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Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship

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ABSTRACT

Legislation in New Zealand dictates that the Whanganui River is a living entity and a legal person. Guardians uphold the river's environmental, social, cultural and economic well-being. We provide a conceptual discussion of the river's economic well-being, understood as the mutual enhancement of natural and human elements through community entrepreneurship that is based on human and non-human capabilities. We discuss human economic activity that preserves the right of the river to be free from pollution and form an integral part of the Māori culture and tradition, the improvement of Māori living conditions, and their rights to self-determination and prior consent.

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Introduction: the Te Awa Tupua Act in New Zealand

In 2017, the settlement of claims between indigenous Māori communities and the state of New Zealand led to legislation, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Act), which dictates that the Whanganui River is a living entity and a legal person with rights that can be judicially enforced by appointed guardians (Hsiao, 2012; Shelton, 2015). The Act recognized that the Whanganui River is a singular entity that is 'indivisible' from its people, various Māori kinship groupings with historic and religious connections to the river, specifically, the Whanganui Iwi (Morris & Ruru, 2010). Legal personhood was provided to the Whanganui River after the continuous efforts of the Whanganui Iwi to enforce their customary property and fishing rights over the river and its protection from over-exploitation and misuse (Hsiao, 2012; Shelton, 2015; Morris & Ruru, 2010).

A new understanding of the well-being of the river

In Articles 12 and 13, the Act recognizes that the river and the surrounding area is an indivisible and living entity, which is simultaneously 'physical', understood as a living ecosystem, and 'spiritual'. It accordingly comprises 'physical' and 'metaphysical' elements and the surrounding communities, which should work collaboratively for one common purpose: the environmental, social, cultural and economic 'health' and 'well-

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being' of the river and of its people, its constituents (Youatt, 2017). Those are the Whanganui Iwi, who customarily depend for their living and economic activities on the river and on its well-being.

The interdependence of the river and the Whanganui Iwi is prescribed in the Act in a list of 'intrinsic values'. These values dictate the 'inalienable connection' and the responsibility of the Whanganui Iwi to protect the river for its benefit and for the benefit of future generations. That is, 'Protecting the River is equivalent to protecting the people, and in this case, protecting the (Māori) people could also lead to better protection of the River' (Hsiao, 2012, p. 371). This nexus is reflected in Article 18 of the Act, which establishes the purpose and the power of the river's guardian body, the Te Pou Tupua office, acting in 'full capacity' and having 'all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties'. Article 20 prescribes that the guardian office comprises two appointed officer-guardians: one Māori representative appointed by the Māori communities and one state representative appointed by the government of New Zealand. The duties of the river's guardians include:

(1) to act and speak for and on behalf of the river;
(2) to uphold the river's recognition and values as an indivisible entity and as a legal person;
(3) to promote and protect the environmental, social, cultural, and economic health and well-being of the river;
(4) to take any other action reasonably necessary to achieve its purpose and perform its functions.

In Article 29, identification of the issues related to the environmental, social, cultural and economic health and well-being of the river is assigned to a 'strategy group', the Te Kōpuka, a competent committee of individuals and organizations with interests in the Whanganui River. Te Kōpuka includes Māori community representatives, local authorities, the government, commercial and recreational users and environmental groups, with the purpose 'to act collaboratively to advance the health and well-being of the river'. Those interests are social, cultural and economic but also environmental (Hsiao, 2012). Te Kōpuka has the duty to develop a management strategy, Te Heke Ngahuru, a forum and inclusive processes where the Whanganui River's best interest can be determined and promoted collaboratively. In addition, the guardians administer a fund, Te Korotete, which provides financial support to the well-being of the Whanganui River, understood as a singular entity (Whanganui Iwi [Whanganui River] Deed of Settlement Summary of 5 August 2014, see New Zealand Government, 2014).

The undermined economic activity of the Whanganui Māori communities

For the state of New Zealand, the importance of the Whanganui River area and its local population in the regional and national economy is acknowledged in Article 69(17) of the Act. However, the economic role of the Whanganui Iwi is frequently undermined (Hsiao, 2012). The Māori population of the Whanganui River area is demonstrably less employed and less qualified for employment compared to the non-Māori population in the same area

(Manawatū-Whanganui Growth Study, 2015). Furthermore, the Māori enterprises contribute less to the national economy (5.6%) than the vast contribution of the non-Māori enterprises (94.4%) (Manawatū-Whanganui Māori Economic Development Strategy, see Horizons Regional Council, 2016). Hence, development is expected for the Māori population following the settlement of the Māori claims in the Act, which promotes local Māori economic interests in connection with the economic, social and natural well-being of the river.

