human beings to this group.
8. In the case of the Whanganui River, respecting the wellbeing of the river has a strong and palpable impact on the wellbeing of the fishermen. Yet, the point of the example is not the size of the impact, but more generally that human interests or capabilities have to be weighed against non-human wellbeing. Human wellbeing can be restricted by an intrinsic value that is valid independently from its value for human beings.
9. An example is the concept of environmental enhancement in the Waikato-Tainui Environmental Plan. This plan has been developed by the Waikato-Tainui tribe in order to restore the environment. According to this concept, resources can be utilised, but the users have the responsibility to 'show a reciprocal benefit back to the environment.' (Waikato-Tainui Te Kauhanganui Environment Team 2013, 56).
10. The Waikato-Tainui Environmental Plan suggests two further criteria that could be taken into account when making policy decisions with regard to the river. The first criterion concerns the question whether the water is able to give and sustain life or not. If the water cannot sustain life any longer, it should receive additional

protection. The second criterion deals with the purpose for which the water is used. If the water is used for ceremonial purposes, it should not be used for other purposes. (Waikato-Tainui Te Kauhanganui Environment Team 2013, 148–50).

11. In order to do justice to Māori philosophy and to stay within the legal framework of Te Awa Tupua Act, I have employed a concept of duty based on the reciprocal relationship between the Whanganui Iwi and the Whanganui River. If rights language is preferable in some political contexts, it would also be possible to derive a set of rights from these two duties.

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About the Author

Matthias Kramm is a PhD candidate at the Department of Philosophy and Religious Studies at Utrecht University. He is doing research on the role of cultural traditions within human development. His interests include the capability approach, ethics of development, and non-Western philosophy. Address: Department of Philosophy and Religious Studies, Faculty of Humanities, Utrecht University, Janskerkhof 13, 3512 BL Utrecht (The Netherlands)

ORCID

Matthias Kramm http://orcid.org/0000-0002-2021-989X

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