Pursuant to the Act, the economic prosperity of the Whanganui River can be understood as the economic well-being of the indivisible Whanganui River community of natural and human elements based on the Māori tradition, religion, culture and identity. Accordingly, in this article, we examine how the economic well-being of the Whanganui River community can contribute to the mutual enhancement of the natural and human elements if it is developed as community and social entrepreneurship (used in this article interchangeably) based on human and non-human capabilities. We consider a framework of human economic activity which can be developed in the form of community and social entrepreneurship that preserves the right of the river to be free from pollution as well as the Māori indigenous identity, culture and tradition, the improvement of their living conditions, and their rights of self-determination and prior consent.

We understand that if the Whanganui River is not perceived as a living entity in its own right, undesirable forms of exploitation and transformation, and/or endangering traditional culture and ways of living, might easily result. Hence, the focus of this article is on finding a harmonious solution for inclusive and sustainable development of the river understood as a community of elements. We aim to contribute to the substance of emerging normative frameworks which are being developed and accommodate this new understanding, such as the Universal Declaration of River Rights and the Earth Charter. We argue in favour of community and social entrepreneurship because we acknowledge the dangers of the economic misuse of the Whanganui River and the pollution that resulted from that misuse.

The legal personhood of the river and guardianship

Stone's (1972) seminal article 'Should Trees Have Standing?' first introduced the idea of humans providing legal personhood to non-human objects and particularly to natural elements, such as trees. According to Stone, legal rights could be used by guardians to claim redress and restitution for environmental damages on behalf of nature and/or nature's non-human objects (see also Chan, 1988, 1989; Hogan, 2007; Morris & Ruru, 2010). Stone instigated the development of scholarship pursuant to the outcome of the US Supreme Court case *Sierra Club v. Morton* (405 [1972] US Supreme Court 727, paras. 742–744; see also Cullinan, 2008).

Stone claims that legal personhood could allow a non-human entity to be part of legal relationships and to seek redress in its own right, represented by guardians. Hence, nature could be represented judicially by guardians who are concerned with nature's well-being and who can initiate legal actions and claim restitution on behalf of nature's non-human objects if nature's interests are violated. In that case, Stone contemplates that courts will be able to assess the actual harm and rehabilitation of nature's non-human objects rather than the individual interests of the guardians (Hogan, 2007; Morris & Ruru, 2010).

Stone's approach differs from the dominant legal approach, which suggests the judicial protection of the environment using claims on the basis of rules in different legal areas, e.g., in property law, in tort law, in environmental laws and in the constitution (Shelton, 1991, 2015). It also differs from the approach of developing market mechanisms for the protection of the environment (Bakker, 2016; Garrick & Svensson, 2016; Shelton, 2015). However, Stone's argument has found ground in the Act in New Zealand and in subsequent constitutional amendments, national laws, case law and legal reforms in various other countries (Bolivian Framework Law of Mother Earth and Integral Development for Living Well, 2012; Daly, 2016; Mohd. Salim v. State of Uttarakhand & others [2017] WPPIL 126/2014, Uttarakhand High Court at Nainital; Lake Erie Bill of Rights (LEBOR), n.d.; Drewes Farm Partnership v. City of Toledo n.d.; O'Donnell & Talbot-Jones, 2018; Shelton, 2015; Tomas, 2011).

The Act dictates that the Whanganui River is a legal person, subject to legal rights and duties dictated by law and introduced into legal relationships (Smith, 1928). In theory, the types of legal persons are discussed in extant literature by three distinct groups of legal scholars. The first group claims that a legal person is humanity's legal concept. Legal personality offers 'formal capacity to bear a legal right and so to participate in legal relations' to anyone or anything, without considering the moral significance of the bearer of legal personhood (Naffine, 2003).

Accordingly, anyone or anything can acquire legal personhood, including non-human objects of nature such as the river, depending on the human will. Humans decide what is to be treated as a subject of rights and duties, within certain legal relationships and based on certain human and societal objectives (Naffine, 2003). Moreover, humans act as the guardians of both the rights and the duties provided to non-human objects. Shelton (2015, paras. 22–23) defines a legal person as an 'artificial' entity 'that is not a human being, but one on which society has decided to confer specific rights and obligations'. Criteria that have been used to define the provision of legal personhood to entities include 'biological life, genetic humanness, brain development, ability to feel pain, consciousness/sentience, ability to communicate, ability to form relationships, higher reasoning ability, and rationality' (paras. 22–23). Therefore, a second group of legal scholars considers that only humans can be legal persons, starting from their birth and for as long as their biological life extends (Naffine, 2003). The third group of legal scholars says that only 'rational' and fully competent humans can have a legal personhood, which is directly related to their capacity to initiate or terminate legal proceedings (Naffine, 2003). According to the first group, a river can be sensibly provided legal personhood. The second and the third groups disagree, because a river does not have biological life or human rationality.

We understand that the foregoing criteria may be sufficient to constitute legal personhood, but they are not necessary to acknowledge legal rights. Obviously, a river does not have higher reasoning ability or rationality, brain development, or consciousness. The legal right of the river is grounded in its being an inseparable element of the preservation of the life and culture of a manifest and discernible group of people. The question therefore is whether a distinction can be made between non-humans that can have legal rights in their own right (like animals) and those that have legal rights conveyed or assigned to them because of their indispensable role in preserving human culture. We believe that a river would fall under this latter category.

Elder (1984) and other scholars provide a different distinction of schools of thought developed in ecology in the early 1970s (Naess, 1973; Stevens, Tait, & Varney, 2018). These are the schools of either deep or shallow ecology (Elder, 1984; Giagnocavo &

Goldstein, 1990; Naess, 1973; Stevens et al., 2018). The distinction relates to either a shallow anthropocentric or a deeply ecocentric view of reality (Giagnocavo & Goldstein, 1990). Shallow ecologists advocate the moral significance of human beings who can only be considered legal persons (Elder, 1984; Giagnocavo & Goldstein, 1990; Naess, 1973) based on their human level of consciousness or capacity to experience reality. Deep ecologists have adopted an ecocentric view that sees an 'inherent' moral value in all entities, including non-human entities (including persons, objects and ecosystems), which could be also considered legal persons.

The anthropocentric moral view of the shallow ecologists also suggests that law itself is a human construct, and thus only human beings can legislate 'any matter of concern', including legal rights and duties to non-human objects of nature (Elder, 1984). Thus, there is a paradox in introducing legal personhood to non-human objects of nature when 'only humans can be actors in the legal system' and 'only human concerns could ever be addressed by it' (p. 291). Consequently, legal scholarship suggests the introduction of policies and legal norms concerning the protection of the environment and of certain objects of nature 'within existing legal and moral paradigms' (p. 291; see also Shelton, 2015) that regulate human behaviour as an 'effective instrument to control' human conduct (Smith, 1928, p. 296). Our position balances the perspectives of deep and shallow ecology. We understand that the river has legal personhood as part of its constitutive role in sustaining Māori culture – equal to the role the Māori have in their mutually directed interactions, and comparable with that of an ancestor. If that culture no longer existed, it would become difficult to convey or assign legal personhood to the river.

Although the approach of shallow ecology is a rational one, it differs from pursuing legal redress on behalf of natural non-human objects for their harm, damage and overexploitation from humans. Giving rights to nature results in a specific responsibility for humans to care for nature and to be accountable for any intervention in nature, which is an approach that goes beyond the established hegemonic attitude of the human race to nature but also differs from notions of environmental stewardship. However, the legal personhood of the Whanganui River comes from its role in contributing to – and preserving – Māori culture and life. Hence, it shows that more is needed (an inalienable right) than just arguing for human and environmental stewardship.

Article 18 in the Act assigns to the Te Pou Tupua (the river's guardians) a legal right to act and speak for and on behalf of the Whanganui River, the duty to uphold the river's status and protect the river's interests as a living entity, and to perform (legal and other) actions. The guardians are appointed directors with fiduciary duties of care in the management of issues pertaining to the governance of the river. These issues should promote the river's 'health' and 'well-being' for the benefit of the river, its community members and future generations.

It is questionable whether modern humans in their guardian role can contemplate the well-being of nature's elements, given the shape of the prevalent human understanding of nature in the modern (particularly) industrialized world, which is based on a value system that allows nature and the environment to be objectified, mainly for human use, and to be subject to property, either public or private (Elder, 1984; Hockstad, 2016; Teubner, 2012). Accordingly, there may be a paradox in introducing legal personhood to non-human elements of nature, which are guarded by modern humans or by modern human institutions (Teubner, 2012). In the industrialized world,

the dominant norm is that nature does not exist 'for its own sake' and that humans are 'inherently superior to other living things' (Hockstad, 2016, p. 122). Obviously, in other legal traditions the legal context allows a different understanding of nature and humans together as a mutually dependent and indivisible relationship in preserving a long-standing culture, as found in various traditional, religious, indigenous and philosophical dogmas, in New Zealand, Bolivia, China, Ecuador and India (Dai, 2015; Daly, 2016; Sachdeva, 2017; Shelton, 2015; Tomas, 2011; Teubner, 2012).

The indigenous community and the guardians of the river must negotiate – time and time again – what is an acceptable balance between preserving the rights of nature (and of the river in particular) and the economic sustainability of the community. In the traditional Māori culture, the river is an entity that itself deserves respect – as part of a dialectic relationship – and so needs to be preserved for future generations. Hence, any change in the economic or other uses of the river can be only accepted with the prior consent of the Māori. In addition, the decision-making procedures that protect the river (and the communities living in harmony with the river) should be constructed in a way that accommodates the traditional way of the Māori appointment of representatives, as well as Māori control over their environment (Teubner, 2012). The principle of prior consent by the Māori in the control and fate of the river allows the Māori to withhold their consent from economic and other activities influencing the natural, community and/or legal conditions of the river (Teubner, 2012). The concept of prior consent is already in use in international law, e.g., in the Convention on Biological Diversity. But even in these indigenous, religious and philosophical dogmas the deification of natural resources and the development of sacred beliefs may lead to limited perception and neglect of risks, which may eventually cause harm to the non-human elements of nature and eventually to humans (Sachdeva, 2017; Tomas, 2011).

Legislative developments analogous and similar to the Māori legislation concerning the Whanganui River manifest the existence of values based on two dominant ontological understandings of the relationship between nature and humanity (Giagnocavo & Goldstein, 1990) and a new ontological approach in the relationship between human and nature.

The first understanding, the ecocentric, dictates that nature is separate from humanity and exists in its own right. The second understanding, the anthropocentric, sees humanity as superior and as capable of using and exploiting nature for its own benefit. However, the Act, as well as constitutional amendments and legislation in various countries, also introduce a third understanding of this relationship between nature and humanity: one of nature being in an inalienable connection with humanity as one living entity.

The latter applies to the Māori communities living in harmony with the Whanganui River. Economic activity can easily lead to disruption of the natural environment, requiring a different conception of economic activity. The basis for such a conception can be found in the work of the American political philosopher Martha Nussbaum (2006, 2013), who develops a *capabilities approach* that encompasses the rights of non-human animals. As Nussbaum (2004, p. 305) explains, 'The basic moral intuition behind the approach concerns the dignity of a form of life that possesses both deep needs and abilities; its basic goal is to address the need for a rich plurality of life activities.' Even though it is not without problems (Barcham, 2012), we believe that a capabilities approach permits the recognition of the river as an entity that should be respected as part of a dialectic relationship to sustain both the river and Māori culture, while at the same time serving the Māoris' need for sustainable economic activities.

The capabilities approach can be seen as a clear operationalization of the third understanding of the relationship between nature and humanity, as an inalienable connection in a single living entity. Particularly when applied to the concept of 'nature', the capabilities approach requires going beyond fulfilling human-centred desires (Kortetmäki, 2017; Schlosberg, 2012; Watene, 2016). It addresses issues of 'ecological injustice' of humans towards ecosystems and the 'wellbeing of non-human life' (Kortetmäki, 2017). Schlosberg (2012, p. 456) confirms 'that the kind of community-based process for determining and prioritizing threats to individual and community capabilities and functioning for human beings would begin to address the status of the functioning of the nonhuman realm as well' and that ecosystems are 'living entities with their own integrity'. He also notes that 'atomizing nature into isolated animals devalues a form of life, and the way that this form of life flourishes' (Schlosberg, 2007, p. 148). There is no reason that Nussbaum's capabilities theory could not be extended to the realm of nature as conceived in Māori culture, an indivisible community of living human and non-human elements. At the time, there was no reason for Nussbaum to go beyond the aspect of humans and animals and to extend the capabilities approach to other forms of living. But when confronted with a culture in which a river potentially comprises 'the dignity of a form of life that possesses both deep needs and abilities' (Nussbaum, 2004, p. 305), in principle there is no reason to deny it the same status as a human or a non-human animal.

Nature is separate from humanity and it exists in its own right

Humanity depends on nature (McIntosh, 1985). This leads McIntosh (1985) to argue for an ecocentric understanding of nature as existing in its own right and superior to human existence. Natural phenomena happen without any human intervention, and natural disasters or the scarcity of natural resources will always evoke human fear. Accordingly, the normative framework should demonstrate nature's superiority over human existence. Although Article 13 of the Act acknowledges the Māori value *ko te awa te mātāpuna o te ora*, meaning 'the river is the source of spiritual and physical sustenance', this does not constitute an ecocentric justification of the supremacy of nature over human beings. The Whanganui River serves nature and simultaneously maintains the balance of the natural ecosystem. Human and technological interventions in nature to support human life might have either positive or negative effects on nature (McIntosh, 1985). Hence, humanity has the moral obligation to initiate learning, understanding and restoration of nature whenever that is necessary – and for its own preservation. Articles 69 and 70 of the Act provide acknowledgements and an apology from the state of New Zealand to the Māori and to the Whanganui River for 'past wrongs' and promise the beginning of 'the process of healing'. In its apology the state of New Zealand recognizes that the Whanganui River is 'an indivisible whole' and notes the 'inalienable interconnection' between the Māori and the river.

Humans use and exploit nature for their survival and well-being

On the anthropocentric understanding, nature exists to sustain human life and any aspect of it. Accordingly, the normative framework 'primarily protects the peoples' use of the environment – that is, their "common heritage" – but not the environment itself … against human use or abuse' (Daly, 2016, p. 66; see also Burdon, 2012). The

anthropocentric view also endorses the position that nature and its elements – such as a river – can facilitate and provide goods and services of an economic value to humans in different industrial sectors, economic activities or interchangeably economic functions or utilities (Peterson & Hendricks, 2016; Starik, 1995). Economic activities are those of an economic significance (Peterson & Hendricks, 2016; Starik, 1995). In the anthropocentric view, the economic value of nature and its elements – such as a river – will always have a connotation and justification that are directly linked to human needs and interests.

The economic benefits are 'use values': certain advantages and benefits provided to humanity from the use of nature's elements (Peterson & Hendricks, 2016): for instance, the utility of the river (in the form of activities) for the well-being of humanity, the Whanganui Iwi and other divisions and communities of the river in providing food, fresh water, housing and other genetic resources. Article 69(4) of the Act acknowledges the importance of the Whanganui River as a source of 'physical and spiritual sustenance' for the Whanganui Iwi as 'a home' and as a 'food basket and fishery'.

Use values include *consumptive* uses, which entail the disruption of the natural functions of the river to serve human needs (Peterson & Hendricks, 2016). For instance, the economic utility of the river contributes to human activity at a national and local level for the benefit of the people by supporting business activities, and by providing access to energy, transportation and exploitation of the river beyond its natural functions (Peterson & Hendricks, 2016; Starik, 1995). Article 69(4)(b) and (d) acknowledges the use of the Whanganui River as a means of travel and trade for the Whanganui Iwi and as a source of *rongoā*, a traditional Māori healing technique. In the same article (69 (17)), economic value is seen in the river as a transportation 'highway' and a source for gravel extraction and electricity generation.

Use values also include *non-consumptive* uses, which serve human needs without disrupting nature's functions (Peterson & Hendricks, 2016): for instance, the social utility of the river for recreation, ecotourism, aesthetics, education, sense of place, cultural heritage, spirituality and religion. Article 69(4)(b) acknowledges the utility of the river as a means of social and cultural connection for the Whanganui Iwi, and in Article 69(17) the river's 'natural' and 'scenic' value and the value of 'recreation' and 'tourism' are also mentioned.

In contrast to use values, a *non-use value* of nature's elements is the option of preserving nature's elements for future use or by future generations (sometimes called 'option value' or 'bequest value') or just to know that the river exists as part of nature and Māori society and for future consumptive or non-consumptive use (Peterson & Hendricks, 2016). Article 69(17) mentions the 'conservation' value of the Whanganui River, which is 'for the benefit of future generations'.

Based on our previous argument that the relationship between humans and nature – and in particular between the Māori and the Whanganui River – is of a dialectic nature, the anthropocentric view does not suffice to acknowledge the responsibilities of humans to preserve nature, while engaging in economic activity that is in the interest of all people – now and in the future – living in the catchment area of the river. That would risk introducing a utilitarian calculus, allowing economic activities that lead to the greatest benefit for the greatest number in the present.[1] Since the Māori communities

control less than 5% of all economic activity in the area, their culture will likely be endangered by an anthropocentric economic policy.

Humans and nature in an intertwined economy

Based on the Māori historic, cultural and religious background, humans and nature (particularly the river) are intertwined (Chan, 1988, 1989; Mathews, 2018; Morris & Ruru, 2010; Tomas, 2011). The Act recognizes the close relationship of the Māori to the river by acknowledging the principle of *ko au te awa, ko te awa ko au* (I am the river and the river is me), as well as their aspiration to be actively involved in the management and protection of the river. In the Māori tradition, humans are *kaitiaki* – caretakers, guardians and protectors of nature (Tomas, 2011). The legal framework given in Articles 12 and 13 uses the indigenous concept of the Whanganui River, which is not perceived in a functional way as a resource provider. On the contrary, the Whanganui River is a 'living' entity of a major significance due to its physical and metaphysical role which is 'indivisible' from human life and its economic and social development, expressed in the concept of 'health and well-being of the iwi, hapū, and other communities of the River' but also for future generations. The Whanganui River is proclaimed to have an existence which is inevitably connected with the physical (natural), social and economic environment of human life, and consequently it relates to all the related constructs and concepts, including law and legal personality but also any organization of social and economic human activity. Respect for nature is inalienably connected with respect for human life in a value system which requires human societies, economies and legal systems to equally serve nature's and humans' well-being, which should be 'mutually enhanced' in a 'social contract with nature' (Daly, 2016, t.o. 64; see also Burdon, 2010; 2012; Teubner, 2006; Chan, 1988; 1989). Such 'mutually enhancing relationships' reject a normative framework which 'posits "abstract" categories or doctrines as the highest authority in human society', which are human 'self-validating', and the idea of 'private property as a mechanism that authorizes human exploitation of nature and the non-recognition of rights outside of the human community' (Burdon, 2012, p. 31; see also Cullinan, 2008; Chan, 1988; 1989). This reciprocity does not constitute moral superiority on either side – that is of nature or humans – although it recognizes that nature preceded human life and humans have grown and developed to become part of a living system. It does constitute a responsibility for humans to behave as caretakers and guardians because they possess the will and the power to deploy (and destroy) nature. Nature does not have such a will to deliberately prioritize the interests of itself over others.

In addition, according to Morris and Ruru (2010, p. 50), this approach regards the river as having its own standing within an mutually recognizing and reinforcing relationship, 'as a holistic being rather than a fragmented entity of flowing water, river bed and river bank', putting 'the health and wellbeing of the river at the forefront of decision-making'.

However, this view should not be understood as preordaining only the Māori communities to serve, guard, promote and protect the river's health and well-being due to their cultural or religious ties to it. The guardianship of natural elements should not be awarded only to the state, nor only to those who respect or care for nature the most. Such an approach risks perpetual dispute between the government, industry and public interest groups to determine guardianship and the substantive content of the legal rights provided to non-human objects of nature (Elder, 1984; see also Kenneth

Kang, 2019, this issue). Establishing 'who best knows' the well-being and health of the natural environment will be a challenging and unorthodox process to understanding that nature and human are intertwined. On the contrary, it should be all humans' responsibility and duty to protect, respect, defend and care for the non-human objects of nature. Though there is a trade-off that if all humans have the right and duty to actively and mutually guard, promote and respect the interests of nature and its elements it might result in their 'human domestication'. Burdon (2010, p. 81) warns of the consequences of 'human domestication' of nature if legal rights are provided horizontally to various natural objects. According to him, the 'domestication' of nature will ultimately result in the 'humanization' of all the natural relationships between humans and natural elements. The 'human domestication of nature' will eventually lead to nature's submission 'into the human political apparatus' (p. 81; see also Teubner, 2006) and market subordination for the benefit of humans (Bakker, 2016). Thus, Elder (1984) also poses another valid question that is reflected in the sections that follow. That is the questions of how the guardians can know better what is nature's health and well-being, using their own human preconceptions and values. We believe that the guardians do not necessarily know better than anyone else what is in nature's and humans' interest, but they have been given this power of governance based on procedural limitations, restrictions and requirements, for which they are accountable. The guardians can use information that is brought to their attention and wisdom to assess the relevance and quality of the information in coming to a decision that is in the best interest of the Māori communities, the river and other stakeholders that have an interest in the use and well-being of the river.

The health and well-being of the river as a living indivisible entity

Article 7 of the Act defines the health and well-being of the Te Awa Tupua as having environmental, social, cultural and economic dimensions. In Article 13, Te Awa Tupua is presented as a spiritual and physical entity that supports and sustains both the life and the natural resources in the Whanganui River, as well as the physical health and well-being of the communities surrounding it. The Māori communities of the river also have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being. This reciprocal relationship between nature and humans results in the development of a system where Te Awa Tupua is a singular entity comprising many elements and communities, working collaboratively for the common purpose of the benefit of Te Awa Tupua, upholding and protecting the vitality of the Whanganui River and its health and well-being for the benefit of future generations. The maintenance and continuity of the relationship between the unlimited lifespan of nature with the limited lifespan of humans' present and future generations also comprises part of the Māori responsibility to nature (Chan, 1988, 1989; Tomas, 2011).

Accordingly, the Māori tradition requires that each of the Māori is a *kaitiaki* who is responsible for maintaining the vitality of the Whanganui River and its people collectively without interfering in the natural balance, which might eventually be detrimental (Tomas, 2011). This overarching duty is a responsibility of the appointed guardians, the Māori and the state of New Zealand, to maintain the environmental, social, cultural and

economic benefit and well-being of the Te Awa Tupua, understood as a community of natural, human, physical and meta-physical elements.

First, it includes the duty of maintaining the environmental health and well-being of the Te Awa Tupua's community of human and non-human elements. This is a responsibility for all, including the appointed guardians, the Māori and the state of New Zealand, to care for the benefit of the environment in all actions pertaining to the use or possession of the river (Tomas, 2011). Any use or possession of the Whanganui River or any of its components must be exercised only in a way that avoids harm to the environment and that 'upholds the physical and spiritual connections between humans and natural systems across generations' (Tomas, 2011). Hence, Article 64 of the Act establishes collaborative processes between the Māori communities, the local and the central government and Maritime New Zealand to consider and consult the guardians on the activities and the regulatory framework of the surface of the Whanganui River, among other things, such as fisheries and customary food gathering. Article 66 establishes coordination groups between the Māori communities and the local and the central governments for the 'protection, management, and sustainable utilization of fisheries and fish habitat managed in the Whanganui River'.

Second, it includes the duty of maintaining the social health and well-being of the Te Awa Tupua's community. This is a responsibility for all, including the appointed guardians, the Māori and the state of New Zealand, to care for the Whanganui River's surrounding society in all actions pertaining to the use or possession of the Whanganui River. The use of the Whanganui River and of its components should be exercised in a way that maintains and respects the Māori as part of the Whanganui River's indivisible community and their societal values, ideals, principles and rules.

Third, it comprises the duty of maintaining the cultural health and well-being of Te Awa Tupua's community. This is a responsibility for all, including the appointed guardians, the Māori and for the state of New Zealand, to care for the Whanganui River's cultural heritage, with activities (as described in Article 75) which are ceremonial, customary, recreational, educational and sporting, as well as customary activities related to the spiritual and physical health of the Māori, e.g., fishing, bathing, cleansing and baptizing.

Finally, it includes the duty of maintaining the economic health and well-being of Te Awa Tupua's community. This is a responsibility for all, including the appointed guardians, the Māori and the state of New Zealand, to care for the Whanganui River's use and economic development of the surrounding Māori communities.

The river's guardians have the power to exercise reasonable activity in the name and for economic benefit of the river and of its community constituents (Article 19). Article 19 authorizes the guardians 'to take any other action reasonably necessary to achieve its purpose and perform its functions', which are to promote and protect the economic health and well-being of the Te Awa Tupua's community of physical and metaphysical elements. The activities of the guardians regarding the administration of the economic well-being of the Whanganui River are demarcated by the Māori principles, values, cultural heritage and tradition, as well as the established collaborative processes and strategy in decision-making and advisory bodies between the Māori communities, the appointed guardians, local and central administration and the industry actors. Their task is a difficult one which requires (local) wisdom. One of the potential dilemmas that

guardians are required to solve relates to economic development and the use of the river and its surroundings while conserving its values for future generations. Others could also learn from the Māori culture, for instance from the intrinsic and relational value of the river and its role in preserving the Māori community (and vice versa). We can learn from the Māori community's structure, institutionalized dialogue, guardianship and respect for future generations. Finally, we argue for the introduction of the principle of prior consent, because that would actually allow the Māori to override – when necessary – economic interests to the benefit of the river and of the environment. The concept of social or community entrepreneurship might prove very useful.

Social and community entrepreneurship for the benefit, health and well-being of the river

The legal personhood of the river introduced into the national legal framework permits the application of a sustainable model of economic development in the area which simultaneously considers the environmental, cultural, social and economic benefit of the Te Awa Tupua community as an entirety of physical and metaphysical but also natural and human elements. Recognizing the need of the Whanganui Iwi to create economic benefits for the preservation of the present and future generations, the legal right of the river can contribute to truly sustainable regional economic development. This calls for individual and collaborative endeavours of indigenous, social (community) entrepreneurship for the benefit of the Te Awa Tupua community of nature and humans. Types of enterprises with community, social and environmental objectives have already been identified in the domestic economy of New Zealand (Internal Affairs, 2013; Strategic Group on Social Enterprise and Social Finance, 2016a, 2016b). The government of New Zealand is rapidly developing a national social entrepreneurship policy. However, Māori and/or Māori-influenced social and community entrepreneurship is still a growing and underdeveloped phenomenon. In 2013, a mapping study by the Ministry of Internal Affairs demonstrated that few social enterprises have mainly Māori beneficiaries or are affiliated with Māori organizations or authorities, and even fewer were social enterprises operating in the region of Manawatu, where the Whanganui area is extended (Internal Affairs, 2013). Later cabinet papers commissioned by the Ministry of Internal Affairs demonstrate that there is great potential in the growth of local Māori social entrepreneurship activity and substantial support by New Zealand's government for growing Māori social entrepreneurial activity.

The concept of social entrepreneurship is multifaceted and means different things to different scholars (Dees, 1998). Choi and Majumdar (2014) even argue that the concept is 'essentially contested'. Nevertheless, there appears to be general agreement about social entrepreneurship being aimed, at its core, at creating societal value while producing economic benefits (Dees, 1998; Nicholls & Cho, 2006; Peredo & McLean, 2006; Seelos & Mair, 2005). Economic development, for instance in terms of sustainable tourism, aquaculture and agriculture, sustainable forestry, and other activities that may impact the river and its surroundings, can be legitimate and add value to current and future Te Awa Tupua communities. Practically speaking, most operationalizations of social entrepreneurship are anthropocentric (Mair & Marti, 2006; Nicholls, 2010; Zahra, Gedajlovic, Neubaum, & Schulman, 2009). Santos (2012, p. 336) goes as far to suggest that 'social entrepreneurship'

is a tautology – economic value creation is 'inherently social' in 'improving society's welfare through a better allocation of resources' (p. 337) – but this view is contentious.

Against the background of the Act, with the recognition of the river as a legal entity aimed at the preservation of the respectful dialectic between nature and human beings, a generic conception of simultaneous societal and economic value creation appears to be too vague to protect and 'conserve' the Whanganui River, now and in the future. We therefore argue for a more targeted and restricted conceptualization of *te piringa whanau* (family shelter) in line with the capabilities approach. This approach requires, *inter alia*, the application of practical reason (in line with the letter and the spirit of the Act), and control by the Māori over their environment, integrity and health, imagination, and the ability to engage in various forms of socio-cultural and natural interaction – and thus economic activities related to, or in the immediate surroundings of, the Whanganui River (Tapsell & Woods, 2008, 2010). Surroundings are 'immediate' to the extent that the consequences of an activity directly affect or can affect the pursuit of the community's objectives and interests. Activities should

- fundamentally respect and sustain the social, environmental and cultural interests of the Te Awa Tupua's community, and the river as an integral part of the community, by means of an *ex ante* (*a priori*) assessment;
- actively involve Māori representation in determining which economic activities sufficiently respect and help sustain the community and the river by means of an advisory committee and the implementation of the principle of prior consent;
- assess the long-term potential impact of economic activities on future generations by means of an *ex ante* (*a priori*) environmental and social impact assessment. Inspiration can be drawn from the Great Law of the Iroquois and its Seventh Generation Principle. This principle is particularly relevant for the relation between humans and nature, in particular regarding issues of water, energy or forestry. The principle is that current generations should think seven generations ahead to consider the potential consequences of our present decision-making. In line with the World Commission on Environment and Development (1987) it would be reasonable in particular to address to what extent current decisions affect the ability of future generations to meet their needs;
- increase Māori human and natural potential and capabilities in terms of well-being, health, prosperity and fulfilment in life by means of training and learning;
- use monitoring to ensure fair and substantial financial-economic contributions to the Te Awa Tupua's community to preserve the environment and their life, culture, traditions and activities.

We acknowledge that there are already a structure, guardians and advisory committees to be used in the implementation of these elements. But what is also needed is the implementation of the principle of prior consent from the Māori. If Māori leadership withholds consent, a development should not take place. This principle of consent also applies to the deliberations of the guardians in case they have dissenting views.

The development of such community and social entrepreneurial initiatives can be aided by the Te Korotete Fund, which is dictated in Articles 57–59 to promote the health and well-being of the Te Awa Tupua and which is administered by the appointed guardians.

Entrepreneurial individual and/or collaborative local (public–private) initiatives in the form of social and community entrepreneurship with the objective to safeguard the environmental, social, cultural and economic benefit of rivers and of the surrounding areas and communities are emerging types of anthropocentric business initiatives. However, a more systemic conception of the river as a living entity with legal personhood which requires the 'mutual enhancement' of both its natural and human elements can promote the establishment in domestic legislation of both more inclusive management systems for rivers, e.g., the Te Pou Tupua, and more sustainable models of economic and entrepreneurial development in the surrounding area, e.g., economic development which simultaneously pursues the environmental, cultural, social and economic benefits of the river community as an indivisible entity.

Conclusions

This article has introduced a discussion on the indigenous values and rules presented in New Zealand's Te Awa Tupua Act. The Act prescribes that the Whanganui River is a legal person with legal rights that is represented by human guardians. The guardians are appointed fiduciaries with the duty to care for the economic, environmental, social and cultural well-being of the Whanganui River. Guardianship is exercised in a framework of collaborative processes which involve the government, society and representatives of the Māori communities to determine what the economic, environmental, social and cultural well-being of the Whanganui River is. Such a model of administration requires a different understanding of the ontological relationship between human and nature. In particular, It requires a mutual agreement that humans are an indispensable part of nature, and as such their existence is interdependent. Accordingly, the interests of both humanity and nature should be mutually served and enhanced. From this point of view, guardianship should not be considered a privilege of those who care the most for nature but a fiduciary duty of all humans to mutually uphold the interests of both humanity and nature; but not in a way that allows domestication and subordination of nature to human needs. Such a model of administration, which mutually serves the needs of nature and humanity, determines the economic health and well-being of a river based on values which consider among others increasing human capability, attaining a successful, inclusive and healthy society, and protecting the natural environment for future generations. It also requires the application of economic activity which is established for the benefit of the river and the community, understood as a singular indivisible entity. Then, assigning rights to the river contributes to the development of social and community entrepreneurial models for the benefit of the river, developed to mutually enhance humanity and the natural environment.

Note

1. A risk of the utilitarian calculus is that it discounts the interests of future generations. As Scruton (2012, p. 189) clarifies: 'Normal practical reasoning concerning the future exhibits "time preference", according to which future benefits are discounted in line with their distance in time. Economists employ a discount rate even when considering the costs and benefits of people who do not yet exist, discounting the interests of future people according to their distance from us in time.' There is no justification for such a

discount when it comes to objects or to states of being that are intrinsically valuable to the Māori – now and in the future – even though these objects may represent an economic opportunity for someone else that ultimately may change the nature of the object or state of being. Mass tourism is a case in point. It can have a significant impact on the river and may have a lasting negative effect on the function of the river as perceived by the Māori.

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